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Second Chances: Why Michigan Should Categorically Prohibit the Sentence of Juvenile Life Without Parole

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SECOND CHANCES: WHY MICHIGAN SHOULD CATEGORICALLY PROHIBIT THE SENTENCE OF JUVENILE LIFE WITHOUT PAROLE

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ABSTRACT

The United States is the only country in the world that sentences children to die in prison. This practice, known as juvenile life without parole (JLWOP), is condemned by the United Nations Convention on the Rights of the Child. Yet twenty-five states still permit the sentence, and Michigan houses one of the nation's largest JLWOP populations. Despite the U.S. Supreme Court's ban on some forms of JLWOP, more must be done to further limit the use of this sentence. The current JLWOP sentencing scheme is untenable, imposes a significant financial burden on taxpayers, and perpetuates racial inequality. This Note explores these reasons for eliminating the practice and ultimately urges Michigan to follow other states in enacting a categorical ban on JLWOP, either through judicial decision or legislative action.

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INTRODUCTION

In September 2020, Michigan settled *Hill v. Whitmer*, a decade-long class action brought by the ACLU of Michigan on behalf of 350 individuals serving life-without-parole (LWOP) sentences for crimes committed when they were minors.[1] The action started as a challenge to Michigan's mandatory juvenile LWOP (JLWOP) scheme,[2] which required an LWOP sentence for individuals who committed certain crimes prior to age eighteen.[3] The original class action complaint alleged, among other things, that a mandatory JLWOP scheme violated the Eighth Amendment's Cruel and Unusual Punishment Clause for failing to take into account salient youthful characteristics, including transient immaturi-

1. *State Settles Decade-Long Lawsuit Challenging Unconstitutional Punishment of Children with Life Behind Bars Without the Possibility of Parole*, AM. C.L. UNION (Sept. 30, 2020), https://www.aclu.org/press-releases/state-settles-decade-long-lawsuit-challenging-unconstitutional-punishment-children [https://perma.cc/85F2-85EV].

2. First Amended Complaint for Declaratory & Injunction Relief ¶ 10, Hill v. Snyder, No. 10-cv-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013), *vacated and remanded*, 821 F.3d 763 (6th Cir. 2016).

3. *See* MICH. COMP. LAWS § 791.234(6)(1953) (listing six types of offense as disqualifying for parole eligibility, including first-degree murder and first-degree criminal sexual conduct).

ty, a lack of sense of responsibility, and possibility of rehabilitation.[4] While the case was pending in the district court, in 2012, the U.S. Supreme Court decided *Miller v. Alabama*, finding that a mandatory JLWOP sentence, such as the one at issue in *Hill*, violated the Eighth Amendment.[5] Following this decision, the *Hill* Court granted partial judgment to the plaintiffs in 2013, finding that the Michigan statute under challenge imposed a cruel and unusual punishment.[6]

Two years later, the U.S. Supreme Court held in *Montgomery v. Louisiana* that *Miller* applied retroactively, thereby requiring states to provide resentencing hearings for juvenile lifers sentenced prior to the *Miller* decision.[7] Despite *Miller* and *Montgomery*, however, the *Hill* plaintiffs continued to be treated as if they were serving a non-parolable life sentence.[8] Seeking further redress, these plaintiffs subsequently filed two amended complaints, alleging, among other things, that 1) they were deprived of programming essential to demonstrate their rehabilitation progress; and 2) the Michigan Attorney General failed to exercise her authority over prosecutors who were responsible for delays in resentencing.[9] The *Hill* settlement tackled these two issues by providing that the State of Michigan would ensure prompt scheduling of resentencing hearings as well as adequate access to rehabilitative programming for the class plaintiffs.[10]

Although the *Hill* plaintiffs received their settlement, the circumstances of the case highlight two problems that make further reform necessary. First, there is significant delay in resentencing. A Detroit Free Press story in 2019 revealed that fifty-five percent of the those sentenced to JLWOP in Michigan had yet to get their second chance.[11] Second, JLWOP is often re-imposed at resentencing. Of the incarcerated individuals who did get a resentencing recommendation, sixty-six percent remained on JLWOP,[12] a percentage seemingly inconsistent with the *Miller* Court's admonition that JLWOP be imposed only in the rarest of cases.[13] This resentencing problem is especially acute in Michigan,

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4. First Amended Complaint for Declaratory & Injunction Relief, *supra* note 2, ¶ 2.

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

6. *Hill*, 2013 WL 364198, at *2.

7. Montgomery v. Louisiana, 577 U.S. 190, 206 (2015) ("*Miller* announced a substantive rule that is retroactive in cases on collateral review.").

8. Third Amended Complaint ¶ 7, Hill v. Whitmer, 10-cv-14568, 2020 WL 2849969 (E.D. Mich. June 2, 2020), ECF No. 298.

9. *Id*. at ¶¶ 37, 274.

10. Plaintiffs' Brief in Support of Motion for Preliminary Approval of Class Settlement, to Direct Class Notice, and to Schedule a Fairness Hearing at 3, 4, *Hill*, 2020 WL 2849969,ECF No. 342.

11. Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Wait for Resentencing*, DETROIT FREE PRESS (Aug. 16, 2019, 10:51 PM), freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/ [https://perma.cc/2Y2W-2LAK].

12. *Id*.

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

where JLWOP is imposed not only on principal defendants who committed certain felonies but also on individuals convicted under an aiding-and-abetting theory and those who committed felony-murder.[14] This scheme represents a further departure from the idea that JLWOP should be for "the rare juvenile offender whose crime reflects irreparable corruption."[15] Therefore, the *Hill* settlement, while a victory for the class plaintiffs, is not sufficient to bring Michigan into full compliance with the teaching of *Miller*. Further reform is necessary.

This Note advocates for a categorical ban of JLWOP in Michigan. Part I provides an overview of JLWOP jurisprudence. Part II urges the Michigan Supreme Court to categorically prohibit the sentence. Part III discusses potential paths of reform other than a judicial determination of the sentence's unconstitutionality.

I. OVERVIEW OF JUVENILE LIFE WITHOUT PAROLE JURISPRUDENCE

This Part discusses six cases. Section I.A discusses three foundational U.S. Supreme Court Eighth Amendment cases, known as the *Miller* trilogy. Section I.B discusses *Montgomery v. Louisiana*, a 2016 U.S. Supreme Court case holding that *Miller v. Alabama* applies retroactively. Section I.C introduces *People v. Carp*, the seminal JLWOP case in Michigan. Finally, Part I.D considers *People v. Skinner*, a Michigan Supreme Court case, and *Jones v. Mississippi*, a United States Supreme Court case. These two cases concerned when JLWOP may be imposed. Ultimately, these cases demonstrate that sentencing children to die in prison is both conceptually and practically untenable. A categorical ban on the sentence is the only path forward.

A. *Unconstitutionality of Mandatory JLWOP: The* Miller *Trilogy*

1. *Roper* and *Graham*

The first two cases of the *Miller* trilogy, *Roper v. Simmons* and *Graham v. Florida*, laid the groundwork for *Miller*'s holding that mandatory JLWOP is unconstitutional. *Roper* and *Graham* both considered whether the Eighth Amendment forbids the imposition of a particular sentence on juveniles. *Roper* challenged the juvenile death penalty,[16] whereas *Graham* dealt with the imposition of JLWOP on offenders who committed

14. Kimberly Thomas, *Juvenile Life Without Parole*, 90 MICH. B.J. 34, 34 (2011).
15. *Miller*, 567 U.S. at 479–80 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).
16. Roper v. Simmons, 543 U.S. 551, 559 (2005).

non-homicide offenses before the age of eighteen.[17] In both cases, the U.S. Supreme Court applied a two-step categorical approach and found an Eighth Amendment violation.

First, the Court examined whether the "evolving standards of decency" demonstrated a national consensus against the imposition of the challenged sentence.[18] In *Roper*, the Court opined that "the rejection of the juvenile death penalty in the majority of States; [and] the infrequency of its use even where it remain[ed] on the books," constituted sufficient evidence of a national consensus against the sentence.[19] In a similar vein, the *Graham* Court found that, while the majority of states permitted JLWOP for non-homicide offenders, when it came to actual sentencing practices, JLWOP was infrequently invoked. The Court observed that "nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses."[20] In light of the rarity of the sentence, the Court found a national consensus against the imposition of JLWOP on non-homicide juvenile offenders.[21]

Second, in both cases, the Court determined whether the challenged sentence was a disproportionate punishment for juveniles.[22] The Court considered three factors: the culpability of the offender, the severity of the punishment, and fulfillment of penological goals.[23] In both *Roper* and *Graham*, the Court found the sentences disproportionate, relying heavily on three constitutionally significant differences between juvenile and adult offenders. First, juveniles lack maturity and a sense of responsibility.[24] Second, "juveniles are more susceptible to negative influences and outside pressures, including peer pressure."[25] Finally, the qualities that juveniles possess are transitory.[26] Based on these observations, the Court concluded that 1) juveniles were less morally culpable than adults committing the same offense;[27] 2) the two challenged sentences were especially harsh for juvenile offenders;[28] and 3) neither deterrence, retribution, nor rehabilitation justified the sentence at issue.[29]

Roper and *Graham* clarified the Court's juvenile Eighth Amendment jurisprudence on two fronts. Conceptually, the Court stressed that ju-

17. Graham v. Florida, 560 U.S. 48, 52–53 (2010).
18. *Roper*, 543 U.S. at 561–67; *Graham*, 560 U.S. at 62.
19. *Roper*, 543 U.S. at 567.
20. *Graham*, 560 U.S. at 62.
21. *Id.* at 67.
22. *Id.* at 61; *Roper*, 543 U.S. at 569.
23. *Graham*, 560 U.S. at 67.
24. *Id.* at 68–69; *Roper*, 543 U.S. at 569.
25. *Roper*, 543 U.S. at 569.
26. *Id.* at 570.
27. *See Graham*, 560 U.S. at 68–69.
28. *See id.* at 70.
29. *Id.* at 71–74; *Roper*, 543 U.S. at 571–72.

veniles were different from adults under the U.S. Constitution and therefore deserved special consideration during sentencing.

The Court also clarified the test for deciding similar cases in the future.[30] Importantly, the *Graham* Court specifically rejected a three-pronged proportionality test that prior courts had applied in cases involving "challenges to the length of term-of-years sentences given all the circumstances in a particular case."[31] The majority explained that the case "implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[32] As such, the two-step categorical approach to juvenile sentencing cases, which is capable of considering characteristics of individual offenders, is more appropriate.

2. *Miller v. Alabama*

Two years after *Graham*, the Court heard *Miller v. Alabama*.[33] *Miller* involved a sentencing scheme where individuals committing certain crimes received a mandatory JLWOP sentence.[34] Justice Kagan, writing for a five-member majority, found that such a mandatory scheme was cruel and unusual to minors under the Eighth Amendment.

First, the Court reaffirmed the observations made in *Roper* and *Graham* that children were constitutionally different than adults in terms of their maturity, sense of responsibility, and vulnerability to the surrounding environment.[35] These attributes of youth, the Court opined, "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[36] Second, the Court built on *Graham*'s analogy of JLWOP to the death penalty and held that the mandated individualized assessments in capital punishment cases should be available in JLWOP cases as well. Because a mandatory JLWOP sentence precluded individualized assessments of youthful characteristics, the sentence necessarily violated *Graham*'s fundamental teaching that "youth matters

30. *Graham*, 560 U.S. at 61–62.

31. *Graham*, 560 U.S. at 59. The three-pronged test consists of 1) a judgment of whether the gravity of the offense is commensurate with the severity of the sentence; 2) a comparison between the challenged sentence and sentences imposed in the same jurisdiction for crimes deemed more serious; and 3) a comparison between the challenged sentence and the sentence imposed in other jurisdictions for the same crime. *See* Solem v. Helm, 463 U.S. 277, 296–300 (1983).

32. *Graham*, 560 U.S. at 61.

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

34. *Id.* at 468–69.

35. *Id.* at 471.

36. *Id.* at 472.

in determining the appropriateness of a lifetime of incarceration without the possibility of parole."[37]

Miller articulated five mitigating factors that must be considered when sentencing a juvenile offender.[38] The decision did not, however, give clear instructions for assessing these factors. As a result, *Miller* preserved JLWOP as a form of punishment for "the rare juvenile offender whose crime reflects irreparable corruption,"[39] but it failed to explain whether and how sentencing authorities should determine that a juvenile offender was incorrigible. That question was answered in *Jones v. Mississippi*, as discussed in Section I.D.

B. *Retroactive Application of* Miller*:* Montgomery v. Louisiana

Unlike the *Miller* trilogy, *Montgomery v. Louisiana* did not challenge a particular sentence; it was a case about the retroactive application of *Miller*.[40] After *Miller*, state courts split over whether *Miller* should be applied to sentences that had been finalized before *Miller* was decided. A split emerged. Several states, including Michigan, found that *Miller* should not be applied retroactively because the decision amounted to only a new procedural rule.[41] A larger number of states concluded that *Miller* should be applied retroactively because it effected a substantive change in the law.[42] The Supreme Court granted review to resolve the split.[43]

In a 6-3 decision, the *Montgomery* Court held that *Miller* announced a new substantive rule.[44] By invalidating mandatory JLWOP as unconstitutional, the *Miller* Court categorically prohibited JLWOP except in the rare cases in which the juvenile offender exhibited irreparable cor-

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37. *Id.* at 473.

38. These five factors are: 1) the offender's immaturity, impetuosity, and failure to appreciate risks and consequences; 2) family and home environment; 3) circumstances of the offense, including the extent of the offender's participation in the conduct and the way familial and peer pressures may have affected the offender; 4) the possibility of being convicted of a lesser crime if not for an incompetency associated with youth; and 5) possibility of rehabilitation. *See id.* at 477–78.

39. *Id.* at 479–80 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

40. Montgomery v. Louisiana, 577 U.S. 190, 193 (2016).

41. *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 162 (2017). The Michigan Supreme Court confronted this issue in *People v. Carp*, *infra* Section I.C, and concluded that *Miller* did not meet either the federal or state retroactivity test. People v. Carp, 852 N.W.2d 801, 849 (Mich. 2014), *vacated sub nom.* Carp v. Michigan, 577 U.S. 1186 (2016), and *vacated sub nom.* Davis v. Michigan, 577 U.S. 1186 (2016).

42. *See* Reichman Hoesterey, *supra* note 41, at 152 n.7.

43. State v. Montgomery, 194 So.3d 606 (La. 2016), *cert. granted*, 575 U.S. 911 (2015).

44. *Montgomery*, 577 U.S at 206 ("*Miller* announced a substantive rule that is retroactive in cases on collateral review.").

ruption.[45] Thus, the *Montgomery* Court held, *Miller* applied retroactively under the federal retroactivity test.[46]

C. *Constitutionality of JLWOP in Michigan:* People v. Carp

The seminal JLWOP case in Michigan is the Michigan Supreme Court's 2013 decision in *People v. Carp*, a case that dealt with the constitutionality of JLWOP under the federal and state constitutions.[47] First, the court assessed JLWOP under the Eighth Amendment to the U.S. Constitution.[48] There, the court adopted the three-pronged proportionality test that the U.S. Supreme Court rejected in *Graham*.[49] Applying the first prong, whether "the gravity of the offense is commensurate with the severity of the sentence,"[50] the court concluded that the imposition of JLWOP for first-degree murder will not "lead[] to an inference of gross disproportionality" in cases where the juvenile offender was determined to possess the same moral culpability and mental faculties as adults.[51]

The second prong compares JLWOP with the sentences received by other offenders in the same jurisdiction.[52] The court noted that adults committing certain nonhomicide offenses would face an LWOP sentence in Michigan.[53] Therefore, "when the commission of a nonhomicide offense by an adult offender may result in the imposition of a life-without-parole sentence, it does not appear categorically disproportionate to impose a life-without-parole sentence on a juvenile offender for committing the gravest and most serious homicide offense."[54] Further, in what appeared to be a separation of powers argument, the court observed that "the people of this state, acting through their Legislature, have already exercised their judgment—to which we owe considerable deference—that the sanction they have selected for juvenile first-degree murder offenders is, in fact, a proportionate sanction."[55]

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45. *See id.* at 734.

46. *See id.* at 736. The federal retroactivity test was announced in *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the U.S. Supreme Court held that a new constitutional rule of criminal procedure should not apply retroactively, with two exceptions. First, new substantive rules of criminal law should apply retroactively. Second, a "watershed" rule implicating fundamental fairness of criminal proceedings should apply retroactively. *Teague*, 489 U.S. at 311.

47. *Carp*, 852 N.W.2d 801.

48. *Id.* at 841.

49. *Id.* at 842.

50. *Id.* at 842 (quoting Graham v. Florida, 560 U.S. 48, at 60 (2010)) (internal quotation marks omitted).

51. *Id.* (quoting *Graham*, 560 U.S. at 60) (internal quotation marks omitted).

52. *Id.* at 842–43 (quoting *Graham*, 560 U.S. at 60).

53. *Id.* at 843.

54. *Id.*

55. *Id.*

Under the third prong, the court compared JLWOP for first-degree murder "with the sentences imposed for the same crime in other jurisdictions."[56] The court noted that at the time of *Miller*, "41 states exercised the authority under at least some circumstances to impose a life-without-parole sentence on a juvenile."[57] Only six states had since abandoned JLWOP in response to *Miller*.[58] The court concluded that because thirty-five states still permitted JLWOP after *Miller*, this sentence was not disproportionate in at least some circumstances.[59] Thus, the court concluded that defendants' claim failed under all three prongs of the federal test.[60]

Regarding defendants' state constitutional argument, the court first recognized that the "cruel or unusual" language of the Michigan Constitution provided "greater protection against certain punishments than its federal counterpart."[61] As a result, Michigan employed a "slightly different and broader test for proportionality than that employed in *Graham*."[62] The test consisted of four parts:

> 1) the severity of the sentence imposed compared to the gravity of the offense; 2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction; 3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states; and 4) whether the penalty imposed advances the penological goal of rehabilitation.[63]

The court observed that the first three parts of the Michigan test largely resembled the federal test.[64] As defendants failed to satisfy any prong under the federal test, so they also failed the first three parts of the Michigan test.[65]

The only remaining inquiry was whether JLWOP advanced the goal of rehabilitation. The *Carp* majority answered in the negative, citing *Graham*'s observation that "[t]he penalty forswears altogether the rehabilitative ideal."[66] Nonetheless, since only one of the four factors sup-

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56. *Id.* at 842–43 (quoting *Graham*, 560 U.S. at 60).
57. *Id.* at 843.
58. *Id.*
59. *See id.* at 843–44.
60. *Id.* at 844.
61. *Id.*
62. *Id.*
63. *Id.* at 845.
64. *Id.*
65. *See id.*
66. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 74 (2010)).

ported a finding of disproportionality, defendants' state constitutionality challenge failed as well.[67]

D. *Incorrigibility Is Not Mandated:* Skinner *and* Jones

As discussed above, *Miller* reserved JLWOP for the rare juvenile offenders whose crimes reflected true incorrigibility. After *Miller*, state and federal appellate courts were divided on the question of whether a sentencer must make a factual finding of incorrigibility before imposing a JLWOP sentence.[68] The Michigan Supreme Court, in the 2018 decision *People v. Skinner*, answered that question in the negative.[69] Roughly three years later, resolving the split, the U.S. Supreme Court agreed with that outcome in *Jones v. Mississippi*.[70]

1. *People v. Skinner*

Skinner considered whether *Miller* and *Montgomery* mandated a finding of incorrigibility in the Sixth Amendment context. Specifically, the Michigan Supreme Court examined whether Michigan's JLWOP sentencing regime, MCL § 769.25, violated the Sixth Amendment by allowing a judge, rather than a jury, to decide whether to impose a JLWOP sentence.[71] The majority held that it did not.[72]

Still in force today, MCL § 769.25 requires prosecutors and the trial court to engage in additional steps before imposing JLWOP.[73] First, to seek a JLWOP sentence, a prosecutor must file a motion within a specified timeframe.[74] Upon receiving the motion, the trial court must hold a

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67. *Id.* at 845–46.

68. *Compare, e.g.*, Commonwealth v. Batts, 163 A.3d 410, 435 (Pa. 2017) (holding that a sentencing court's imposition of a discretionary JLWOP sentence without first making a finding of a juvenile defendant's permanent incorrigibility was illegal), *abrogated by* Jones v. Mississippi, 141 S. Ct. 1307 (2021), Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018) (concluding that a sentencing judge violated *Miller*'s rule any time it imposed a JLWOP sentence without first making an explicit finding of permanent incorrigibility), *abrogated by Jones*, 141 S. Ct. 1307, *and* Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016) (holding that a trial court's failure to find a distinct determination of a juvenile defendant's irreparable corruption required remand), *abrogated by Jones*, 141 S. Ct. 1307, *with, e.g.*, State v. Ramos, 387 P.3d 650, 665 (Wash. 2017) (holding that *Montgomery* explicitly found that *Miller* did not require a finding of incorrigibility), People v. Skinner, 917 N.W.2d 292, 309 (Mich. 2018) (holding that *Miller* did not require a finding regarding a child's incorrigibility), *and* United States v. Sparks, 941 F.3d 748, 756 (5th Cir. 2019) (holding that *Miller* did not mandate a finding of a juvenile defendant's permanent incorrigibility).

69. *Skinner*, 917 N.W.2d at 317.

70. *Jones*, 141 S. Ct. at 1321.

71. *Skinner*, 917 N.W.2d at 295.

72. *Id.* at 137–38.

73. MICH. COMP. LAWS § 769.25 (2022).

74. *Id.* § 769.25(3).

hearing to consider the *Miller* factors[75] and then "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed."[76] Absent a prosecutorial motion seeking JLWOP, the trial court must impose a default term-of-years sentence.[77]

The *Skinner* defendants challenged the statute as violating the Sixth Amendment.[78] They argued that the last step in this sentencing procedure—allowing a trial judge to engage in additional fact-finding to support a JLWOP sentence—was impermissible because the Sixth Amendment mandated that a *jury*, rather than a judge, find beyond a reasonable doubt any facts that would increase the sentence beyond the one authorized by the jury verdict alone.[79]

The majority, led by former Chief Justice Markman, found no such violation. The court held that neither the challenged statute, nor *Miller* and *Montgomery*, required a trial court to conduct additional fact-finding regarding a juvenile's incorrigibility before imposing a JLWOP sentence.[80] First, the majority posited that the challenged statute did not require the trial court to make any particular factual finding before it may impose JLWOP.[81] Although the statute required the trial court to consider and specify the aggravating and mitigating circumstances supporting its sentencing decision, the trial court did not have to find an aggravating circumstance in order to impose JLWOP.[82] In other words, the jury verdict alone authorized a JLWOP sentence.[83] Second, the majority held that neither *Miller* nor *Montgomery* mandated any particular finding regarding a juvenile offender's incorrigibility.[84] Rather, the *Miller* and *Montgomery* courts used words like "rare" and "exceptional" merely to describe their prediction that incorrigible juvenile offenders deserving of JLWOP would be rare.[85] For these reasons, the *Skinner*

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75. *Id.* § 769.25(6).

76. *Id.* § 769.25(7).

77. *Id.* § 769.25(4).

78. *Skinner*, 917 N.W.2d at 295.

79. Defendants' challenge was based on the U.S. Supreme Court's *Apprendi* line of cases. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also* Ring v. Arizona, 536 U.S. 584 (2002) (holding that the Sixth Amendment requires an aggravating circumstance necessary for the imposition of the death penalty to be found by a jury).

80. *Skinner*, 917 N.W.2d at 307, 310.

81. *Id.* at 307.

82. *Id.* at 306.

83. *Id.*

84. *Id.* at 309.

85. *Id.* at 313–14. In other words, *Miller* and *Montgomery* simply noted that those juvenile offenders who are deserving of life-without-parole sentences are rare; they did not impose any requirement on sentencing courts to explicitly find that a juvenile offender is or is not "rare" before imposing life without parole. *Id.*

court held the trial court did not have to find any facts beyond those inherent in the jury verdict to impose JLWOP, and as a result, the sentencing statute did not violate the Sixth Amendment.[86]

2. *Jones v. Mississippi*

The Supreme Court granted certiorari in *Jones v. Mississippi* to resolve the split over whether the Eighth Amendment required a sentencing authority to find that a juvenile offender was permanently incorrigible before sentencing them to JLWOP.[87] In a 6-3 decision, the Supreme Court sided with the *Skinner* majority and held that a JLWOP sentence did not require a finding of incorrigibility. [88]

Writing for the majority, Justice Kavanaugh concluded that *Miller* only required a sentencer to follow a particular process before imposing a JLWOP sentence.[89] *Miller* did not require a factual finding of incorrigibility because such a finding was not necessary to achieve *Miller*'s mandate that JLWOP be imposed only in rare circumstances.[90] The Court also noted language in *Montgomery* that appeared to reject the incorrigibility finding requirement.[91]

Importantly, the *Jones* majority noted that their decision should not "preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."[92] States may categorically prohibit JLWOP or require extra factual finding before imposing the sentence.[93] The *Jones* decision, the majority explained, only meant that "the U.S. Constitution does not demand those particular policy approaches."[94]

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86. *Id.* at 311 ("[T]he Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole.").

87. Jones v. State, 122 So.3d 698 (Miss. 2013), *cert. granted*, 140 S. Ct. 1293 (2020).

88. Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021).

89. *Id.* at 1314.

90. *Id.* at 1318.

91. *Id.* at 1314–15. The Court cited the following language from *Montgomery* for support:

> Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. . . . 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. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

Id. at 1315 n.2 (quoting *Montgomery*, 577 U. S. at 211).

92. *Id.* at 1323.

93. *Id.*

94. *Id.*

The analysis in *Jones* bore striking resemblance to that in *Skinner*. Indeed, *Skinner* may have provided some analytical guidance to the *Jones* majority, as Justice Kavanaugh cited *Skinner* approvingly at the end of his opinion.[95] However, *Skinner* and *Jones* further confused, rather than clarified, the issue of exactly when a JLWOP sentence may be imposed. *Miller* held that "appropriate occasions for sentencing juveniles to [LWOP] will be uncommon" because of "the great difficulty . . . of distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[96] Later, in *Montgomery*, the Court again counseled that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption."[97] The language in these cases—language that neither *Skinner* nor *Jones* categorized as dicta—suggests that there is a threshold below which JLWOP is disproportionate in violation of the Eighth Amendment. The holding of *Skinner* and *Jones*—that no threshold finding must be made before imposing JLWOP—seems contradictory to a plain reading of *Miller* and *Montgomery*. Moreover, if *Miller* merely announced a particular sentencing *procedure*, as Justice Kavanaugh suggested, why would the *Montgomery* Court hold that *Miller* effected substantive changes in the law that gave the decision retroactive effect under *Teague v. Lane*?[98]

As will be discussed in Part II, these inconsistencies create practical challenges in sentencing, which provide yet another reason for abolishing JLWOP.

II. PROBLEMS WITH *CARP* AND *SKINNER*

The two most important Michigan JLWOP decisions, *Carp* and *Skinner*, do not withstand scrutiny. This Part illuminates these cases' flaws and concludes that JLWOP is both conceptually and practically untenable, and thus should be abolished in Michigan. Section II.A shows that the *Carp* majority applied a test that the *Graham* Court explicitly rejected as inappropriate for the type of claim presented. It further explains that a faithful application of the *Graham* approach suggests that the continued practice of JLWOP rests on shaky constitutional grounds today. Section II.B demonstrates that the approach advocated by the *Skinner* and *Jones* courts is not viable because it creates an intolerable risk

95. *Id.* at 1319.

96. Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

97. Montgomery v. Louisiana, 577 U.S. 190, 195 (2015).

98. *See supra* note 47 and accompanying text.

of arbitrary sentencing. These conceptual and practical challenges make a categorical ban on JLWOP in Michigan the only appropriate course of action.

A. *The* Carp *Majority Should Have Developed and Applied a Categorical Approach*

The *Carp* decision is problematic because the majority applied a test that the U.S. Supreme Court had previously rejected in categorical Eighth Amendment challenges.[99] Recall that in *Graham*, the Court specifically noted that "the present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence."[100] The majority then opined that *Graham* "implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime *does not* advance the analysis."[101] Based on these observations, the *Graham* majority proceeded to apply the categorical two-step approach advanced in cases such as *Roper*.[102]

The sentence at issue in *Carp* differed from that in *Graham* in only one respect: the *Carp* sentence applied to an entire class of offenders convicted of the same crime, rather than offenders who committed a range of crimes.[103] This slight difference, however, does not justify applying the proportionality test in a categorical challenge based on the characteristics of the offender class. This is because the categorical approach is the only test that is capable of considering the youthful characteristics of a juvenile offender, as the *Miller* trilogy requires. The proportionality test, which weighs the offense (not the offender) against the punishment, leaves no room for any consideration of an offender's characteristics. In contrast, the two-step categorical approach adopted by the *Graham* Court "requires consideration of the culpability of the offenders . . . in light of their crimes and characteristics, along with the severity of the punishment in question."[104] In fact, the Washington Supreme Court adopted this very reasoning when it rejected the propor-

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99. People v. Carp, 825 N.W.2d 801, 842 (Mich. 2014). In *Carp*, the Michigan Supreme Court applied the three-step approach rejected by the *Graham* Court. Graham v. Florida, 560 U.S. 48, 61–62 (2010).

100. *Graham*, 560 U.S. at 61.

101. *Id.* (emphasis added).

102. *Id.* at 62.

103. MICH. COMP. LAWS § 791.234(6)(1953) (listing six types of offense as disqualifying for parole eligibility, including first-degree murder and first-degree criminal sexual conduct).

104. *Id.* at 67 (citing Roper v. Simmons, 543 U.S. 551, 568 (2005)).

tionality test in a similar categorical challenge.[105] Likewise, the Iowa Supreme Court held in *State v. Sweet* that, "[i]n considering whether to adopt a categorical approach to the class of offenders or offenses under the cruel and unusual punishment clause of the Iowa Constitution, we have referred to the two-step process found in the cases of the United States Supreme Court."[106]

The *Carp* majority may have felt bound by precedent to apply the proportionality test because, unlike Washington and Iowa, Michigan caselaw did not (and still does not) have an analogue to the Supreme Court's two-step categorical approach.[107] However, that does not mean that Michigan courts are required to apply the proportionality test when reviewing sentencing challenges.

Because the proportionality test fails to incorporate the fundamental lessons of the *Miller* trilogy, the Michigan Supreme Court must reconsider the wisdom of its prior decisions. This is especially imperative as the Michigan cases that embraced the proportionality test were decided long before the *Miller* trilogy.[108] Ensuring that children are treated like children under the law is far more important than mechanical deference to precedent. Accordingly, in *Carp*, the Michigan Supreme Court should have adopted the two-step categorical approach and clarified its necessity.

If the court were to perform that analysis today, it would likely reach the conclusion that JLWOP should be categorically prohibited. Under the categorical approach, the court must first examine "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against JLWOP.[109] When it decided *Carp*, the court observed that only six states had categorically prohibited JLWOP.[110] Now, more than nine years after *Miller*, that is no longer the case. Twenty-five states and the District of Columbia have categorically prohibited JLWOP.[111] Further,

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105. State v. Bassett, 428 P.3d 343, 350–51 (Wash. 2018).

106. State v. Sweet, 879 N.W.2d 811, 835 (Iowa 2016).

107. Michigan's proportionality test was set forth in *People v. Lorentzen*, 194 N.W.2d 827, 831–33 (Mich. 1972), and reaffirmed in *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992). *Lorentzen* examined the constitutionality of a statute mandating a minimum of twenty years' imprisonment for the sale of narcotics. *Lorentzen*, 194 N.W.2d at 829. *Bullock* involved a challenge to Michigan's mandatory LWOP sentence for possession of 650 grams or more of cocaine. *Bullock*, 485 N.W.2d at 867. Neither case involved a categorical challenge based on the characteristics of the offender. As such, the court did not have the occasion to devise a test that considered the characteristics of the offender.

108. The earliest case in the *Miller* trilogy, *Roper v. Simmons*, was decided in 2005—thirteen years after *Bullock* and thirty-three years after *Lorentzen*.

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

110. People v. Carp, 852 N.W.2d 801, 843–44 (Mich. 2014).

111. *See infra* note 180; *see also* Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/S8PA-UAKV].

the comparison should not end at whether other jurisdictions have officially put an end to the practice. In *Graham*, the Court remarked that "[t]here are measures of consensus other than legislation"[112] and that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus."[113] At the time of writing, nine states that permit JLWOP have no prisoners serving the sentence.[114] These numbers indicate that Michigan is one of only sixteen states that both permit JLWOP and have juveniles serving this sentence. At a minimum, these findings demonstrate that Michigan is in the minority in terms of reducing the size of its JLWOP population. This trend weakens the *Carp* majority's observation that JLWOP was not so unusual that it failed the first step of the categorical test. On the contrary, the consistent trend in JLWOP policymaking and sentencing practice indicates a growing consensus against the sentence. Given these findings, Michigan is clearly on the wrong side of history.

The second step of the test requires the court to exercise its independent judgment in determining whether JLWOP is constitutional.[115] Three factors guide this evaluation: 1) "the culpability of the offenders at issue in light of their crimes and characteristics"; 2) "the severity of the punishment in question"; and 3) "whether the challenged sentencing practice serves legitimate penological goals."[116]

In terms of culpability, the *Miller* trilogy has affirmatively established that children are less culpable than adults committing the same crime because of their "transient rashness, proclivity for risk, and inability to assess consequences."[117] This is true regardless of whether the crime committed is homicide—the offense involved in *Carp*. The argument that children are somehow more culpable for murder than a lesser offense does not hold up, since the youthful characteristics that the *Miller* trilogy identified do not simply disappear when children commit murder. Indeed, *Miller* itself dealt with the mandatory imposition of JLWOP on homicide offenders, and the Court still recognized that children were less culpable than adults in that context.[118]

The next factor is the severity of the sentence. LWOP is the most severe punishment available in Michigan because of the state's constitutional ban on capital punishment.[119] The *Graham* majority recognized

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112. Graham v. Florida, 560 U.S. 48, 62 (2010) (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).

113. *Id*.

114. These states are: Illinois, Indiana, Maine, Minnesota, Missouri, New Hampshire, New Mexico, New York, and Rhode Island. *See* Rovner, *supra* note 111.

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

116. *Id*. at 67.

117. Miller v. Alabama, 567 U.S. 460, 472 (2012).

118. *Id*. at 479.

119. MICH. CONST. art. IV, § 46 ("No law shall be enacted providing for the penalty of death.").

that LWOP "alters the offender's life by a forfeiture that is irrevocable" and "deprives [offenders] of the most basic liberties without giving hope of restoration."[120] This is especially true when LWOP is imposed on children, who will necessarily spend more time in prison than adults who commit the same crimes.

Finally, the court must consider whether the sentence advances any legitimate penological goal.[121] Retribution, deterrence, and rehabilitation are all poorly served by JLWOP, and incapacitation alone does not justify the imposition of the sentence. Retribution is served only when a sentence is proportionate to the offender's blameworthiness.[122] As explained, JLWOP is particularly harsh, even when it is imposed on juvenile homicide offenders, because children have diminished culpability. As such, JLWOP does not advance the goal of retribution. JLWOP also does not advance of the goal of deterrence because the youthful characteristics that make juvenile offenders less culpable also make them less likely to consider the long-term consequences of their actions. As for rehabilitation, even the *Carp* majority conceded that a JLWOP sentence was antithetical to the rehabilitative ideal.[123] The fact that offenders are sentenced to LWOP in the first place suggests that the State believes them incapable of reform.

Thus, the only penological goal that JLWOP might serve is incapacitation. A JLWOP sentence, by definition, incapacitates the offender for life. However, as *Graham* instructed, to justify JLWOP on incapacitation grounds alone "requires the sentencer to make a judgment that the juvenile is incorrigible."[124] That judgment is questionable considering the characteristics of juveniles—characteristics that do not change based on the crime committed. Therefore, just as incapacitation did not justify JLWOP for non-homicide offenders in *Graham*, incapacitation does not justify JLWOP for homicide offenders either. Indeed, adopting the *Graham* Court's reasoning, the *Miller* Court rejected incapacitation as insufficient justification for a mandatory JLWOP sentence, even on homicide juvenile offenders.[125]

Moreover, the Michigan Supreme Court has a great textual hook to justify reaching beyond the U.S. Supreme Court's JLWOP jurisprudence. That textual hook is Michigan's Constitution, which protects

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120. *Graham*, 560 U.S. at 69–70.

121. *Id.* at 67.

122. *See id.* at 71 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *see also* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

123. People v. Carp, 852 N.W.2d 801, 845 (Mich. 2014).

124. *Graham*, 560 U.S. at 72.

125. Miller v. Alabama, 567 U.S. 460, 472–73 (2012).

against "cruel *or* unusual"[126] punishment. This is distinct from the federal Eighth Amendment's prohibition against "cruel *and* unusual" punishment.[127] Even the *Carp* majority recognized that, by virtue of this deliberate phraseological choice, the state constitution was intended to offer broader protection than its federal counterpart.[128]

The court could use this language to argue that JLWOP is categorically prohibited by the state constitution, even though it is not prohibited by the federal Constitution. Indeed, that may have been what the Washington Supreme Court did in *State v. Bassett*.[129] The Washington State Constitution forbids "cruel punishment."[130] In *Bassett*, the Washington Supreme Court interpreted this provision in light of its precedent and determined that, "in the context of juvenile sentencing, article I, section 14 [the cruel punishment provision] provides greater protection than the Eighth Amendment."[131] This determination preceded the court's application of the two-step categorical test and its ultimate holding: that the discretionary imposition of JLWOP violated the Washington State Constitution.[132]

B. *Discretionary Imposition of JLWOP Leads to Arbitrary Sentencing Decisions*

As discussed in Part I of this Note, *Skinner* and *Jones* support a categorical ban on JLWOP. Following *Jones*, the Michigan Supreme Court has three options when it comes to imposing a JLWOP sentence. It can 1) continue to require no additional fact-finding before imposing JLWOP (The Status Quo); 2) overrule *Skinner* and require a sentencer to make an additional finding before imposing JLWOP (The Intermediate Step); or 3) prohibit JLWOP (The Reform). As explained below, the first two options are not viable in practice because they create an intolerably high risk of arbitrary sentencing. Thus, a categorical ban is the only path forward.

1. Michigan May Continue to Require No Additional Finding Before Imposing JLWOP (The Status Quo)

Since *Skinner*, Michigan has allowed a sentencer to impose JLWOP without making any additional finding regarding incorrigibility, so

126. MICH. CONST. art. I, § 16 (emphasis added).
127. U.S. CONST. amend. VIII (emphasis added).
128. People v. Carp, 852 N.W.2d 801, 844 (Mich. 2014).
129. State v. Bassett, 428 P.3d 343 (2018).
130. WASH. CONST. art. I, § 14.
131. *Bassett*, 428 P.3d at 350.
132. *Id.* at 352–54.

long as the sentencer complies with the requirements laid out in MCL § 769.25. As mentioned in Section I.D, MCL § 769.25 requires a sentencing court to specify on the record the aggravating and mitigating circumstances it considered and the reasons it imposed the sentence it chose.[133] A manual published by the Michigan Judicial Institute in May 2021 confirms that this remains the procedure post-*Jones*.[134] Unfortunately, this approach gives a sentencer no guidance for considering the aggravating and mitigating circumstances. In contrast, under a standard such as incorrigibility, a sentencer must at least explain how their consideration of the aggravating and mitigating circumstances leads to a finding of incorrigibility. In other words, an incorrigibility requirement creates a threshold that the sentencer must meet.

Without this threshold, however, a sentencer's consideration of the aggravating and mitigating circumstances can be unguided, cursory, or even nominal. What is to stop a sentencer from simply declaring in every case that they have considered all relevant circumstances and find JLWOP appropriate? There is no effective mechanism to cabin a sentencer's discretion since the sentencer does not need to make any specific findings. Given how deferential appellate courts are to lower court findings, no level of scrutiny is likely to disturb a sentencer's decision, absent evidence of obvious abuse of discretion. This creates a serious risk of arbitrary sentencing—a risk that the people of Michigan should not bear.

A recent Michigan Supreme Court case illustrates this risk. In *People v. Masalmani*, the court considered Ihab Masalmani's JLWOP sentence.[135] One of the questions at issue was whether the sentencing court, applying *Miller*, properly examined the characteristics associated with Masalmani's age.[136] In an unreasoned order, the majority of the Michigan Supreme Court denied Masalmani's application for leave to appeal.[137]

In dissent, Chief Justice McCormack criticized the trial court for failing to treat the *Miller* factors as mitigating considerations.[138] For example, in assessing Masalmani's potential for rehabilitation, the trial

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133. MICH. COMP. LAWS § 769.25(7) (2022).

134. *Procedures for Handling Juvenile Life-Without-Parole ("LWOP") Sentencings and Resentencings Under* Miller v Alabama, Jones v Mississippi, People v Skinner, *and MCL 769.25/MCL 769.25a*, MICH. JUD. INST., https://mjieducation.mi.gov/documents/family-qrms/285-juv-lwop-tables/file [https://perma.cc/6SWJ-FR94] (Oct. 1, 2021).

135. People v. Masalmani, 943 N.W.2d 359 (Mich. 2020) (mem.), *cert. denied sub nom.* Masalmani v. Michigan, 141 S. Ct. 2634 (2021).

136. People v. Masalmani, 924 N.W.2d 585 (Mich. 2019) (mem.), *vacated*, People v. Masalmani, 943 N.W.2d 359 (Mich. 2020) (mem.), *cert. denied sub nom.* Masalmani v. Michigan, 141 S. Ct. 2634 (2021).

137. People v. Masalmani, 943 N.W.2d 359 (Mich. 2020) (mem.), *cert. denied sub nom.* Masalmani v. Michigan, 141 S. Ct. 2634 (2021).

138. *Id.* at 360 (McCormack, J., dissenting).

court noted his troubled upbringing but concluded that it *supported* the imposition of JLWOP.[139] The proffered reasoning was that Masalmani had minimal capacity for reform because he was unlikely to get the type of treatment he needed in prison.[140] This logic effectively swallows the rehabilitation factor altogether. In every instance, the trial court may simply declare that since the juvenile will be imprisoned, and since the range of rehabilitative services offered in prisons is inevitably limited, the juvenile will almost always fail to get some treatment and therefore fall short of full rehabilitation. Moreover, under this logic, the State's inability to provide the requisite treatment necessary for incarcerated juvenile offenders becomes an *aggravating* factor in sentencing. As Chief Justice McCormack aptly put it, "[t]he trial court did not evaluate Masalmani's potential for rehabilitation but rather the state's inability to facilitate such rehabilitation."[141] This decision provides a clear example of a sentencing court's unguided application of the *Miller* factors. Because the Michigan Supreme Court refused to take up the case, the sentencing court's arbitrary decision will stand.

Preventing arbitrary sentencing aligns with Michigan's longstanding opposition to the death penalty. Michigan was the first state in the Union to categorically prohibit the imposition of the death penalty.[142] This categorical ban was partly motivated by the sentencing and execution of two innocent men.[143] The tragedy helped generate momentum for a categorical ban on the death penalty, and in 1847, the Michigan legislature passed an Act outlawing this sentence.[144] That ban was later enshrined in the Michigan Constitution.[145] In the JLWOP context, if a sentencer may impose a JLWOP sentence without any threshold finding, arbitrary sentencing decisions, like the one in *Masalmani*, will likely ensue. Under such a regime, juvenile offenders who are entirely capable of reform risk being condemned to prison for life. Because JLWOP is a death-in-prison sentence, this result will not be much different, in principle, from sentencing an innocent adult to death.

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139. *Id.* at 363 (McCormack, J., dissenting).

140. *Id.*

141. *Id.* at 363–64 (McCormack, J., dissenting).

142. *See* Dan Austin, *The Day Michigan Became 1st State to Ban Death Penalty*, DETROIT FREE PRESS (May 4, 2015, 4:37 PM), https://www.freep.com/story/news/2015/05/04/death-penalty/26879705/ [https://perma.cc/A8H6-XKMJ].

143. *Id.*

144. *See* Eugene G. Wagner, *Michigan and Capital Punishment*, 81 MICH. BAR J. 38, 40 (2002).

145. *Id.* at 41.

2. Michigan May Require Some Fact-Finding Before Imposing JLWOP (The Intermediate Step)

Under *Jones*, states could require a sentencer to find additional facts before imposing JLWOP. This path would likely require the sentencer to make an incorrigibility finding, since *Miller* holds that JLWOP is only appropriate when a juvenile is irreparably corrupted. Adopting this approach would require the Michigan Supreme Court to overrule part of *Skinner*. Even if it did so, this approach would be untenable in practice. This is because the individualized inquiry required under *Miller* cannot reliably distinguish a juvenile offender whose conduct reflects only transient immaturity from one who is truly incorrigible. Overwhelming evidence supports this conclusion.

First, a careful reading of *Graham* indicates that it is impossible to make a case-by-case incorrigibility determination with sufficient accuracy. The *Graham* Court explicitly considered a case-by-case approach when it evaluated the proportionality test in cases involving juvenile offenders.[146] The Court recognized that, theoretically, some juveniles might have "sufficient psychological maturity, and at the same time demonstrate sufficient depravity to merit a life without parole sentence."[147] However, the Court rejected this approach, cautioning that "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."[148] Importantly, this problem cannot be mitigated even with expert insight because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[149]

Further, the Court noted the "unacceptable likelihood that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."[150] Finally, the majority pointed out that, because juveniles tend to "mistrust adults and have limited understanding of the criminal justice system and the roles of the institutional actors within it," a juvenile offender might have a hard time working with defense counsel.[151] As such, only a categorical approach can avoid the risk that a sentencer would "erroneously

146. Graham v. Florida, 560 U.S. 48, 77–80 (2010).
147. *Id.* at 78 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).
148. *Id.* (emphasis added).
149. *Id.* at 74 (quoting *Roper*, 543 U.S. at 572).
150. *Id.* at 78 (quoting *Roper*, 543 U.S. at 573).
151. *Id.*

conclude that a particular juvenile is sufficiently culpable to deserve life without parole" because of the possibility of subpar representation.[152]

Although *Graham* focused on JLWOP for non-homicide juvenile offenders, all the risk factors that the majority identified are also present in the homicide context. The degree to which sentencing authorities can accurately distinguish an irreparably corrupt offender from a temporarily immature one does not vary with the offense committed. As such, it is at least equally hard to determine who exactly deserves JLWOP in the homicide context. If anything, at least one of these factors will be even more salient and therefore more problematic in sentencing a homicide juvenile offender: a sentencer is more likely to be influenced by emotions and preconceptions when considering the appropriate sentence for a homicide offender. Consequently, a subjective assessment of the heinousness of the crime is more likely to result and overpower the mitigating factors associated with youth.

Moreover, the *Graham* Court's hesitation to adopt a case-by-case approach is well-supported by scientific literature.[153] Research shows that it is difficult to predict the future threat of *adult* offenders, let alone juvenile ones.[154] A 2013 American Bar Association report examining Texas' capital punishment procedure recommended that the state abandon its "future dangerousness" determination altogether because of the imprecise nature of such inquiries.[155] A more recent study also revealed that a common test for measuring future dangerousness, the psychopathy checklist, can engender significant inaccuracy and should not be used to draw conclusions about an individual's future behavior.[156] Research is even more conclusive as to the unreliability of predicting future dangerousness in defendants under age twenty-one. Cognitive science shows that the behavior of juveniles—even those who have committed serious crimes—does not predict how they might be-

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152. *Id.* at 78–79.

153. *See, e.g.*, Casey Matsumoto, *"Permanently Incorrigible" Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole*, 88 GEO. WASH. L. REV. 239 (2020); Mary Marshall, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633 (2019); Reichman Hoesterey, *supra* note 41.

154. *See generally* Marshall, *supra* note 153, at 1635 ("By limiting life without parole sentences to only those juveniles who are irreparably corrupt, the Court is asking sentencers to predict whether a juvenile will be a danger decades down the road and after a long prison sentence.").

155. AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS CAPITAL PUNISHMENT ASSESSMENT REPORT, viii (2013), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

156. *See* David DeMatteo, Stephen D. Hart, Kirk Heilbrun, Marcus T. Boccaccini, Mark D. Cunningham, Kevin S. Douglas, Joel A. Dvoskin, John F. Edens, Laura S. Guy, Daniel C. Murrie, Randy K. Otto, Ira K. Packer & Thomas J. Reidy, *Statement of Concerned Experts on the Use of the Hare Psychopathy Checklist—Revised in Capital Sentencing to Assess Risk for Institutional Violence*, 26 PSYCH., PUB. POL'Y & L. 133 (2020); *see also* Tess M.S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" out of the Courtroom?*, 20 ASS'N PSYCH. SCI. J. 135 (2019).

have once their brain becomes more mature.[157] Of course, some juvenile offenders may commit violent criminal acts in the future, but it is practically impossible to determine which juveniles will fall in that category.

In sum, of the three paths that the Michigan Supreme Court can take, the first two make it difficult, if not impossible, for sentencing authorities to impose a fair and accurate sentence. If no threshold finding is required, as *Jones* and *Skinner* held, sentencing decisions risk being entirely arbitrary. If incorrigibility remains the standard, a sentencer has no reliable means of distinguishing between the transiently immature and the permanently incorrigible. Both approaches produce an intolerably high risk of sentencing undeserving juveniles to die in prison. The recourse afforded to the wrongly sentenced—appellate review of sentencing decisions—is unlikely to disturb the outcomes, barring obvious abuse of discretion.

Thus, the only way to avoid the risk of arbitrary sentencing is to completely abolish JLWOP by stripping sentencers of the discretion to impose it. That is what is required to make the juvenile justice system fairer, and that is how the Michigan Supreme Court should respond to a decision as confounding as *Jones*.

III. ALTERNATIVE PATHS OF REFORM

Part III of this Note argues that the Michigan Supreme Court should prohibit JLWOP altogether. However, many justices—even those in favor of more restrictions on JLWOP—might view a categorical ban as too drastic, especially given the U.S. Supreme Court's acknowledgement that JLWOP may be imposed in some cases.[158] This Part explores alternative ways to either abolish the sentence or limit its imposition. Section III.A discusses two judicial remedies that fall short of a categorical ban but that might further restrict the use of JLWOP, and Section III.B urges the Michigan Legislature to prohibit the sentence by statute.

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157. *See* Adriana Galván, Terrie Moffitt & Russell Poldrack, *New Brain Science Shows Future Dangerousness Cannot Be Predicted in Defendants Under 21*, AM. CONST. SOC'Y (July 1, 2020), https://www.acslaw.org/expertforum/new-brain-science-shows-future-dangerousness-cannot-be-predicted-in-defendants-under-21/ [https://perma.cc/BAZ8-ET6K]; *see also* Petition for Writ of Certiorari, *Ex Parte* Wardlow, Nos. WR-58,548-01 and WR-58,548-02, 2020 WL 2059742 (Tex. Crim. App. Apr. 29, 2020), *cert. denied sub nom.* Wardlow v. Texas, 141 S. Ct. 191 (2020).

158. Miller v. Alabama, 567 U.S. 460, 483 (2012) ("Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*.").

A. *Alternative Judicial Actions*

While a categorical ban on JLWOP is unlikely, courts may restrict its use in other ways. This Note discusses two judicial remedies that are particularly promising in Michigan, given the composition of the state's high court. The first is creating a presumption against JLWOP that would require juvenile offenders to receive a term-of-years sentence unless the State can prove beyond a reasonable doubt that the offender is incorrigible. The second is extending *Miller* and *Montgomery* to offenders who commit crimes between eighteen and their mid-twenties, which would increase the number of individuals entitled to the *Miller* protection.

1. A Presumption Against JLWOP

A presumption against JLWOP requires a sentencing court to impose a term-of-years sentence unless the State can prove a juvenile defendant's incorrigibility beyond a reasonable doubt. Such a presumption imposes a higher evidentiary burden on prosecutors and requires a jury to make a finding of incorrigibility before a sentencing court may impose a JLWOP sentence. Although the incorrigibility standard is imperfect, as previously discussed, this reform at least ensures that JLWOP will not be imposed unless prosecutors overcome the presumption. Thus, such a presumption will likely reduce the imposition of JLWOP.

To adopt this approach, the Michigan Supreme Court would need to overrule *Skinner* in part. Recall that the statute at issue in *Skinner*, MCL §769.25, imposes additional procedural requirements on both prosecutors and sentencing courts before JLWOP may be imposed.[159] Specifically, before sentencing an offender to JLWOP, the sentencing judge must specify on the record the aggravating and mitigating circumstances considered and the reasons supporting the ultimate sentence imposed.[160] The key question in *Skinner* was whether this requirement constituted additional fact-finding beyond that inherent in a jury verdict.[161] If it did constitute additional fact-finding (a "murder-plus" reading), the statute might violate the Sixth Amendment by delegating the jury's fact-finding responsibility to the judge.[162] If it did not constitute additional fact-finding (a "murder-minus" reading), the statute might violate the Eighth Amendment if the Court interpreted

159. MICH. COMP. LAWS § 769.25 (2022).
160. *Id.* § 769.25(7).
161. People v. Skinner, 917 N.W.2d 292, 303 (Mich. 2018).
162. *Id.* at 320–21.

Miller and *Montgomery* as mandating additional fact-finding before JLWOP may be imposed.[163]

The majority found no constitutional violation whatsoever.[164] It held that the statute did not run afoul of the Eighth Amendment because neither *Miller* nor *Montgomery* required a sentencer to find any particular fact before imposing JLWOP.[165] Further, the requirement embedded in MCL §769.25 was not an additional fact-finding process that must be performed by a jury.[166] Accordingly, the Court determined that the statute fully complied with the Sixth Amendment.[167]

Then-Justice McCormack, joined by Justice Bernstein, wrote a compelling dissent. Justice McCormack concluded that neither "murder-plus" nor "murder-minus" could cure the statute's constitutional infirmity.[168] On the one hand, reading the statute as "murder-plus"—as requiring additional fact-finding before imposing JLWOP—would violate the Sixth Amendment[169] because the statute clearly directs a sentencing judge to reach beyond facts found by a jury before imposing JLWOP.[170] The majority sidestepped this issue by holding that the statute did *not* require any additional fact-finding. To Justice McCormack, that conclusion defied a plain reading of the statutory text.[171]

On the other hand, reading the statute as "murder-minus"—as requiring no additional fact-finding before imposing JLWOP—would create an Eighth Amendment problem. This is because the statute does not allow for a presumption against JLWOP, which Justice McCormack believed *Miller* and *Montgomery* mandated.[172] *Miller* and *Montgomery* undoubtedly "require[] something beyond merely a finding that all the elements of an offense are proved to sentence a juvenile to LWOP."[173] *Miller*'s holding supports the reading that certain factors must be considered before sentencing authorities can impose JLWOP.[174] A sentencer's consideration of the *Miller* factors necessarily constitutes fact-finding beyond that inherent in the jury verdict. Accordingly, unless and until a sentencer engages in such additional fact-finding, JLWOP

163. *Id.* at 323–24.

164. *Id.* at 295.

165. *Id.* at 310 ([T]he Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence.").

166. *Id.* at 306 (holding that JLWOP is authorized by the jury verdict alone).

167. *Id.* at 311.

168. *Id.* at 318–24 (McCormack, J., dissenting).

169. *Id.* at 317.

170. *Id.* at 320–21.

171. *Id.* at 318 ("I see no way to conclude that the jury verdict *alone* authorizes an LWOP juvenile sentence under the statute's plain language.").

172. *Id.* at 323–34.

173. *Id.* at 322.

174. *See* Miller v. Alabama, 567 U.S. 460, 477–78 (2012) (specifying five factors that sentencing courts must consider in imposing JLWOP).

may not be imposed. In Justice McCormack's words, "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole."[175] According to Justice McCormack, this is the only reasonable reading of *Miller* and *Montgomery*, which reserved a JLWOP sentence for the rare juvenile offenders who are beyond reform.[176]

Justices McCormack and Bernstein are not the only ones who interpret *Miller* and *Montgomery* to mandate a presumption against JLWOP. Since *Miller*, at least seven state supreme courts have held that *Miller* and *Montgomery* create a rebuttable presumption against JLWOP that can be overcome only where the state proves permanent incorrigibility beyond a reasonable doubt.[177] Given *Miller*'s emphasis on the necessary rarity of JLWOP, requiring the state to prove irreparable corruption before imposing a JLWOP sentence is exceedingly reasonable.

Moreover, the *absence* of such a presumption creates perverse incentives and exacerbates the resource disparity between the state and individual defendants. Without a default a term-of-years sentence with the possibility of release, there is nothing to stop prosecutors from recommending JLWOP at resentencing hearings; all they have to do is sit back and wait for individual defendants to demonstrate that they do *not* deserve to die in prison. It is also hard to imagine how individual defendants, many of whom do not have adequate access to rehabilitative services, can prove a negative—that they are *not* beyond reform. If the

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175. *Skinner*, 917 N.W.2d at 323 (McCormack, J., dissenting) (quoting Commonwealth v. Batts, 163 A.3d 410, 452 (Pa. 2017)).

176. *Miller*, 567 U.S. at 479–80.

177. Reichman Hoesterey, *supra* note 41, at 198 app. E. These seven states are: Indiana, Conley v. State, 972 N.E.2d 864, 871 (Ind. 2012) ("The penalty phase of an LWOP trial requires introduction of evidence with the burden on the State to prove its case beyond a reasonable doubt."); Missouri, State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."); Pennsylvania, Commonwealth v. Batts, 163 A.3d 410, 452 (Pa. 2017) ("We therefore conclude that in Pennsylvania, a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole."); Connecticut, State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) ("[*Miller*'s] language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances."); Iowa, State v. Seats, 865 N.W.2d 545, 555 (Iowa 2015) ("Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence."); Utah, State v. Houston, 353 P.3d 55 (Utah 2015); and Wyoming, Davis v. State, 415 P.3d 666, 681 (Wyo. 2018) ("A faithful application of *Miller* and *Montgomery* requires Wyoming to join Pennsylvania and the other states that have concluded there must be a presumption against imposing a life sentence without parole, or its functional equivalent, on a juvenile offender. Further, we conclude, as did Pennsylvania and Missouri, that the State bears the burden of overcoming that presumption at sentencing." (citations omitted)).

burden of persuasion and proof falls on the state, however, prosecutors must unearth evidence of permanent incorrigibility. The latter is more in line with *Miller*'s mandate: that JLWOP sentences must be rarely and thoughtfully imposed.

In text and spirit, *Miller* and *Montgomery* create a presumption against JLWOP—a presumption that can be overcome only if the state can prove that an offender is permanently incorrigible beyond a reasonable doubt. At least three sitting justices on the Michigan Supreme Court have indicated that *Skinner* was wrongly decided and would adopt a presumption against JLWOP. Chief Justice McCormack and Justice Bernstein advocated for this reading in their *Skinner* dissent.[178] Most recently, in *Masalmani*, both justices reiterated their dissent from the *Skinner* majority and stated that they would overrule *Skinner* in its entirety.[179] This time, they found an ally in Justice Megan Cavanagh, who was not a member of the *Skinner* court but signed onto the *Masalmani* dissent.[180] Of the Justices in the *Skinner* majority, only Justices Zahra and Viviano are still on the bench.[181] The two remaining members of the court, Justice Clement and Justice Welch, have yet to share their views on this issue. But it is safe to say that, when the appropriate case reaches the current court, proponents of the presumption will need to convince only one additional justice to overrule *Skinner* and adopt a presumption against JLWOP. As such, a strategy focused on convincing the court to adopt a presumption against JLWOP may be more promising than advocating for an outright ban on the sentence.

178. *Skinner*, 917 N.W.2d at 323–24 (McCormack, J., dissenting).

179. People v. Masalmani, No. 325662, 2016 WL 5329765 (Mich. Ct. App. Sept. 22, 2016), *appeal granted*, 924 N.W.2d 585 (Mich. 2019), *vacated*, 943 N.W.2d 359 (Mich. 2020) (McCormack, J., dissenting).

180. Justices Bernstein and Cavanagh joined the dissenting statement of Chief Justice McCormack in *Masalmani*. *Masalmani*, 943 N.W.2d at 364 (McCormack, J., dissenting). Justice Cavanagh was elected to the Michigan Supreme Court in 2018 and began her tenure on January 1, 2019. When *Skinner* was decided in June 2018, she was not yet a member of the court. *Megan Cavanagh*, MICH. SUP. CT. HIST. SOC'Y, http://www.micourthistory.org/justices/megan-cavanagh/ [https://perma.cc/TF9F-77F5] (last visited Mar. 13, 2022).

181. Justice Stephen Markman, the *Skinner* majority author, retired on January 1, 2021. *See* Associated Press, *Michigan Supreme Court Justice Retiring After 21 Years Calls Service a Blessing*, DETROIT NEWS (Nov. 14, 2020, 1:32 PM), https://www.detroitnews.com/story/news/local/michigan/2020/11/14/michigan-supreme-court-justice-retiring-markman/114942590/ [https://perma.cc/5ZGR-NMQN]. He was succeeded by Justice Elizabeth Welch. *See* Oralandar Brand-Williams, *Meet Michigan's Incoming Supreme Court Justice: Elizabeth Welch*, DETROIT NEWS (Nov. 23, 2020, 10:45 PM), https://www.detroitnews.com/story/news/local/michigan/2020/11/24/elizabeth-welch-michigan-newest-supreme-court-justice/6317246002/?gnt-cfr=1 [https://perma.cc/FR3L-CDHN].

2. An Extension of *Miller* and *Montgomery*

Another alternative is to extend *Miller* and *Montgomery* to individuals between ages eighteen and twenty-five, a period during which the decision-making part of the brain continues to mature and alter human behavior.[182] Across the nation, a few courts have entertained this proposal, but most of them, including the Michigan Supreme Court, have rejected calls for such an extension.[183] Nevertheless, since the Michigan Supreme Court last considered this question, the composition of the bench has changed. For this reason, this reform remains promising in Michigan, given that several sitting justices have indicated an interest in exploring it.

The chief argument in favor of extending *Miller* and *Montgomery* to offenders who commit their crimes between the ages of eighteen and twenty-five is that the youthful characteristics identified in the *Miller* trilogy continue to develop well into the mid-twenties.[184] This contention is logical. After all, the immaturity and impetuosity that the law recognizes as mitigating factors for seventeen-year-olds do not magically disappear at age eighteen. Indeed, research suggests that the prefrontal cortex, the part of human brain responsible for executive functions, does not fully mature until the early to mid-twenties.[185] Poor executive function can lead to "difficulty with planning, attention, using feedback, and mental inflexibility, all of which could undermine judgment and decision-making."[186] The implication is that human beings are not fully capable of good judgment and rational decision-making until they are in their early to mid-twenties. Given this evidence, the eighteen-year-old line seems arbitrary and more connected to our societal conception of age eighteen as a turning point from adolescence to adulthood than to developmental science. Indeed, that is

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182. *See, e.g.*, Emily Powell, *Underdeveloped and Over-Sentenced: Why Eighteen- to Twenty-Year-Olds Should Be Exempt from Life Without Parole*, 52 U. RICH. L. REV. 83 (2018).

183. *E.g.*, Haughey v. Comm'r of Corr., 164 A.3d 849, 856 (Conn. App. Ct. 2017); People v. Pittman, 104 N.E.3d 485 (Ill. App. Ct. 2018); People v. Manning, 951 N.W.2d 905 (Mich. 2020).

184. *See* Application for Leave to Appeal at 13–14, People v. Manning, 951 N.W.2d 905 (Mich. 2020) (No. 160034), *cert. denied sub nom.* Manning v. Michigan, 142 S. Ct. 405 (2021); Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577 (2015); Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667 (2014).

185. *See, e.g.*, Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 459 (2013).

186. Sarah B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 217 (2009).

exactly how the *Roper* Court justified their line-drawing decision in the capital punishment context.[187]

Proponents of extending *Miller* heeded the science and argued that those between the ages of eighteen and twenty-five are more like children than mature adults when it comes to rational decision-making.[188] Unfortunately, this argument met with resistance in court. For example, in *Haughey v. Commissioner of Correction*, the Connecticut Court of Appeals rejected an attempt to extend *Miller* to "youthful" offenders, holding that "an offender who has reached the age of eighteen is not considered a juvenile for sentencing procedures and Eighth Amendment protections articulated in *Miller*."[189] In 2018, in what may have been a sign of hope for youthful offenders, a federal district court in Connecticut granted habeas corpus relief to a defendant sentenced to LWOP for a crime he committed at age eighteen, noting that the youthful characteristics identified in *Miller* applied to eighteen-year-olds.[190] The Second Circuit, however, vacated this decision two years later, holding that a mandatory LWOP sentence for offenders who commit their crimes at age eighteen does not violate the Eighth Amendment.[191] The same result transpired in Illinois,[192] California,[193] and Wyoming.[194] In 2017 and 2018, the Michigan Court of Appeals twice considered and rejected this argument in *People v. Jordan*[195] and *People v. Stanton-Lipscomb*.[196] The Michigan Supreme Court denied leave to appeal in both cases.[197]

The most encouraging success stories have come from the Washington Supreme Court. At first, in 2015, the court held that the youth of an eighteen-year-old offender was a mitigating circumstance because of "fundamental differences between adolescent and mature brains."[198] Most recently, in March 2021, the court held that a mandatory LWOP sentence for eighteen- to twenty-one-year-olds was unconstitutional under the state constitution and the Eighth Amendment.[199] In so hold-

187. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("[T]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood.").

188. *See generally* Michael M. O'Hear, *Not Just Kid Stuff—Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087 (2013). For an example of lawyers arguing that Miller should apply to eighteen-year-olds, see Application for Leave to Appeal , *supra* note 184, at 14.

189. Haughey v. Comm'r of Corr., 164 A.3d 849, 856 (Conn. App. Ct. 2017).

190. *See* Cruz v. United States, No. 11-cv-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018).

191. Cruz v. United States, 826 Fed. App'x 49 (2d Cir. 2020).

192. People v. Pittman, 104 N.E.3d 485 (Ill. App. Ct. 2018).

193. People v. Argeta, 149 Cal. Rptr. 3d 243 (Ct. App. 2012).

194. Nicodemus v. State, 392 P.3d 408 (Wyo. 2017).

195. People v. Jordan, No. 328474, 2017 WL 908294 (Mich. Ct. App. Mar. 7, 2017).

196. People v. Stanton-Lipscomb, No. 337433, 2018 WL 4576682 (Mich. Ct. App. Sept. 20, 2018).

197. People v. Jordan, 901 N.W.2d 109 (Mich. 2017); People v. Stanton-Lipscomb, 925 N.W.2d 853 (Mich. 2019).

198. State v. O'Dell, 358 P.3d 359, 364 (Wash. 2015).

199. *In re* Monschke, 482 P.3d 276 (Wash. 2021).

ing, the court made clear that "[m]odern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood."[200] Those decisions recognize that eighteen- to twenty-one-year-olds still possess the salient characteristics of youth which diminish their culpability, warranting lesser sentences.

Recently, the Michigan Supreme Court reviewed this question again in *People v. Manning*.[201] Robin Manning received a mandatory LWOP sentence for a crime he committed when he was eighteen years and three months old.[202] On appeal, counsel for Manning, as well as the ACLU of Michigan as amicus curiae, argued that Manning should not be treated any differently than a seventeen-year-old and therefore should come within the ambit of *Miller* and *Montgomery*, citing prolific evidence in neurological science concerning adolescent brain development.[203] The majority of the Michigan Supreme Court again denied leave to appeal.[204] In a concurring statement, Justice Markman, joined by Justice Zahra, asserted that Manning was not entitled to relief because his mandatory LWOP sentence was *not* precluded by *Miller* and *Montgomery*.[205] The two Justices then proceeded to recite the *Carp* Eighth Amendment inquiry approvingly, indicating that they still found *Carp*'s proportionality analysis convincing.[206] Justice Clement filed a separate concurring statement in which she also agreed that Manning's claim failed on the merits (i.e., that he was not entitled to relief because his sentence was not unconstitutional under the Eighth Amendment).[207] Chief Justice McCormack, again joined by Justices Bernstein and Cavanagh, filed a dissenting statement in which she expressed interest in extending *Miller* and *Montgomery* to offenders who committed their crimes at or over the age of eighteen in light of "advances in studies of brain development" demonstrating that youthful attributes continue well beyond eighteen.[208]

As noted above, the breakdown of the bench in *Manning* suggests that at least three members of the court are amenable to extending *Miller* and *Montgomery* in recognition of "fundamental differences between adolescent and mature brains."[209] Justices Zahra and Clement will be

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200. *Id.* at 277.
201. People v. Manning, 951 N.W.2d 905 (Mich. 2020).
202. Application for Leave to Appeal, *supra* note 184, at 13.
203. *Id.* at 14–15; Brief of Amici Curiae Juv. L. Ctr. and Am. C.L. Union of Mich. in Support of Defendant-Appellant Robin Manning at 3–5, *Manning*, 951 N.W.2d 905.
204. *Manning*, 951 N.W.2d 905 (order denying application for leave to appeal).
205. *Id.* at 905 (Markman, J., concurring).
206. *Id.* at 907.
207. *Id.* at 910.
208. *Id.* (McCormack, J., dissenting).
209. State v. O'Dell, 358 P.3d 359, 364 (Wash. 2015).

tough votes to get, given their unwillingness to extend *Miller* to someone who was just three months past eighteen. Thus, the outcome of this reform again turns on two justices: Justice Viviano and Justice Welch. At the time of writing, the Michigan Supreme Court had just heard oral arguments in *People v. Poole*,[210] which considered whether *Miller* and *Montgomery* should be extended to murder defendants who were over seventeen years old when they committed a crime.[211] Since three sitting justices appear amenable to such an expansion, this may be a more realistic path of reform than a categorical ban on JLWOP in the short term.

B. *A Legislative Fix*

In January 2021, Washtenaw County prosecutor Eli Savit urged the Michigan Legislature to ban JLWOP, noting that "nearly half of the states in the country now categorically prohibit" the sentence.[212] Indeed, outside the realm of judicial pronouncements, the most straightforward solution is a law to ban JLWOP. Most recently, Maryland abolished JLWOP by statute in April 2021,[213] joining twenty-four other states and the District of Columbia to officially ban the practice of sentencing children to die in prison.[214] As of writing, twenty states and the District of Columbia have enacted legislation to effectuate a complete ban (both prospective and retroactive) on JLWOP since *Miller*.[215]

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210. Oral Argument, People v. Poole, 960 N.W.2d 529 (mem.) (Mich. 2021), https://www.youtube.com/watch?v=qhOy3m2BwSk&t=1537s [https://perma.cc/KMH9-EDS8].

211. People v. Poole, 960 N.W.2d 529, 530 (mem.) (Mich. 2021).

212. Eli Savit (@EliNSavit), TWITTER (Jan. 16, 2021, 4:20 PM), https://twitter.com/EliNSavit/status/1350553631699959812 [perma.cc/LJ9D-9RGK].

213. *Maryland Bans Life Without Parole for Children*, EQUAL JUST. INITIATIVE (Apr. 12, 2021), https://eji.org/news/maryland-bans-life-without-parole-for-children/ [perma.cc/WSH6-BKAH].

214. Rovner, *supra* note 111, at 4.

215. Twenty-five states and the District of Columbia have a complete ban on JLWOP. These states are: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, Nevada, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Rovner, *supra* note 111. This section of the Note focuses on the nineteen states that have enacted legislation to completely ban JLWOP since *Miller*. These states are: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. *See Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop/ [https://perma.cc/N4GS-FENG] (listing seventeen states that have banned JLWOP through legislation since *Miller*); *Virginia Abolishes Life Without Parole for Children*, EQUAL JUST. INITIATIVE (Feb. 25, 2020), https://eji.org/news/virginia-abolishes-life-without-parole-for-children/ [https://perma.cc/A7NF-N5W3]; *Ohio Abolishes Life Without Parole for Children*, EQUAL JUST. INITIATIVE (Jan. 13, 2021), https://eji.org/news/ohio-abolishes-life-without-parole-for-children/[https://perma.cc/M548-NQPT]; *Maryland Bans Life Without Parole for Children*, EQUAL JUST. INITIATIVE (Apr. 12, 2021), https://eji.org/news/maryland-bans-life-without-parole-for-children/ [perma.cc/WSH6-BKAH]. Note that Colorado enacted a prospective ban on JLWOP in 2006, but a retroactive ban on the sentence did not transpire until 2016. *Colorado*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/colorado/

Michigan's response pales in comparison. As discussed, in response to *Miller*, the Michigan Legislature enacted MCL §769.25, which set forth a resentencing procedure that has been used by prosecutors across the state to re-impose JLWOP at resentencing hearings.[216] Thus, while the purported goal of the law is to bring the state into compliance with *Miller* and *Montgomery*, there is reason to question whether this resentencing scheme will comply with *Miller* by making a JLWOP sentence extremely uncommon.

California is a good case study of legislating against JLWOP. In the three years preceding *Miller*, California had the second-highest number of JLWOP sentences per year behind Florida.[217] It had the fourth largest JLWOP population in the country behind Pennsylvania, Michigan, and Florida.[218] Yet the state was quick to respond to *Miller* and *Montgomery*. In 2012, California became one of the first states to enact legislation in response to *Miller*, giving juvenile lifers an opportunity to petition their sentencing judge to reconsider their sentence.[219] Following *Montgomery*, in 2017, California adopted two of the country's most progressive post-*Montgomery* juvenile justice reforms.[220] One of these laws granted parole

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[https://perma.cc/ZDC9-2A6V]. Alaska, Kansas, and Kentucky abolished JLWOP by statute before *Miller* and are therefore not included on this list. *See* ALASKA STAT. ANN. § 12.55.125 (West 2021); COLO. REV. STAT. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1) (2021); KAN. STAT. ANN. § 21-6618 (2021); KY. REV. STAT. ANN. § 640.040(1) (West 2021). Washington and Iowa effectuated a complete ban on JLWOP through court decisions and are therefore not included on this list. *See* State v. Bassett, 428 P.3d 343 (Wash. 2018); State v. Sweet, 879 N.W.2d 811 (Iowa 2016). Some reports claim that Montana also bans JLWOP by statute. *See e.g.*, John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 595 (2016); CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 12 (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/E3ZB-FD4K]. However, it appears that judges have discretion to restrict access to parole. *See e.g.*, Joseph Landau, *New Majoritarian Constitutionalism*, 103 IOWA L. REV. 1033, 1075 n.225 (2018); *A State-by-State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 31, 2017), https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85 [https://perma.cc/2KA3-WX9W]. Therefore, this Note does not consider Montana's scheme as a complete ban on JLWOP.

216. *See, e.g.*, Elizabeth Weill-Greenberg, *The Supreme Court Ruled That Sentences Like Hers Are Unconstitutional. Prosecutors Are Fighting to Keep Her Incarcerated*, APPEAL (Dec. 9, 2019), https://theappeal.org/juvenile-life-without-parole-michigan/ [perma.cc/ZE66-JWC9]; Brian Dickerson, *Justice Delayed, Again, for Michigan's Juvenile Lifers*, DETROIT FREE PRESS (Aug. 27, 2016, 11:31 PM), http://www.freep.com/story/opinion/columnists/briandickerson/2016/08/27/michigan-juvenile-lifers-sentences/89363426/ [perma.cc/7822-LWKG].

217. DEBORAH LABELLE & ANLYN ADDIS, SECOND CHANCES 4 YOUTH, BASIC DECENCY: PROTECTING THE HUMAN RIGHTS OF CHILDREN 25 (2012), http://jjie.org/wp-content/uploads/2012/05/BasicDecencyReport2012.pdf [perma.cc/AU5L-ANE6].

218. *Id.*

219. *New Law Gives California Children Sentenced to Die in Prison a Chance for Parole*, EQUAL JUST. INITIATIVE (Oct. 4, 2012), https://eji.org/news/california-law-gives-children-sentenced-to-die-in-prison-chance-for-parole/ [https://perma.cc/9YMB-QY3A].

220. *California Abolishes Death in Prison Sentences for Children*, EQUAL JUST. INITIATIVE (Oct. 13, 2017), https://eji.org/news/california-abolishes-juvenile-life-without-parole/ [https://perma.cc/SFH2-AXNN]; *California*, JUVENILE SENT'G PROJECT, https://juvenilesentencingproject.org/california/ [https://perma.cc/CP9Z-C2X5].

eligibility to juvenile lifers during their twenty-fifth year of incarceration, putting an end to the discretionary imposition of JLWOP.[221] The other law extended parole eligibility to those who commit their "controlling offenses" at or under the age of twenty-five.[222] A "controlling offense" is defined in the bill as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment."[223] Together, these two provisions ended not only JLWOP, but also LWOP sentences imposed on those who committed their "controlling offenses" at or under the age of twenty-five. These laws reflect not only the state's commitment to *Miller* and *Montgomery*, but also its recognition of developments in cognitive science.

Of course, passing legislation requires political will, and in this respect, each state is unique. However, there are good policy reasons for *any* state legislature to abolish JLWOP. Two are particularly salient in Michigan. First, LWOP takes a massive financial toll on the state. JLWOP, which by definition entails longer imprisonment, only aggravates the problem. Second, JLWOP exacerbates racial disparities in an already inequitable criminal justice system. In the quest towards a more equitable society, eliminating JLWOP is a significant step in the right direction.

1. JLWOP Exacts a Heavy Financial Burden on Michigan Taxpayers

Prisons must provide necessary services to accommodate all aspects of an incarcerated individual's life. As such, putting people behind bars is an expensive endeavor. In Michigan, according to a January 2018 House Fiscal Agency report, the average cost of incarcerating one individual in prison was $36,106 in fiscal year 2017.[224] The same report showed an allocation of approximately $1.95 billion to the Michigan Department of Corrections, which constituted nineteen percent of the State's $10.2 billion general fund budget.[225] In contrast, the educational budget made up thirteen percent of the general fund revenue, and budget for school aid only two percent.[226]

Now consider the cost of housing incarcerated individuals for life. According to a report published by the Washington State Office of Financial Management, "each LWOP sentence will cost Washington state

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221. CAL. PENAL CODE § 3051(b) (West 2020).

222. *Id.*

223. *Id.* at § 3051(a)(2)(B).

224. ROBIN R. RISKO, HOUSE FISCAL AGENCY, BUDGET BRIEFING: CORRECTIONS 26 (2018), https://www.house.mi.gov/hfa/PDF/Briefings/Corrections_BudgetBriefing_fy17-18.pdf [https://perma.cc/D3Z5-ZJGU].

225. *Id.* at 9.

226. *Id.*

$51,193 each year for 30 years (until age 55). Elderly prisoners over 55 are at least twice as costly to incarcerate as their younger peers."[227] The January 2018 Michigan House Fiscal Agency report confirms that the same trend was true in Michigan during the documented period.[228] This should hardly come as a surprise, since elderly individuals who are incarcerated need more regular and likely more specialized medical services.

The problem is only exacerbated in the context of JLWOP, since juvenile lifers will stay in prison longer than adults sentenced to LWOP. A recently updated report from the Sentencing Project put the cost of incarcerating a sixteen-year-old for fifty years (not even for life) at an astronomical $2.25 million.[229] In Michigan, a 2012 study posited that the state spent $10 million per year incarcerating individuals for life for crimes committed when they were juveniles.[230] Although up-to-date statistics for Michigan are hard to pin down, it is safe to assume that the cost would be close to these estimates.

Moreover, JLWOP poses additional financial burdens on states on top of the costs associated with incarceration. Michigan's current resentencing regime uses a resource-intensive process to determine whether JLWOP is warranted. This process entails costs to the judicial system, the defense, and the prosecution. Regardless of whether a finding of incorrigibility is required or where the burden of proof falls, the *Miller* hearing under MCL § 769.25 requires the presentation of extensive evidence about a defendant's past, including the defendant's criminal record, medical history, family and social background, and anything else that might shed light on whether the defendant is capable of reform.[231] The production of such evidence is a labor- and capital-intensive process. One estimate put the defense expenses for hearings at $50,000 to $75,000 in Louisiana.[232]

These findings establish that JLWOP takes a big financial toll on states generally, and especially on states like Michigan that house a significant number of juvenile lifers. Although budget is not the only factor in determining legislative agenda, it is certainly prudent for lawmakers to consider where taxpayer money goes and should go. When school aid

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227. *Incarceration of Elderly Inmates: Research and Data Points*, WASH. OFF. FIN. MGMT., at 2, https://ofm.wa.gov/sites/default/files/public/legacy/sgc/meetings/2016/01/incarceration_elderly_inmates.pdf [https://perma.cc/8YB9-8BFC].

228. *See* RISKO, *supra* note 224, at 32 ("One major factor in the rise of per-prisoner health care costs is the aging of the prison population.").

229. Rovner, *supra* note 111, at 4.

230. LABELLE & ADDIS, *supra* note 217, at 30.

231. Ben Finholt, Brandon L. Garrett, Karima Modjadidi & Kristen M. Renberg, *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141, 167 (2020).

232. Bryn Stole, *With New Law on the Books, Louisiana Courts Prepare to Re-Sentence Hundreds of Juvenile Murderers*, ADVOCATE (July 23, 2017, 2:00 PM), https://www.theadvocate.com/baton_rouge/news/courts/article_dc5ae4c2-6f28-11e7-9633-2bee1fbaf113.html [https://perma.cc/DE53-ZVY4].

appropriation represents only one-tenth of the correctional budget, the legislature may face a reckoning over its priorities.[233]

2. JLWOP Widens Racial Disparities in Michigan's Juvenile Justice System

In 2016, the American University Law Review published an article that used data from state corrections departments to demonstrate that people of color are overrepresented in the national JLWOP population "in ways perhaps unseen in any other aspect of our criminal justice system."[234] Using this dataset, the Prison Policy Initiative calculated that people of color constituted only thirty-eight percent of the U.S. population in 2015, but seventy-seven percent of those serving a JLWOP sentence across the country were people of color.[235] Moreover, the rate at which Black children were sentenced to JLWOP compared to their white peers only increased over time, demonstrating a widening gap in the racial composition of juvenile lifers nationwide.[236]

The situation is no different in Michigan. A 2012 Michigan-specific study confirms that people of color are overrepresented among JLWOP prisoners in the state. The study found that seventy-three percent of youth serving a JLWOP sentence are children of color, even though children of color only represent twenty-nine percent of the state's youth population.[237] In Wayne County, where Detroit is located, more than ninety percent of those serving a JLWOP sentence are Black, even though Black people constitute just forty percent of the county population.[238]

The disproportionate imposition of JLWOP on racial minorities is largely due to disturbing racial dynamics at the charging and plea-bargaining stage. According to the 2012 Michigan study, "[y]outh accused of a homicide offense where the victim was white were 22% less likely to receive a plea offer than in cases where the victim was a person of color."[239] More fundamentally, imposing JLWOP on racial minorities at such a disproportionate rate suggests a troubling assumption that racial minorities are categorically less likely to learn from and grow out

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233. *See* RISKO, *supra* note 224, at 9.

234. Mills et al., *supra* note 215, at 579.

235. Joshua Aiken, *Prison Pol'y Initiative, Why Do We Lock Juveniles up for Life and Throw Away the Key? Race Plays a Big Part*, PRISON POL'Y INITIATIVE (Sept. 15, 2016), https://www.prisonpolicy.org/blog/2016/09/15/juvenile_lwop/ [https://perma.cc/87EE-HVFG].

236. *Id.*

237. LABELLE & ADDIS, *supra* note 217, at 15.

238. Kira Lerner, *In Detroit Prosecutor Race, a Stark Contrast on Whether Children Should Serve Life in Prison*, THE APPEAL (July 22, 2020), https://theappeal.org/politicalreport/wayne-county-detroit-prosecutor-election-youth-sentences/ [https://perma.cc/DS7M-W6TD].

239. LABELLE & ADDIS, *supra* note 217, at 15.

of their mistakes. The current resentencing scheme does nothing to counteract this assumption. In fact, the existing resentencing regime does nothing to stop prosecutors from disproportionately re-imposing JLWOP on people of color, and thereby perpetrating racial disparities in the juvenile justice system. Indeed, in 2016, following the *Montgomery* decision, Wayne County prosecutor Kym Worthy announced that she would "aggressively pursue life without possibility of parole" in 60 of the county's 141 JLWOP cases.[240] Though Worthy did not announce the details of the sixty individuals she was intent on keeping in prison for life, data shows that "even if the list includes every white or Hispanic person serving juvenile life without parole in Wayne County, black LWOP defendants would still account for 80 percent of those being retried for LWOP."[241] As such, anything short of a categorical ban risks exacerbating racial inequity in Michigan's juvenile justice system.

CONCLUSION

This Note urges the complete abolition of juvenile life without parole (JLWOP) in Michigan. Although *Miller* already limits JLWOP, further reform remains necessary for two reasons. First, although *Miller* and *Montgomery* require that the sentence be extremely uncommon, prosecutors still seek to impose the sentence in numbers that cannot be reconciled with these two decisions. This problem is only exacerbated by *Skinner* and *Jones*, as sentencers are not required to make specific findings before imposing the harshest sentence in the state. A large JLWOP population leads to a series of problems, including a massive financial burden that the State must bear to house a non-negligible number of juvenile lifers and the exacerbation of racial disparity in the juvenile justice system. The only way to solve these problems is to strip prosecutors of the power to impose a JLWOP sentence. This is not an uncommon or drastic solution, as evidenced by the trend of reform across the country following *Miller* and *Montgomery*.[242] Second, the law has an expressive function. To abolish JLWOP is to recognize the unmistakable fact that, with appropriate resources, children are capable of rehabilitation and reform. The United States is the only country in the world that imposes a death-in-prison sentence on children.[243] A categorical ban on JLWOP in a state with one of the country's largest juve-

240. Josie Duffy Rice, *Detroit's Head Prosecutor Doesn't Believe These Black Kids Can Change*, DAILY KOS (July 29, 2016, 10:59 AM), https://www.dailykos.com/stories/2016/7/29/1554091/-Why-doesn-t-Detroit-s-head-prosecutor-believe-these-kids-can-change [https://perma.cc/B4HC-HV6F].

241. *Id.*

242. *See supra* note 216 and accompanying text.

243. JUVENILE L. CTR., *Juvenile Life Without Parole (JLWOP)*, https://jlc.org/issues/juvenile-life-without-parole [https://perma.cc/Z6HT-PQ6C].

nile lifer populations[244] will go a long way in reaffirming America's commitment to human rights and international law.[245]

244. Allie Gross, *More than Half of Michigan Juvenile Lifers Still Wait for Resentencing*, DETROIT FREE PRESS (Aug. 15, 2019, 6:30 AM), https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/ [https://perma.cc/J74U-QFCQ] ("Michigan . . . has the second highest number of juvenile lifers in the nation.").

245. JLWOP is condemned by international law. *See* Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.").