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State-by-State Abolition of
Juvenile Life without Parole Sentences in the United States
since *Miller v. Alabama* (2012)

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Abstract

State-by-State Abolition of Juvenile Life without Parole Sentences in the United States since *Miller v. Alabama* (2012)

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Since *Miller v. Alabama* (2012), 18 states and the District of Columbia abolished juvenile life without parole sentences. This thesis examines the arguments, norms, logic, and messages utilized at each state since *Miller* to support the elimination of juvenile life without parole sentences. The arguments either stem from the nature of children or the nature of the sentence itself. Scientific studies that confirm the distinctive psychological attributes of youth has been adduced to argue for the diminished culpability of children, the inability of the sentence to serve its penological goals, children's capacity of change, and the fallacy of the predictive enterprise to determine the incorrigibility of a juvenile offender. The harshness of the sentence itself, domestic and foreign practice, the prohibition of the sentence under international human rights law, the fiscal and behavioral benefits of offering the possibility of parole, and the racial disparities of the sentence have also been argued at the state-level. The effectiveness of the arguments above may be enhanced when they are delivered by formerly incarcerated youth or victims of violence or when they are reframed as a religious ideal to a more conservative, religious audience.

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I. Introduction

1. Background

Today, the United States is the only country in the world that sentences life incarceration without the possibility of parole to juvenile offenders who have committed crimes before the age of 18. The U.S. is a pariah in a world that reached a consensus through international human rights treaties such as the Convention on the Rights of the Child, specifically prohibiting countries from imposing life without parole sentences to juvenile offenders. Although the U.S. Supreme Court banned the juvenile death penalty in *Roper v. Simmons* in 2005, juvenile offenders can still be sentenced to die in prison despite subsequent efforts to bar juvenile life without parole (JLWOP) sentences.¹ In 2010, *Graham v. Florida* banned the sentencing of life without parole for juveniles convicted of non-homicide crimes.² Two years later, the Supreme Court's joint decision of *Miller v. Alabama* and *Jackson v. Hobbs* held that *mandatory* life without parole sentences for juveniles convicted of homicide related crimes are unconstitutional.³ However, *Miller* did not constitute a categorical bar on juvenile life without parole sentences, merely banning the *mandatory* sentencing of it. In other words, a juvenile convicted of a homicide offence can still "be sentenced to life without parole if the sentencing scheme follows certain processes, including considering the youth and individual characteristics of the offender."⁴ In 2016, the Supreme Court ruled in *Montgomery v. Louisiana* that the decision in *Miller* applied retroactively, meaning that inmates serving

¹ *Roper v. Simmons*, No. 543 U.S. 551 (Supreme Court of the United States March 1, 2005).

² *Graham v. Florida*, No. 560 U.S. 48 (Supreme Court of the United States May 17, 2010).

³ *Miller v. Alabama*, No. 567 U.S. 460 (Supreme Court of the United States June 25, 2012).

⁴ Martha F. Davis, Johanna Kalb, and Risa Kaufman, *Human Rights Advocacy in the United States* (St. Paul, MN: West Academic Publishing, 2014), 52.

mandatory life without parole sentences for crimes they committed as a juvenile before *Miller* are also entitled to the possibility of parole or resentencing.⁵

While federal courts have left life without parole as a sentencing option for juveniles, a rapidly growing number of states have abolished the sentence. Since the Supreme Court's *Miller* decision in 2012, an additional 18 states and the District of Columbia have prohibited JLWOP sentences either through state supreme court holdings or state legislation: adding up to a total of 21 states and the District of Columbia.⁶ Four states, including Maine, New Mexico, New York, and Rhode Island, do not have any inmates serving life without parole for crimes they have committed as a juvenile.⁷

Despite the limitations of the Supreme Court's holding in *Miller v. Alabama*, states are rapidly abandoning juvenile life without parole. The growing number of states as well as the consistency in the direction of change warrant an examination on how each of the states have succeeded in abolishing the sentence.

2. Objective

This research project seeks to examine what arguments, human rights norms, logic, and messages have been utilized by actors in the 18 states and the District of Columbia that have eliminated juvenile life without parole sentences since *Miller v. Alabama* (2012). This research will also attempt to answer the following questions: How did each state abolish juvenile life

⁵ *Montgomery v. Louisiana*, No. 577 U.S. 460 (Supreme Court of the United States January 25, 2016).

⁶ "Juvenile Life Without Parole: An Overview" (The Sentencing Project, October 22, 2018), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

⁷ Matt Gritzmacher, "Does Your State Still Use Life-without-Parole Sentences for Kids?," Campaign for the Fair Sentencing of Youth, February 1, 2018, <https://www.fairsentencingofyouth.org/does-your-state-use-juvenile-life-without-parole-jlwop/>.

without parole since 2012, through litigation or legislation? What arguments, norms, logic, messages were utilized at each state? What arguments were made most frequently? What factors may have affected the efficacy of certain arguments? Do the arguments, norms, logic, messages made at the state level refer to those made in *Miller v. Alabama*? Finally, the question that is of most interest is whether states have highlighted the prohibition of the sentence under international human rights law. Do state supreme court decisions cite international human rights law that prohibit juvenile life without parole? Do state legislators and other actors refer to international human rights law as evidence to support abolishing the sentence?

3. Significance

The United States is the only country in the world to impose life without parole sentences to juvenile offenders.⁸ Previous Supreme Court decisions have failed to categorically bar the sentence. The Supreme Court recently denied to hear a case arguing the unconstitutionality of the sentence in November 2017.⁹ The hurdles federal-level litigation are facing suggest that advocates should reassess the arguments made to eliminate the sentence and examine the value of state-by-state abolition.

Therefore, rather than analyzing federal-level litigation, this research will focus on state-level efforts as “a vast majority of child offenders sentenced to life without parole were sentenced under state rather than federal laws.”¹⁰ In addition, although the expansion of higher court policies does not occur often, since the Supreme Court’s decision on *Miller* in 2012, an additional 18 states

⁸ Davis, Kalb, and Kaufman, *Human Rights Advocacy in the United States*, 53; Jo Becker, *Campaigning for Justice : Human Rights Advocacy in Practice* (Stanford, California: Stanford University Press, 2013), 222.

⁹ “Justice at Last for the Youngest Inmates?,” *The New York Times*, January 20, 2018, <https://www.nytimes.com/2017/11/20/opinion/life-sentence-youth-parole.html>.

¹⁰ Becker, *Campaigning for Justice*, 223.

and the District of Columbia have categorically prohibited JLWOP sentences either through state supreme court holdings or state legislation: constituting a vast majority of the 21 states and the District of Columbia that have barred the sentence.¹¹ Documentation of change at the state level since *Miller* has focused on the end results rather than the process and specific arguments utilized to bring about such change.¹² The few scholarly works that have examined the dynamic efforts at the state-level to end JLWOP had focused on California, prior to the *Miller* decision in 2012.¹³ Therefore, this paper's update on the new developments at the state-level and its focus on arguments made at the state-level since *Miller* will contribute to understanding how and why states have expanded the decision of *Miller* and provide a deeper analysis on the process of change and the effectiveness of certain advocacy efforts.

¹¹ Bradley C. Canon, *Judicial Policies : Implementation and Impact* (Washington, D.C.: CQ Press, 1999), 44; "A State-by-State Look at Juvenile Life without Parole," *The Seattle Times*, July 30, 2017, <https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/>.

¹² John R. Mills, Anna M. Dorn, and Amelia Courtney Hritz, "Juvenile Life without Parole in Law and Practice: Chronicling the Rapid Change Underway," *American University Law Review* 65 (2016): 535; "A State-by-State Look at Juvenile Life without Parole"; "Juvenile Life Without Parole After Miller v. Alabama" (The Phillips Black Project, July 8, 2015), <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf>.

¹³ Becker, *Campaigning for Justice*, chap. 11.

II. Current Literature

1. International Human Rights Law Framework

Global consensus against juvenile life without parole sentences is reflected in international and regional human rights treaties and mechanisms. First, the Convention on the Rights of the Child, the world's most widely ratified human rights treaty, explicitly prohibits sentencing juvenile offenders to life without parole. Article 37(a) of the Convention on the Rights of the Child (CRC) states that

Neither capital punishment *nor life imprisonment without the possibility of release* shall be imposed for offences committed by persons below *eighteen* years of age.¹⁴

Article 37 specifically sets the age of eighteen in the provision: thereby highlighting the significance of age “in contrast with other rights which in Article 1 defers to domestic laws for the age of majority.”¹⁵ However, the United States has not ratified the CRC despite signing it 1995.¹⁶

Second, juvenile life without parole sentences are also implicitly prohibited in Article 14(4) of the International Covenant on Civil and Political Rights (ICCPR) which states that in the case of juvenile persons, imprisonment should promote rehabilitation. Juvenile life without parole sentences do not promote rehabilitation as the sentence “reflects a determination that there is nothing that can be done to render the child a fit member of society ... [and] is a sentence of permanent banishment.”¹⁷ Although the U.S. ratified the ICCPR, it attached a reservation on Article 14(4), stating that “the United States reserves the right, in exceptional circumstances, to

¹⁴ Emphasis added.

¹⁵ “Brief of Amici Curiae Amnesty International, et Al. in Support of Petitioners” (Amnesty International et al., 2012), 22, <https://eji.org/sites/default/files/miller-amicus-amnesty-international.pdf>.

¹⁶ Amnesty International and Human Rights Watch, *The Rest of Their Lives* (U.S.: Human Rights Watch/Amnesty International, 2005), 99.

¹⁷ Amnesty International and Human Rights Watch, 95-96.

treat juveniles as adults, notwithstanding ... paragraph 4 of article 14.”¹⁸ The reservation did not explicitly state that the U.S. will continue to impose the juvenile life without parole sentence, but that the state would treat juveniles as adults in exceptional cases: leaving open the possibility to sentence juveniles to life without parole.

Regional human rights treaties also reflect global consensus on the prohibition of juvenile life without parole sentences and the need to provide minors with special protection. The two bodies of human rights treaties that establish the Inter-American Human Rights System, the American Declaration of the Rights and Duties of the Man and the American Convention on Human Rights, both highlight that minors have the right to special protection. First, Article VII of the American Declaration of the Rights and Duties of the Man, which the United States has signed and ratified, states that “all children have the right to special protection, care and aid.” Second, Article 19 of the American Convention on Human Rights also states that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” The United States has not ratified the American Convention on Human Rights.

In addition to the substantive provisions of international human rights treaties, UN treaty bodies that monitor the implementation of the treaties have called for the United States to abandon the sentence. In its 2014 review of the U.S., the UN Human Rights Committee expressed concern that U.S. courts may still impose life without parole sentences to juvenile offenders and called for

¹⁸ United Nations Treaty Collection, International Covenant on Civil and Political Rights, United States of America: Reservations. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec

the U.S. to prohibit and abolish the sentence.¹⁹ In its 2014 Concluding Observations on the U.S., the UN Committee on the Elimination of Racial Discrimination highlighted the racial disproportionality in which juveniles are sentenced to life without parole and called upon the U.S. to prohibit and abolish the sentence.²⁰ In the same year, the UN Committee against Torture emphasized how juveniles in the U.S. are sentenced to life without parole “even where the child played a minimal role in the crime,” and recommended that the U.S. abolish the sentence and “enable child offenders currently serving life without parole to have their cases reviewed by a court for reassessment and resentencing, to restore parole eligibility and for a possible reduction of the sentence.”²¹

2. Supreme Court Decisions on Juvenile Life Without Parole

Current literature on efforts to end juvenile life without parole in the U.S. has primarily focused on litigation at the federal level, particularly the three Supreme Court decisions, *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*. The *Roper* decision barred the juvenile death penalty.²² In 2010, *Graham v. Florida* banned the sentencing of life without parole for juveniles convicted of non-homicide crimes.²³ In 2012, the Supreme Court’s joint decision of *Miller v. Alabama* and *Jackson v. Hobbs* held that *mandatory* life without parole sentences for juveniles

¹⁹ “Concluding Observations on the Fourth Periodic Report of the United States of America” (Human Rights Committee, April 23, 2014), 10, <http://undocs.org/CCPR/C/USA/CO/4>.

²⁰ “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America” (Committee on the Elimination of Racial Discrimination, September 25, 2014), 10, <http://undocs.org/CERD/C/USA/CO/7-9>.

²¹ “Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America” (Committee against Torture, December 19, 2014), 12, <http://undocs.org/CAT/C/USA/CO/3-5>.

²² *Roper v. Simmons*.

²³ *Graham v. Florida*.

convicted of homicide related crimes are unconstitutional.²⁴ Often referred to as the *Roper-Graham-Miller* trilogy, several arguments, logic, and messages have been repeatedly utilized in each of the three cases. This section will examine these recurring arguments and their effectiveness which can be inferred through the Court's citation to the specific arguments in its decision. The section will then provide a summary of the *Miller* decision, as *Miller* has been a reference point to examine rapid change at the state-level.

Reference to psychological, neurobiological studies

Scientific studies of adolescent brain research that confirm that youth are less culpable than adults were cited in all three of the Supreme Court decisions. For example, Laurence Steinberg and Elizabeth Scott's research outlined three factors that reduce juvenile's criminal responsibility.²⁵ First, "adolescents' levels of cognitive and psychological development ... may undermine competent decision making."²⁶ Second, adolescents are "more vulnerable ... to the influence of coercive circumstances ... such as provocation, duress, or threat."²⁷ Third, "because adolescents are still in the process of forming their personal identity, their criminal behavior is less likely than that of an adult to reflect bad character" and thus have a greater capacity for change.²⁸ The American Psychological Association (APA) also submitted amici that confirmed the scientific and sociological studies of juvenile developmental immaturity. The Supreme Court cited Steinberg and

²⁴ *Miller v. Alabama*.

²⁵ Laurence Steinberg and Elizabeth S Scott, "Less Guilty by Reason of Adolescence," *American Psychologist* 58, no. 12 (2003): 1009-18.

²⁶ Steinberg and Scott, "Less Guilty by Reason of Adolescence," 1009-18.

²⁷ Steinberg and Scott, 1009-18.

²⁸ Steinberg and Scott, "Less Guilty by Reason of Adolescence," 1011.

Scott’s research as well as the APA’s amicus brief in its decisions in *Miller*. Steinberg argues that “neuroscientific evidence was probably persuasive to the Court not because it revealed something new about the nature of adolescence but precisely because it aligned with common sense and behavioral science.”²⁹ In fact, this scientific narrative was not only critical to the Supreme Court decisions on JLWOP, “but the view that “kids are different” has had spillover effects to broader juvenile justice reforms as well.”³⁰

Reference to international law and foreign practice

The stark reality that the United States is the only country in the world that officially sanctions and imposes juvenile life without parole sentences has been highlighted by various actors. Both in *Graham* and *Miller*, human rights organizations such as Amnesty International and Human Rights Watch submitted amicus briefs stating that international human rights law prohibits JLWOP sentences and urged the Court to “consider international and foreign law and practice in its interpretation of the Eighth Amendment’s clause prohibiting cruel and unusual punishment.”³¹ The Court noted international law’s prohibition of JLWOP sentences and U.S. isolation in practicing the sentence in *Graham*. On the other hand, in the *Miller* decision, international law is conspicuous only for its absence. However, advocates have recognized that “[a]t the federal level, references to foreign and international law have historically been most effective in cases dealing with the Eighth

²⁹ Laurence Steinberg, “The Influence of Neuroscience on US Supreme Court Decisions about Adolescents’ Criminal Culpability,” *Nature Reviews. Neuroscience; London* 14, no. 7 (July 2013): 513, <http://dx.doi.org.ezproxy.cul.columbia.edu/10.1038/nrn3509>.

³⁰ Ashley Nellis, *A Return to Justice : Rethinking Our Approach to Juveniles in the System* (Lanham: Rowman & Littlefield, 2015), 83.

³¹ Davis, Kalb, and Kaufman, *Human Rights Advocacy in the United States*, 54.

Amendment’s prohibition on cruel and unusual punishment.”³²

Miller v. Alabama

On June 25, 2012, the Supreme Court held that “[t]he Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile homicide offenders.”³³

The Court relied on two strands of precedent as a basis for the decision. First, citing Steinberg and Scott’s research on youth developmental psychology, the Court ruled that the diminished culpability of children under the age of 18 requires consideration of adolescence as a mitigating factor. Thus, mandatory sentencing that “prohibit[s] a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender” and can carry a life without parole sentence for juveniles is unconstitutional.³⁴ The second line of precedents found that the similarities of juvenile life without parole sentences and juvenile death penalty “show the flaws of imposing mandatory life without parole sentences on juvenile homicide offenders.”³⁵

3. State Courts’ and State Legislatures’ Reactions to *Miller*

Documentation on state-level change since *Miller* has focused on the final outcome rather than on the process and various arguments, norms, logic, and messages utilized to create such

³² Davis, Kalb, and Kaufman, 54.

³³ *Miller v. Alabama*. Emphasis added.

³⁴ *Miller v. Alabama*.

³⁵ *Miller v. Alabama*.

change.³⁶ Since the Supreme Court’s decision on *Miller* in 2012, an additional 18 states and the District of Columbia have categorically prohibited JLWOP sentences either through state supreme court holdings or state legislation: adding up to a total of 21 states and the District of Columbia. In states where the sentence can still be imposed, “the legislatures and courts have diminished its impact through retroactivity rulings that provide every juvenile an opportunity to receive a lesser sentence, reforms to narrow the application of JLWOP, or a combination of the two.”³⁷

While literature on a comprehensive analysis of the arguments, norms, logic, and messages utilized to abolish JLWOP at the state-level since 2012 is lacking, California’s case, particularly from 2002 to 2011, has been well documented. In its campaign to introduce legislation to prohibit JLWOP sentencing, Human Rights Watch conducted research on California’s practice of the sentencing that revealed profound racial disparities, approached state senators with a professional background on child psychology, and appealed to the potential financial savings for reforming JLWOP legislation.³⁸ One notable dynamic was Human Rights Watch’s successful alliance with the California Correctional Peace Officers Association (CCPOA) that traditionally had “an interest in maintaining a large prison population, which provided more jobs for its members.”³⁹ Advocates persuaded CCPOA executives that “the possibility of parole would provide incentives for better behavior and consequently enhance safety for CCPOA’s members.”⁴⁰

³⁶ Mills, Dorn, and Hritz, “Juvenile Life without Parole in Law and Practice”; “A State-by-State Look at Juvenile Life without Parole”; “Juvenile Life Without Parole After *Miller v. Alabama*.”

³⁷ Mills, Dorn, and Hritz, “Juvenile Life without Parole in Law and Practice,” 552.

³⁸ Becker, *Campaigning for Justice*, 224–29.

³⁹ Becker, 230.

⁴⁰ Becker, 231.

In addition, “precipitating factors, such as a dramatic event, [which] give the generalized beliefs a concrete target for collective action,” has also been utilized in California’s campaign.⁴¹

One example was Sara Kruzan, who was sixteen when she killed the man who had raped her at age twelve and lured her into prostitution at age thirteen. Kruzan was tried as an adult and sentenced to life without parole. ... The coalition made a video featuring Kruzan ... the video was posted on YouTube and, by mid-2010, had been viewed 280,000 times ...⁴²

Such cases that evoke public sympathy had been repeatedly cited by the media and “favorable editorials from state and national papers before key votes” have been valuable for the campaign.⁴³

In conclusion, the current academia’s focus on Supreme Court litigation and on the results of state-level change rather than the process leaves a gap to understand what arguments, norms logic, and messages have been employed and which have been effective since the *Miller* decision in 2012.

⁴¹ Suzanne Staggenborg, *Social Movements* (New York: Oxford University Press, 2011), 14; Neil J. Smelser, *Theory of Collective Behavior* (New York: Free Press, 1971).

⁴² Becker, *Campaigning for Justice*, 234–35.

⁴³ Becker, 235.

III. Methodology

This research will conduct a series of case studies regarding each state that has abolished juvenile life without parole since *Miller v. Alabama* (2012) through state supreme court rulings or the passage of state legislation. The identification of which states have abolished the sentence since 2012 was made through information provided by the Juvenile Sentencing Project.⁴⁴

For the states that have eliminated the sentence through state supreme court decisions, the research analyzed the court decision itself, referred to amicus briefs submitted by various stakeholders and case comments by academia.⁴⁵

For states that have abolished the sentence through legislation, the research first analyzed the bill itself, considering several factors including whether the bill bars the sentence prospectively and/or retroactively, whether the bill stipulates the required number of years' incarceration for the juvenile offender to be eligible for parole, and whether the bill requires the judges or the parole board to consider the hallmark attributes of youth.⁴⁶ The research also examines bill analyses provided by the state legislatures, interviews of lawmakers who sponsored the bill, press releases of national and local human rights organizations that work extensively on eliminating juvenile life without parole, and local news reports that have covered the legislation process.

⁴⁴ "Juvenile Sentencing Project: A Resource for Advocates, Courts, and Legislatures," accessed December 7, 2018, <https://juvenilesentencingproject.org/>.

⁴⁵ Iowa, Massachusetts, and Washington have abolished juvenile life without parole through state supreme court decisions.

⁴⁶ Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming have abolished juvenile life without parole through state legislation.

IV. Findings and Discussion

1. Overview

Since *Miller v. Alabama* (2012), 18 states and the District of Columbia have abolished juvenile life without parole sentences through state supreme court decisions or state legislation. Three state supreme courts have ruled the sentencing practice unconstitutional and 15 states and the District of Columbia have passed legislation that effectively bars the sentence. The following two sections will first lay out the findings of the case studies conducted for each state, including the effect of each court decision or legislation and the arguments made at each state. The last section will then analyze the arguments, norms, logic, and messages utilized at the state-level and highlight certain factors that may impact the effectiveness of the arguments.

2. State Supreme Court Decisions

Iowa: State v. Sweet (2016)

In 2016, the Supreme Court of Iowa held that sentencing juveniles to life without parole violates the prohibition against cruel and unusual punishment clause of article I, section 17 of the Iowa Constitution.

In 2012, Isaiah Sweet, then 17 years old, shot and killed Richard Sweet and Jane Sweet. Richard Sweet was Isaiah Sweet's biological grandfather. Isaiah Sweet pleaded guilty to two counts of first-degree murder. The district court accepted the guilty plea and ordered a presentence investigative report to be prepared to outline the facts surrounding the crime. The report included information regarding Sweet's juvenile arrest history, education, family dynamics, psychological, emotional, and personal health, history of drug abuse, and other behavioral characteristics. The report revealed Sweet's tumultuous family dynamics, his diagnosis of Attention Deficit Disorder

(ADD) and experience of symptoms of mania or Bipolar Disorder, his attempts to commit suicide, and his tendency to undertake risky or reckless activities. During the sentencing hearings, Sweet offered the testimony of Dr. Stephen Hart, a clinical psychologist who testified that it was “simply not possible to determine whether Sweet would develop a full-blown psychopathic personality disorder as an adult, and even if he did, psychologists could not say whether it could be untreatable.”⁴⁷ However, the district court sentenced Sweet to life without parole, stressing that the crimes were premeditated and that Dr. Hart’s assessment of Sweet’s possibility of rehabilitation was too optimistic.

In his appeal, Sweet argued that life sentences without the possibility of parole should be categorically banned for juvenile offenders under the Iowa Constitution. Thus, the Iowa Supreme Court sought to reach a judgment on whether juvenile life without parole sentences should be categorically banned as it violates article I, section 17’s prohibition of cruel and unusual punishment clause of the Iowa Constitution.

The Court adopted a two-step process in its deliberation. First, the Court examined whether there is a national consensus or at least an emerging consensus prohibiting the sentencing scheme. While the Court concluded that “evidence of consensus on the general proposition that “youth are different” is not subject to dispute, ... [the Court did not] ... find a consensus today on the very narrow question ... whether the small number of juvenile offenders convicted of murder may be sentenced *at time of trial* to life in prison without the possibility of parole or whether such determination must be made *at a later date* by a parole board.”⁴⁸

⁴⁷ State v. Sweet, No. 879 N.W. 2d 811 (The Supreme Court of Iowa 2016).

⁴⁸ State v. Sweet.

Unable to find a national consensus on the latter matter, the Court exercised its independent judgment to determine the constitutionality of the sentence. The Court pointed to the fallacy of the predictive enterprise, in that it is too speculative to make a conclusion that a juvenile offender is irretrievable. The Court stressed that even professional psychologists cannot reach a definitive assessment on the incorrigibility of a juvenile offender and that no structural or procedural approach can cure the fallacy. Citing neurobiological evidence of adolescent brain development, the Court concluded that “juvenile offenders’ prospects for rehabilitation augur forcefully against speculative, up-front determinations of opportunities for parole and leads inexorably to the categorical elimination of life-without-the-possibility-of-parole sentences for juvenile offenders.”⁴⁹

The norms, logic, and arguments that are embedded in *Miller* can be found in Sweet’s appeal as well as in the Court’s deliberation. Citing amicus briefs submitted by the American Bar Association and the American Psychological Association in the *Miller* decision, Sweet argued that the abandonment of juvenile life without parole sentences has been supported by such professional organizations. Separately, Sweet also pointed to the absence of the sentencing scheme in foreign practice as the United States is the only country in the world that continues to impose juvenile life without parole.

In the process of its deliberation, the Court also refers to the *Miller* decision as well as the amicus briefs filed for *Miller*. In particular, the Court cites neurobiological studies by Laurence Steinberg and Elizabeth Scott that were frequently cited in the *Roper-Graham-Miller* decisions. The psychological and neurobiological features of adolescence identified in the studies,

⁴⁹ State v. Sweet.

particularly the immaturity and impressionability of youth, provided persuasive evidence to support the fallacy of predicting the incorrigibility of a juvenile offender. Further, the Court also cites amicus briefs in the *Miller* decision. The Court cites the American Bar Association's amicus brief to *Miller* in noting that the U.S. is the only country in the world that imposes juvenile life without parole. Citing the American Psychological Association's amicus brief to *Miller*, the Court emphasizes that professional psychologists cannot predict the irretrievability of a juvenile offender. Finally, the Court also refers to the Supreme Judicial Court of Massachusetts decision, *Diatchenko v. District Attorney*, as evidence of possible national consensus supporting the prohibition of juvenile life without parole sentences.

Massachusetts: Diatchenko v. District Attorney (2013)

In 2013, the Supreme Judicial Court of Massachusetts ruled that both the mandatory and discretionary imposition of juvenile life without parole sentences violates the prohibition of cruel or unusual punishment clause of article 26 of the Massachusetts Declaration of Rights.

In 1981, Gregory Diatchenko, then 17 years old, stabbed Thomas Warf nine times. Warf was later pronounced dead. Diatchenko was convicted of first-degree murder and sentenced to mandatory juvenile life without parole. Diatchenko's appeals were rejected in 1982. However, following the U.S. Supreme Court's decision in *Miller v. Alabama* in 2012, Diatchenko appealed the constitutionality of juvenile life without parole sentences and called for the sentence to be abolished categorically.

The Court deliberated on whether juvenile life without parole sentences should be categorically banned as it violates the prohibition of cruel or unusual punishment of article 26 of the Massachusetts Declaration of Rights.

The Court concluded that juvenile life without parole sentences are unconstitutionally disproportionate to the young offender. Because the juvenile’s brain is not fully developed, “a judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.”⁵⁰ The Court also noted that because adolescents have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. Further, the Court stated that the distinctive attributes of juveniles render the penological justifications for imposing life without parole sentences – incapacitation, retribution, and deterrence – suspect.

In the process of its deliberation, the Court frequently refers to the *Miller* decision. In its reiteration that children are constitutionally different, have diminished culpability and greater prospects for reform, and are less deserving of the most severe punishments, the Court cites the parallel reasoning in *Miller*. However, key to the Court’s “broader application of *Miller* is its focus on contemporary moral standards and concepts of decency.”⁵¹ Referring to state case law precedents, the Court stresses that the analysis of disproportionality occurs “in light of contemporary standards of decency which mark the progress of society.”⁵²

The decision of *Diatchenko v. District Attorney* triggered subsequent legislation in Massachusetts in 2013. Massachusetts House Bill 4307 established a three-tier parole eligibility system and created avenues for less restrictive custody for juveniles, including treatment, education, and training. Such legislation suggests that court decisions “could have a broader impact

⁵⁰ *Diatchenko v. District Attorney for Suffolk District*, No. 1 N.E.3d 270 (Supreme Judicial Court of Massachusetts 2013).

⁵¹ Julianne Feliz-Kidd, “*Diatchenko v. District Attorney for the Suffolk District*,” *Massachusetts Law Review* 97, no. 2 (December 1, 2015): 39.

⁵² *Diatchenko v. District Attorney for Suffolk District*.

on the way judges and juries assess the culpability of juveniles in criminal cases, reflecting societal acceptance of the view that with appropriate sentences and rehabilitation programs, many youthful offenders can indeed become productive law-abiding adults.”⁵³

Washington: State v. Bassett (2018)

In 2018, the Supreme Court of Washington ruled that sentencing juvenile offenders to life without the possibility of parole or early release is cruel punishment and therefore unconstitutional under article I, section 14 of the Washington Constitution.

In 1996, then 16-year-old Brian Bassett allegedly shot and killed his mother and father and drowned his brother in the bathtub. Bassett was convicted of three counts of aggravated first-degree murder. Bassett was sentenced to three consecutive terms of life without parole. At the time, life without parole was a mandatory sentence for aggravated first degree murder in Washington.

Following the *Miller* decision in 2012, the Washington state legislature enacted the so-called *Miller*-fix statute which required sentencing courts to consider the *Miller* factors such as the diminished culpability of juvenile offenders before sentencing 16 or 17-year-olds to life without parole. Under the *Miller*-fix statute, in 2015, Bassett appeared for resentencing and presented various evidence in his mitigation documents, including his childhood life experience, the stressors of homelessness and rejection from his parents, evidence of his grown emotional and behavioral maturity, efforts to pursue an education and successfully earning a full scholarship for college. However, the sentencing judge rejected most of the evidence Bassett presented and imposed three consecutive life without parole sentences. Bassett appealed, and his case made its way to the

⁵³ Feliz-Kidd, “Diatchenko v. District Attorney for the Suffolk District,” 40.

Washington Supreme Court.

In his appeal, Bassett argued that imposing life without parole sentences on juvenile offenders is categorically a cruel punishment and therefore unconstitutional under article I, section 14 of the Washington Constitution. The Washington Supreme Court deliberated on whether to adopt a categorical approach in examining the constitutionality of juvenile life without parole sentences and whether the sentencing scheme is cruel and therefore prohibited based on article I, section 14 of the state's Constitution.

First, the Court deliberated whether to adopt a categorical approach in its analysis of juvenile life without parole sentences or adopt the so-called *Fain* proportionality test. The latter approach requires the individual consideration of “(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received, (4) the punishment meted out for other offenses in the same jurisdiction.”⁵⁴ The Court concludes that a categorical bar analysis is required because Bassett's claim is a categorical challenge based on the hallmark propensities of a specific offender class – children.

Adopting a categorical bar approach, the Court then deliberates whether juvenile life without sentences are categorically unconstitutional by conducting a two-step analysis: whether there is a national trend prohibiting the sentencing scheme and then considering the Court's independent judgment based on its own understanding and interpretation of the cruel punishment provision.

First, the Court concludes that a strong and rapid national trend of abolishing juvenile life

⁵⁴ State v. Bassett, No. 94556–0 (The Supreme Court in the State of Washington 2018).

without parole sentences exists. The Court noted the fact that 20 states and the District of Columbia have categorically abolished the sentence. Also, a vast majority of the states, 17, have done so after the *Miller* decision in 2012. An additional four states no longer have anyone serving the sentence, and others have significantly limited its imposition. The number of states abandoning the sentence and the consistency in the direction of change provided sufficient evidence for the Court to conclude that the U.S. has reached a national consensus to prohibit juvenile life without parole.

Second, in its independent judgment, the Court examines the culpability of juvenile offenders, the severity of the punishment of juvenile life without parole, and the penological justifications of the sentencing scheme. Neuroscientific and psychological studies confirm the immaturity, impetuosity, and impressionability of adolescents. These adolescent propensities diminish the culpability of juvenile offenders. Second, life without parole sentences imposed on juveniles is especially harsh for children because they will “on average serve more years and a greater percentage of [their] li[ves] in prison than an adult offender.”⁵⁵ Finally, the distinctive attributes of youth weaken the penological goals of retribution, deterrence, incapacitation, and rehabilitation. The diminished culpability of youth weakens the goal of retribution. Minors’ lack of ability to anticipate the consequences of their actions weakens the goal of deterrence. The judgment that children are incorrigible cannot be made at such an early stage and thus weakens the goal of incapacitation and rehabilitation.

State v. Bassett very frequently cites the *Roper-Graham-Miller* trilogy and refers to relevant studies and state supreme court decisions in its opinion. First, in its deliberation on whether to adopt a categorical bar approach, the Court cites the *Miller* reasoning that considers the

⁵⁵ *State v. Bassett*; *Graham v. Florida*.

hallmark characteristics of youth. Second, in its examination of whether a national consensus exists in abolishing juvenile life without parole sentences, the Court cites *State v. Sweet* and *Diatchenko v. District Attorney* as evidence of the growing number of states that are abolishing the sentence. Although *Sweet* failed to find a national consensus that bars the sentencing, *Bassett* made the opposite conclusion. In addition, the Court cites a report by the Campaign for the Fair Sentencing of Youth that specifies the states that have no inmates serving juvenile life without parole.⁵⁶

The Court's independent analysis also refers to the *Miller* decision frequently. In highlighting the diminished culpability of adolescents, the Court refers to the neuroscientific studies underlying *Miller* that "establish a clear connection between youth and decreased moral culpability for criminal conduct."⁵⁷ For its analysis of each of the four penological goals served by the sentence – retribution, deterrence, incapacitation, and rehabilitation – the Court quotes *Miller* and the parallel analysis in the decision, particularly the latter two goals. The Juvenile Law Center, the American Civil Liberties Union of Washington, the Campaign for the Fair Sentencing of Youth and others filed an amicus brief arguing that adolescent neuroscience confirms that juvenile life without parole sentences do not serve precisely those four penological purposes.⁵⁸ Although the Court decision did not specifically cite the amicus brief, its reference to the neuroscientific studies and how it weakens each of the four penological justifications suggest that the Court may have referred to the brief.

⁵⁶ Gritzmacher, "Does Your State Still Use Life-without-Parole Sentences for Kids?"

⁵⁷ *State v. Bassett*.

⁵⁸ "Amicus Curiae Brief of Juvenile Law Center, American Civil Liberties Union of Washington, Campaign for Fair Sentencing of Youth, Council of Juvenile Correctional Administrators, and Mothers Against Murderers Association in Support of Respondent, Brian Bassett," January 8, 2018, <https://www.courts.wa.gov/content/Briefs/A08/945560%20Amioci%20-%20Juvenile%20Laws%20Center,%20et%20al.pdf>.

3. State Legislation

Arkansas

In 2017, the state of Arkansas passed Senate Bill 294 (SB 294) that eliminates life sentences without the possibility of parole as a sentencing option for minors. Juvenile offenders convicted of capital murder or treason would be eligible for parole after serving a minimum of 30 years' imprisonment. Minors convicted of murder in the first degree would be eligible for parole after serving 25 years' imprisonment. Juvenile offenders that are convicted with a criminal offense in which the death of another person did not occur would be eligible for parole after serving a minimum of 20 years' imprisonment.

SB 294 goes further to require the circuit court to ensure that a comprehensive mental health evaluation of the juvenile offender is conducted, including information such as family interviews, prenatal history, developmental history, medical history, history of treatment for substance abuse, social history, and a psychological evaluation. The information contained in the report is not admissible into evidence at a trial or sentencing hearing over the objections of the minor. During the parole eligibility hearing, the board is required to take into consideration multiple factors including, but not limited to, "the diminished culpability of minors, the hallmark features of youth, the person's family and community circumstances at the time of the offense, including any history of abuse, trauma, and involvement in the child welfare system."⁵⁹

The legislative intent section of the bill clearly states that the General Assembly "acknowledges and recognizes that minors are constitutionally different from adults and that these

⁵⁹ SB 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), <http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SB294.pdf>

differences must be taken into account when minors are sentenced for adult crimes.”⁶⁰ Citing the *Roper-Graham-Miller* trilogy, the legislature emphasizes that the distinctive psychological and neurobiological attributes of youth diminish the penological justifications for imposing the harshest sentences to a minor. The General Assembly also refers to the 20 states that have abolished juvenile life without parole as a sentencing option.

Before the bill was voted on, Xavier McElrath-Bey, a young man who was formerly incarcerated for a crime committed when he was a minor and now works as a senior advisor for the Campaign for the Fair Sentencing of Youth (CFSY), was interviewed in a podcast by the Arkansas Advocates for Children and Families.⁶¹ In his interview, Mr. McElrath-Bey spoke of his challenging family and community circumstances at the time of the offense, how he became remorseful during his time of incarceration, and his journey to strive for a better life, academically improving, demonstrating positive change and creating a better legacy for formerly incarcerated youth. After the interview, an Arkansas resident and listener of the podcast called in, and stated that he had formerly supported life without parole sentences for any criminal regardless of age. However, after listening to what the possibility of parole meant for Mr. McElrath-Bey, he shared his hope that legislators would hear Mr. McElrath-Bey’s story before they cast their votes on the bill.

In fact, the bill was co-sponsored by a representative who withdrew her opposition after meeting with advocates such as Xavier McElrath-Bey. SB 294 was co-sponsored by Representative Rebecca Petty, whose 12-year-old daughter was kidnapped, raped, and murdered

⁶⁰ SB 294

⁶¹ Arkansas Advocates for Children and Families, *Xavier McElrath-Bey’s Story*, Speak Up Arkansas, January 25, 2017, <http://www.aradvocates.org/podcast/speak-up-arkansas-episode-4-part-ii-xavier-mcelrath-beys-story/>.

in 1999. Because of this traumatizing personal experience, Representative Petty had opposed a similar bill in 2015.⁶² However, after meeting with CFSY senior advisor Xavier McElrath Bey and Linda White, a CFSY partner who advocates to end juvenile life without parole sentences despite her experience of losing her daughter to youth violence, Representative Petty not only withdrew her opposition, but became a lead sponsor of the bill in the House.⁶³ Representative Petty addressed the House that her “decision to run this legislation was not an easy one due to [her] own struggles and with the state criminal justice system, but [that she] put a lot of time and heart and studying and energy into this”⁶⁴ Representative Petty also added that because the legislation ensures the eligibility of parole for offenders, the state could also save millions of dollars that would otherwise be spent in administering lengthier prison terms.⁶⁵

California

In 2017, the state of California passed Senate Bill 394 which retroactively eliminated the sentencing of juvenile offenders to life without the possibility of parole.⁶⁶ The legislation requires the state to offer those sentenced to life without parole for crimes committed when they were under 18 years old the eligibility of parole during his or her 25th year of incarceration.

The Bill Analysis summarizes the arguments made in support for the bill by the National

⁶² Jacob Rosenberg, “No Life Terms for Minors,” *Arkansas Times*, March 16, 2017, <https://www.arktimes.com/arkansas/no-life-terms-for-minors/Content?oid=5608715>.

⁶³ Matt Gritzmacher, “Arkansas Abolishes Life Without Parole for Children,” Campaign for the Fair Sentencing of Youth, March 22, 2017, <https://www.fairsentencingofyouth.org/arkansas-sb-294-abolishes-jlwop-life-without-parole-for-children-act-539/>.

⁶⁴ Rosenberg, “No Life Terms for Minors.”

⁶⁵ Rosenberg.

⁶⁶ SB 394 (Cal. 2017), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB394

Center for Youth Law.⁶⁷ This includes the fact that the United States is the only country in the world to impose the sentence, and the argument that U.S. “should comply with international human rights law and norms.”⁶⁸ The arguments also include the psychological differences between children and adults and the capacity of youth to change, mature, and rehabilitate. In addition, the racial disparities of the sentencing are highlighted, particularly the fact that in California, African American youth are sentenced to life without parole “at a rate that is 18 times that of white youth.”⁶⁹

State Senators Ricarda Lara and Holly Mitchell co-sponsored the bill, emphasizing that the United States is the only country in the world that sanctions and imposes life without parole sentences to juvenile offenders.⁷⁰ Senator Lara particularly highlighted the distinctive attributes of youth, such as their unique capacity to learn, rehabilitate, and change and that “even those who commit crimes deserve a second chance.”⁷¹

Elizabeth Calvin, Senior Advocate of the Children’s Rights Division at Human Rights Watch who spearheaded the legislative campaign, stressed that California “continues to reform its laws to ensure that children are treated with mercy by the criminal justice system, and that their

⁶⁷ Mary Kerry, “Senate Floor Analysis,” September 15, 2017, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394#.

⁶⁸ Kerry, 5.

⁶⁹ Kerry, 6.

⁷⁰ Christopher Cadelago, “California Youths Serving Life Will Get Possibility of Parole,” *The Sacramento Bee*, October 11, 2017, <https://www.sacbee.com/news/politics-government/capitol-alert/article178375836.html>.

⁷¹ Michael Fitzgerald, “This California Bill Would Erase Life Without Parole Sentences for Juveniles,” *The Chronicle for Social Change: Children and Youth, Front and Center*, October 3, 2017, <https://chronicleofsocialchange.org/news-2/this-california-bill-would-erase-life-without-parole-sentences-for-juveniles>.

unique potential for positive change is recognized.”⁷² The campaign was supported by a wide base of communities, ranging from child and teen welfare groups, Christian evangelical groups, public defenders, psychology experts, and even to some victims’ advocacy groups.⁷³ In addition, formerly incarcerated members of the Anti-Recidivism Coalition personally advocated for the bill through sharing their stories which demonstrated that positive change and rehabilitation is possible.⁷⁴

Prior to SB 394, in 2012, the state of California passed SB 9 which allowed individuals sentenced to life without parole for offenses committed when they were minors to petition for a resentencing hearing. Although the passage of SB 9 represented the successful efforts by advocates to utilize statistics and documentation, galvanize a broad base, and effectively engage with media outlets, the bill itself did not guarantee a parole hearing or resentencing hearing.⁷⁵ Because of this loophole, the California Supreme Court found that SB 9 provided inadequate protections required by the U.S. Supreme Court decision *Miller v. Alabama*.⁷⁶ As a result, SB 394 was introduced and signed into law in 2017.

Colorado

In 2016, the state of Colorado enacted SB 16-181 which retroactively eliminates life without parole sentences imposed on minors. The bill provides that juvenile offenders convicted of a class 1 felony that was committed “on or after July 1, 1990 and before July 1, 2006, and who

⁷² Matt Gritzmacher, “California Becomes 20th State to Abolish Life-without-Parole Sentences for Children,” Campaign for the Fair Sentencing of Youth, October 12, 2017, <https://www.fairsentencingofyouth.org/california-becomes-20th-state-to-abolish-life-without-parole-sentences-for-children-2/>.

⁷³ Fitzgerald, “This California Bill Would Erase Life Without Parole Sentences for Juveniles.”

⁷⁴ Fitzgerald.

⁷⁵ Becker, *Campaigning for Justice*, 241–43.

⁷⁶ Gritzmacher, “California Becomes 20th State to Abolish Life-without-Parole Sentences for Children.”

received a sentence to life imprisonment without the possibility of parole” shall be sentenced to “a term of life imprisonment with the possibility of parole after serving a period of 40 years.”⁷⁷ If the felony for which the person was convicted is murder in the first degree, the district court may sentence the person to a determinate sentence between 30 to 50 years’ imprisonment or to a term of life imprisonment with the possibility of parole after serving 40 years. If the felony is not murder in the first degree, the district court may sentence the person to life imprisonment with the possibility of parole after 40 years of imprisonment.

Prior to the passage of SB 16-181, in 2006, the state of Colorado prospectively abolished imposing life without parole sentences to juvenile offenders but the legislation did not apply retroactively. As a result, 48 juvenile offenders who were sentenced to life without parole between 1990 and 2006, when the sentencing was an option, were not eligible for the possibility of parole.⁷⁸ However, SB 16-181 “offered the 48 offenders ... an opportunity to be resentenced in a manner that complies with the central tenet of *Miller*.”⁷⁹

Connecticut

In 2015, the state of Connecticut passed Senate Bill 796 that effectively eliminated the sentencing of life without parole to minors. Juvenile offenders who received a sentence of more than 10 years imprisonment are guaranteed a parole hearing. If the individual is sentenced to less than 50 years, he or she shall be eligible for parole after serving 60% of the sentence or twelve years, whichever is longer. If the individual is sentenced to more than 50 years, he or she shall be

⁷⁷ SB 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016), <https://leg.colorado.gov/bills/sb16-181>

⁷⁸ “A State-by-State Look at Juvenile Life without Parole.”

⁷⁹ Hannah Seigel Proff and Michael Stevens Juba, “Evolving the Standard of Decency: How the Eighth Amendment Reduces the Prosecution of Children as Adults,” *Colorado Lawyer* 47, no. 3 (March 2018): 43.

eligible for parole after serving 30 years.

SB 796 goes further to specify youth-related factors for the parole board to consider during the parole hearings of inmates serving sentences for the crimes they have committed before they were 18 years old. These factors include, but are not limited to, “the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, . . . , trauma, [and the] lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system...”⁸⁰

Eddie Joseph, on behalf of Connecticut Voices for Children, a research-based advocacy organization that works to promote the well-being of Connecticut’s youth, testified before the state legislature’s Judiciary Committee in support of SB 796. First, she emphasized that the bill has received broad support from a wide range of communities, such as “the Connecticut Sentencing Commission, a bipartisan group of judges, law enforcement and prison officials, prosecutors, public defenders, and citizens that also received extensive input from the victim advocate and the public.”⁸¹ Notably, Ms. Joseph expressed concern of the significant racial and ethnic disparities in the lengthy sentences imposed on juveniles, citing data that “88% of individuals serving sentences of greater than ten years for juvenile crimes are black or Hispanic.”⁸² She also cites multiple neuroscientific studies of youth that confirm that the last neurodevelopmental features to develop in adolescents are those that control decision making and proper understanding of the

⁸⁰ SB 796, Jan. Sess. (Conn. 2015), <https://www.cga.ct.gov/2015/ACT/PA/2015PA-00084-R00SB-00796-PA.htm>

⁸¹ Eddie Joseph, “Testimony in Support of Senate Bill 796” (Connecticut Voices for Children, March 4, 2015), http://www.ctvoices.org/sites/default/files/030415_judic_sb796_chilyouthcrimesentences.pdf.

⁸² Joseph.

consequences of actions.⁸³ Finally, Ms. Joseph highlights the *Roper-Graham-Miller* trilogy’s reasoning that the hallmark features of youth – immaturity, impetuosity, and impressionability – require the recognition that children are constitutionally different from adults.

Delaware

In 2013, the state of Delaware passed Senate Bill 9 that limited the sentencing of life without the possibility of parole to juvenile offenders.⁸⁴ Under SB 9, juvenile offenders convicted of first-degree murder shall be sentenced to a term of incarceration from 25 years to life, and shall be eligible to petition the Superior Court for sentence modification after the offender has served 30 years. Juvenile offenders sentenced to more than 20 years’ imprisonment for any offense or offenses other than first-degree murder shall be eligible to petition the Superior Court for sentence modification after the offender has served 20 years. However, the eligibility to *petition* the Superior Court for sentence modification leaves a loophole in which life without parole remains an option for juvenile offenders.⁸⁵

District of Columbia

In 2016, the District of Columbia passed D.C. Act 21-568, the Comprehensive Youth Justice Amendment Act, that eliminates life without parole as a sentencing option for juvenile offenders. The Act specifically states that “the court shall not impose a sentence of life

⁸³ Kendall Powell, “Neurodevelopment: How Does the Teenage Brain Work?,” *Nature* 442, no. 7105 (August 24, 2006): 865–67, <http://dx.doi.org.ezproxy.cul.columbia.edu/10.1038/442865a>; Jay N. Giedd, “The Teen Brain: Insights from Neuroimaging,” *Journal of Adolescent Health* 42, no. 4 (April 1, 2008): 335–43, <https://doi.org/10.1016/j.jadohealth.2008.01.007>.

⁸⁴ SB 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), https://juvenilesentencingproject.org/wp-content/uploads/Delaware_sb9.pdf

⁸⁵ “A State-by-State Look at Juvenile Life without Parole.”

imprisonment without the possibility of parole or release” if the person was convicted of a crime her or she committed while under 18 years of age.⁸⁶ The bill also provides that the court may reduce the term of imprisonment imposed upon a juvenile if the defendant has served at least 20 years in prison, and if the court finds that the defendant is not a danger to society and that the interests of justice warrant a sentence modification. The Act also contains provisions regarding the improving of youth services and rehabilitation enhancement and improving conditions of confinement for juveniles. The Act was passed unanimously by the Council of the District of Columbia.⁸⁷

Councilmember Kenyan McDuffie, who sponsored the bill, stated that “the bill is incredibly important because it recognizes that young people must fundamentally be treated differently from adults – that they have a capacity to change and be rehabilitated. In that vein, adults who committed crimes much earlier in their lives as youth should have an opportunity for judicial review of their sentences after a certain period of time.”⁸⁸ In addressing opposition, Councilmember McDuffie stressed that the incarceration reduction provision “isn’t about giving people a slap on the wrist,” but about “giving people consequences that are age-appropriate.”⁸⁹ Councilmember McDuffie worked closely with the Campaign for the Fair Sentencing of Youth (CFSY), the Campaign for Youth Justice, and D.C. Lawyers for Youth to pass the bill.

⁸⁶ D.C. Act 21-568, Sess. 2016, (DC. 2016), <http://lims.dccouncil.us/Download/35539/B21-0683-SignedAct.pdf>

⁸⁷ Appendix 1.

⁸⁸ Matt Gritzmacher, “District of Columbia Abolishes Life Without Parole for Children,” Campaign for the Fair Sentencing of Youth, April 13, 2017, <https://www.fairsentencingofyouth.org/district-of-columbia-abolishes-jlwop-life-without-parole-for-children/>.

⁸⁹ Keith L. Alexander, “As a Teen He Killed a Man. A New Law Has given Him a Second Chance.,” *The Washington Post*, September 6, 2018, https://www.washingtonpost.com/local/public-safety/an-opportunity-to-change-new-dc-law-allows-juveniles-sentenced-as-adults-to-have-sentences-reduced-after-20-years/2018/08/09/dcc65ff2-93eb-11e8-a679-b09212fb69c2_story.html?utm_term=.9de1b26d92ad.

In particular, members of CFSY’s Incarcerated Children’s Advocacy Network who have been previously incarcerated, Andre Williams and Eddie Ellis provided testimony to the Council. Mr. Williams was sentenced to life without parole for a non-homicide, drug related crime as a teen and was released after serving 23 years: Mr. Ellis was convicted with murder when he was 16 years old, sentenced to 22 years, served 15 years and finished the rest of his time on parole.⁹⁰ Both members’ personal stories provided powerful testimony to the Council that youth have a unique capacity to change and deserve a second chance.⁹¹

Hawaii

In 2014, the state of Hawaii passed House Bill 2116 and abolished juvenile life without parole sentences. HB 2116 states that juvenile offenders convicted of first-degree murder or first-degree attempted murder shall be sentenced to life imprisonment *with* the possibility of parole. The bill does not specify the minimum number of years’ imprisonment required for the defendant to serve to gain parole eligibility.

HB 2116 clearly recognizes that children are constitutionally different from adults and through citing the *Roper-Graham-Miller* trilogy. The bill emphasizes that the distinctive attributes of youth render the penological justifications of imposing the harshest sentences to juvenile offenders void. Notably, the bill also recognizes that international law prohibits the imposition of juvenile life without parole and the absence of foreign practice of imposing the sentence. The bill states:

⁹⁰ “Andre Williams a 2015 Healing & Hope Award Recipient,” Campaign for the Fair Sentencing of Youth, November 20, 2015, <https://www.fairsentencingofyouth.org/andre-williams-a-2015-healing-hope-award-recipient/>; “Eddie Ellis,” Campaign for the Fair Sentencing of Youth, January 18, 2018, <https://www.fairsentencingofyouth.org/team/ellis/>.

⁹¹ Gritzmacher, “District of Columbia Abolishes Life Without Parole for Children.”

The legislature further acknowledges that the United States is the only nation in the world that allows children to be sentenced to life imprisonment without parole, in violation of Article of the United Nations Convention on the Rights of the Child, which categorically bars the imposition of “capital punishment [or] life imprisonment without the possibility of release ... for offenses committed by persons below eighteen years of age.”⁹²

State Representative Karen Awana, who co-sponsored the bill, stated that HB 2116 “created parity in our laws by recognizing that children are different from adults when it comes to criminal sentencing and that they should not be subject to our state’s toughest penalties.”⁹³ State prosecutors in Hawaii also supported the passage of the bill. For example, Kauai County Prosecuting Attorney Justin Kollar praised the legislature’s acknowledgement that children are different from adults and emphasized that “when children commit serious crimes, we in law enforcement must respond and protect the community; however, putting a child in prison and throwing away the key is not a humane or cost-effective solution to this problem.”⁹⁴

Nevada

Nevada passed Assembly Bill 267 in 2015 and abolished juvenile life without parole sentences. Specifically, the bill states that “life imprisonment without the possibility of parole must not be imposed or inflicted upon any person convicted of a crime ... who at the time of the commission of the crime was less than 18 years of age.”⁹⁵ Juvenile offenders convicted of non-homicide crimes will be eligible for parole after serving 15 calendar years of incarceration, and juveniles convicted of an offense or offenses that resulted in the death of one victim will be eligible

⁹² HB 2116, 27th Leg. Sess. (Haw. 2014), https://www.capitol.hawaii.gov/session2014/bills/HB2116_CD1_.pdf

⁹³ “Righting Wrongs: The Five Year Groundswell of State Bans on Life without Parole for Children” (The Campaign for the Fair Sentencing of Youth, September 2016), 5, <https://www.fairsentencingofyouth.org/wp-content/uploads/Righting-Wrongs-.pdf>.

⁹⁴ “Hawaii Legislature Abolishes JLWOP,” Campaign for the Fair Sentencing of Youth, May 6, 2014, <https://www.fairsentencingofyouth.org/hawaii-legislature-abolishes-jlwop/>.

⁹⁵ AB 267, 78th Reg. Sess. (Nev. 2015), https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB267_EN.pdf

for parole after serving 20 calendar years of incarceration. The bill also requires state courts to consider the differences between juvenile and adult offenders, including, but not limited to, “the diminished culpability of juveniles compared to that of adults and the typical characteristics of youth.”⁹⁶ The legislature passed the bill unanimously.⁹⁷

Formerly incarcerated members of the Campaign for the Fair Sentencing of Youth’s Incarcerated Children’s Advocacy Network testified in hearings to support the bill. Xavier McElrath-Bey, who also played an important role in persuading Arkansas legislators to support abolishing juvenile life without parole sentences, testified with fellow members Mario Taylor, Marcus Dixon, and Traci Rutherford that children can change and deserve a second chance.⁹⁸ The coalition received broad support in passing the bill, including support from “Democrats, Republicans, victims’ families, formerly incarcerated youth, and prosecutors.”⁹⁹

New Jersey

In 2017, New Jersey passed Act 373 that eliminated juvenile life without parole sentences.¹⁰⁰ The bill requires that juvenile offenders convicted of murder shall be sentenced to a period of 30 years’ incarceration, in which he or she shall not be eligible for parole, or be sentenced to a specific term of years between 30 years and life imprisonment, in which he or she shall be eligible for parole after serving 30 years.

⁹⁶ AB 267.

⁹⁷ Appendix 1.

⁹⁸ Nicole Roussell, “Nevada Eliminates Life without Parole for Youth!,” Campaign for the Fair Sentencing of Youth, May 26, 2015, <https://www.fairsentencingofyouth.org/nevada-eliminates-life-without-parole-for-youth/>.

⁹⁹ Roussell.

¹⁰⁰ A 373, 217th Leg. Assemb. (N.J. 2017), <https://www.njleg.state.nj.us/2016/Bills/AL17/150..PDF>

The bill was introduced after the New Jersey Supreme Court ruled that courts are required to evaluate the *Miller* factors – such as immaturity, failure to appreciate risks and consequences, family and home environment, family and peer pressures, and the possibility of rehabilitation – when a juvenile faces a “lengthy term of imprisonment that is the practical equivalent of life without parole.”¹⁰¹

North Dakota

North Dakota abolished juvenile life without parole sentences through the passage of House Bill 1195 in 2017. The bill states that courts may reduce the term of imprisonment for a defendant who was convicted of a crime he or she committed before he or she was 18 years of age if the defendant has served at least 20 years of imprisonment. The court must consider multiple factors in its deliberation in commuting a sentence, including, but not limited to, the “defendant’s family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system ... [and] the diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and circumstances.”¹⁰² The bill passed the state legislature unanimously.¹⁰³

Representative Lawrence R. Klemin, who sponsored the bill, said “this bill reflects our understanding that even children who commit serious crimes are capable of change” and that he “introduced this bill to give hope to those children who do change, so that they may have the

¹⁰¹ State v. Zuber and Comer, No. Nos. 076806, 077318, A.3d 0, 2017 WL 105004 (New Jersey Supreme Court January 11, 2017).

¹⁰² N.D. H.B. 1195, 65th Leg. Assemb. (N.D. 2017), <https://www.legis.nd.gov/assembly/65-2017/documents/17-0583-05000.pdf>

¹⁰³ Appendix 1.

opportunity to demonstrate to a judge that they are deserving of a second chance.”¹⁰⁴ The bill also received support from members of law enforcement. Leann Bertsch, director of the North Dakota Department of Corrections and Rehabilitation, expressed support for the bill, stating that

“[e]very day within the Department of Corrections and Rehabilitation we see people who turn their lives around in prison, in spite of the obstacle of incarceration ... Kids can and do grow up; and as they develop, they change. None of us are the same at 50 as we were at 16. Providing the possibility for judicial sentencing review decreases the likelihood of continued violent behavior behind bars and provides incentives to engage in meaningful rehabilitative programs so as to be considered more favorably by the sentencing court.”¹⁰⁵

South Dakota

South Dakota passed Senate Bill 140 in 2016 that abolished juvenile life without parole sentences. SB 140 specifically states that “the penalty of life imprisonment may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age.”¹⁰⁶ The bill also provides that the maximum sentence for juvenile offenders convicted with a Class A, B, or C felony may be a term of years in the state penitentiary.

Senator Craig Tieszen, who sponsored the bill, expressed strong support that children, “even children who commit terrible crimes, can and do change” and that he believes that children “deserve a chance to demonstrate that change and become productive citizens.”¹⁰⁷ Senator Tieszen also pointed that the Campaign for the Fair Sentencing of Youth has provided important testimony, support, education and perspective to the legislators “to think differently about children’s capacity

¹⁰⁴ Matt Gritzmacher, “North Dakota Bans Life-without-Parole Prison Sentences for Children,” Campaign for the Fair Sentencing of Youth, April 20, 2017, <https://www.fairsentencingofyouth.org/north-dakota-bans-life-without-parole-prison-sentences-for-children/>.

¹⁰⁵ Gritzmacher.

¹⁰⁶ SB 140, 2016 S.D. Sess. Laws (S.D. 2016), <https://legiscan.com/SD/text/SB140/2016>

¹⁰⁷ “Righting Wrongs: The Five Year Groundswell of State Bans on Life without Parole for Children,” 5.

for change.”¹⁰⁸

Texas

In 2013, Texas passed Senate Bill 2 that eliminated life without parole sentences for 17-year-olds convicted of a capital felony, furthering the protection for the age group which was formerly afforded to children under the age of 17.¹⁰⁹ As a result of the legislation, juvenile offenders under the age of 18 who are convicted with a capital felony would be mandatorily sentenced to life *with* the possibility of parole after serving 40 years. The bill was intended to comply with *Miller v. Alabama* which “contemplated juveniles as being under the age of 18” while the age of majority in Texas is 17 years.¹¹⁰

While SB 2 has eliminated life without parole sentences for juveniles convicted of a capital felony, replacing it with a *mandatory* sentence of life with parole after 40 years suggests that the bill “does not go far enough in acknowledging the fundamental difference between children and adults and children’s unique capacity for change and rehabilitation.”¹¹¹ In fact, state House Representatives argued that the bill may be unconstitutional because 40 years in prison before being eligible for parole is too long for a minor and would be “tantamount to a sentence of life without parole.”¹¹² State Senators also raised concerns that SB 2 does not comply with the

¹⁰⁸ “South Dakota Bans Life without Parole for Children,” Campaign for the Fair Sentencing of Youth, March 17, 2016, <https://www.fairsentencingofyouth.org/south-dakota-bans-life-without-parole-for-children/>.

¹⁰⁹ SB 2, 83rd Leg. Special Sess. (Texas 2013), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=832&Bill=SB2>

¹¹⁰ Joan Huffman, “Bill Analysis S.B. 2” (Texas Senate Research Center, July 19, 2013), <https://capitol.texas.gov/tlodocs/832/analysis/pdf/SB00002F.pdf#navpanes=0>.

¹¹¹ “Texas Eliminates Death-in-Prison Sentences for Children,” Campaign for the Fair Sentencing of Youth, August 5, 2013, <https://www.fairsentencingofyouth.org/texas-eliminates-death-in-prison-sentences-for-children/>.

¹¹² Brandi Grissom and Jody Serrano, “House OKs Life Without Parole for Juvenile Murderers,” *The Texas Tribune*,

constitutional provisions set in the *Miller* case because the mandatory sentence does not allow for the consideration of individual factors concerning the hallmark attributes of youth required by *Miller*.¹¹³ In fact, the bill’s sponsor, Senator Joan Huffman, stated that the bill “addressed Texas’ historic policy of being tough on “the more heinous offenders” while still addressing the [Supreme] Court’s concerns.”¹¹⁴

Utah

Utah’s passage of House Bill 405 in 2016 prohibited life without parole sentences to juvenile offenders convicted of a capital crime.¹¹⁵ Instead, HB 405 provides that the maximum sentence that can be imposed to a minor convicted of a capital crime is an indeterminate prison term of not less than 25 years and that may be for life with the possibility of parole.

The bill’s sponsor, Representative Lowry Snow applauded the passage of the bill, stating that “Utah’s criminal justice system has long recognized the fundamental difference between children and adult offenders” and that the passage of HB 405 “is an expression of that important recognition and it provides a clear statement of Utah’s policy regarding the treatment of children placed in custody for serious offenses.”¹¹⁶ In an interview with the Liberstas Institute, Representative Snow highlighted that neuroscientific studies provide strong evidence that children

July 11, 2013, <https://www.texastribune.org/2013/07/11/senate-approves-key-special-session-measures/>.

¹¹³ Brandi Grissom, “Senate Approves Life With Parole for 17-Year-Old Murderers,” *The Texas Tribune*, June 14, 2013, <https://www.texastribune.org/2013/06/14/senate-oks-life-parole-17-year-old-murderers/>.

¹¹⁴ Grissom.

¹¹⁵ HB 403 (Utah 2016), <https://le.utah.gov/~2016/bills/static/HB0405.html>

¹¹⁶ “Righting Wrongs: The Five Year Groundswell of State Bans on Life without Parole for Children,” 5.

can be rehabilitated.¹¹⁷ In addition, pointing to the growing number of states abolishing juvenile life without parole sentences, Representative Snow emphasized the trend of a national recognition that children are different and that laws should treat children differently.¹¹⁸ Representative Snow also suggested that the religious idea of redemption may have resonated among more conservative lawmakers as “Utah is very prone to a recognition that there can be redemption and people can be given a second chance.”¹¹⁹

Vermont

In 2015, the state of Vermont passed H 62 that provides that a court “shall not sentence a person to life imprisonment without the possibility of parole if the person was under 18 years of age at the time of the commission of the offense.”¹²⁰ The bill does not specify the number of years’ incarceration a defendant is required to serve in order to be eligible for parole.

Representative Barbara Rachelson, who sponsored the bill, emphasized that Vermont has never imposed life without parole sentences to juvenile offenders but “will take a step further and take the crime off the books.”¹²¹ Representative Rachelson also pointed out that the United States is the only country in the world that still sanctions and imposes juvenile life without parole

¹¹⁷ “HB 405: A Potential Second Chance for Juvenile Offenders,” Libertas Institute, February 25, 2016, <https://libertasutah.org/bill/hb-405-a-potential-second-chance-for-juvenile-offenders/>.

¹¹⁸ “HB 405: A Potential Second Chance for Juvenile Offenders.”

¹¹⁹ Amber Phillips, “States Are Getting Rid of Life Sentences for Minors. And Most of Them Are Red States.,” *The Washington Post*, April 1, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/04/01/an-increasing-casualty-of-the-waning-war-on-crime-life-sentences-for-minors/?noredirect=on&utm_term=.f03b28472da1.

¹²⁰ H 62, 73rd Sess. (Ver. 2015), <https://legislature.vermont.gov/assets/Documents/2016/Docs/BILLS/H-0062/H-0062%20As%20Passed%20by%20Both%20House%20and%20Senate%20Official.pdf>

¹²¹ “Vermont Eliminates Life without Parole for Kids,” Campaign for the Fair Sentencing of Youth, May 14, 2015, <https://www.fairsentencingofyouth.org/vermont-eliminates-life-without-parole-for-kids/>.

sentences. State Senator Richard Sears, chairman of the Senate Judiciary Committee, stated that Vermont’s passage of the bill was part of a “national push” that recognizes that “more has been learned about brain development and juvenile crime” making less sense to “sentence juveniles to life without parole, no matter how horrific the crime.”¹²²

West Virginia

West Virginia passed House Bill 4210 in 2014 that prohibits juvenile life without parole sentences and instead requires that juvenile offenders be eligible for parole after he or she has served 15 years. The bill also requires the court to take into consideration multiple factors in determining the appropriate sentence for a juvenile offender convicted as an adult such as, but not limited to, “age at the time of the offense, impetuosity, family and community environment, ... capacity for rehabilitation, ... trauma history, ... and other mitigating factors.”¹²³ The bill also requires the parole board to take into consideration “the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.”¹²⁴

Representative John Ellem, who co-sponsored the bill, published an op-ed in a magazine *The Progressive*, highlighting how HB 4210 not only acknowledges the potential for youth to grow, change, and rehabilitate, but also how granting the possibility of parole “helps to curb away the runaway costs of incarceration ... [as] it costs an estimated \$2.5 million to imprison a child for

¹²² “Vermont Law Already Prohibits Juvenile Life without Parole,” *The Associated Press*, July 13, 2017, <https://www.washingtontimes.com/news/2017/jul/31/vermont-law-already-prohibits-juvenile-life-without/>.

¹²³ HB 4210, 81 Leg., 2d Sess. (W.Va. 2014), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sessty pe=RS&i=4210

¹²⁴ HB 4210.

life.”¹²⁵ Representative Ellem also highlighted how his religious beliefs strengthened his confidence that “all can be redeemed, particularly our children.”¹²⁶ State Senator Corey Palumbo, Chair of the Senate Judiciary Committee, also reiterated that children are different from adults and deserve a second chance and that the bill also represents a sound fiscal policy.¹²⁷

Wyoming

The state of Wyoming passed House Bill 23 in 2013 that eliminated life sentences without parole for juvenile offenders. HB 23 empowers the governor to commute a life sentenced imposed on a juvenile to a term of years. Accordingly, a minor sentenced to life imprisonment shall be eligible for parole “after commutation of his sentence to a term of years or after having served 25 years of incarceration.”¹²⁸ However, the bill does not apply retroactively.

Wyoming Deputy Attorney General Dave Delicath stated that juvenile offenders who were sentenced to life without parole before the effective date of the legislation will not be affected by the bill because “their sentences were within the law allowed at the time.”¹²⁹

4. Analysis

The arguments made at the state-level to support the abolition of juvenile life without

¹²⁵ John Ellem, “Let’s Reform Punishment for Juveniles,” *The Progressive*, May 5, 2014, <https://progressive.org/dispatches/reform-punishment-juveniles/>.

¹²⁶ Ellem.

¹²⁷ “West Virginia Eliminates Life without Parole for Children,” Campaign for the Fair Sentencing of Youth, March 29, 2014, <https://www.fairsentencingofyouth.org/west-virginia-eliminates-life-without-parole-for-children/>.

¹²⁸ HB 23, 62nd Leg., Gen. Sess. (Wyo. 2013), <https://www.wyoleg.gov/2013/Engross/HB0023.pdf>

¹²⁹ James Swift, “Wyoming Law Eliminating Mandatory Juvenile LWOP Won’t Be Retroactive,” Juvenile Justice Information Exchange, February 28, 2013, <https://jjie.org/2013/02/28/wyoming-law-eliminating-mandatory-juvenile-lwop-wont-be-retroactive/>.

parole sentences can be subsumed under two broad categories: those that are based on the nature of children and those that stem from the nature of the sentence itself. The following section will discuss each of the arguments, norms, logic, and messages based on this framework, including examples of how some states have put these arguments into language. The final section will then address certain factors that may impact the effectiveness of these arguments.

Nature of children

State courts and legislatures have drawn on scientific studies that confirm the distinctive psychological attributes of youth (particularly their immaturity, impressionability, and unformed character) as a basis for each of the further arguments related to the nature of children. All three main propensities, children's immaturity, impressionability, and unformed character, provide evidence for children's diminished culpability and the failure of the sentence to serve its penological justifications. The second attribute, children's impressionability, mainly supports the message that children can change, have better prospects for reform and deserve a better chance. The last attribute, children's unformed character, provides evidence that even professional psychologists cannot predict the incorrigibility of a juvenile offender.

Neuroscientific and psychological evidence of the immaturity, impressionability, and unformed character of youth has been the most frequently used argument to support eliminating juvenile life without parole sentences at the state-level. For example, the psychological study cited in the *Roper-Graham-Miller* trilogy, Laurence Steinberg and Elizabeth Scott's research on children's developmental immaturity and diminished responsibility, was referred to in all three state supreme court decisions.¹³⁰ Lawmakers and advocates in Arkansas, California, Connecticut,

¹³⁰ Steinberg and Scott, "Less Guilty by Reason of Adolescence."

Hawaii, Utah, and Vermont also reiterated the scientific evidence of youth developmental psychology to emphasize the immaturity of juvenile offenders. The frequent usage of neuroscientific evidence may reflect its persuasiveness “not because it revealed something new about the nature of adolescence but precisely because it aligned with common sense and behavioral science.”¹³¹

The scientific studies of youth psychology have served as a basis for an additional argument that children have diminished culpability: thus, they do not deserve the most severe punishments. Citing the scientific research on adolescent brain development and psychology, the Supreme Judicial Court of Massachusetts’ decision in *Diatchenko v. District Attorney* particularly emphasized the disproportionality of juvenile life without parole sentences, “not with respect to the offense itself, but with regard to the particular offender.”¹³²

The main three psychological attributes of youth have also been adduced to argue that the sentence also does not serve its four penological goals of retribution, deterrence, incapacitation, and rehabilitation. The logic of this argument was most effectively outlined in the amicus brief by the Juvenile Law Center, ACLU, Campaign for the Fair Sentencing of Youth (CFSY) and others, as well as the subsequent Washington Supreme Court holding *State v. Bassett*.¹³³

First, the case for retribution is weakened because youth developmental immaturity lessens the blameworthiness of juveniles. Second, the goal of deterrence is weakened because children

¹³¹ Steinberg, “The Influence of Neuroscience on US Supreme Court Decisions about Adolescents’ Criminal Culpability.”

¹³² *Diatchenko v. District Attorney for Suffolk District*.

¹³³ “Amicus Curiae Brief of Juvenile Law Center, American Civil Liberties Union of Washington, Campaign for Fair Sentencing of Youth, Council of Juvenile Correctional Administrators, and Mothers Against Murderers Association in Support of Respondent, Brian Bassett”; *State v. Bassett*.

cannot assess the consequences of their actions: therefore, a juvenile would be unable to anticipate the harsh sentence he or she may receive as a result of his or her offense. Third, the case for incapacitation is weakened because judges and professional psychologists cannot predict the incorrigibility of juvenile offenders. Because judges and psychologists are unable to predict the irretrievability of a juvenile offender, they cannot justify incarcerating the offender for life without the possibility of parole. Finally, the goal of rehabilitation cannot be achieved because a *life without parole* sentence imposed on a juvenile inherently “forswears altogether the rehabilitative ideal.”¹³⁴ The sentence’s failure to serve its penological justifications was more emphasized in state supreme court cases rather than in legislative campaigns. This may be because determining the constitutionality of a sentencing scheme requires the examination of whether “the challenged sentencing practice serves legitimate penological goals.”¹³⁵

The second psychological attribute, the impressionability of children, supports the firm belief that children can change, have greater prospects for reform and thus deserve a second chance. This message was the second most frequently made argument by states to support abolishing juvenile life without parole. States such as California, Nevada, North Dakota, South Dakota, West Virginia, Vermont, and the District of Columbia have emphasized children’s unique ability to change. Formerly incarcerated youth who testified in the legislative hearings in Arkansas, D.C., and Nevada provided a living demonstration that children can positively change and grow to become law-abiding members of society. Several lawmakers such as Representative John Ellem of West Virginia and Representative Lowry Snow of Utah emphasized how the religious idea of

¹³⁴ State v. Bassett; Roper v. Simmons.

¹³⁵ State v. Bassett; Graham v. Florida.

redemption also supports the idea that children can change and therefore deserve a second chance.¹³⁶

The third psychological attribute, the unformed character of youth, also supports the argument that judges nor professional psychologists can predict the irretrievability of a juvenile offender. This argument was the crux of the *State v. Sweet* decision. Citing the American Psychology Association’s amicus brief to *Miller*, the Iowa Supreme Court concluded that

sentencing courts should not be required to make speculative up-front decisions on juvenile offenders’ prospects for rehabilitation because they lack adequate predictive information supporting such a conclusion. The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available.¹³⁷

In addition, the Supreme Judicial Court of Massachusetts emphasized that “because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved.”¹³⁸ Therefore, a judge cannot ascertain whether “imposition of this most severe punishment is warranted.”¹³⁹

Nature of the sentence

The severity, patterns of domestic and foreign practice, the sentence’s prohibition under international law, fiscal cost, possible violent behavior, and racial disparities of life without parole sentences imposed on juveniles were reiterated to support the elimination of the sentence.

The harshness of the sentence, particularly when compared to the imposition of life without

¹³⁶ Ellem, “Let’s Reform Punishment for Juveniles”; Phillips, “States Are Getting Rid of Life Sentences for Minors. And Most of Them Are Red States.”

¹³⁷ *State v. Bassett*.

¹³⁸ *Diatchenko v. District Attorney for Suffolk District*.

¹³⁹ *Diatchenko v. District Attorney for Suffolk District*.

parole on adults, was emphasized in *State v. Bassett*. The Washington Supreme Court highlighted the severity of the sentence especially for children. Citing *Graham v. Florida*, the Court reiterated that children sentenced to life without parole will “on average serve more years and a greater percentage of [their] li[ves] in prison than an adult offender.”¹⁴⁰

State courts and legislatures also determined whether foreign practice, or lack thereof, and international law call for the prohibition of the sentence. The Iowa State Supreme Court decision and the legislative campaigns in California, Hawaii, and Vermont emphasized that the U.S. is the only country in the world that imposes the sentence.

However, the prohibition of juvenile life without parole under international human rights law was much less referred to as evidence to abolish the sentence. State supreme court decisions did not cite any international human rights treaties that bar the sentence. Such absence may be due to state jurists’ uncertainty “with how international human rights law claims should be treated in state courts.”¹⁴¹ The absence may also reflect state courts’ tendency to be generally “dismissive of the claim that they are bound by even the ratified instruments” of international human rights treaties.¹⁴² Perhaps due to similar reasons, only a couple of state legislatures referred to international human rights treaties that prohibit juvenile life without parole sentences. Hawaii’s House Bill 2116 highlighted that the UN Convention on the Rights of the Child prohibits juvenile life without parole.¹⁴³ In addition, the need to comply with international human rights law and

¹⁴⁰ *Graham v. Florida*; *State v. Bassett*.

¹⁴¹ Johanna Kalb, “Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after *Medellin*,” *Penn State Law Review* 115, no. 4 (2011): 1057.

¹⁴² Kalb, 1059.

¹⁴³ HB 2116, Sess. of 2014 (Hawaii, 2014), https://www.capitol.hawaii.gov/session2014/bills/HB2116_CD1_.pdf

norms was argued for in California.¹⁴⁴

In addition to referring to foreign practice and international human rights law, states also highlighted the existence of a national consensus barring the sentence. The number of states that have abandoned the sentence and the consistency in the direction of change provides evidence of such national consensus. The Washington Supreme Court highlighted these trends in its decision:

As of January 2018, 20 states and the District of Columbia have abolished life without parole for juveniles. This trend has occurred rapidly since *Miller*, before which only 4 states banned juvenile life without parole. Additionally, 4 states no longer have anyone serving a life without parole sentence under their respective statutes. Other states have limited the offenses that qualify for juvenile life without parole. Lastly, several states moved to provide parole eligibility to those sentenced to juvenile life without parole pre-*Miller*.¹⁴⁵

The Court concluded that there is a “clear trend” of states rapidly abandoning or limiting the imposition of the sentence. The Court also cited fellow state supreme court decisions of Massachusetts and Iowa that categorically abolished the sentence as further evidence of a national trend.

States have also stressed the fiscal and behavioral benefits of offering juvenile offenders the possibility of parole. First, highlighting the estimated cost of \$2.5 million to incarcerate a juvenile offender for life, Representative John Ellem of West Virginia argued that providing the possibility of parole “helps curb away the runaway costs of incarceration.”¹⁴⁶ Legislators of Arkansas and Hawaii also highlighted the fiscal benefits of offering the possibility of parole for juvenile offenders.

In terms of behavioral benefits of offering the possibility of parole, Leann Bertsch, director of the North Dakota Department of Corrections and Rehabilitation, reiterated that it can decrease

¹⁴⁴ Kerry, “Senate Floor Analysis.”

¹⁴⁵ State v. Bassett.

¹⁴⁶ Ellem, “Let’s Reform Punishment for Juveniles.”

violent behavior behind bars because parole possibility will serve as an incentive for inmates to engage in good behavior and participate in rehabilitation programs.¹⁴⁷

While the arguments stated above have been made relatively frequently, the racial disparities in the imposition of juvenile life without parole have not been a major rationale for states to support the elimination of the sentence. Nonetheless, representatives of human rights organizations that have testified at legislative hearings have brought attention to the problem of racial disproportionality. The National Center for Youth Law emphasized that in California, African American youth are sentenced to life without parole at a rate that is 18 times that of white youth.¹⁴⁸ Connecticut Voices for Children highlighted that 88% of juveniles serving sentences of greater than ten years are black or Hispanic.¹⁴⁹

Factors that may impact the effectiveness of certain arguments

The arguments, norms, logic, and messages laid out above tend to be more effective when presented by a particular source or when they are framed differently when presented to a particular audience. The impact of the arguments may be more effective when presented by formerly incarcerated youth or families of victims and a different method of framing may resonate among more conservative, religious audiences.

First, the persuasiveness of children's ability to change and their deserving of a second chance tends to be more powerful when they are made by formerly incarcerated youth who were given that second chance. Members of CFSY's Incarcerated Children's Advocacy Network who

¹⁴⁷ Gritzmacher, "North Dakota Bans Life-without-Parole Prison Sentences for Children."

¹⁴⁸ Kerry, "Senate Floor Analysis."

¹⁴⁹ Joseph, "Testimony in Support of Senate Bill 796."

have had experiences of incarceration and rehabilitation testified at the legislative hearings in D.C. and Nevada to amplify the message that children can change and that they are not isolated exceptions to the rule but representations of what all children are capable of. The bills eliminating juvenile life without parole passed unanimously in D.C. and Nevada.¹⁵⁰

Similarly, the arguments supporting the elimination of juvenile life without parole sentences may carry more weight when delivered by family members of victims of violence. For example, in Arkansas, Linda White, a CFSY partner who advocates for eliminating juvenile life without parole sentences despite losing her daughter to youth violence, met with state Representative Rebecca Petty who had also lost her daughter to violence. Because of her personal experience, Representative Petty had previously opposed a bill supporting more lenient sentencing for juveniles, but dropped her opposition and became a lead sponsor of the new bill eliminating juvenile life without parole after meeting with advocates including Linda White. Representative Petty addressed the House that her decision to sponsor the bill was not easy but that eliminating the sentence was in the better interest of the state. The bill passed the House 86 to 1.¹⁵¹

The arguments supporting the elimination of juvenile life without parole can be framed differently to resonate among certain audiences. While law-and-order conservatism tends to support more aggressive prosecutions and stricter sentences, many Republican-leaning states have successfully abolished juvenile life without parole.¹⁵² The message that children, and even juveniles convicted of serious crimes, can change and deserve a second chance may be reframed

¹⁵⁰ Appendix 1.

¹⁵¹ Appendix 1.

¹⁵² Jill Lepore, "The Rise of the Victims'-Rights Movement," *The New Yorker*, May 14, 2018, <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

as an issue of religious redemption: an argument that “seems to resonate among more conservative, religious lawmakers.”¹⁵³ For example, Representative Lowry Snow of Utah highlighted that “Utah is very prone to a recognition that there can be redemption and people can be given a second chance.”¹⁵⁴ Representative John Ellem who co-sponsored the bill eliminating the sentence in West Virginia stressed how his religious beliefs that children can be redeemed supported his decision to provide juvenile offenders a second chance.¹⁵⁵ Further, faith-based communities, such as Christian evangelical groups in California, joined state-level coalitions campaigning to abolish juvenile life without parole sentences.¹⁵⁶

¹⁵³ Phillips, “States Are Getting Rid of Life Sentences for Minors. And Most of Them Are Red States.”

¹⁵⁴ Phillips.

¹⁵⁵ Ellem, “Let’s Reform Punishment for Juveniles.”

¹⁵⁶ Fitzgerald, “This California Bill Would Erase Life Without Parole Sentences for Juveniles.”

V. Conclusion

The arguments, norms, logic, and messages utilized at the state-level to support the elimination of juvenile life without parole sentences tend to either stem from the nature of children or from the nature of the sentence itself. Scientific studies that confirm the distinctive psychological attributes of youth have been adduced to argue for the diminished culpability of children, the inability of the sentence to serve its penological goals, children's capacity of change, and the fallacy of the predictive enterprise to determine the incorrigibility of a juvenile offender. The harshness of the sentence itself, domestic and foreign practice, the prohibition of the sentence under international human rights law, the fiscal and behavioral benefits of offering the possibility of parole, and the racial disparities of the sentence have also been argued for at the state-level. The effectiveness of the arguments above may be enhanced when they are delivered by formerly incarcerated youth or victims of violence or when they are reframed as a religious ideal to a more conservative, religious audience.

Although state supreme court decisions and state legislation did not refer to international human right law frequently, utilizing an international human rights framework may provide advocates with an additional tool to pressure states to abolish juvenile life without parole sentences. Advocates can highlight that the state's imposition of the sentence contravenes international human rights treaties such as the Convention on the Rights of the Child. Advocates can also emphasize UN treaty body recommendations that call for the U.S. to abolish the sentence. For example, the UN Committee on the Elimination of Racial Discrimination expressed deep concern of the racial disproportionality of JLWOP sentences and reiterated that the U.S. prohibit and abolish the sentence.¹⁵⁷ This recommendation in particular allows advocates to highlight both the

¹⁵⁷ "Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,"

racial disproportionality of JLWOP and how continuing to impose the sentence would violate U.S. treaty obligations.

While this research identified the various arguments made at the state-level and conducted a deeper examination into how the states have abolished juvenile life without parole, the level of analysis was limited in its scope. The limitations were due to the absence of information or lack of documentation for a number of states as well as its failure to determine why certain arguments were not made as frequently as others. For example, the racial disparities in sentencing, despite staggering statistics confirming the disproportionality, was not made as often as the researcher initially anticipated. Further examination into why this may have been the case is necessary.

Nevertheless, the results of this research may provide juvenile justice advocates with useful information on how to effectively frame the various arguments made to support the elimination of juvenile life without parole sentences. The examination of how certain arguments have played out in states that have successfully abolished the sentence may add a layer of complexity that helps human rights activists understand how to enhance the effectiveness of their advocacy.

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VII. Appendix 1: States that have abolished juvenile life without parole since *Miller v. Alabama* (2012)

Mode of reform: litigation				
State	Year	Case/court	Court decision	
Iowa	2016	<i>State v. Sweet</i> Iowa Supreme Court	JLWOP violates the prohibition against cruel and unusual punishment clause of article I, section 17 of the Iowa Constitution.	
Massachusetts	2013	<i>Diatchenko v. District Attorney for Suffolk District</i> Massachusetts Supreme Judicial Court	Both mandatory and discretionary JLWOP sentences violate the prohibition of cruel or unusual punishment clause of article 26 of the Massachusetts Declaration of Rights.	
Washington	2018	<i>State v. Bassett</i> Washington Supreme Court	JLWOP violates the prohibition against cruel punishment clause of article I, section 14 of the Washington Constitution.	
Mode of reform: legislation				
State	Year	Bill	Effect	Vote margin¹⁵⁸
Arkansas	2017	SB 294	Eliminates JLWOP -Capital murder or treason: parole eligibility after 30 years -Murder in the first degree: parole eligibility after 25 years -Non-capital criminal offense: parole eligibility after 20 years	House: 86 yeas, 1 nay Senate: 22 yeas, 4 nays
California	2017	SB 394	Retroactively eliminates JLWOP -Parole eligibility during 25 th year of incarceration	Senate: 28 yeas, 9 nays Assembly: 44 yeas, 30 nays
Colorado	2016	SB 16-181	Retroactively eliminates JLWOP -First-degree murder: 30-50 years' imprisonment, parole eligibility after 40 years	Senate: 33 yeas, 2 nays House: 43 yeas, 22 nays

¹⁵⁸ Information retrieved from each state legislature's online, public record of votes on each bill.

			-Non-first-degree murder felony: life imprisonment, parole eligibility after 40 years	
Connecticut	2015	SB 796	Eliminates JLWOP -Less than 50 years sentence: parole eligibility after 60% of sentence or 12 years, whichever is longer -More than 50 years sentence: parole eligibility after 30 years	Senate: 32 years, 3 nays House: 135 years, 11 nays
Delaware	2013	SB 9	Eliminates JLWOP -First-degree murder: 25 years to life, petition for sentence modification after 30 years -20 years imprisonment, not first-degree murder: petition for sentence modification after 20 years	Senate: 19 years, 1 nay House: 39 years, 0 nays
District of Columbia	2017	D.C. Law 21-238	Eliminates JLWOP -Sentence modification possible after 20 years	Council: 13 years, 0 nays
Hawaii	2014	H.B. 2116	Eliminates JLWOP -First-degree murder or attempted murder: life with the possibility of parole	Senate: 25 years, 0 nays House: N/A
Nevada	2015	AB 267	Eliminates JLWOP -Non-homicide crimes: parole eligibility after 15 years -Homicide crimes: parole eligibility after 20 years	Assembly: 42 years, 0 nays Senate 21 years, 0 nays
New Jersey	2017	A 373	Eliminates JLWOP -Murder: 30 years incarceration without parole or 30 years to life imprisonment with parole eligibility after 30 years	Senate: 36 years, 1 nay General Assembly: 69 years, 0 nays
North Dakota	2017	HB 1195	Eliminates JLWOP -Sentence reduction possible after 20 years	Senate: 46 years, 0 nays House: 87 years, 0 nays
South Dakota	2016	SB 140	Eliminates JLWOP -Class A, B, C felony:	Senate: 23 years, 11 nays

			maximum sentence for a term of years	House: 50 yeas, 17 nays
Texas	2013	SB 2	Eliminates JLWOP -Capital felony: mandatory life sentence with parole eligibility after 40 years	Senate: 87 yeas, 44 nays House: 113 yeas, 23 nays
Utah	2016	HB 405	Eliminates JLWOP -Capital crime: not less than 25 years to life with parole	Senate: 23 yeas, 0 nays House: 64 yeas, 3 nays
Vermont	2015	H 62	Eliminates JLWOP	Senate: 24 yeas, 6 nays House: N/A
West Virginia	2014	HB 4210	Eliminates JLWOP -Parole eligibility after 15 years	House: 89 yeas, 9 nays Senate: 34 yeas, 0 nays
Wyoming	2013	HB 23	Eliminates JLWOP -Parole eligibility after commutation of his sentence to a term of years or after 25 years	Senate: 30 yeas, 0 nays House: 42 yeas, 17 nays