CHILDREN ARE CONSTITUTIONALLY DIFFERENT, BUT LIFE WITHOUT PAROLE AND DE FACTO LIFE SENTENCES ARE NOT: EXTENDING *GRAHAM* AND *MILLER* TO DE FACTO LIFE SENTENCES

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Under the U.S. Supreme Court's current juvenile sentencing jurisprudence, a juvenile may legally receive a prison sentence of hundreds of years without parole in instances in which a sentence of life without parole would be unconstitutional. This illogical state of affairs is the result of the Court's silence on whether its holdings in Graham v. Florida *and* Miller v. Alabama*, which together limit the availability of juvenile life without parole sentences, also apply to so-called de facto life sentences. De facto life sentences are lengthy term-of-years sentences that confine offenders to prison for the majority, if not the entirety, of their lives. Whether* Graham *and* Miller *apply to such sentences has been the subject of staunch disagreement among various federal courts of appeals, leaving some juvenile defendants' hopes for eventual life out of prison up to the interpretive whims of the judges in their jurisdiction.*

This Note contends that although the Supreme Court has taken important steps toward protecting juveniles from receiving cruel life without parole sentences, its decisions mean little if sentencing judges are allowed to impose term-of-years sentences that are functionally equivalent. This Note argues that to close this sentencing loophole, Graham *and* Miller *should apply equally to life without parole and de facto life sentences. Given the Supreme Court's apparent unwillingness to clarify this issue, this Note posits that it is incumbent upon state courts to step in. By extending* Graham *and* Miller *to bar de facto life sentences under their state constitutions, state judges would not only protect juveniles from cruel and unusual punishment, but also create the basis for more expansive Supreme Court juvenile sentencing jurisprudence in the future.*

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INTRODUCTION

In 2001, sixteen-year-old Chaz Bunch was arrested for rape and robbery.[1] He was convicted and sentenced to eighty-nine years in prison.[2] Three years later, Terrance Jamar Graham, also sixteen years old, was arrested for armed

1. *See* Bunch v. Smith, 685 F.3d 546, 547–48 (6th Cir. 2012).
2. *See id.* at 548.

burglary and attempted armed robbery.[3] He too was convicted, but Graham was sentenced to life in prison without the possibility of parole.[4] Bunch and Graham's cases were similar: both boys were juvenile nonhomicide offenders sentenced to prison terms that would almost certainly keep them in prison for life.[5] Yet on appeal, only Graham's formal life without parole (LWOP) sentence was deemed cruel and unusual in violation of the Eighth Amendment.[6] Bunch's eighty-nine-year sentence was deemed constitutional because it was not a formal LWOP sentence.[7] This discrepancy in the constitutionality of the two sentences—different in name but not in substance—illustrates the arbitrariness of the Supreme Court's current juvenile sentencing jurisprudence.

In a series of decisions since 2005, the Supreme Court took strides toward protecting juvenile offenders from severe sentences.[8] Notably, in *Graham v. Florida*[9] and *Miller v. Alabama*,[10] the Court invalidated the use of juvenile LWOP sentences in nonhomicide cases and greatly limited the availability of such sentences in juvenile homicide cases. In deciding *Graham* and *Miller*, the Court acknowledged that "children are constitutionally different from adults for purposes of sentencing"[11]: developing children are more apt for reform than many adults, undermining the rationale behind severe sentences.[12] For this reason, the Court decided that LWOP is an unconstitutionally disproportionate sentence for the majority of juvenile defendants.[13] However, the Court has not spoken on whether its decisions extend to juvenile de facto life (DFL) sentences. This silence has enabled sentencing judges to evade the mandates of *Graham* and *Miller* and circumvent the protections of the Eighth Amendment.

An LWOP sentence confines an offender to prison until they die without an opportunity for release.[14] DFL sentences have the same effect as LWOP

3. *See* Graham v. Florida, 560 U.S. 48, 55–57 (2010).

4. *See id.* at 57.

5. Bunch, sentenced to eighty-nine years, was unlikely to outlive his sentence. *See Bunch*, 685 F.3d at 551 n.1 (explaining that Bunch would be at least ninety-one years old before he would be eligible for release); *see also* ELIZABETH ARIAS, BETZAIDA TEJADA-VERA, KENNETH D. KOCHANEK & FARIDA B. AHMAD, NAT'L VITAL STATS. SYS., PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR 2021, at 1 (2022), https://www.cdc.gov/nchs/data/vsrr/vsrr023.pdf [https://perma.cc/QF5K-MTXY] (reporting that in 2021 the average life expectancy at birth in the United States was just over seventy-six years).

6. *Compare Graham*, 560 U.S. at 96, *with Bunch*, 685 F.3d at 551.

7. *See Bunch*, 685 F.3d at 551.

8. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 479 (2012); *Graham*, 560 U.S. at 74 (2010); Roper v. Simmons, 543 U.S. 551, 568 (2005).

9. 560 U.S. 48 (2010).

10. 567 U.S. 460 (2012).

11. *Id.* at 471.

12. *Graham*, 560 U.S. at 76.

13. *See id.* at 74; *Miller*, 567 U.S. at 479.

14. *See* ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 9 (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf [https://perma.cc/L2CB-KTW4] ("Life-without-parole sentences eliminate the possibility

sentences—near guaranteed life imprisonment—but provide for a possible release date after an offender has served a certain number of years.[15] However, that date is either so late in the offender's life that they are prevented from having a meaningful reentry to society or is beyond typical life expectancy calculations.[16] Significantly, there is no widely accepted demarcation of when a lengthy term-of-years sentence becomes a DFL sentence. One definition considers DFL sentences to be those that surpass a juvenile's life expectancy.[17] Others define it as those that exceed an offender's retirement age.[18] Another definition is based on the length of time that a prisoner is ineligible for parole.[19] Regardless, most definitions agree that DFL sentences, also known as virtual or essential life sentences, are the functional equivalent of LWOP because both sentences destroy a juvenile's hope for leading a meaningful life outside of prison.[20] The Supreme Court's silence on whether its LWOP decisions extend to juveniles who receive DFL sentences has caused thousands of children like Bunch to fall through the cracks of its Eighth Amendment jurisprudence.[21] In this way, arbitrary differences in the types of sentences that young people can receive dictate whether their juvenile status[22] is recognized and protected.[23]

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of release from prison except in the rare case of a clemency or commutation by the executive branch.").

15. *See id.*

16. *See Know More: De Facto Life Sentences*, RESTORE JUST., https://www.restorejustice.org/about-us/resources/know-more/know-more-de-facto-life-sentences/ [https://perma.cc/7Z7C-SX5P] (last visited Sept. 3, 2023).

17. *See* People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (defining a DFL sentence as a "mandatory term-of-years sentence that cannot be served in one lifetime").

18. *See* United States v. Grant, 887 F.3d 131, 142 (3d Cir.) (stating that a term-of-years sentence that withholds release until after the national retirement age of sixty-five is unconstitutional), *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018), *aff'd in part, vacated and remanded in part*, 9 F.4th 186 (3d Cir. 2021); *see also* Rachel Forman, *You Have Your Whole Life in Front of You . . . Behind Bars: It's Time to Ban De Facto Life Without Parole for Juvenile Non-Homicide Offenders*, 5 L.J. SOC. JUST. 1, 2 (2015).

19. *See* NELLIS, *supra* note 14, at 9 (defining DFL sentences as those that withhold parole for fifty years or more); Commonwealth v. Perez, 80 N.E.3d 967, 975–76 (Mass. 2017) (treating aggregate sentences in excess of what would be applicable to a juvenile convicted of murder as requiring special consideration even if they provide for parole eligibility).

20. *See* Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012); Jenna McGreevy, Comment, *Growing Up in Prison: Rethinking Juvenile Offender Parole Hearings to Eliminate Essential Life Sentences*, 50 U. BALT. L. REV. 221, 230 (2020).

21. *See* ASHLEY NELLIS, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 17 (2017), https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf [https://perma.cc/TQ5A-EQHK] (stating that as of 2017, there were 2,089 people nationally serving virtual life terms of fifty or more years for crimes committed as juveniles).

22. The Supreme Court's decisions on the validity of juvenile sentences under the Eighth Amendment are premised on the notion that some sentences are disproportionate to the status of the offender. *See* Graham v. Florida, 560 U.S. 48, 68 (2010).

23. *See* Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017); Daniel Jones, Note, *Technical Difficulties: Why a Broader Reading of* Graham *and* Miller *Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN'S L. REV. 169, 194 (2016).

This Note examines the Supreme Court's juvenile LWOP jurisprudence—particularly *Graham* and *Miller*—as well as the different ways that federal courts of appeals have applied these rulings to juvenile DFL sentences. Ultimately, this Note argues that for *Graham* and *Miller* to truly protect children from cruel and unusual punishment, the limitations that they impose on LWOP must be extended to juvenile DFL sentences. Further, for this extension to be meaningful, DFL sentences must be clearly defined. This Note contends that states have a vital role to play in effectuating this extension.

Part I discusses the cognitive differences between children and adults, the juvenile justice system that was created in response to these differences, and how the Court has applied these differences in its juvenile sentencing jurisprudence. It also summarizes state powers over sentencing. Part II considers the various approaches that federal courts of appeals have taken in considering whether the Supreme Court's LWOP decisions extend to DFL sentences. Part III then argues that the Supreme Court's decisions in *Graham* and *Miller* limiting the availability of LWOP must be extended to juvenile DFL sentences. It contends that states offer the most strategic forum for this extension, given the wealth of protections that state constitutions offer and the likelihood that widespread state action would create a national consensus to motivate future action at the Supreme Court. It offers strategies for the criminal defense bar and state courts to consider when litigating these types of cases and summarizes this route's short- and long-term benefits.

I. A NEW SYSTEM THAT ACCOUNTS FOR YOUTH: THE JUVENILE JUSTICE SYSTEM'S RISE, WORKINGS, AND LEGALITY

This Note begins with an exploration of the scientific, historical, and legal context surrounding the juvenile justice system. Part I.A first explains the psychological and cognitive differences between children and adults, then describes the juvenile justice system's rise, mission, and structure. Part I.B reviews the Supreme Court's recent juvenile sentencing decisions. Part I.C examines the role that states play in sentencing and protecting civil rights.

A. Children in the Juvenile System

Today's juvenile justice system arose thanks to Progressive Era reforms at the turn of the twentieth century.[24] Believing that children should not be treated the same as adults due to their unique developmental and psychological challenges, reformers sought to create a new and altogether separate adjudicative system that would focus on rehabilitating rather than punishing child offenders.[25] This system endures today, though the scope of rights that it extends to its constituents has evolved. Part I.A.1 covers the

24. *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZATION OF JUVENILE JUSTICE 19 (2017).

25. *See* INST. MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell eds., 2001).

psychological and developmental underpinnings that motivated the creation of the separate juvenile justice system. Part I.A.2 describes how this separate juvenile system emerged and evolved.

1. Developmental Psychology and Why "Children Are Constitutionally Different"

The juvenile justice system was created as a separate adjudicatory forum for children based on the understanding[26] that children are different from adults and should therefore be treated differently.[27] This concept, intuitive to many of us who remember our youth, along with psychological and sociological understandings of development underpin the creation of both the juvenile system and modern sentencing jurisprudence.[28]

It is well established in the medical and scientific communities that the human brain does not fully develop until the midtwenties or even later.[29] Until then, brain regions associated with long-term planning, emotion regulation, impulse control, and risk and reward assessment undergo structural development.[30] Specifically, the prefrontal cortex—responsible for executive functions such as decision-making, goal-setting, and cognitive analysis—does not fully develop until the midtwenties.[31] Moreover, lower levels of dopamine and serotonin in the adolescent brain result in difficulty regulating moods and controlling impulses.[32] These structural and chemical

26. Congress and legislatures in all fifty states have recognized that children are different from adults by passing laws that reflect this notion. *See, e.g.*, 23 U.S.C. § 158 (incentivizing states to establish a minimum drinking age). Legislation limiting "the authority [of young people] to vote, serve on a jury, create a binding legal contract, purchase and possess a firearm, serve in the military, or gamble" illustrates the sentiment that some activities should be reserved for mature and fully developed adults. Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1462 (2012). Actuarial science also supports this view. For example, car insurance prices for adolescents are higher compared to adults, presumably because of the perceived heightened risk of insuring young drivers. *See* Ben Breiner, *How Age Affects Car Insurance Costs*, VALUEPENGUIN, https://www.valuepenguin.com/how-age-affects-auto-insurance-costs [https://perma.cc/58FU-GLWR] (Dec. 15, 2022).

27. *See generally* Quinn Myers, *How Chicago Women Created the World's First Juvenile Justice System*, NPR (May 13, 2019), https://www.npr.org/local/309/2019/05/13/722351881/how-chicago-women-created-the-world-s-first-juvenile-justice-system [https://perma.cc/2NDG-FYKK].

28. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012).

29. *See* COAL. FOR JUV. JUST., APPLYING RESEARCH TO PRACTICE: WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? 7 (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf [https://perma.cc/K2PN-X369]; Carl Zimmer, *You're An Adult. Your Brain, Not So Much.*, N.Y. TIMES (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html [https://perma.cc/SN54-8HT7].

30. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1013 (2003).

31. *See* 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, 452–53 (2013).

32. *See id.*

realities inform the common understanding that reasoning capabilities increase with age and explain the youthful impetuousness so many of us once experienced.[33]

Further, adolescents face psychosocial immaturity factors that hinder their decision-making outcomes, if not their processes.[34] These psychosocial factors include: (1) high susceptibility to peer pressure, (2) low risk perception, (3) differing perceptions of the future, and (4) decreased capacity for self-management.[35] In other words, young people more easily submit to social pressures in order to understand their social group and establish a place in it, even if that results in hazardous behavior.[36] According to developmental psychologist Erik Erikson's famous theory on the stages of psychosocial development,[37] empirical studies have shown[38] that young people endure an identity crisis that spurs periods of considerable exploration and experimentation—even in harmful behaviors—as part of the identity formation process and evolution toward a "developed self."[39] As only a small proportion of people retain nonsocial tendencies into adulthood,[40] it follows that although young people may engage in more criminality than adults,[41] they are also more amenable to reform and thus more likely to benefit from rehabilitative measures.

33. *See* Steinberg & Scott, *supra* note 30, at 1011.

34. *See id.* at 1012. The transition from adolescence to adulthood often includes a period of intellectual maturity but low self-regulating capacity. *See* REBECCA PIRIUS, NAT'L CONF. STATE LEGISLATURES, YOUNG ADULTS IN THE JUSTICE SYSTEM 3 (2019), https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/front_end_young-adults_v04_web.pdf [https://perma.cc/CXK9-T52C]. This "maturity gap" results in a phenomenon by which young people may understand risks before they are cognitively able to resist them. *See id.*

35. *See* Steinberg & Scott, *supra* note 30, at 1011. Studies show that children respond to peer pressure more frequently than adults do and are less able to foresee their actions' consequences due to an inability to think in hypothetical terms. *Id.*

36. Charles E. Lewis & Mary Ann Lewis, *Peer Pressure and Risk-Taking Behaviors in Children*, 74 AM. J. PUB. HEALTH 580, 580 (1984).

37. Erikson identified eight stages that all developing humans pass through from infancy through adulthood. *See* Saul McLeod, *Erik Erikson's Stages of Psychosocial Development*, SIMPLYPSYCHOLOGY, https://www.simplypsychology.org/Erik-Erikson.html [https://perma.cc/5M6J-6VSH] (June 9, 2023). Erikson noted that adolescents especially face an identity crisis whereby they must integrate their individual sense of self with the image of themselves that they believe others see and that society expects. *See id.* For more information, see ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (W.W. Norton & Co. 1963) (1950).

38. *See* Patricia A. Stark & Anthony J. Traxler, *Empirical Validation of Erikson's Theory of Identity Crises in Late Adolescence*, 86 J. PSYCH. 25 (1974).

39. *See* Steinberg & Scott, *supra* note 30, at 1014.

40. *See id.*

41. *See* Dana Goldstein, *Too Old to Commit Crime?*, MARSHALL PROJECT (Mar. 20, 2015, 1:00 PM), https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime [https://perma.cc/SM9Y-98QL]. Crime rates peak at various ages for different crimes but typically reach their highest incidence in the teens and early twenties before declining in the midtwenties. *Id.*

2. The Emergence of the Juvenile Justice System

At the turn of the twentieth century, Progressive Era reformers, understanding that children deserve care and treatment despite their recklessness, called for the creation of a new juvenile system that would better account for differences between adults and children.[42] This new system departed from the existing criminal treatment of children.

At common law, children under seven were deemed incapable of criminal responsibility.[43] Children between seven and fourteen benefitted from a rebuttable presumption—under the infancy defense—that they were incapable of forming mens rea, the intent necessary for criminal conviction.[44] For children who could not successfully assert this defense (whether because they were too old or because the jury found the presumption to be rebutted), the common law did not offer a separate adjudicatory forum apart from the adult criminal court.[45] Though juries in criminal court often acquitted young defendants, those who were convicted received the same punishments as adults, including whippings, imprisonment, and execution.[46] This continued until the late nineteenth century when reformers objected to these practices based on the emerging understanding that children are more amenable to reform than adults.[47] Reformers envisioned the creation of a separate juvenile system that rejected the punitive treatment of children as criminals in favor of rehabilitative treatment.[48]

Reformers built this new system on the foundational doctrine of parens patriae.[49] A concept derived from English common law, the government has the power, as the "common guardian of the community,"[50] to protect those most vulnerable in society, including children.[51] In this new juvenile system, the state, as parens patriae, stepped in to promote the well-being of children who broke the law or led "the kind of life which will inevitably result in such

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42. *See* INST. MED., *supra* note 25, at 157. The first juvenile court in the United States was established in Chicago, Illinois in 1899. *Id.* Within twenty-five years, all states had a separate juvenile court. *Id.*

43. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) (suggesting that the age of criminal responsibility in the early United States varied by state, most often drawing the line at the ages of seven, ten, or twelve).

44. *See* Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1586–87 (2018) (explaining that children in this age group could claim the infancy defense upon a showing of their inability to differentiate right from wrong).

45. *See* INST. MED., *supra* note 25, at 157 (reporting that children were tried in adult criminal court until the early nineteenth century).

46. *See Development of the Juvenile Justice System*, CONST. RTS. FOUND., https://www.crf-usa.org/bill-of-rights-in-action/bria-11-2-c-juvenile-justice-what-should-we-do-with-children-who-break-the-law [https://perma.cc/TT5T-3QBV] (last visited Sept. 3, 2023).

47. *See* INST. MED., *supra* note 25, at 157.

48. *See* Myers, *supra* note 27.

49. *See* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1381 (2020).

50. *See Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839).

51. *See generally* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 219 (1971).

a breach."[52] Because the system centered around governmental care for children, notions of crime and punishment were abandoned.[53] Juveniles found to have committed what they were accused of were deemed delinquents, not criminals, and were enrolled in rehabilitative "reform schools" rather than imprisoned.[54] Children thus received unique privileges not offered to adult defendants and escaped the punitive nature of the adult criminal court system.[55]

However, the juvenile system's focus on rehabilitation allowed it to skirt the constitutional protections required in criminal courts that shield adult defendants from overly retributive proceedings.[56] The rights to an attorney and a trial by jury, to know the charges one faces, and to confront one's accusers—among other rights typically thought necessary in criminal proceedings—were therefore considered unnecessary in these new juvenile courts.[57] This lack of procedural due process was not understood as violating children's rights because children were not seen as having any.[58]

In the landmark 1967 case of *In re Gault*,[59] the Supreme Court began to extend more rights to children. The *Gault* Court held that the due process protections applicable in adult criminal court must be extended to juvenile courts, for "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[60] Still, the expansion of rights owed to juveniles in delinquency adjudications has not yet encompassed all those constitutionally owed to adult criminal defendants.[61] Notably, because juvenile proceedings are still not considered fully criminal, the Sixth Amendment trial by jury requirement does not apply.[62]

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52. *See* Mack, *supra* note 43, at 106.

53. *See id.* at 119–20; *see also In re* Gault, 387 U.S. 1, 15 (1967).

54. *See* People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 282 (1870); INST. MED., *supra* note 25, at 154.

55. *See Gault*, 387 U.S. at 22–26.

56. *See id.* at 16–17 ("The Latin phrase [of parens patriae] proved to be a great help to those who sought to rationalize the seclusion of juveniles from the constitutional scheme."); *see also* Kent v. United States, 383 U.S. 541, 555 (1966).

57. *See* INST. MED., *supra* note 25, at 154.

58. *See Gault*, 387 U.S. at 17.

59. 387 U.S. 1 (1967).

60. *Id.* at 13.

61. Critics note that the expansion of rights afforded to juvenile offenders, among other factors, led to the convergence of the adult and juvenile court systems in a way that has had negative consequences for juvenile offenders, including harsher sentences. *See* JEFFREY A. BUTTS & OJMARRH MITCHELL, URB. INST., BRICK BY BRICK: DISMANTLING THE BORDER BETWEEN JUVENILE AND ADULT JUSTICE 202 (2000), https://www.urban.org/sites/default/files/publication/62026/1000234-Brick-by-Brick-Dismantling-the-Border-Between-Juvenile-and-Adult-Justice.PDF [https://perma.cc/VAX8-3TUF].

62. McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971). The Court acknowledged that the juvenile system failed to embody the "stalwart" and "protective" figure that the doctrine of parens patriae envisions. *Id.* Still, it refrained from extending to juvenile defendants all the protections against the power of the government that existed for adult defendants for fear that doing so would erode the separation of the systems and crush the rehabilitative goals—however lofty—of the juvenile system. *See id.* It reasoned that, "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." *Id.* at 551.

In the half century since *Gault*, the challenge for the Court has been to define the proper scope of governmental power vis-à-vis juvenile defendants, given their unique psychological status as developing individuals, the patchwork of constitutional rights afforded to them so far, and the juvenile justice system's rehabilitative goals. These debates continue today in the juvenile sentencing arena.

B. The Supreme Court's Juvenile Sentencing Jurisprudence

As a result of the shift toward more punitive sentencing that occurred in response to increased crime rates in the 1970s and 80s,[63] the Supreme Court heard several Eighth Amendment challenges to various juvenile sentencing practices.[64] Until recently, the Court gradually limited the use of the criminal justice system's most severe punishments in the juvenile context, always keeping in mind that children are different from adults in terms of sentencing.[65] It started by repudiating the juvenile death penalty under the Eighth Amendment[66] before limiting the use of juvenile LWOP in certain circumstances.[67]

To understand how the Court came to these conclusions, one must first understand how it analyzes Eighth Amendment claims. The Eighth Amendment prohibits the infliction of cruel and unusual punishment.[68] The Court has held that some types of punishment are prohibited under the Eighth Amendment because they are "inherently barbaric," and others are prohibited because they are disproportionate to the crime committed.[69] Proportionality is central to the Eighth Amendment, as it is a "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[70] The Court's proportionality decisions fall into two general categories. The first considers all of the circumstances surrounding a particular crime, offender, and sentence to determine if the punishment is unconstitutionally excessive in a given case.[71] The second considers categorical rules that prohibit certain sanctions given the general nature of the offense or certain characteristics of the offender, such as age.[72] To determine if a sentence is so disproportionate to a certain type of crime or

63. *See infra* note 131 and accompanying text. Unsubstantiated fears about juvenile "superpredators" spread in the 1990s, and states adopted tough "adult time for adult crime" measures in response. *See* Carroll Bogert & Lynnell Hancock, *The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/K8X6-ZTGD] (last visited Sept. 3, 2023).

64. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012).

65. *See Miller*, 567 U.S. at 471.

66. *See Roper*, 543 U.S. at 568.

67. *See Graham*, 560 U.S. at 74; *Miller*, 567 U.S. at 479.

68. U.S. CONST. amend. VIII.

69. *See Graham*, 560 U.S. at 59.

70. Weems v. United States, 217 U.S. 349, 367 (1910).

71. *See Graham*, 560 U.S. at 59–60.

72. *See id.* at 60–61.

offender such that a categorical bar is appropriate, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice."[73] If these indicia reflect a national consensus against a practice, the Court uses its own judgment to decide whether the punishment's justifications validate its use.[74] In this way, the Court focuses on "evolving standards of decency that mark the progress of a maturing society"[75] to determine the constitutionality of a sentencing scheme under the Eighth Amendment.[76] In much of its juvenile sentencing jurisprudence, the Court has used the categorical rules approach.[77]

For example, in the 2005 case *Roper v. Simmons*,[78] the Court decided that there was a national consensus against the juvenile death penalty such that evolving standards of decency favored its invalidation under the Eighth Amendment.[79] The Court analyzed how many states formally prohibited the practice and how often juveniles were sentenced to death.[80] Then, as Eighth Amendment analysis dictates, it weighed the validity of the punishment's rationale and deduced that the sound penological justifications for the death penalty in adult populations—specifically retribution and deterrence—are less applicable to youth, given their developmental status.[81] The Court posited that youthful immaturity, susceptibility to peer pressure, and the transient nature of adolescents' characters[82] both lessen their culpability and create a greater likelihood for reform.[83] Therefore, such a severe punishment is disproportional when "imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[84] This finding, paired with the national consensus against the practice, led the *Roper* Court to rule that the Eighth Amendment categorically prohibits the juvenile death penalty.[85]

Five years later, in *Graham v. Florida*, the Court built on *Roper* by prohibiting LWOP sentences for nonhomicide juvenile offenders.[86] The *Graham* Court doubled down on the reasoning in *Roper* that youths face unique and important developmental challenges that require consideration at

73. *See* Roper v. Simmons, 543 U.S. 551, 563 (2005).

74. *See* William W. Berry III, *Evolved Standards, Evolving Justices?: The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 117–18 (2018).

75. Trop v. Dulles, 356 U.S. 86, 101 (1958).

76. *See* Berry, *supra* note 74, at 117–18.

77. *See, e.g.*, *Roper*, 543 U.S. at 564; *Graham*, 560 U.S. at 61–62.

78. 543 U.S. 551 (2005).

79. *See id.* at 575–79.

80. *See id.* at 564–65 (noting that though twenty states did not formally prohibit the juvenile death penalty, only three states imposed it in the prior decade).

81. *See id.* at 571.

82. *See supra* Part I.A.1.

83. *See Roper*, 543 U.S. at 570.

84. *Id.* at 571.

85. *See id.* at 568.

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

sentencing.[87] Given that proportionality is vital to Eighth Amendment analyses, the Court concluded that the severity of LWOP sentences is unsuitable for the diminished culpability of juvenile defendants, especially those who have not committed homicide—the most serious category of crime.[88] Consequently, the Court asserted that the Eighth Amendment prohibits LWOP in nonhomicide juvenile cases because all juvenile nonhomicide offenders should have a "meaningful opportunity to obtain release" and a "chance to demonstrate maturity and reform."[89]

In 2012, the Court held in *Miller v. Alabama* that mandatory LWOP sentences for juvenile homicide offenders violate the Eighth Amendment.[90] Short of extending *Graham*'s ruling to juvenile homicide offenders, the Court emphasized that LWOP may only be imposed after judicial consideration of "youth and its attendant characteristics" as a mitigating factor.[91] Thus, *Miller* imposed a procedural requirement on sentencing judges considering LWOP to prevent its mandatory imposition.[92] Justice Kagan explained the importance of this requirement by noting that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[93]

Four years later, in *Montgomery v. Louisiana*,[94] the Court declared *Miller* a substantive rule that applied retroactively.[95] Here, the Court granted certiorari to decide whether the substantive rule[96] announced in *Miller* would retroactively invalidate an LWOP sentence imposed on a juvenile about fifty years earlier without consideration of age.[97] According to the majority, an LWOP sentence that reflects judicial consideration of the *Miller* factors could still violate the Eighth Amendment if imposed on a juvenile whose age

87. *See id.* at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

88. *See id.* at 69, 74. In considering the severity of the sentence, the Court recognized that "[i]n some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment," hinting that its ruling may not be limited to formal LWOP. *Id.* at 70 (quoting Harmelin v. Michigan, 501 U.S. 957, 996 (1991)).

89. *Id.* at 75, 79.

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

91. *See id.* at 465, 483. The Court highlighted five "attendant characteristics," known as the "*Miller* factors," emblematic of children's diminished culpability: (1) immaturity and inability to evaluate risks, (2) family and home environment, (3) circumstances of the crime, including the defendant's role and what pressures they were under, (4) the availability of a lesser charge if the defendant had not exhibited youthful incompetency when dealing with police or attorneys, and (5) the defendant's likelihood of reform. *See id.* at 477–78.

92. *See* Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 688–89 (2016).

93. *Miller*, 567 U.S. at 474.

94. 136 S. Ct. 718 (2016).

95. *See id.* at 736.

96. A substantive rule prohibits a certain category of punishment for a class of defendants because of their status or the offense. *See id.* at 732. Substantive rules are thus those "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Id.* at 729.

97. *See id.* at 727.

reflects the temporarily diminished culpability associated with youth.[98] The *Montgomery* Court therefore concluded that *Miller* was both procedural and substantive; not only did *Miller* "require a sentencer to consider a juvenile offender's youth," but it also substantively prohibited LWOP sentences for youth "whose crime reflects 'unfortunate yet transient immaturity.'"[99] Since *Montgomery*, the Court has considered *Miller* a substantive rule that goes beyond imposing mere procedural requirements.[100]

Most recently, the Court in *Jones v. Mississippi*[101] sought to clarify the scope of the class exempted from LWOP mentioned in *Montgomery*.[102] After *Montgomery*, lower courts struggled to determine whether a showing of incorrigibility was required as a procedural matter before a sentencing judge could sentence a juvenile convicted of homicide to LWOP.[103] In *Jones*, Justice Kavanaugh explained that though "youth matters in sentencing,"[104] a factual finding of permanent incorrigibility is not required before sentencing a juvenile to LWOP.[105] Accordingly, after *Jones*, judges imposing an LWOP sentence in juvenile homicide cases are only required to hold a *Miller* hearing to consider youth and its effects on culpability; judges are not required to make a substantive finding of incorrigibility.[106]

Jones has been strongly criticized.[107] Some critics say that the decision—one of the new 6-3 conservative majority's firsts—signals an ideological unwillingness to continue expanding protections in this area.[108] In a strong dissent, Justice Sotomayor classified the ruling as gutting the substantive holding of *Miller* by allowing juveniles whose crimes reflect "unfortunate yet transient immaturity" to die in prison, thus abrogating the substance of both *Miller* and *Montgomery*.[109] In addition, Justice Thomas, though he concurred in the judgment, believed that the majority incorrectly read

98. *See id.* at 733–34 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

99. *Id.* (quoting Miller v. Alabama, 567 U.S. 460, 479–80 (2012)).

100. *See* Anton Tikhomirov, Comment, *A Meaningful Opportunity for Release:* Graham *and* Miller *Applied to De Facto Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C. L. REV. (E. Supp.) II.-332, II.-346 (2019).

101. 141 S. Ct. 1307 (2021).

102. *See id.* at 1313.

103. *See id. See generally* Logan Moore, Note, *Children Sentenced to Die in Prison: Why a Lifetime Behind Bars Is No Longer Justified for Juvenile Offenders*, 87 MO. L. REV. 637, 648 (2022).

104. *Jones*, 141 S. Ct. at 1314.

105. *See id.* at 1318–19.

106. *See id.* at 1317–19.

107. *See, e.g.*, John Pfaff, *It Is Ludicrous for the Supreme Court to Say Children Are Irredeemable*, WASH. POST (Apr. 23, 2021, 3:12 PM), https://www.washingtonpost.com/outlook/2021/04/23/jones-mississippi-supreme-court-life-sentence/ [https://perma.cc/8AHY-MS3R].

108. *See* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 69 (2021) (stating that "[i]f it wasn't clear before the [*Jones*] decision, it's clear now: *Montgomery* was the high-water mark of the Supreme Court's 'evolving standards of decency' jurisprudence," which encompassed juvenile sentencing protections); *see also* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205 (2020) ("Future expansion of the Eighth Amendment [by the Supreme Court] also seems unlikely.").

109. *See Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting).

Montgomery, which he understood to clearly expand *Miller* beyond the mere creation of a procedural requirement.[110] This incorrect interpretation of *Montgomery*, he wrote, made the substantive aspect of *Miller* as defined in *Montgomery* "more fanciful than real."[111] After *Jones*, confusion persists as to the degree of substantivity this line of cases now represents.[112]

Despite this confusion, the Court's decisions in this area clearly show that sentencing a juvenile to life in prison should only be done, if at all, after seriously considering the realities of youth.[113] Notably absent from the Court's decisions, though, is any indication about whether the Court's limitations on juvenile LWOP sentences, as articulated by *Graham* and *Miller*, are meant to extend to DFL sentences imposed on defendants who were under eighteen at the time of the offense. As previously discussed, a DFL sentence differs from LWOP in name only.[114] Both sentences imprison a young person for the likely duration of their life without opportunity for release: LWOP does it explicitly, and DFL does it in terms-of-years.[115] Given the Court's silence on whether *Graham* and *Miller*'s LWOP limitations apply to DFL sentences, it is important to consider where these sentencing regimes come from.

C. The Role of States

The power to set criminal sentencing policy primarily lies with state legislatures.[116] This power includes the ability to establish and organize juvenile courts, their procedures, and their sentencing schemes.[117] This section outlines the role that states play in criminal sentencing. Part I.C.1 describes prevailing sentencing practices across the country that affect both adult and juvenile offenders. Part I.C.2 reflects on the theory of New Judicial Federalism and how it enables states to provide strong protections against cruel and unusual punishment.

1. State Power in Setting Sentencing Policy

In the United States, power over criminal law is generally within the fifty states' sovereign "police power."[118] Police power is generally described as the authority of state legislatures to regulate in furtherance of public health,

110. *See id.* at 1324–25 (Thomas, J., concurring).

111. *See id.* at 1326.

112. *See* Moore, *supra* note 103, at 652 ("[I]t is clear that both the majority and dissent failed to fully address the confusion surrounding *Miller* and *Montgomery*.").

113. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016); Miller v. Alabama, 567 U.S. 460, 483 (2012).

114. *See supra* note 20 and accompanying text.

115. *See generally* NELLIS, *supra* note 14, at 9.

116. *See* ALISON LAWRENCE, NAT'L CONF. STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 1 (2015), https://documents.ncsl.org/wwwncsl/Criminal-Justice/sentencing.pdf [https://perma.cc/VG6P-28UJ].

117. *See, e.g.*, N.Y. FAM. CT. ACT § 1011 (McKinney 2022).

118. *See* Roozbeh B. Baker, *Proportionality in the Criminal Law: The Differing American Versus Canadian Approaches to Punishment*, 39 U. MIA. INTER-AM. L. REV. 483, 485 n.8 (2008).

safety, and welfare.[119] Accordingly, except for limited circumstances in which Congress has outlined offenses against the United States, the administration of criminal justice is a state power[120] which includes the authority to create and enforce criminal sanctions and sentences.[121]

All U.S.[122] states except Alaska have used their police powers to sentence adult defendants convicted of certain crimes to formal life sentences.[123] There are two types of formal life sentences: life with parole and LWOP.[124] Despite recent efforts to prohibit these types of sentences altogether,[125] life sentences remain a widespread sentencing practice for certain types of offenders.[126] Indeed, in 2020, more than 161,000 people—adults and children—in the United States were serving either a life with parole or LWOP sentence.[127] An additional 42,353 people were serving DFL sentences of fifty or more years without parole.[128]

In addition to their general sentencing powers, state legislatures create and define the reach of their juvenile courts.[129] Most state legislatures have given their juvenile courts jurisdiction over offenders younger than eighteen years

119. *See* 16A AM. JUR. 2D *Constitutional Law* § 333 (2023).

120. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 635 (1993).

121. *See* 16A AM. JUR. 2D, *supra* note 119.

122. The use of LWOP sentences in juvenile cases is a uniquely American phenomenon; no other country in the world imposes LWOP sentences on defendants who commit crimes before eighteen years old. *See* Brandon L. Garrett, *Life Without Parole for Kids Is Cruelty with No Benefit*, ATLANTIC (Oct. 19, 2020), https://www.theatlantic.com/ideas/archive/2020/10/life-without-parole-kids-cruelty-no-benefit/616757/ [https://perma.cc/23M5-UF5P]. Indeed, LWOP sentences violate several international human rights treaties, and the United Nations General Assembly has repeatedly called for their ban. *See* ERIN FOLEY SMITH, HUM. RTS INST. COLUMBIA L. SCH., CHALLENGING JUVENILE LIFE WITHOUT PAROLE: HOW HAS HUMAN RIGHTS MADE A DIFFERENCE? 2 (2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1042&context=human_rights_institute [https://perma.cc/9D99-SFUF].

123. *See* NELLIS, *supra* note 21, at 11; *see also* N.Y. PENAL LAW § 70.00 (McKinney 2022). For an overview of the rise of LWOP sentences, see generally William W. Berry III, *Life-With-Hope Sentencing*, 76 OHIO ST. L.J. 1051, 1059–64 (2015).

124. *See* NELLIS, *supra* note 21, at 9.

125. *See, e.g.*, *People Serving Mandatory Life Without Parole Challenge Death-By-Incarceration Sentences as Cruel and Unusual*, CTR. FOR CONST. RTS. (July 8, 2020), https://ccrjustice.org/home/press-center/press-releases/people-serving-mandatory-life-without-parole-challenge-death [https://perma.cc/E7AN-6QL9]; John Whittaker, *Senator Proposes End to Life Without Parole Sentences*, OBSERVER (Oct. 18, 2021), https://www.observertoday.com/news/page-one/2021/10/senator-proposes-end-to-life-without-parole-sentences/ [https://perma.cc/79NL-6XA9]; Berry, *supra* note 123, at 1068–79.

126. *See generally* MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, SENT'G PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 9–10 (2004). Most prisoners serving life sentences have been convicted of violent offenses. *See* NELLIS, *supra* note 21, at 5. However, three-strike laws in states like California and Florida have resulted in increased numbers of nonviolent offenders sentenced to life in prison. *See* CAL. PENAL CODE § 1170.12 (West 2022); FLA. STAT. ANN. § 775.084 (2022); MAUER ET AL., *supra* at 13.

127. *See* NELLIS, *supra* note 21, at 10 (reporting that 105,567 people were serving life with parole and 55,945 people were serving LWOP).

128. *See id.* at 9–10.

129. *See, e.g.*, N.Y. FAM. CT. ACT § 301.1 (McKinney 1983).

old at the time of the offense[130] but have also adopted mechanisms to allow certain defendants in this age range to be moved to adult court.[131] Transfer laws remove juveniles from the "competent and specialized tribunals" of juvenile courts and place them in adult criminal courts to be tried and sentenced as adults.[132] The specifics of these laws vary by state;[133] some allow transfer automatically, while others allow it at the discretion of either the juvenile judge or prosecutor.[134] Elements considered in the transfer decision are usually age and the charge brought.[135] Most states allow for children older than fourteen to be transferred for violent offenses.[136] All states have some kind of transfer mechanism,[137] and as of 2014, twenty-nine states had automatic transfer policies on the books.[138]

Juveniles face longer sentences when transferred to adult court.[139] One reason for this is because transferred children become subject to mandatory minimum sentences.[140] As a result, transfer policies make it possible for juveniles to receive LWOP sentences, which are still permissible for adults in many states.[141] These policies also allow youth to receive very lengthy sentences that amount to DFL, given that criminal court judges are less likely to consider age as a mitigating factor.[142] Even youths who remain in juvenile court can receive extreme sentences due to "blended" sentencing, a

130. *See* Julia Vitale, *A Look at Why Almost All States Have "Raise the Age" Laws*, INTERROGATING JUST. (July 22, 2021), https://interrogatingjustice.org/https-interrogatingjustice-org-governmental-accountability/a-look-at-why-almost-all-states-have-raise-the-age-laws/ [https://perma.cc/72VG-XQEH] (reporting that every state except Georgia, Texas, and Wisconsin have raised the age of adult criminal responsibility from sixteen to eighteen years old).

131. States adopted mechanisms to allow cases involving juvenile offenders to be adjudicated in adult court as a "get tough" response to rising crime rates in the 1970s and 1980s. *See* Roger-Claude Liwanga & Patrick Ibe, *Transfer of Child Offenders to Adult Criminal Courts in the USA: An Unnecessary Exercise, Unconstitutional Practice, International Law Violation, or All of the Above?*, 49 GA. J. INT'L & COMP. L. 99, 106–07 (2021).

132. *See id.* at 103.

133. *See id.*

134. *See* RICHARD E. REDDING, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 2 (2010), https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf [https://perma.cc/E6QP-ZDG2].

135. *See* Liwanga & Ibe, *supra* note 131, at 109–10.

136. *See* REDDING, *supra* note 134, at 2.

137. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [https://perma.cc/E4XM-J894].

138. *See* Audrey Fernandez, Comment, *"Juveniles are Different": Easier Said than Done Resolving Disparities Among Courts Regarding the Constitutionality of Sentencing Juveniles to De Facto Life-Without-Parole*, 14 FIU L. REV. 775, 790–91 (2021).

139. *See* Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 375, 377 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006). Studies also indicate that transferred juveniles may receive harsher sentences than adults sentenced for the same offense. *See id.*

140. *See* Fernandez, *supra* note 138, at 791.

141. *See id.* at 790–91.

142. *See id.* at 791.

dispositional transfer that allows youths convicted in juvenile court to nevertheless be subject to adult sentences.[143]

Between 1979 and 2000, all fifty states amended their transfer statutes to allow young adults to be transferred to adult court more easily and in higher numbers.[144] Accordingly, between 1985 and 2000, the number of transferred youths increased by 70 percent.[145] In 2019, 53,000 youths were transferred to adult court.[146]

There is an irrefutable racial component to these practices. 57 percent of transferred youths in the fifteen years before 2000 were Black.[147] Black youths today are nine times more likely than white youths to be given an adult sentence,[148] and half of the country's juvenile prisoners serving life and DFL sentences are Black.[149] Other estimates suggest that nearly 79 percent of youths in the nation serving DFL sentences are nonwhite.[150] This is to be expected considering the overall racial composition of the juvenile justice system and the disproportionate arrest and imprisonment rates of Black and minority youths.[151]

Given the high number of children—primarily of color—who are transferred to adult court or otherwise face the possibility of adult sentences, the protections that reformers intended the juvenile system to provide against punitive sentencing have been increasingly undermined.[152] Consequently, there is a need for increased protections against overly harsh sentences for youths, including the use of DFL sentences.

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143. *See* Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 104 (2013).

144. *See id.* at 103 (describing efforts to lower the age at which transfer is acceptable, increase the number of charges for which transfer is an option, and allow more stakeholders to have power to make these decisions).

145. Redding, *supra* note 139, at 377.

146. MARCY MISTRETT & MARIANA ESPINOZA, SENT'G PROJECT, YOUTH IN ADULT COURTS, JAILS, AND PRISONS 6 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/12/Youth-in-Adult-Courts-Jails-and-Prisons.pdf [https://perma.cc/94AB-MX3H].

147. *See* Redding, *supra* note 139, at 377.

148. MISTRETT ET AL., *supra* note 146, at 6.

149. *See* ASHLEY NELLIS, SENT'G PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT 3 (2019), https://www.sentencingproject.org/app/uploads/2022/08/Youth-Sentenced-to-Life-Imprisonment.pdf [https://perma.cc/ER7Z-WAQW].

150. *See id.* at 3.

151. *See* CHARLES PUZZANCHERA, OFF. OF JUV. JUST. & DELINQ. PREVENTION & NAT'L INST. OF JUST., JUVENILE ARRESTS, 2019, at 8 (2021), https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf [https://perma.cc/CAP3-LUQW] (showing that young Black people are arrested at disproportionate rates); PIRIUS, *supra* note 34, at 3 (reporting that Black men aged eighteen to twenty-four are twelve times more likely to be jailed than their white counterparts).

152. *See generally* JEFFREY A. BUTTS, URB. INST., CAN WE DO WITHOUT JUVENILE JUSTICE? 1 (2000), https://www.urban.org/sites/default/files/publication/63766/1000232-Can-We-Do-Without-Juvenile-Justice-.pdf [https://perma.cc/ZV7M-C9JG] ("The juvenile court no longer lives up to its part of the initial bargain."). Even the Supreme Court has recognized the failure of juvenile courts to fulfill their promises. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971).

2. New Judicial Federalism

Of course, the Supreme Court has provided some protections against harsh juvenile sentencing practices.[153] Lower federal courts also have an opportunity to extend such protections.[154] But the federal judiciary does not have the sole power to define constitutional rights, including rights against cruel and unusual punishment.[155] According to New Judicial Federalism,[156] state constitutions and legislatures can "secure rights unavailable under the U.S. Constitution."[157] Massachusetts Supreme Judicial Court Justice Scott L. Kafker explains that "[s]tate courts are fully empowered and expected to interpret independently analogous provisions in their state constitutions and thereby provide greater protections of individual rights" than may exist at the federal level.[158]

According to the adequate and independent state grounds doctrine, as long as a state decision explicitly cites its reasoning as resting on the state constitution, and such reasoning is both adequate to support the decision and independent from federal-based reasoning, it is unreviewable by federal courts.[159] For this reason, state courts offer strong protections for individual civil rights in instances where the federal judiciary may be hostile to such an expansion.[160] Proponents of this theory also argue that state decisions resting on state constitutions may contribute to increased legal and scholastic discussion on an issue when such a decision is in conflict with federal precedent, therefore fostering legal innovation.[161]

The popularity of New Judicial Federalism has waxed and waned throughout the years with the leanings of the federal judiciary.[162] The theory

153. *See supra* Part I.B.

154. *See infra* Part II.

155. *See* U.S. CONST. amends. IX, X; *see also* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 137 (2022) ("Indeed, the Ninth and Tenth Amendments provide an express reservation of rights for the people and the states, a reservation that encompasses the right to include greater protection of individual rights under analogous provisions of state constitutions.").

156. This doctrine has been attributed to Justice William J. Brennan, Jr. For more information, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

157. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63, 63 (1994).

158. Kafker, *supra* note 155, at 116.

159. *See* Michigan v. Long, 463 U.S. 1032, 1038 (1983); *see also* Herb v. Pitcairn, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

160. *See* Kafker, *supra* note 155, at 115–16.

161. *See* Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 347 (2004); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 125–26 (2000).

162. *See* Abrahamson, *supra* note 161, at 341; Tarr, *supra* note 157, at 64–65 (explaining that states promulgated civil liberties until the 1930s, when federal law became the purveyor for civil liberties until that power shifted back to states during the Burger Court era); Kafker,

has gained most traction during periods of retrenchment of federal constitutional rights, during which states have stepped in to protect what the federal judiciary has ignored.[163] In the 1970s, for example, state courts turned with fervor toward their state constitutions as "font[s] of individual liberties"[164] not only in criminal procedure but also in economic regulation, religion, education, and personal autonomy cases in response to fears that the conservative Court's rulings would have far-reaching consequences.[165] But a refocusing on the power that states may exert in the protection of individual rights and liberties may again be on the horizon; this is especially true in areas concerning criminal procedure, which traditionally nest within the states' police powers.[166] Specifically, in light of the Supreme Court's recent retrenchment of juvenile defendants' rights under the Eighth Amendment as illustrated by *Jones*,[167] states may choose to utilize their state constitutions to bolster the Eighth Amendment in the juvenile context.[168] This will be further discussed in Part III.

II. ARGUMENTS FOR AND AGAINST INCLUDING DFL SENTENCES IN THE COURT'S JUVENILE LWOP JURISPRUDENCE

Having discussed the history of the juvenile justice system, present day sentencing schemes, and the Supreme Court's juvenile sentencing rulings, Part II of this Note now considers the disagreement among certain federal courts of appeals regarding whether *Graham* and *Miller*'s LWOP holdings apply to DFL sentences.[169] Part II.A outlines the arguments that some circuits have made for the inclusion of DFL sentences within the reach of *Graham* and *Miller*, whereas Part II.B considers decisions that have come to the opposite conclusion. Part II.C then discusses the U.S. Court of Appeals for the Third Circuit, which originally came down in favor of including DFL

supra note 155, at 129–30 (describing increased state judicial activism during the more conservative Burger Court era as opposed to the Warren Court era).

163. *See* Kafker, *supra* note 155, at 130.

164. Brennan, *supra* note 156, at 491.

165. *See generally* A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878–79 (1976).

166. *See* Kafker, *supra* note 155, at 119 ("If the new U.S. Supreme Court majority undertakes a dramatic revision and retrenchment of federal constitutional protections in criminal procedure, state courts can be expected to react."); Shapiro & Gonnerman, *supra* note 108, at 69 ("Indeed, with a flurry of state supreme court litigation and renewed scholarly interest in state constitutions that restrict extreme criminal punishments, the center of innovation is already beginning to shift from the federal courts to their state counterparts—both for juvenile life without parole and for criminal punishments more broadly.").

167. *See* Shapiro & Gonnerman, *supra* note 108, at 69.

168. *See* Mark Denniston & Christoffer Binning, *The Role of State Constitutionalism in Determining Juvenile Life Sentences*, 17 GEO. J.L. & PUB. POL'Y 599, 600 (2019).

169. It should be noted that *Graham*, which prohibits LWOP in nonhomicide juvenile cases, and *Miller*, which requires that LWOP be imposed only discretionarily after accounting for age in homicide cases, are not expressly coextensive. For this reason, courts that have ruled on the applicability of these cases to DFL sentences have only done so one case at a time. However, this Note proceeds with the assumption that, given the interrelatedness of the reasoning in *Graham* and *Miller*, a court's ruling on the applicability of *Graham* to DFL sentences would be consistent with its ruling in a case subject to *Miller* and vice versa.

sentences but vacated its ruling in light of what appears to be widespread doctrinal confusion.

A. The Broad Reading: The Court's LWOP Holdings in Graham *and* Miller *Extend to DFL Sentences*

The U.S. Courts of Appeals for the Seventh,[170] Ninth,[171] and Tenth[172] Circuits have interpreted the LWOP limitations articulated by *Graham* and *Miller* to apply to DFL sentences. These courts looked to the purpose behind *Graham* and *Miller* and concluded that the Court intended to limit the imposition of lengthy sentences that resulted in all-but-guaranteed death in prison. As a result, these circuits have held that LWOP jurisprudence must necessarily be extended to materially indistinguishable DFL sentences if the purpose of *Graham* and *Miller* is to be effectuated.

1. Seventh Circuit: *McKinley v. Butler*

The Seventh Circuit held in *McKinley v. Butler*[173] that the Eighth Amendment prohibits DFL sentences under the plain meaning of *Graham* and *Miller*.[174] The court considered Benard McKinley's 100-year sentence, which he received upon conviction for a murder he committed when he was sixteen years old.[175] Though the sentence was not mandatory, the sentencing judge did not hold a hearing to consider McKinley's age.[176] According to Illinois law, McKinley, as a first-degree murder offender, was ineligible for parole before serving the full term.[177] Thus, McKinley faced a DFL sentence, as his sentence confined him to prison until the age of 116,[178] an age that he is unlikely to reach. Once *Montgomery* made *Miller* retroactive, McKinley argued that his sentence was invalid because it was imposed without a hearing in contravention of *Miller*, which he believed extended to both LWOP and DFL sentences.[179] McKinley petitioned the U.S. District Court for the Northern District of Illinois for a writ of habeas corpus and appealed to the Seventh Circuit when that petition was denied.[180]

McKinley argued that *Miller* required age to be considered before imposition of either an LWOP or a DFL sentence, meaning that his DFL sentence was invalid for failing to comply with this procedural

170. McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016).
171. Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).
172. Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017).
173. 809 F.3d 908 (7th Cir. 2016).
174. *See id.* at 914.
175. *See id.* at 909.
176. *See id.* at 910.
177. *See id.* at 909.
178. *See id.*
179. *See id.* at 911.
180. *See id.* at 909. There was also a procedural issue in this case: whether McKinley's habeas corpus petition was proper given his failure to raise the constitutional claim in state court. *Id.* at 909–10. For the purposes of this Note, only the constitutional claim is addressed.

requirement.[181] Specifically, he emphasized three principles derived from *Graham* and *Miller* that required his sentence be vacated. First, *Graham* acknowledged the unique attributes of youth that diminish the penological justifications for lengthy juvenile sentences.[182] Second, *Miller* required sentencing courts to address certain considerations before concluding that a juvenile is fit for a sentence as severe as LWOP.[183] Third, *Graham* and *Miller* together apply to all juvenile convictions implicating severe sentences, including life in prison.[184] For these reasons, McKinley argued that the extension of these cases to DFL sentences was required and unambiguous.[185] Because the Supreme Court's reasoning applies to the "most severe" penalties, and LWOP and DFL sentences are "especially harsh" with "negligible difference[s]," limitations on LWOP must also apply to DFL sentences.[186] Since his 100-year prison term was a DFL sentence imposed without any judicial consideration of his youth or aptness for rehabilitation, McKinley maintained that his sentence was unconstitutional under *Miller*.[187]

In a succinct opinion, the Seventh Circuit agreed.[188] It found that McKinley's 100-year prison term, given life expectancy calculations, must be subject to the central holding of *Miller* in order for the Supreme Court's "children are different" logic to be fulfilled.[189] Although McKinley's sentence may have been valid if he had been an adult, it was not valid here because McKinley was a juvenile and the sentencing judge had not taken his youth into consideration as *Miller* required.[190] Thus, the Seventh Circuit extended *Miller* to DFL sentences.

2. Ninth Circuit: *Moore v. Biter*

In *Moore v. Biter*,[191] the Ninth Circuit held that a 254-year sentence for a juvenile nonhomicide offender was contrary to clearly established federal law put forth in *Graham*.[192] After being tried as an adult, Brian Moore was found guilty of nonhomicide sexual offenses committed when he was sixteen

181. *See* Brief for Appellant at 36–37, *McKinley*, 809 F.3d 908 (No. 14-1944).
182. *See id.* at 36–39.
183. *See id.* at 43–45.
184. *See id.* at 37. McKinley's argument relies on the language in *Miller* that explains that *Graham*'s reasoning "implicates any life-without-parole sentence imposed on a juvenile" and that the characteristics of youth counsel against irrevocable lifetime prison terms. *Id.* (quoting Miller v. Alabama, 567 U.S. 460, 473 (2012)).
185. *See id.* at 45–48.
186. *See id.* at 46 (quoting Graham v. Florida, 560 U.S. 48, 70–71 (2010)).
187. *See id.* at 50.
188. *See* McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016).
189. *See id.* at 911–12. The court explained that "the 'children are different' passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life." *Id.* at 911.
190. *See id.* at 914.
191. 725 F.3d 1184 (9th Cir. 2013).
192. *See id.* at 1194.

years old.[193] He was sentenced to 254 years and four months in prison, whereby he was ineligible for parole until he served 127 years and two months.[194] At that point, Moore would be 144 years old, meaning that he had no realistic chance to receive parole.[195] After *Graham* barred LWOP for juvenile nonhomicide offenders,[196] Moore filed a habeas corpus petition in federal court, which was denied at the district court level.[197] He appealed to the Ninth Circuit, which faced the question of whether *Graham* clearly established that DFL sentences are invalid for nonhomicide offenders.[198]

Moore argued that it did,[199] citing *Graham*'s proclamation that LWOP violates the Eighth Amendment for juvenile nonhomicide offenders because it does not offer "some meaningful opportunity to obtain release."[200] Although Moore conceded that he was not given a formal LWOP sentence, he asserted on appeal that his term-of-years sentence was indistinguishable from LWOP because it inevitably guaranteed that he would die in prison without an opportunity for release.[201] Because he was not a homicide offender, Moore argued that his DFL sentence violated *Graham*.[202]

The Ninth Circuit agreed.[203] The court found that "there [were] no constitutionally significant distinguishable facts" between LWOP and the term-of-years sentence given to Moore.[204] The court understood *Graham*'s central holding to be that the Eighth Amendment prohibits sentences that deny juveniles a chance to leave prison before they die.[205] Moreover, because *Graham* offers a broad guarantee that "all juvenile nonhomicide

193. *See id.* at 1186; *see also* Maura Dolan, *Long Beach Rapist Sentenced as Teen Could Be Eligible for Release*, L.A. TIMES (Aug. 7, 2013, 12:00 AM), https://www.latimes.com/local/la-xpm-2013-aug-07-la-me-teen-rapist-20130808-story.html [https://perma.cc/UQ4L-LNXE].

194. *See Moore*, 725 F.3d at 1186–87.

195. *See id.* at 1186.

196. Graham v. Florida, 560 U.S. 48, 74–75 (2010).

197. *See Moore*, 725 F.3d at 1187.

198. *Id.* The procedural posture of this case complicated the scope of the issue before the court. The Antiterrorism and Effective Death Penalty Act (AEDPA) provides the appropriate standard of review for federal courts reviewing habeas petitions based on federal claims, like Moore's, adjudicated in state court. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382 (1996). AEDPA requires federal courts reviewing state court habeas rulings to ask whether the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Therefore, the Ninth Circuit was not tasked with ruling directly on the merits of the applicability of *Graham* to DFL sentences, but rather with ruling on whether it was *clearly established* that *Graham* applied to such sentences. *See Moore*, 725 F.3d at 1187–88.

199. *See* Brief for Appellant at 31, *Moore*, 725 F.3d 1184 (No. 11-56846).

200. *See id.* at 22–24 (quoting *Graham*, 560 U.S. at 75).

201. *See id.* at 24, 31 ("In denying Moore relief, the state court acted contrary to clearly established federal law because it reached a result different from *Graham* even though it was faced with materially indistinguishable facts.").

202. *See id.* at 31.

203. *See Moore*, 725 F.3d at 1194.

204. *See id.* at 1191 (quoting Cudjo v. Ayers, 698 F.3d 752, 763 (9th Cir. 2012)).

205. *See id.*

offenders [have] a chance to demonstrate maturity and reform" such that they can obtain an opportunity for release within their lifetimes, the court held that it naturally must also prohibit DFL sentences, as they deny release to the same practical measure as explicit LWOP sentences do.[206] The court reasoned that because both Moore and Graham faced life behind bars without regard for their "remorse, reflection, or growth" and without a chance to return to society, both of these sentences—despite their technical differences—violated the Eighth Amendment.[207] The Ninth Circuit thus extended LWOP jurisprudence and held that a DFL sentence imposed on a juvenile nonhomicide offender is unconstitutional under *Graham*.[208]

3. Tenth Circuit: *Budder v. Addison*

Likewise, in *Budder v. Addison*,[209] the Tenth Circuit determined that it was clearly established federal law that *Graham* provided a categorical ban on life sentences—both literal and de facto—for juvenile nonhomicide offenders.[210] Appellant Keighton Budder was convicted of several nonhomicide offenses relating to a violent stabbing and rape he committed when he was sixteen.[211] Budder originally received three LWOP sentences, but he was resentenced after *Graham* to three life *with* parole sentences plus twenty years to run consecutively.[212] This sentence withheld parole eligibility until he served more than 131 years.[213] When Budder's request for his sentence to be modified to comply with *Graham* was denied, he filed a habeas corpus petition in federal court.[214] The U.S. District Court for the Western District of Oklahoma denied his petition, and Budder appealed, asking the Tenth Circuit to decide whether it was clearly established that *Graham* controlled here.[215]

Budder argued that his sentence, though a term-of-years rather than LWOP, was unconstitutional because it denied him the "meaningful opportunity to obtain release based on demonstrated maturity and

206. *See id.* at 1192–93 (quoting Graham v. Florida, 560 U.S. 48, 79 (2010)).
207. *See id.* at 1192.
208. *See id.* at 1194.
209. 851 F.3d 1047 (10th Cir. 2017).
210. *See id.* at 1059 ("Thus, under the categorical rule clearly established in *Graham*, Budder's sentence violates the Eighth Amendment.").
211. *See id.* at 1049.
212. *See id.* at 1049–50.
213. *See id.* at 1050. Under Oklahoma law, life sentences are calculated at forty-five years for parole purposes, and offenders are required to serve 85 percent of their sentence before being eligible for parole. *See* Anderson v. State, 130 P.3d 273, 282–83 (Okla. Crim. App. 2006). Therefore, Budder's sentence amounted to 155 years in prison with parole unavailable for the first 131.75 years. *Budder*, 851 F.3d at 1050.
214. *See Budder*, 851 F.3d at 1050.
215. *See id.* This is another case in which the issue before the court was limited by the AEDPA. *See* 28 U.S.C. § 2254(d). Thus, the court was not asked to decide whether *Graham* applied to DFL sentences, but whether *Graham* posited a categorical holding that clearly controlled. *See Budder*, 851 F.3d at 1050–52.

rehabilitation" that *Graham* required.[216] Budder highlighted *Graham*'s opposition to severe sentences that altogether deny parole due to the fact that they permanently deprive the offender of liberty.[217] Therefore, Budder argued, *Graham* is not "a rigid, mechanical concern about sentences expressly labeled 'life-without-parole,'" but rather extends to term-of-years sentences that deny nonhomicide juvenile offenders a possibility of release.[218] Budder pointed out that Terrance Graham himself did not even receive LWOP; instead, Graham received a life *with* parole sentence where parole was later made unavailable by statute.[219] For these reasons, Budder argued that it was nonsensical to interpret *Graham* as applying only to formal LWOP sentences and urged the Tenth Circuit to find his sentence contrary to clearly established federal law.[220]

The Tenth Circuit concluded that *Graham* controlled this inquiry.[221] The court summarized *Graham* as essentially holding that the Eighth Amendment prohibits "all 'sentences that deny [juvenile nonhomicide] convicts the possibility of parole,'" even sentences that do not fall within the specific LWOP label.[222] In the Tenth Circuit's eyes, *Graham* focused its Eighth Amendment inquiry on LWOP sentences not because of their label, but because of their irrevocability.[223] Because DFL sentences and explicit LWOP sentences are equally permanent revocations of an offender's liberty, they are equally as inappropriate for nonhomicide juvenile offenders.[224] Moreover, the Tenth Circuit noted that *Graham* was a categorical rule that applied uniformly "to an entire class of offenders"—in this case, juvenile nonhomicide offenders.[225] Thus, because Budder—a juvenile nonhomicide offender—fell into the class identified by *Graham*, the Eighth Amendment protected him from an irrevocable sentence, which includes LWOP and DFL sentences.[226]

Furthermore, the court reasoned that constitutional protections should not be "so malleable" as to be threatened by technical differences between sentences.[227] The court held that because LWOP and DFL are materially indistinguishable, the spirit of *Graham* and *Miller* ought to be applied to

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216. *See EJI Wins Relief for 16-Year-Old Sentenced to 155 Years in Prison*, EQUAL JUST. INITIATIVE (March 22, 2017), https://eji.org/news/eji-wins-relief-for-keighton-budder-sentenced-to-155-years/ [https://perma.cc/FE2N-RU9E]; *see also* Brief for Appellant at 7–8, *Budder*, 851 F.3d 1047 (No. 16-6088).

217. *See* Brief for Appellant, *supra* note 216, at 8–9.

218. *See id.* at 9.

219. *See id.* at 12.

220. *See id.* at 15.

221. *See Budder*, 851 F.3d at 1059–60.

222. *See id.* at 1055–56 (quoting Graham v. Florida, 560 U.S. 48, 70 (2010)).

223. *See id.* at 1056.

224. *See id.* ("[T]here is no material distinction between a sentence for a term of years so lengthy that it 'effectively denies the offender any material opportunity for parole' and one that will imprison him for 'life' without the opportunity for parole—both are equally irrevocable." (quoting *Graham*, 560 U.S. at 113 n.11 (Thomas, J., dissenting))).

225. *See id.* at 1053–54 (quoting *Graham*, 560 U.S. at 61).

226. *See id.* at 1059–60.

227. *See id.* at 1056.

both.[228] To rule differently would allow technicalities to undermine Eighth Amendment protections: "The Constitution's protections do not depend upon a legislature's semantic classifications. Limiting the Court's holding [in *Graham*] by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life.'"[229]

B. The Narrow Reading: The Court's LWOP Holdings in Graham *and* Miller *Do Not Extend to DFL Sentences*

The U.S. Courts of Appeals for the Fifth,[230] Sixth,[231] and Eighth[232] Circuits have taken an alternate approach to addressing the issue of whether *Graham* and *Miller* apply to DFL sentences. Formalist interpretations of *Graham* and *Miller* have bolstered these circuits' conclusions that the Supreme Court's rulings cannot extend to DFL sentences, as *Graham* and *Miller* left this category of sentences unmentioned.[233] Moreover, despite *Montgomery*'s efforts to broaden the reach of *Miller*,[234] these circuit courts have continued to apply *Miller* as a purely procedural rule.[235] Ultimately, the Fifth, Sixth, and Eighth Circuits have disagreed with their previously discussed sister circuits and found that the Supreme Court's juvenile LWOP cases apply uniquely to LWOP and do not extend to juvenile DFL sentences.

1. Fifth Circuit: *United States v. Sparks*

The Fifth Circuit pronounced in *United States v. Sparks*[236] that *Miller* does not apply to DFL sentences.[237] The appellant, Tony Sparks, pled guilty to aiding and abetting a carjacking when he was sixteen years old.[238] In 2001—before *Graham* and *Miller* were decided—he was sentenced to LWOP.[239] Once *Graham* and *Miller* were decided, he was resentenced to thirty-five years with credit for time served, a downward variance that reflected the judge's consideration of Sparks's age and its attendant characteristics.[240] On appeal, the Fifth Circuit considered the constitutionality, under *Miller*, of a thirty-five-year sentence imposed on a nonhomicide juvenile offender.[241]

228. *See id.*
229. *See id.*
230. United States v. Sparks, 941 F.3d 748 (5th Cir. 2019).
231. Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012).
232. United States v. Jefferson, 816 F.3d 1016 (8th Cir. 2016).
233. *See Bunch*, 685 F.3d at 553.
234. *See id.* at 552; *Sparks*, 941 F.3d at 754.
235. *See Sparks*, 941 F.3d at 753–54; *Jefferson*, 816 F.3d at 1018–19.
236. 941 F.3d 748 (5th Cir. 2019).
237. *See id.* at 754.
238. *See id.* at 750–51.
239. *See id.* at 752.
240. *See id.* at 753.
241. *See id.*

Sparks's principal argument on appeal was that his sentence violated both the substantive and procedural aspects of *Miller*.[242] However, the facts and procedural posture of Sparks's case and sentence do not lend themselves to discussion of the applicability of *Miller* as easily as some of the other cases previously discussed. First, Sparks's sentence was not a mandatory one; the judge at resentencing thoroughly examined Sparks's youth before imposing the discretionary sentence.[243] Thus, his sentence was not at odds with the procedural requirements *Miller* espoused.[244] Second, Sparks's thirty-five-year sentence, though lengthy, did not guarantee that he would die in prison.[245] Unlike the much longer sentences discussed previously,[246] Sparks's sentence was much closer to the undefined line that differentiates merely long sentences from DFL sentences.[247] The amorphous nature of Sparks's sentence in terms of procedure and substance may have hindered the court's ability to issue a clear ruling on the merits of whether *Miller* applies to DFL sentences.[248]

Nevertheless, the Fifth Circuit indicated that it did not believe *Miller* imposed procedural or substantive limitations on DFL sentences.[249] The court described three natural consequences of *Miller*. First, LWOP sentences imposed *discretionarily* are constitutionally sound because *Miller* only prohibited *mandatory* LWOP.[250] Second, "*Miller* has no relevance to sentences less than LWOP . . . [such as] life with the possibility of parole or early release."[251] In other words, these sentences can be mandatory without

242. *See id.*; Brief for Appellant at 4–5, *Sparks*, 941 F.3d 748 (No. 18-50225). Sparks's briefing highlights areas where the resentencing judge gave short shrift to the required *Miller* factors. *See id.* at 9–21. At argument, Sparks also urged the court to consider the substantive *Miller* violations apparent in Sparks's sentence. *See Sparks*, 941 F.3d at 753.

243. *See Sparks*, 941 F.3d at 753.

244. *See id.* at 756.

245. Assuming Sparks was sentenced when he was sixteen, he would be incarcerated until at least age fifty-one, which is younger than the seventy-six year average life expectancy in the United States as of 2021. ARIAS ET AL., *supra* note 5, at 1. However, life expectancy estimates in incarcerated populations are significantly lower, so this sentence likely brought him closer to his life expectancy than would appear at first glance. *See generally* Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 523 (2013).

246. *See supra* Part II.A.

247. Some judges and scholars have defined DFL sentences as those that exceed a defendant's life expectancy, while others have defined it as those that exceed retirement age or are so long that a meaningful release is unavailable. *See supra* notes 17–20 and accompanying text. It may be that cases involving term-of-years sentences that surpass a juvenile's life expectancy offer a clearer opportunity for courts to rule on issues relating to DFL sentences.

248. *See Sparks*, 941 F.3d at 755 (finding that Sparks could not show a substantive *Miller* violation because his sentence was discretionary and not an LWOP sentence, ignoring the issue of whether a DFL sentence would be subject to the same procedural and substantive requirements).

249. *See id.* at 754.

250. *See id.* at 753. In characterizing *Miller* as a purely procedural decision, the Fifth Circuit ignored *Montgomery*. In fact, the Fifth Circuit limited its discussion of *Montgomery* to the section that makes *Miller* retroactive, disregarding that the case also made *Miller* substantive. *Id.* at 752.

251. *Id.* at 754.

violating *Miller*.[252] Finally, the court explained that *Miller* does not control term-of-years DFL sentences.[253] The court pointed to language in *Miller* that distinguished LWOP sentences from "impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years.'"[254] According to the Fifth Circuit, because *Miller* mentioned the presumed constitutionality of lengthy term-of-years sentences, it would be "bizarre" to extend *Miller* to limit the constitutionality of DFL sentences.[255]

Because the court did not address whether Sparks's sentence was a DFL sentence, its refusal to extend *Miller* in this way may have been just dicta. Still, its rejection of extending *Miller* was clear and decisive.[256] The opinion strongly suggests that if the Fifth Circuit were to face a case ripe for the question of whether *Miller* prohibits mandatory DFL sentences, it would hold that *Miller* does not.

2. Sixth Circuit: *Bunch v. Smith*

In *Bunch v. Smith*,[257] the Sixth Circuit held that an eighty-nine-year sentence imposed on a juvenile nonhomicide offender did not violate *Graham*, reasoning that *Graham* does not clearly establish that term-of-years sentences that are functionally equivalent to LWOP are unconstitutional.[258] Appellant Chaz Bunch was convicted of multiple nonhomicide offenses including rape, aggravated robbery, and kidnapping that occurred when he was sixteen years old.[259] The Ohio trial court sentenced Bunch to eighty-nine years in prison.[260] After Ohio's state courts rejected Bunch's argument that his sentence was unconstitutional, Bunch filed a habeas petition in federal district court that was also ultimately denied.[261] Then, after the Supreme Court decided *Graham*, the Sixth Circuit granted Bunch a certificate of appealability to consider whether *Graham* applied to DFL sentences. Specifically, because this was a federal habeas petition after an adjudication on the merits in state court, the Antiterrorism and Effective Death Penalty

252. *See id.*
253. *See id.* at 753–54.
254. *Id.* at 754 (quoting Lucero v. People, 394 P.3d 1128, 1133 (Colo. 2017)).
255. *See id.* The court went on to highlight the Third Circuit's failed attempt at applying *Miller* to DFL sentences that extend beyond retirement age. *See id.*; *see also infra* Part II.C (discussing the Third Circuit's decision in United States v. Grant, 887 F.3d 131 (3d Cir.), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018), *aff'd in part, vacated and remanded in part*, 9 F.4th 186 (3d Cir. 2021)).
256. *See Sparks*, 941 F.3d at 754.
257. 685 F.3d 546 (6th Cir. 2012).
258. *See id.* at 547.
259. *See id.*
260. *See id.* The sentence reflected multiple consecutive, fixed-term sentences, none of which individually surpassed ten years. *See id.* at 551.
261. *See id.* at 548–49.

Act of 1996 (AEDPA)[262] applied, limiting the issue to whether Bunch's sentence was clearly contrary to *Graham*.[263]

Bunch argued that his eighty-nine-year sentence for a nonhomicide offense was "tantamount to a life sentence" and therefore contravened *Graham*.[264] His argument rested on the reality that his sentence would not allow him to have a meaningful opportunity to be released from prison and was therefore functionally equivalent to LWOP because both types of sentences vitiate an offender's hope for release.[265] For that reason, Bunch urged that because he was a juvenile nonhomicide offender, his sentence violated the Eighth Amendment as dictated by *Graham*.[266]

The Sixth Circuit rejected Bunch's argument, holding that *Graham* did not clearly establish the unconstitutionality of DFL sentences for juvenile nonhomicide offenders.[267] In resolving this issue, the Sixth Circuit noted that Bunch exhausted all of his state claims before *Graham* was even decided.[268] Because clearly established federal law must have been established before the last state adjudication, it would not be temporally possible for the state decisions in Bunch's case to be clearly contrary to the not-yet-decided *Graham*.[269]

The court nonetheless took the liberty to rule that even if *Graham* had been decided in time to control, it would not invalidate Bunch's eighty-nine-year sentence because it did not clearly establish that consecutive term-of-years sentences violate the Eighth Amendment when they amount to DFL.[270] Although it conceded that an eighty-nine-year sentence could be the "functional equivalent" of LWOP, the Sixth Circuit endorsed a formalist interpretation of *Graham* and held that its plain language only applied to strict LWOP sentences.[271] The Sixth Circuit focused on *Graham*'s acknowledgement that its holding "concerns *only* those juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense."[272] Noting that *Graham* required a realistic opportunity to obtain release in cases of juvenile offenders sentenced to "life" and did not address juvenile offenders facing consecutive term-of-years sentences, the *Bunch* court reasoned that *Graham* could not clearly apply to types of sentences that it did not even

262. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.).

263. *See Bunch*, 685 F.3d at 549. For more information on the AEDPA, see *supra* note 198 and accompanying text.

264. *See Bunch*, 685 F.3d at 547.

265. *See id.* at 548.

266. *See id.*

267. *See id.* at 553.

268. *See id.* at 549–50.

269. *See id.*

270. *See id.* at 550 ("Bunch's sentence was not contrary to clearly established federal law even if *Graham* is considered a part of that law.").

271. *See id.* at 551. The Sixth Circuit concluded that "[i]f the Supreme Court has more in mind, it will have to say what that is." *Id.* at 553 (alteration in original) (quoting Henry v. State, 82 So.3d 1084, 1089 (Fla. Dist. Ct. App. 2012)).

272. *Id.* at 553 (quoting Graham v. Florida, 560 U.S. 48, 63 (2010)).

mention.[273] The court held that Bunch's sentence was not contrary to clearly established law because *Graham* did not establish the unconstitutionality of DFL sentences on juvenile nonhomicide offenders.[274]

3. Eighth Circuit: *United States v. Jefferson*

In *United States v. Jefferson*,[275] the Eighth Circuit held that *Miller* was a procedural ruling that prohibited mandatory LWOP sentences for juvenile offenders but found that *Miller* stopped short of prohibiting mandatory DFL sentences.[276] The *Jefferson* court considered the constitutionality of a fifty-year sentence for multiple drug trafficking offenses and murders committed by Jefferson before he was eighteen years old.[277] In 1998, Jefferson was initially sentenced to life in prison pursuant to then-mandatory sentencing guidelines.[278] However, Jefferson petitioned for a resentencing hearing after the Supreme Court handed down *Miller* in 2012.[279] The U.S. District Court for the District of Minnesota granted the petition, varied downward from the advisory guidelines, and imposed the fifty-year sentence that Jefferson then appealed to the Eighth Circuit.[280]

On appeal, Jefferson argued that a categorical bar on juvenile LWOP "draws inexorably" from the Supreme Court's rulings in *Roper*, *Graham*, and *Miller*.[281] Given that Jefferson was twenty years old when he was sentenced, this fifty-year prison term kept him in prison until he was at least seventy years old.[282] Jefferson characterized the central theme of the Supreme Court's juvenile jurisprudence as providing juvenile offenders the right to a "potential for a meaningful life out of custody"[283] because of their inherent psychological differences from adults and resulting diminished culpability.[284] Despite acknowledging that the Court did not categorically bar juvenile life sentences,[285] he argued that his sentence nevertheless "implicates precisely what lies at the heart of the Supreme Court's jurisprudence regarding juvenile offenders."[286] As his crime was committed

273. *See id.* at 552 ("[T]he Court did not even consider the constitutionality of such [consecutive, fixed-term] sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments.").
274. *See id.* at 552–53.
275. 816 F.3d 1016 (8th Cir. 2016).
276. *See id.* at 1018; Tikhomirov, *supra* note 100, at II.-344 to -345 (describing the Eighth Circuit as reasoning that "*Miller* did not establish a categorical rule against life sentences for juveniles convicted of homicide offenses, and pronounced a ban only on mandatory life without parole sentences for juveniles convicted of homicide, purposely leaving discretionary life sentences untouched").
277. *See Jefferson*, 816 F.3d at 1017.
278. *See id.*
279. *See id.* at 1018.
280. *See id.*
281. *See id.*
282. *See* Reply Brief for Appellant at 7, *Jefferson*, 816 F.3d 1016 (No. 15-1309).
283. *Id.* at 8.
284. *See id.* at 8–10; *see also supra* Part I.A.1.
285. *See Jefferson*, 816 F.3d at 1018.
286. Reply Brief for Appellant, *supra* note 282, at 9.

in the diminished capacity of youth and he was denied release until old age, Jefferson argued that *Graham* and *Miller* categorically barred his sentence under the Eighth Amendment.[287]

The Eighth Circuit rejected Jefferson's argument and refused to recognize a categorical ban on juvenile life sentences.[288] Given that Jefferson was a juvenile homicide offender, the *Jefferson* court focused on *Miller*, which it summarized as a procedural ruling merely requiring that sentencing judges consider age as a mitigating factor before imposing LWOP.[289] Noting that the District of Minnesota held a hearing to consider Jefferson's age and "the teaching[s] of *Roper*, *Graham*, and *Miller*" before making its resentencing decision, the Eighth Circuit concluded that Jefferson's sentence was discretionary and not in contravention of *Miller*.[290]

Interestingly, the Eighth Circuit made no mention of *Montgomery*, though it was decided before the Eighth Circuit decided *Jefferson*.[291] *Montgomery* held that *Miller* was more than the simple procedural rule that the Eighth Circuit characterized it as[292] and that *Miller* posited the substantive rule that LWOP is a categorically excessive sentence under the Eighth Amendment for the vast majority of juvenile offenders.[293] Had the *Jefferson* court considered *Montgomery*, it may have come to a different conclusion. But the *Jefferson* court instead focused on the procedural aspect of *Miller* and found that Jefferson's sentence was lawful because it was the discretionary result of a hearing that considered age.[294] The Eighth Circuit therefore disposed of Jefferson's argument on a procedural point rather than on the validity of DFL sentences.

C. Confusion in the Third Circuit: United States v. Grant

The current constitutional landscape regarding juvenile sentencing is complicated and muddled.[295] Some courts continue to read *Miller* as a purely

287. *See id.* at 10. Jefferson's argument was not that *Miller* controlled and required a hearing in his case, but rather that the central holdings of *Roper*, *Graham*, and *Miller* demand a categorical bar to life sentences, including both LWOP and DFL. *See id.* at 7–10.

288. *See Jefferson*, 816 F.3d at 1019.

289. *See id.* at 1018–19.

290. *See id.* at 1019.

291. *Montgomery* came down in January of 2016, and the Eighth Circuit decided *Jefferson* in March of 2016. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016); *Jefferson*, 816 F.3d 1016.

292. *See* Erin Dunn, Comment, Montgomery v. Louisiana*: An Attempt to Make Juvenile Life Without Parole a Practical Impossibility*, 32 TOURO L. REV. 679, 693 (2016).

293. *See Montgomery*, 136 S. Ct. at 734 (explaining that the imposition of LWOP will violate the Eighth Amendment even after a hearing is held if it is imposed on one of the vast majority of juvenile offenders whose "crime[s] reflect[] 'unfortunate yet transient immaturity'" (quoting Miller v. Alabama, 567 U.S. 460, 479 (2012))). The scope of substantivity this line of cases stands for is unclear, see *supra* notes 107–12 and accompanying text, but for the purposes of this Note, it is enough to say that *Montgomery* made *Miller* a substantive rule prohibiting LWOP sentences for the vast majority of offenders.

294. *See Jefferson*, 816 F.3d at 1019.

295. *See generally* Juliet Liu, Note, *Closing the Door on Permanent Incorrigibility: Juvenile Life Without Parole After* Jones v. Mississippi, 91 FORDHAM L. REV. 1033, 1051–59

procedural rule, even after *Montgomery* clarified that it is substantive, too.[296] Others have gotten lost in the Court's discussion of the existence or nonexistence of incorrigibility requirements before imposing LWOP sentences.[297] The Third Circuit's two decisions in *United States v. Grant*[298]—*Grant I* in 2018 and *Grant II* in 2021—highlight the challenges of the Supreme Court's juvenile sentencing jurisprudence.

In 2018, the Third Circuit considered whether term-of-years sentences that withhold parole eligibility within a juvenile homicide offender's life expectancy violate the Eighth Amendment.[299] It considered the case of Corey Grant, a sixteen-year-old who committed various racketeering offenses that were predicated on murder[300] and was sentenced to sixty-five years in prison, despite the sentencing judge finding that he was capable of reform due to his youth.[301] This sentence committed him to prison until at least age seventy-two, which Grant showed was not within his life expectancy based on various calculations.[302] Grant argued that *Miller* and *Montgomery* together posited a substantive rule that categorically barred such life sentences for juvenile offenders like him who have shown capacity for reform.[303]

The Third Circuit agreed, aligning itself with the approaches of the Seventh, Ninth, and Tenth Circuits previously discussed.[304] It concluded that under *Miller* and *Montgomery*, life sentences violate the Eighth Amendment if they deprive corrigible offenders of a meaningful opportunity for release.[305] Due to the mitigating characteristics of youth and the accompanying "diminished penological justification[s]" for serious sentences imposed on juveniles as a class, these cases' holdings must apply equally across all sentences that destroy this opportunity.[306] The spirit of *Miller*, it concluded, does not "turn on the sentence's formal designation" as LWOP but should apply to all sentences that incarcerate a corrigible offender for life.[307]

(2022) (surveying state approaches to incorrigibility after *Jones*); 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, 161–72 (2017) (highlighting the various conflicting judicial interpretations and responses after *Montgomery*).

296. *See, e.g.*, United States v. Sparks, 941 F.3d 748, 754 (5th Cir. 2019); *Jefferson*, 816 F.3d at 1019.

297. *See* Liu, *supra* note 295, at 1051–59.

298. 887 F.3d 131 (3d Cir.), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018), *aff'd in part, vacated and remanded in part*, 9 F.4th 186 (3d Cir. 2021).

299. *See id.* at 142.

300. *See id.* at 136.

301. *See id.* at 134–35.

302. *See id.* at 135; Brief for Appellant at 23, *Grant*, 887 F.3d 131 (No. 16-3820).

303. *See* Brief for Appellant, *supra* note 302, at 30–31.

304. *See supra* Part II.A.

305. *See Grant*, 887 F.3d at 143. The court's focus on corrigible offenders illustrates the way many courts interpreted *Montgomery* to require a showing of incorrigibility before that understanding was undermined by *Jones*.

306. *See id.* at 142–44.

307. *See id.* at 143.

In *Grant I*, the Third Circuit went further than simply extending *Miller* and *Montgomery* to DFL sentences; it also created a framework for courts to use to determine what length of sentences is constitutionally appropriate for corrigible juvenile offenders.[308] It recommended that sentencing courts use actuarial tables, medical history, and expert testimony to determine the particular juvenile defendant's life expectancy[309] and then determine at what age an offender's return to society would still be meaningful.[310] The court then suggested that the national retirement age of sixty-five years old is an age that, in most cases, allows an offender to be released from prison with enough time to build a meaningful life in society.[311] The *Grant I* decision has been strongly criticized,[312] and it was ultimately vacated and reheard en banc.[313]

In the months leading up to the rehearing, the Supreme Court handed down *Jones*, which retreated from the incorrigibility requirements that the Third Circuit, among others, had derived from *Miller* and *Montgomery*.[314] As a result, the second *Grant* opinion (*Grant II*)[315] came to a conclusion in opposition to its first. It noted that, after *Jones*, "[t]he [Supreme] Court has *not* guaranteed particular outcomes for either corrigible or incorrigible juvenile homicide offenders."[316] Therefore, because the Supreme Court has not created clear sentencing structures for corrigible versus incorrigible juvenile offenders—which would have been a substantive rule—the nature of the Supreme Court's jurisprudence on this matter is understood as mostly procedural.[317] In this way, the court dispensed with the idea that *Montgomery* expanded *Miller* into a substantive rule that swept broadly to

308. *See id.* at 149; ALLISON M. SMITH, CONG. RSCH. SERV., THIRD CIRCUIT INVALIDATES *DE FACTO* LIFE SENTENCES FOR "NON-INCORRIGIBLE" JUVENILE OFFENDERS 3 (2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10123 [https://perma.cc/64ST-5XVJ].

309. *See Grant*, 887 F.3d at 149–50.

310. *See id.* at 150.

311. *See id.* at 151–52.

312. The Fifth Circuit criticized the *Grant I* decision, deeming the Third Circuit's suggestion that an opportunity for release must be given to juvenile offenders before their sixty-fifth birthday arbitrary and not bound by law. *See* United States v. Sparks, 941 F.3d 748, 754–55 (5th Cir. 2019). Given that the age of retirement, and life expectancy more generally, will vary by jurisdiction and demographic, such a bright-line rule eviscerates the discretion that courts have to sentence and that state legislatures have to set sentencing guidelines. *See id.* Moreover, the decision has been criticized for impermissibly expanding the issue before the court from the constitutionality of DFL sentences to what age guarantees a meaningful life after prison. *See* Dominic A. Carrola, Student Article, *How Long Is Too Long?: Why a Method Proposed by a Panel of the United States Court of Appeals for the Third Circuit for Determining the Constitutionality of De Facto Life Without Parole Imposed upon Juvenile Offenders Was Grounded in Logic But Missed the Mark*, 58 DUQ. L. REV. 324, 343–44 (2020).

313. United States v. Grant, 905 F.3d 285 (3d Cir. 2018) (mem.) (granting rehearing en banc).

314. *Jones* was decided in April 2021 and *Grant II* was decided in August 2021. Jones v. Mississippi, 141 S. Ct. 1307 (2021); United States v. Grant, 9 F.4th 186 (3d Cir. 2021).

315. *Grant*, 9 F.4th 186.

316. *Id.* at 197.

317. *See id.* ("The Court's precedents only 'require a *discretionary sentencing procedure*.'" (quoting *Jones*, 141 S. Ct. at 1322)).

prohibit LWOP for all but the rarest offenders.[318] Instead, it understood the *Graham*, *Miller*, and *Montgomery* trifecta to boil down to one constitutional procedural requirement: a discretionary sentencing hearing that guarantees tailored reflection of the individual offender's youth described by *Miller*.[319] The Third Circuit upheld Grant's sentence in *Grant II* because he received this individualized sentencing procedure. The court ultimately disposed of Grant's case on a procedural point without revisiting the DFL argument.[320]

However, implicit in the Third Circuit's ruling is a tacit acknowledgement that the procedural requirement stemming from *Miller* applies to DFL sentences as well as to LWOP sentences. The Third Circuit noted that Grant's lengthy sentence did not violate *Miller*, "even if it amount[ed] to de facto LWOP."[321] In other words, the court upheld Grant's sentence even assuming that Miller reached DFL sentences because his sentence satisfied *Miller*'s mere procedural requirements. Although it would be imprudent to take this assertion as evidence that the Third Circuit would firmly include DFL sentences in the Supreme Court's juvenile sentencing jurisprudence, this statement certainly hints at the circuit's acknowledgement of uniform rules that may apply equally to both LWOP and DFL sentences.

More generally, this vacillation in the Third Circuit between the first and second *Grant* decisions highlights the persistent and deep confusion that courts continue to struggle with regarding the scope of the Supreme Court's rulings in *Graham*, *Miller*, *Montgomery*, and *Jones*.[322] Even though confusion in this area persists, the federal judiciary is unlikely to provide any real answers.

III. STATE POWER IN PROTECTING AGAINST UNCONSTITUTIONAL DFL SENTENCES

Over the last two decades, the Supreme Court has sought to protect young people from the most serious criminal sanctions available.[323] First, it categorically barred the juvenile death penalty.[324] Then, in *Graham*, it invalidated LWOP under the Eighth Amendment in cases involving juvenile nonhomicide offenders who ought to receive a "meaningful opportunity to obtain release" from prison.[325] Finally, it declared in *Miller* that LWOP cannot be imposed without consideration of "an offender's youth and attendant characteristics."[326] The Court's silence on whether these LWOP

318. *See id.* at 196 ("The *Jones* Court, consistent with our narrow reading, confirmed that '*Montgomery* did not . . . add to *Miller*'s requirements.'" (quoting *Jones*, 141 S. Ct. at 1316–17)).
319. *See id.* at 197.
320. *See id.* at 197–98.
321. *See id.* at 193.
322. *See* Carrola, *supra* note 312, at 327, 339 (describing the Supreme Court's precedents as "unworkable," "troubled," and creating "uncertainty").
323. *See supra* Part I.B.
324. Roper v. Simmons, 543 U.S. 551, 578 (2005).
325. Graham v. Florida, 560 U.S. 48, 75 (2010).
326. Miller v. Alabama, 567 U.S. 460, 483 (2012).

limitations also extend to DFL sentences has sparked confusion in lower courts and left a gaping hole in the Court's jurisprudence.[327] As a result, sentences as long as 1,000 years have escaped the Eighth Amendment's reach and have been upheld in juvenile cases.[328]

To clarify the Court's precedents and heal this doctrinal infirmity, this part argues that the spirit of *Graham* and *Miller* cannot be fully effectuated unless their holdings are clearly extended to DFL sentences. It contends that this process must occur in state courts under state constitutions. Further, it urges state judges to clearly define DFL sentences in term-of-years measures such that the extension of LWOP jurisprudence to DFL sentences can serve a prescriptive value. Part III.A explains why *Graham* and *Miller* must be extended to DFL sentences and how these sentences should be defined in order to maximize the value of an extension. Part III.B argues that this extension must occur in state courts under state constitutions and envisions a framework for how this can be done.

A. Graham *and* Miller *Must Be Extended to DFL Sentences*

To fulfill the spirit of the Supreme Court's LWOP jurisprudence, *Graham* and *Miller* must be extended to DFL sentences. This conclusion is necessary for two main reasons. First, the justifications underlying the Court's limitations of juvenile LWOP apply with equal force to DFL sentences due to the material identicality of the two sentences. Second, excluding DFL sentences from LWOP limitations creates a loophole through which sentencing judges can capitalize on mere technical differences between LWOP and DFL sentences to evade the Eighth Amendment's mandate. This section addresses these points in turn.

The limitations on the use of juvenile LWOP sentences advanced by *Graham* and *Miller* ought to be extended to DFL sentences because the reasoning for limiting LWOP sentences necessarily applies to its materially indistinguishable counterpart. The key justification for the Court's LWOP opinions is that because children face psychological and developmental hurdles that lessen their culpability and increase their likelihood for reform,[329] they should not easily be imprisoned for life without a chance for release.[330] The dual concerns that the Court has cited when considering the constitutionality of LWOP include the sentence's finality in revoking eventual opportunities for release and ignorance of the juvenile offender's ability, if not likelihood, to mature and reform.[331] Ultimately, the Court has determined that LWOP's conclusiveness suggests that it should be

327. *See supra* Part II.

328. *See* Franklin v. State, 258 So. 3d 1239 (Fla. 2018), *cert. denied*, 139 S. Ct. 2646 (2019).

329. *See supra* Part I.A.1.

330. *See supra* notes 87, 92 and accompanying text.

331. *See* Graham v. Florida, 560 U.S. 48, 79 (2010).

categorically barred in some cases[332] and would be inappropriate without consideration of age in others.[333]

As the Seventh, Ninth, and Tenth Circuits have pointed out, DFL sentences threaten the same conclusiveness and should be similarly limited.[334] DFL sentences, like LWOP sentences, commit juvenile offenders to spend all (or at least the most meaningful part) of their lives in prison. Both sentences are final, irrevocable determinations that do not consider a juvenile's aptitude for improvement.[335] And despite differences in terminology, they are equally severe sentences.[336] If LWOP's finality has led the Court to determine that it is a sentence severe enough to require constitutional limitations in the juvenile context, the same must be said of a DFL sentence—its materially indistinguishable counterpart.[337]

Those who argue against the extension of *Graham* and *Miller* to DFL sentences suggest that such an extension would be unfaithful to the "letter of the law."[338] Because *Graham* and *Miller* referred explicitly and individually to LWOP, critics suggest that there is no basis for extending the decisions to DFL sentences.[339] This textualist argument is unpersuasive because without such an extension, *Graham* and *Miller* are altogether meaningless.[340] Because *Graham* and *Miller*'s reasoning for limiting LWOP sentences applies with equal force to limiting DFL sentences, a formal extension of *Graham* and *Miller* to DFL sentences must be made to truly effectuate their rulings.[341] Otherwise, sentencing judges can evade the decisions' mandates by legally imposing term-of-years sentences amounting to decades of imprisonment without parole—sentences with the same practical effect as LWOP—for cases in which LWOP is unconstitutional.[342] Because LWOP and DFL sentences are virtually identical, to allow one and not the other in any given context opens a loophole through which judges can evade Eighth Amendment protections. As former Iowa Supreme Court chief justice Mark S. Cady noted, "it is important that the spirit of the law not be lost in the application of the law," which is exactly what maintaining such a strict textualist interpretation of *Graham* and *Miller* threatens here.[343] Ultimately, *Graham* and *Miller* do not honor the developmental realities of youth or

332. *See id.* at 82.
333. *See* Miller v. Alabama, 567 U.S. 460, 483 (2012).
334. *See supra* Part II.A.
335. *See supra* note 206 and accompanying text.
336. *See supra* note 189 and accompanying text.
337. *See supra* note 224 and accompanying text.
338. *See* Jones, *supra* note 23, at 186–90.
339. *See id.*; *see also* Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012).
340. This argument should also fail because it overly narrows the Court's juvenile sentencing decisions. *See* Jones, *supra* note 23, at 198–99. The text of the decisions shows that juvenile offenders should have a "meaningful opportunity for release," an opportunity which LWOP and DFL sentences both eradicate. *See* Graham v. Florida, 560 U.S. 48, 75 (2010); *supra* note 206 and accompanying text.
341. *See* Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017).
342. *See supra* note 229 and accompanying text.
343. State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013).

protect juveniles from Eighth Amendment violations if they do not limit LWOP and DFL sentences alike.[344]

For such an extension to have any prescriptive value, though, the DFL sentences to which the extension is made must be clearly defined. DFL sentences have many definitions, some of which are quite tenuous.[345] Some define these sentences as those that imprison a defendant past typical retirement age or life expectancy.[346] As seen in the Third Circuit's short-lived *Grant I* decision, such definitions can be unwieldy and prone to criticism, as these demarcations may differ by demographic and are therefore not easily applicable to a broad range of defendants.[347] Other definitions use descriptive, sometimes ambiguous terms such as "functional equivalent"[348] or "lengthy,"[349] but these definitions do little to clarify what constitutes DFL sentences in practical terms. Definitions based on the length of time that a sentence withholds parole[350] are most promising, as they are not demographic-specific and apply widely to many different cases.

In deciding what period of imprisonment ought to invoke the protections of *Graham* and *Miller*, judges should keep in mind that sentences must offer a "meaningful opportunity to obtain release";[351] sentences that extend into old age and near life expectancies do not offer such opportunities. Sentences that withhold parole for forty years are good starting points for definitions of DFL sentences. Assuming that the oldest juvenile offenders are eighteen when sentenced, sentences that withhold parole until they are fifty-eight would be DFL sentences under such a definition. This is eighteen years before average life expectancy in the United States and seven years before the average national retirement age according to *Grant I*, so such a definition would arguably offer a meaningful opportunity for release.[352] However, given lowered life expectancies in incarcerated populations, sentences that withhold parole for shorter periods may be more appropriate.[353] The length of imprisonment that courts ultimately choose when defining DFL sentences should reflect the jurisdiction's sentencing culture and attitude, but these types of considerations are relevant.

B. The Role of State Courts and State Constitutions in Extending Graham *and* Miller *to DFL Sentences*

The extension of LWOP jurisprudence to DFL sentences must occur in state courts under state constitutions, for this is the most realistic and strategic forum for change. Some scholarship on this matter urges the Supreme Court

344. *See supra* note 189.
345. *See supra* notes 15–20 and accompanying text.
346. *See id.*
347. *See supra* note 312.
348. Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012).
349. *Id.* at 552.
350. *See* NELLIS, *supra* note 14, at 9.
351. Graham v. Florida, 560 U.S. 48, 75 (2010).
352. *See* ARIAS ET AL., *supra* note 5, at 1; *supra* Part II.C.
353. *See* Patterson, *supra* note 245, at 523.

to formally make this extension.[354] An extension from the highest federal court is the most ideal way to bolster protections for juvenile defendants given the decisiveness it would offer. However, this is not realistic given the current makeup of the Court and the 2021 *Jones* decision, which reversed the Court's previous trend towards increasing juvenile protections.[355] The explicit statement in *Jones* that clarified that its decision did not preclude states from expanding protections in this area further supports shifting efforts toward state courts.[356] Moreover, the disagreement among the federal courts of appeals about the legality of DFL sentences and the widespread doctrinal confusion evidenced by the Third Circuit's *Grant* decisions dampen hopes that any such extension or clarity could come from the federal judiciary.[357] Evidence also suggests that Congress, too, is unlikely to enter into the fray.[358] States consequently provide the most promising forum for immediate guidance.

States provide the most strategic setting for extending *Graham* and *Miller* to DFL sentences because state court decisions could create the foundation for a national consensus in favor of extending LWOP jurisprudence to DFL sentences. Eighth Amendment analysis at the Supreme Court level begins with determining whether a certain practice reflects society's evolving standards of decency, in part evidenced by whether a national consensus exists for or against a certain policy.[359] State judicial decisions that extend LWOP jurisprudence to DFL sentences would move the country toward a national consensus in favor of treating LWOP and DFL sentences alike while protecting juvenile defendants from cruel and unusual punishments in the process. This solution therefore offers both short- and long-term benefits. For this reason, it is incumbent on states, as the arbiters of sentencing policy,[360] to extend the holdings of *Graham* and *Miller* to DFL sentences within their borders. Some state high courts have already done so under the Eighth Amendment.[361]

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354. *See* Thomas Garrity, Comment, *Cruel and Unusual: Closing the Door on Juvenile* De Facto *Life Sentences*, 69 CATH. U. L. REV. 613, 630 (2020); Kristin E. Murrock, Comment, *A Coffin Was the Only Way Out: Whether the Supreme Court's Explicit Ban on Juvenile Life Without Parole for Non-Homicide Offenses in* Graham v. Florida *Implicitly Bans De Facto Life Sentences for Non-Homicide Juvenile Offenses*, 25 GEO. MASON U. CIV. RTS. L.J. 243, 257–58 (2015); Megan Pollastro, Note, *Where Are You, Congress?: Silence Rings in Congress as Juvenile Offenders Remain in Prison for Life*, 85 BROOK. L. REV. 287, 315–16 (2019); Forman, *supra* note 18, at 21.

355. *See supra* note 108.

356. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021).

357. *See supra* Part II.

358. *See* Pollastro, *supra* note 354, at 313.

359. *See* Berry, *supra* note 74, at 117–18.

360. *See supra* Part I.C.1.

361. *See, e.g.*, State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) (holding that *Miller* and the Eighth Amendment apply to both LWOP and DFL sentences); State v. Moore, 76 N.E.3d 1127, 1140–41 (Ohio 2016) (deciding that term-of-years sentences that exceed a juvenile nonhomicide offender's life expectancy are invalid under the Eighth Amendment as articulated by *Graham*); Casiano v. Comm'r of Correction, 115 A.3d 1031, 1048 (Conn. 2015) (finding that the Eighth Amendment requires consideration of the *Miller* factors when imposing a sentence that withholds parole for fifty years on a juvenile homicide offender);

However, this Note endorses an even more deliberate approach by taking the position that state courts should tether this extension to their state constitutions, rather than to the U.S. Constitution. As New Judicial Federalism suggests, state judges have the power to strengthen constitutional protections beyond those given by the federal Constitution and judiciary by deciding cases under their state constitutions.[362] Moreover, because state high courts are the supreme authorities on their state constitutions, such decisions cannot be abrogated or undone by federal courts.[363] The same cannot be said for state court decisions rooted in the Federal Eighth Amendment. Given the widespread disagreement in the federal judiciary on whether *Graham* and *Miller* include limitations on DFL sentences,[364] the ability of state judiciaries to control for themselves the sentencing policy that exists within their borders could play an important role in actually achieving a national consensus on this issue.[365] Therefore, to uphold the mandate that "children are constitutionally different for purposes of sentencing,"[366] state courts should extend *Graham* and *Miller* to DFL sentences and ought to do so under their state constitutions to create a lasting, irrebuttable national consensus supporting that outcome.

Four state high courts have done exactly that. In *State v. Zuber*,[367] the Supreme Court of New Jersey invalidated a mandatory fifty-five year sentence and a mandatory sixty-eight year sentence by concluding that lengthy term-of-years sentences imposed on juvenile homicide offenders are "sufficient to trigger the protections of *Miller* under the Federal and State Constitutions."[368] Similarly, the Iowa Supreme Court ruled in *State v. Ragland*[369] that *Miller* applies to sentences that are the functional equivalent of LWOP, invalidating a mandatory sentence of sixty years without parole under *Miller*, the Eighth Amendment, and the state constitution.[370] These cases offer keen illustrations of how state courts can use their state constitutions to extend *Graham* and *Miller* to DFL sentences.

Still, *Zuber* and *Ragland* fall short of their prescriptive potential because they fail to define the point at which a sentence becomes a DFL sentence. The Supreme Court of North Carolina's 2022 *State v. Kelliher*[371] decision and the Massachusetts Supreme Judicial Court's 2017 *Commonwealth v.*

Bear Cloud v. State, 334 P.3d 132, 144 (Wyo. 2014) (concluding that sentences that withhold parole for forty-five years are DFL sentences controlled by *Miller* and the Eighth Amendment); People v. Caballero, 282 P.3d 291, 296 (Cal. 2012) (holding that term-of-years sentences that do not offer parole eligibility within a juvenile nonhomicide offender's lifetime violate the Eighth Amendment as pronounced by *Graham*).

362. *See supra* Part I.C.2.
363. *See supra* note 159 and accompanying text.
364. *See supra* Part II.
365. *See* Denniston & Binning, *supra* note 168, at 600.
366. Miller v. Alabama, 567 U.S. 460, 471 (2012).
367. 152 A.3d 197 (N.J. 2017).
368. *See id.* at 212–13.
369. 836 N.W.2d 107 (Iowa 2013).
370. *See id.* at 121–22.
371. 873 S.E.2d 366 (N.C. 2022).

Perez[372] decision, on the other hand, do not make this mistake. Acknowledging that the North Carolina State Constitution need not be interpreted in lockstep with the federal Constitution and citing unique state provisions that provide explicit safeguards for children,[373] the *Kelliher* court held that juvenile LWOP is unconstitutionally cruel in certain circumstances under Article I, Section 27 of the North Carolina State Constitution and that DFL sentences are, too.[374] It concluded that "any sentence or combination of sentences which, considered together, requires a juvenile to serve more than forty years in prison before becoming eligible for parole is a de facto [life] sentence."[375] Similarly, the Massachusetts Supreme Judicial Court decided in *Perez* that the state constitution's proportionality clause, Article 26, requires consideration of the *Miller* factors in situations in which "the aggregate time to be served [by a juvenile nonhomicide offender] prior to parole eligibility exceeds that applicable to a juvenile convicted of murder."[376] By offering such strong definitions of DFL sentences, *Kelliher* and *Perez* provide a clearer framework for future application than *Zuber* or *Ragland*, which only defined DFL sentences as those with a "lengthy overall term of imprisonment"[377] or "the functional equivalent" of LWOP,[378] respectively.

State courts should follow the lead of North Carolina and Massachusetts and extend LWOP limitations to clearly-defined DFL sentences under their state constitutions. For such decisions to have practical value, state judges must surpass the scope of *Zuber* and *Ragland* and instead clearly define DFL sentences as *Kelliher* and *Perez* did.[379] It is thus imperative that litigants take steps to preserve, develop, and brief clear state constitutional arguments such that state constitutional law may develop in this way.[380] The opportunity to do so is widely available, as nearly every state in the country has a provision analogous to the Eighth Amendment.[381] Such decisive state action would provide short- and long-term benefits. It would immediately prevent state sentencing judges from circumventing the dictates of *Graham* and *Miller* by imposing lengthy term-of-year sentences instead of juvenile LWOP sentences. On a larger scale and over time, it would also work to create an irrebuttable national consensus that a future Supreme Court could use as a

372. 80 N.E.3d 967 (Mass. 2017).
373. *See id.* at 385–87.
374. *Id.* at 386–87 (invalidating a sentence that withheld parole for fifty years). Ultimately, the court determined that LWOP and DFL sentences are unconstitutional when imposed on corrigible juveniles. *Id.* Though this is not the exact holding of *Graham* or *Miller* after *Jones*, given the continued confusion of the substantive nature of *Miller*'s reach and the existence of independent state jurisprudence, the opinion nevertheless supports this Note's proposed solution by illustrating how state courts can extend LWOP jurisprudence and the spirit of *Graham* and *Miller* to DFL sentences under state constitutions.
375. *Id.* at 370.
376. *See Perez*, 80 N.E.3d at 970.
377. State v. Zuber, 152 A.3d 197, 201–02 (N.J. 2017).
378. State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013).
379. *See supra* notes 375–76 and accompanying text.
380. *See* Denniston & Binning, *supra* note 168, at 616 n.109.
381. *See* Berry, *supra* note 108, at 1205 n.23.

basis to hold once and for all that juvenile DFL sentences and juvenile LWOP sentences are one in the same and should be treated as such. For these reasons, it is incumbent on states to breathe life back into the mantra that "children are constitutionally different from adults for purposes of sentencing"[382] by extending *Graham* and *Miller* to DFL sentences.

CONCLUSION

Over the last two decades, the Supreme Court has expanded the Eighth Amendment's reach to protect juveniles from the harshest penalties available in the criminal justice system. Fundamental to these decisions are the cognitive and psychological differences between children and adults that the Court deemed constitutionally significant. The Court has determined that because of children's developmental immaturity and ability to reform, the Eighth Amendment prohibits the juvenile death penalty and invalidates juvenile LWOP sentences except in rare juvenile homicide cases and only after a hearing to consider age as a mitigating factor.

Notably missing from the Court's precedents is guidance on whether DFL sentences, which do not have an exact definition but essentially confine children to jail for life, ought to be similarly limited. This silence has sparked disagreement in lower courts and has created a route for sentencing judges to evade the Eighth Amendment's mandates. In a world in which the Court's LWOP decisions in *Graham* and *Miller* do not apply to DFL sentences, judges can legally sentence children to hundreds of years in prison without parole in cases where LWOP would be unconstitutional. Such an outcome is illogical and a threat to the Court's well-reasoned and well-established Eighth Amendment decisions in the juvenile sentencing context. Closing this sentencing loophole is an urgent and necessary step toward upholding the intent of *Graham* and *Miller* and toward making sentencing more fair for the thousands of juveniles now suffering the effects of clearly discordant policies. To respect and uphold the spirit and intent of these holdings, the Court's LWOP jurisprudence must be extended to juvenile DFL sentences.

The Supreme Court's latest juvenile sentencing decision in *Jones* and the widespread doctrinal confusion among circuit courts dash hopes that such an extension will soon come from the federal judiciary. Therefore, it is incumbent upon state courts to step in and extend *Graham* and *Miller* to DFL sentences under their state constitutions. State courts must also clearly define DFL sentences so that their decisions can have prescriptive value. In making these needed changes under state constitutions, state judges will create momentum toward expansive protections for juvenile defendants that could become the basis for future Supreme Court protections. By closing the loophole that allows children to be sentenced to life in prison despite the mandates of *Graham* and *Miller*, state judges have a distinctly important opportunity to protect juvenile defendants from cruel and unusual punishment.

382. Miller v. Alabama, 567 U.S. 460, 471 (2012).