Washington University Journal of Law & Policy

Volume 62 *Celebrating 150 Years of Women at WashULaw*

2020

All but the Rarest of Children: Miller and Montgomery's Implicit Ban on Victim and Community Impact Testimony in Juvenile Life Without Parole Sentencing

Allison M. Scoggin
Washington University in St. Louis

ALL BUT THE RAREST OF CHILDREN: *MILLER* AND *MONTGOMERY*'S IMPLICIT BAN ON VICTIM AND COMMUNITY IMPACT TESTIMONY IN JUVENILE LIFE WITHOUT PAROLE SENTENCING

Allison M. Scoggin*

INTRODUCTION

Children are less responsible than adults. It seems superfluous to say and unnecessary to question. But the seemingly simple distinction between the culpability of adults and that of juveniles has been the subject of significant debate in criminal sentencing jurisprudence over the last few decades.

Although the idea that juveniles and adults are qualitatively different originated in the sixteenth century, this concept didn't make its way into the American criminal justice system until 1899 when the first juvenile court was created in the United States.[1] Our modern, formalized juvenile court system was developed in the 1960s.[2]

In the 1970s and 1980s, rising rates of violent crime resulted in an increase in the practice of trying juveniles in adult court and incarcerating them in adult prisons.[3] As crime rates have steadily declined over the last two decades, the criminal justice system has been sluggishly returning to the days of juvenile justice reform, devoting attention once again to the

* J.D. Candidate (2020), Washington University in St. Louis.

1. *See Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., http://www.cjcj.org/education1/juvenile-justice-history.html [https://perma.cc/B9AB-XZVV].

2. *Id.* ("In the 1960s, the Supreme Court made a series of decisions that formalized the juvenile courts and introduce[d] more due process protections such as right to counsel. Formal hearings were required in situations where youth faced transfer to adult court and or a period of long-term institutional confinement.").

3. *See* Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, A.B.A. (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/ [https://perma.cc/59HH-YCZX].

differences between juveniles and adults, and the need to treat them differently, especially when it comes to sentencing.[4]

One of the greatest areas of controversy in juvenile sentencing reform has been in the context of first-degree murder. The death penalty was an available punishment for juveniles older than fourteen until 1988.[5] And it wasn't until 2005 that the death penalty was outlawed for all juveniles.[6] The focus of this line of cases was the distinctive differences in the maturity and culpability of children and adults, and the impact those differences should have on sentencing.

Modern juvenile sentencing reform reached a new height in 2012, when the Supreme Court, in *Miller v. Alabama*, held that mandatory sentences of life without parole for juveniles are unconstitutional.[7] The significant and well-known differences in the maturity and decision-making ability of juveniles and adults and the resulting difference in culpability must now be taken into consideration before courts assign a juvenile life without parole (JLWOP) sentence.[8]

Then, in 2016, the Court in *Montgomery v. Louisiana* held that *Miller* applies retroactively and that states must allow applicable offenders currently serving mandatory JLWOP sentences to be resentenced or considered for parole.[9] The Court made it clear that only "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified" should be given such a sentence.[10]

States are now in the process of resentencing these individuals and redrafting JLWOP statutes, and a wide variety of approaches are being taken

4. *See id.*
5. Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting capital punishment for juveniles fourteen to sixteen years old).
6. Roper v. Simmons, 543 U.S. 551 (2005).
7. Miller v. Alabama, 567 U.S. 460 (2012).
8. *See id.* at 480.
9. Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Making *Miller* retroactive creates an interesting dilemma, which courts must now resolve: in determining the parole eligibility of an offender who was sentenced to mandatory JLWOP when he was juvenile, must the court limit evidence regarding his potential for rehabilitation to only that which was available at the time of his trial, or may the court look at the individual's life within the prison walls to make a determination? The Court didn't directly address this issue in *Montgomery*, and states vary in their methods. For the most part, this Note will focus on post-*Montgomery* crimes, but the same issues potentially apply in both situations.
10. *Id.* at 733–34.

to achieve these ends.[11] Many of these statutes contain a list of specific factors, aggravating and mitigating, that a court must consider when deciding whether to sentence an offender to JLWOP. And frequently, the list of factors includes victim or community impact testimony (or both).[12]

Such impact testimony is the focus of this Note. Despite its frequent inclusion in sentencing, impact testimony contributes neither to individualized sentencing nor to helping a court determine whether a juvenile defendant is so "irretrievabl[y] deprav[ed] that rehabilitation is impossible."[13] Thus, although not explicitly prohibited in *Miller* or *Montgomery*, the use of impact testimony is violative of the Court's holdings and should not be permitted during consideration of a JLWOP sentence. Instead, statutes governing JLWOP sentences should limit the factors that may be considered to those involving the defendant's capacity for rehabilitation or his "irretrievable depravity," as suggested by the Court in *Miller* and *Montgomery*.

Part I of this note lays out the history of the Court's juvenile and capital sentencing cases and catalogs various states' statutory responses to *Miller* and *Montgomery*. Part II analyzes the Court's holdings in these two cases and their implicit prohibition on victim and community impact testimony, as well as the attempts by states to comply with those holdings in revising their JLWOP statutes.

I. HISTORY

Part I is broken into five sections: Section A traces the Court's preliminary decisions regarding juvenile sentencing that the *Miller* court relied on; Section B discusses a series of cases requiring individualized sentencing in capital cases; Section C presents two cases taking opposing stances on the use of impact testimony in capital sentencing; Section D breaks down the Court's reasoning in both *Miller* and *Montgomery*; and Section E summarizes states' statutory responses to *Miller* and *Montgomery*.

11. *See Locked Up for Life: 50-State Examination*, ASSOCIATED PRESS (July 31, 2017), https://www.ap.org/explore/locked-up-for-life/50-states [https://perma.cc/Q6VP-9MKX].
12. The distinction between victim and community impact testimony is minimal and is largely a product of statutory language. I will collectively refer to both as "impact testimony."
13. *Montgomery*, 136 S. Ct. at 733–34.

A. Roper *and* Graham*: Laying the Foundation of Modern Juvenile Sentencing*

Two recent cases laid the foundation for *Miller* and *Montgomery* by banning entire classes of sentences for juveniles.[14] The first of these, *Roper v. Simmons*, eliminated the death penalty for juveniles.[15] *Roper* involved a seventeen-year-old defendant who was convicted of murder and sentenced to death.[16] After the Supreme Court barred the death penalty for intellectually disabled persons in *Atkins v. Virginia*,[17] Simmons sought postconviction relief on the basis that the Court's reasoning in *Atkins* ought to apply to the same punishment for juveniles.[18] In evaluating Simmons's case,[19] the Court implemented its longstanding Eighth Amendment framework which includes "referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual."[20]

The Court examined state legislation and sentencing practices as "objective indicia" of states' evolving views that the death penalty is an inappropriate punishment for juvenile offenders.[21] The Court then reflected on "three general differences between juveniles . . . and adults" which demonstrate juveniles' lessened culpability.[22] The first difference is juveniles' immaturity, which "often result[s] in impetuous and ill-considered actions and decisions."[23] The second difference the Court recognized between juveniles and adults "is that juveniles are more

14. Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).
15. *Roper*, 543 U.S. 551.
16. *Id.* The defendant (Simmons) planned and committed a burglary and murder, tying his (seemingly random) victim up and throwing her from a railway bridge. *Id.* at 556–57.
17. Atkins v. Virginia, 536 U.S. 304 (2002).
18. *Roper*, 543 U.S. at 559. The death penalty had previously been disallowed for persons under the age of sixteen, so in effect, *Roper* only applied to sixteen- to eighteen-year-olds. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).
19. On a writ of habeas corpus, the Missouri Supreme Court agreed with Simmons's reasoning and set aside his death penalty sentence in favor of life without parole. After Roper (superintendent of the correctional facility where Simmons was incarcerated) appealed, the Supreme Court granted certiorari. *Roper*, 543 U.S. at 559–60.
20. *Id.* at 560–561 (internal quotation marks omitted).
21. *Id.* at 564–65.
22. *Id.* at 569. These differences arise again in the subsequent juvenile sentencing cases.
23. *Id.* The Court looked to what "any parent knows" and "scientific and sociological studies," as well as the fact that "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent" as evidence that adolescent immaturity is commonly known. *Id.*

vulnerable or susceptible to negative influences and outside pressures, including peer pressure" due to their lack of control "over their own environment" and inability to change their circumstances.[24] Finally, the Court noted that "the character of a juvenile is not as well formed as that of an adult" and that their personality traits "are more transitory, less fixed."[25] The Court concluded that these differences make it clear that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[26]

The Court then argued that, in light of juveniles' reduced moral culpability, it is also "evident that the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults."[27] Finally, the Court held that the Eighth Amendment "forbid[s] imposition" of the death penalty on juvenile offenders.[28]

Five years later, in *Graham v. Florida*, the Court furthered its juvenile sentencing jurisprudence, finding that JLWOP for nonhomicide offenses violates the Constitution.[29] In that case, the sixteen-year-old defendant attempted to rob a restaurant with some friends, one of whom hit the manager over the head with a metal bar before the group fled in a getaway car.[30] Graham was charged as an adult and pleaded guilty to armed burglary with assault or battery, which was classified as a first-degree felony in Florida and carried a maximum sentence of life without parole.[31] He was sentenced to three years' probation, with a plea agreement whereby the court withheld formal adjudication of his guilt.[32] Graham was again arrested for an armed burglary approximately seventeen months after the first offense.[33] During his probation hearings, the court found Graham had

24. *Id.*
25. *Id.* at 570.
26. *Id.*
27. *Id.* at 571. The Court noted that retribution in the form of death is not merited given the lesser culpability of juveniles and that deterrence is especially ineffective for juveniles given their impetuousness. *Id.* at 571–72.
28. *Id.* at 578.
29. Graham v. Florida, 560 U.S. 48 (2010).
30. *Id.* at 53.
31. *Id.* at 53–54. Graham also pleaded guilty to attempted armed robbery.
32. *Id.* at 54.
33. *See id.* at 53–54. Graham attempted to flee from the police but crashed into a pole. *Id.* at 54–55. The police then found firearms in Graham's vehicle. *Id.* at 55. Both facts constituted probation violations. *Id.*

violated the terms of his probation, and he was thus formally convicted and sentenced for the prior offenses.[34] Sentencing recommendations ranged from four to forty-five years, but the court, after lamenting over Graham's choice to throw his "life away" despite having "a lot of people who wanted to try and help" him, sentenced him to life imprisonment.[35]

The Supreme Court evaluated Graham's Eighth Amendment challenge with much of the same reasoning it used in *Roper*,[36] determining that a categorical ban on JLWOP sentences for nonhomicide crimes fits better within the scope of prior categorical bans on the death penalty[37] than with traditional proportionality cases that consider the particular defendant's crime on a case-by-case basis.[38] Thus, the Court applied the same categorical test used in *Roper*, considering the "objective indicia of society's standards . . . to determine whether there is a national consensus against the sentencing practice at issue"[39] and "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation" of the Eighth Amendment.[40] The Court determined that although state and federal legislation did not indicate a national consensus against JLWOP for nonhomicide offenses,[41] actual sentencing practices did.[42]

34. *Id.* at 55–57.
35. *Id.* at 56–58. Because Florida had no parole program at the time, Graham's life sentence amounted to life without parole. *Id.* at 57. Before the case reached the Supreme Court, a Florida appellate court determined that Graham was "incapable of rehabilitation" and upheld his sentence. *Id.* at 58.
36. *See id.* at 58–62.
37. *Id.* at 61–62. The "categorical ban on the death penalty" cases the Court references include bans on classes of defendants and classes of crimes. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (rape of a child); Roper v. Simmons, 543 U.S. 551 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (intellectually disabled persons).
38. *See* Graham, 560 U.S. at 59–60 (2010) (citing Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding life without parole for cocaine possession)). The test applied in these cases is two-pronged: courts must "begin by comparing the gravity of the offense and the severity of the sentence," and if the sentence is found grossly disproportionate (which should be rare), courts "should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdiction." *Id.* at 60. Only if this process supports the initial finding of disproportionality will the sentence be considered cruel and unusual. *Id.*
39. *Id.* at 61 (citing *Roper*, 543 U.S. at 563).
40. *Id.* (citing *Kennedy*, 554 U.S. at 421).
41. *Id.* at 62. Thirty-seven states, the District of Columbia, and federal law allowed the practice at the time. *Id.*
42. *Id.* The Court found that, at the time, there were only 124 juveniles serving life without parole for nonhomicide offenses; seventy-seven of those were in Florida. *Id.* at 64.

The Court then evaluated the culpability of juvenile offenders convicted of nonhomicide crimes, referring to the characteristics distinguishing juveniles from adults first laid out in *Roper*.[43] The Court concluded that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[44] Next, the Court compared the severity of life without parole to that of the death penalty,[45] especially when given to juvenile offenders.[46] Finally, the Court analyzed the sentence in light of penological justifications,[47] echoing its prior decision in *Roper*: "With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification."[48]

After holding that the Eighth Amendment forbids JLWOP for nonhomicide offenders, the Court advised states that they are "not required to guarantee eventual freedom" to such offenders but must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[49]

B. Woodson *and Its Offspring: Requiring Individualized Sentencing for Capital Punishment*

Graham's "treatment of juvenile life sentences as analogous to capital punishment" draws into the discussion a line of cases in which the Court invalidated mandatory death penalty sentences and instead required

43. *See id.* at 68 (citing *Roper*, 543 U.S. at 569–70).
44. *Id.* at 69.
45. *Id.* ("It is true that a death sentence is unique in its severity and irrevocability; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences." (internal quotation marks omitted)).
46. *Id.* at 70. ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.")
47. *See id.* at 71–75.
48. *Id.* at 71. The Court stated that "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity" and that "[t]he penalty forswears altogether the rehabilitative ideal." *Id.* at 73–74.
49. *Id.* at 75. The Court qualified its holding by reassuring states that "those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives" and that the Eighth Amendment only prohibits states "from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

individualized sentencing for capital offenders.[50] The first of those cases, *Woodson v. North Carolina*, held that a mandatory death sentence for first-degree murder violates the Eighth Amendment.[51] The Court stated that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[52]

Two years later, the Court specified in *Lockett v. Ohio* that in capital cases, the sentencer must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[53] Although *Lockett* did not enumerate specific mitigating factors that must be considered in every case, it did point to "[t]he absence of direct proof that the defendant intended to cause the death of the victim," "a defendant's comparatively minor role in the offense," and "age" as examples of factors the Ohio statute in question failed to take into account, thus violating *Woodson*.[54]

Then, in *Eddings v. Oklahoma*, the Court evaluated the case of a sixteen-year-old charged with the murder of a police officer.[55] The Court vacated Eddings's death sentence because the trial court failed to consider his offered mitigating evidence, including his problematic family background and delayed mental and emotional development.[56] The Court explained its reasoning:

> The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . Even the normal 16-year-old

50. Miller v. Alabama, 567 U.S. 460, 475 (2012). The Court added, "Of special pertinence here, we insisted in these rulings that a sentence have the ability to consider the mitigating qualities of youth. Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions." *Id.* at 476 (citation omitted).
51. Woodson v. North Carolina, 428 U.S. 280 (1976).
52. *Id.* at 304 (citation omitted).
53. Lockett v. Ohio, 438 U.S. 586, 604 (1978).
54. *Id.* at 608.
55. Eddings v. Oklahoma, 455 U.S. 104 (1982).
56. *See id.* at 112–17.

> customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.[57]

The Court made clear in this line of cases that the sentencer must take into account mitigating factors such as "an offender's age and the wealth and characteristics and circumstances attendant to it" before condemning that offender to the harshest penalty available to him.[58]

Finally, in *Zant v. Stephens*, the Court further clarified the constitutional requirements of capital sentencing schemes by examining the flip side of the individualized sentencing coin: aggravating factors.[59] The Court announced that one fundamental requirement of capital sentencing statutes is that "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others

57. *Id.* at 115–16.

58. Miller v. Alabama, 567 U.S. 460, 476 (2012). The *Miller* Court also quoted from *Johnson v. Texas*, 509 U.S. 350 (1993), a case that upheld a defendant's conviction despite the jury not being instructed that it must consider the nineteen-year-old defendant's youth as a mitigating factor. The Court in *Johnson* acknowledged that "[t]here is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury" but found that there was no "reasonable likelihood" the jury did not consider the defendant's youth because his father testified on his behalf and spoke specifically to his immaturity. *Johnson*, 509 U.S. at 367–68. Of special relevance to the *Miller* Court was the *Johnson* Court's explanation that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* at 368.

59. Zant v. Stephens, 462 U.S. 862 (1983).

found guilty of murder."[60] A statute with vague or overly broad aggravating factors leads to "arbitrary and capricious sentencing" and is thus disproportionate and unconstitutional.[61]

C. Booth *and* Payne*: The Introduction of Victim Impact Testimony in Capital Sentencing Hearings*

In 1987, the Court held in *Maryland v. Booth* that victim impact testimony "is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner," the very consequence the Court sought to avoid in its mandatory individualized sentencing cases.[62]

The Court was concerned with the possibility that victims who were especially likeable or whose families were more articulate in expressing their grief would effect harsher punishment than would a victim of "more questionable character," resulting in arbitrary sentencing.[63]

The Court acknowledged that it "has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations" but maintained that "a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's personal responsibility and moral guilt."[64]

However, only four years later, the Court reversed *Booth* in *Payne v. Tennessee*.[65] In that case, the Court argued that the use of victim impact testimony in capital sentencing falls well within states' rights to determine their own sentencing procedures, and that "victim impact evidence is simply another form or method of informing the sentencing authority about the

60. *Id.* at 877.
61. *Id.* The aggravators upheld in this case were the defendant's prior record of conviction for a capital felony and that the defendant's escape from lawful confinement. *Id.* at 879. The Court found that these factors "adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.*
62. *See* Booth v. Maryland, 482 U.S. 496, 502–03 (1987).
63. *Id.* at 505–06.
64. *Id.* at 502.
65. Payne v. Tennessee, 501 U.S. 808 (1991).

specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[66]

Furthermore, the Court stated that "[i]n the majority of cases . . . victim impact evidence serves entirely legitimate purposes" and that the possibility of undue prejudice or unfairness the *Booth* Court foresaw could be curbed by the safety net of the Fourteenth Amendment.[67] Finally, the Court reasoned that if the sentencer is required to view the defendant as an individual, it would be unfair to not grant the same treatment to the victim and that only in doing so could the sentencer be given all the information necessary to make a sentencing decision.[68]

Since *Payne* was decided, victim impact testimony has routinely been a component of sentencing, whether the victims appear in court or their written statements are included in presentencing reports.[69] Following the Court's directive, many states now have victims' rights provisions that mandate an opportunity for victims to testify at trial.[70]

D. Miller *and* Montgomery*: Banning Mandatory JLWOP*

In *Miller v. Alabama*, the Court merged its juvenile sentencing and individualized sentencing reasoning to categorically ban mandatory JLWOP.[71] The Court reviewed *Miller* and its companion case, *Jackson v. Hobbs*. Both cases involved fourteen-year-old defendants—Miller in Alabama and Jackson in Arkansas—charged with murder and given mandatory sentences of life without parole.[72]

Jackson and two friends decided to rob a video store; on the way, he discovered one of his friends was carrying a gun.[73] He initially elected to wait outside the store, but later went inside and found his weapon-toting

66. *Id.* at 825.
67. *Id.*
68. *See id.* ("Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.").
69. *See* Susan A. Bandes, *What Are Victim-Impact Statements For?*, ATLANTIC (July 23, 2016), https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/ [https://perma.cc/7CGK-TTKS].
70. *Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/our-programs/public-policy/amendments [https://perma.cc/R5FD-UPCW].
71. Miller v. Alabama, 567 U.S. 460 (2012).
72. *Id.* at 465.
73. *Id.*

friend pointing the gun at the clerk, demanding money.[74] Jackson's friend shot and killed the clerk, and Jackson was convicted of felony murder and aggravated robbery.[75]

Miller and a friend were drinking and smoking marijuana with a drug-dealing neighbor and decided to rob the dealer after he passed out.[76] The dealer woke up and an altercation ensued, ending with Miller hitting the dealer repeatedly with a baseball bat and leaving him unconscious.[77] The boys lit two fires to cover up their crime, and the dealer died as a result.[78] Miller was convicted of murder in the course of arson.[79]

The Court noted that *Miller* "implicate[s] two strands of precedent."[80] The first strand is the categorical ban on sentences that reflect a disproportionality between the culpability of the offender and the severity of the penalty; this is the strand that *Graham* and *Roper* hinged upon.[81] The Court considered the three *Roper* characteristics which make juveniles less morally culpable than adults[82] and the insufficiency of the penological justifications when applied to juveniles.[83] The Court in *Miller* stated that because "none of what [*Graham*] said about children . . . is crime-specific . . . its reasoning implicates any life-without-parole sentence imposed on a juvenile."[84] The Court argued that a mandatory sentence, by its nature, precludes the sentencer from considering the "distinctive attributes of youth," among other things, and thus "prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that the imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[85]

74. *Id.*
75. *Id.* at 466.
76. *Id.* at 468. The dealer showed up to Miller's house to sell drugs to Miller's mother. *Id.* Miller and his friend then went with the dealer back to his trailer next door. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 469.
80. *Id.* at 470.
81. *See id.*
82. *Id.* at 471. The *Miller* Court calls them "the distinctive attributes of youth." *Id.* at 472.
83. *See id.* at 472–73.
84. *Id.* at 473.
85. *Id.* at 474.

The second strand of precedent is made up of those previously mentioned cases that prohibit mandatory forms of capital punishment, which don't allow the sentencer to consider the circumstances of the individual defendant and the crime committed.[86] Just as it did in *Graham*, the Court again compared JLWOP to a death sentence, pointing out the disproportionality of time served on a life without parole sentence for a juvenile versus the time served on the same sentence for an adult.[87] And just as the Court's precedent requires the sentencer to consider mitigating factors before sentencing a defendant to death, the Court insisted on the same consideration for juveniles being sentenced to life without parole:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[88]

The Court then applied these considerations to the cases in front of it, finding both Miller and Jackson had reduced culpability in light of the

86. *See id.* at 475–76. The Court cites *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), noting that "*Eddings* is especially on point" due to the defendant's age. *Miller*, 567 U.S. at 476.

87. *See* Miller, 567 U.S. at 474–75 ("In part because we viewed this ultimate penalty for juveniles as akin to the death penalty [in *Graham*], we treated it similarly to that most severe punishment. We imposed a categorical ban.").

88. *Id.* at 477–78.

circumstances of their crimes and their difficult family backgrounds and upbringings.[89] While the Court ultimately declined to impose an absolute categorical ban on JLWOP, it warned that "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" and suggested such a sentence would only be appropriate for "the rare juvenile offender whose crime reflects irreparable corruption."[90]

After *Miller*, states began revising their criminal codes to align with the Court's decision,[91] and there was much discussion about whether the ban on mandatory JLWOP applied retroactively to those already serving time for crimes committed while they were juveniles.[92] The Court settled the matter in *Montgomery* when it held that the prohibition on mandatory JLWOP was a new substantive rule and did, in fact, apply retroactively.[93]

The Court reassured states that complying with *Miller* need not be overly burdensome and that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions . . . . A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."[94]

Montgomery also attempted to assist states by providing some clarification of which offenders *Miller* applied to: "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[95] The Court warned, however, that mere

89. *See id.* at 478–79.

90. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)). The dissent considered this warning a "gratuitous prediction" which "appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges" as a means of making them uncommon, at which time "the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them." Miller, 567 U.S. at 501 (Roberts, C.J., dissenting).

91. *See* Kimberly Thomas, *Random if Not "Rare"? The Eighth Amendment Weaknesses of Post-*Miller *Legislation*, 68 S.C. L. REV. 393 (2017).

92. *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option,* 45 FORDHAM URB. L.J. 149 (2017).

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

94. *Id.* The Court added, "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.*

95. *Id.* Additionally, the Court stated that *Miller* permitted life without parole for only "those whose crimes reflect permanent incorrigibility." *Id.* at 734.

cursory consideration of age isn't sufficient to satisfy *Miller*; a JLWOP sentence "still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[96]

E. Statutory Provisions

In light of both *Miller* and *Montgomery,* states have continued to revise their criminal statutes to comport with the Court's decisions, and have begun the process of resentencing or making eligible for parole those offenders who were sentenced— decades ago for many—to mandatory life without parole as juveniles.[97] States have taken a variety of approaches in drafting their statutes. Of the twenty-eight states that had JLWOP at the time *Miller* was decided, seven have since eliminated the punishment altogether.[98] Most states that have kept the punishment simply reworked their traditional capital sentencing statutes to create separate sentencing procedures for juveniles and adults,[99] but some created a separate statute specifically for JLWOP.[100] At least five states have drafted statutes that make JLWOP discretionary but do not provide specific aggravating or mitigating factors that must be considered.[101] Three states have not yet redrafted their general life without parole statutes, which currently reflect no distinction between life without parole for adults and juveniles and therefore violate *Miller*.[102] Of the states that do provide statutory guidance for mitigating or aggravating factors that should be considered, eight of them explicitly allow or mandate the consideration of impact testimony.[103]

---

96. *Id.* at 734 (internal quotation marks omitted).

97. *See* John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 552-53 (2016). This article analyzes the legislative responses to *Miller* and *Montgomery* and sentencing data from states' departments of corrections. The authors note multiple disparities in pre-*Miller* JLWOP practices, including racial and geographical disproportionalities. *See id.*; *see also* ASSOCIATED PRESS, *supra* note 11 (containing a multistate survey of statutory re-drafting and offender resentencing attempts).

98. *See* ASSOCIATED PRESS, *supra* note 11 (Arkansas, Connecticut, Hawaii, Massachusetts, South Dakota, Texas, and Wyoming).

99. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752(A) (2019).

100. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209A (2019).

101. *See* ASSOCIATED PRESS, *supra* note 11 (Delaware, Idaho, Louisiana, North Carolina, and Ohio).

102. *See* ASSOCIATED PRESS, *supra* note 11 (Minnesota, New Hampshire, and Virginia).

103. *See* ALA. R. CRIM. P. 26.3 (LexisNexis 2018)(court decides between life without parole and life with minimum of thirty years, after considering presentence report which "may contain . . . Victim Impact Statements"); ARIZ. REV. STAT. § 13-752 (2019); FLA. STAT. § 921.1401 (2019) ("[T]he court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances,

II. ANALYSIS

The reasoning that culminated in the *Miller* and *Montgomery* decisions can be traced through decades of capital and juvenile sentencing jurisprudence. This same line of reasoning also leads to the conclusion that any sentencing considerations that do not focus primarily on the defendant and his capacity for rehabilitation—such as community and victim impact[104]—have no place in JLWOP sentencing.

To be sure, neither *Miller* nor *Montgomery* expressly limits sentencing considerations to only those which are defendant-focused, nor do they expressly prohibit impact testimony. However, the Court makes clear that the *only* evidence that matters in sentencing an offender to JLWOP is that which concerns his capacity for rehabilitation.

For example, in *Montgomery*, the Court asserts that a JLWOP sentence "still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[105] Additionally, the Court insists that only "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is *impossible* and life without parole is justified" can be sentenced to JLWOP.[106]

Thus, if there is *any* evidence that the offender could mature or be rehabilitated over time—and the Court points out that "all but the rarest of children"[107] is capable of such growth—a JLWOP sentence is disproportionate and therefore unconstitutional. Testimony highlighting the impact the offender's crime had on the victim's family or community does not contribute to any finding regarding the offender's capacity for maturity or rehabilitation. *Miller* and *Montgomery* simply leave no room for the

---

including, but not limited to . . . [t]he effect of the crime on the victim's family and on the community."); 730 ILL. COMP. STAT. ANN. 5/5-4-1(a)(8) (West, Westlaw through P.A. 101-115); IOWA CODE § 902.1(2)–(3) (2019); MICH. COMP. LAWS § 769.25 (2017); MO. ANN. STAT. § 565.033(2)(10) (West, Westlaw through 2019 First Reg. Sess. and First Extraordinary Sess.); 18 PA. CONS. STAT. ANN. § 1102.1(d)(1) (West, Westlaw through 2019 Reg. Sess. Act 75).

104. Many states allow for the consideration of other aggravating factors which are not necessarily defendant-focused. *See, e.g.*, FLA. STAT. § 921.1401 (2019) (mandates consideration of "the nature and circumstances of the offense committed by the defendant" as well as victim and community impact and eight defendant-focused factors). This Note is limited to victim and community impact and will not address other often-included factors, which may or may not adhere to *Miller.*

105. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

106. *Id.* at 733 (emphasis added).

107. *Id.* at 726.

consideration of victim or community impact in determining a JLWOP sentence.

Although not explicitly discussed in any of the juvenile sentencing cases, impact testimony has been hotly debated by the Court in the capital sentencing context.[108] The argument against its use in *Booth* focused on its potential to incite discriminatory or arbitrary sentencing, largely because it requires the sentencing authority to shift its focus from the defendant to the victim's family member.[109] However, the Court in *Payne* had the last word and argued that impact testimony serves to paint a complete picture of the circumstances of the crime, which should be considered equally alongside the individual defendant's culpability while assigning a death sentence.[110]

This would appear, at first glance, to be problematic. The holding of *Payne* unequivocally permits the use of impact evidence in capital sentencing, and neither the *Miller* nor the *Montgomery* Court explicitly prohibits them in JLWOP cases. However, *Payne* is directly at odds with the Court's insistence on strictly defendant-centered considerations in *Montgomery*. In fact, *Miller* and *Montgomery* implicitly echo *Booth*'s concerns about impact testimony taking the sentencer's focus away from the defendant.

Also problematic is that *Graham* compared JLWOP to the death penalty due to the number of years juveniles spend in prison compared to an adult given a life without parole sentence.[111] The comparison is apt, and the resulting mandate that JLWOP cases require individualized sentences similar to capital cases is sensible. However, the Court in *Miller* and *Montgomery* draws a bright line between juveniles and adults in terms of brain development and culpability, thereby implicitly distinguishing between capital and JLWOP sentencing by requiring strictly defendant-focused sentencing for JLWOP.[112]

108. *See* Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987).
109. *See Booth*, 482 U.S. at 502–03.
110. *See Payne*, 501 U.S. at 825.
111. *See* Graham v. Florida, 560 U.S. 48, 70–75 (2010).
112. This raises the question of whether victim or community impact testimony should be used in *any* juvenile sentencing. Although the question is beyond the scope of this Note, it should be observed that, while the holdings of *Miller* and *Montgomery* apply solely to JLWOP sentencing, the observations made by the Court regarding juvenile brain development served only to separate juveniles from adults. Nothing in these observations relates solely to the crime of murder.

Aside from its potential to result in a disproportionate JLWOP sentence, impact testimony fails to serve any legitimate penological purpose.[113] It's clear that impact testimony has little deterrent effect on future juvenile offenders.[114] The developmental differences[115] noted by the Court in the juvenile sentencing cases mean that juveniles are virtually incapable of planning ahead or considering the consequences of their actions. In particular, the Court in *Roper* highlighted the unlikelihood that juveniles are susceptible to any deterrent effects due to their impetuosity.[116] No impact testimony, no matter how passionate or sincere, will prompt a child to do something their brain is not yet capable of.

Similarly, allowing impact testimony at sentencing will not serve a significant rehabilitative function. Although *Miller* and *Montgomery* strive to make rehabilitation a possibility for juvenile offenders, the same developmental differences that make juveniles impetuous and short-sighted also render them unable to fully understand the perspective of their victim's family and community members.[117] It is not until later in their lives, when their brains are fully developed, that offenders who committed crimes as juveniles are able to fully appreciate the harm they may have caused to the victim's family or community.[118] Thus, while impact testimony may be an important rehabilitative tool, its usefulness to that end is only realized years *after* sentencing.

---

113. *See* Niru Shanker, *Getting a Grip on* Payne *and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711, 734–36 (1999).

114. *See* Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 354 (2009).

115. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (listing developmental findings of "transient rashness, proclivity for risk, and inability to assess consequences").

116. Roper v. Simmons, 543 U.S. 551, 571 (2005).

117. *See* Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801 (2013). The author observes that:

> As compared to mature adults, adolescents and emerging adults are less able to accurately predict the impact of their behavior, exercise self-restraint, and maturely weigh costs and benefits. One study reveals that adolescents at age seventeen are less able than adults to gauge, understand, and account for the perspectives of others in the decision-making process.

Id. at 835–36.

118. *See id.* There have been numerous studies regarding the effectiveness and appropriateness of victim impact testimony even with adult offenders. *See, e.g.*, Shanker, *supra* note 113 (analyzing the use of impact testimony in the Timothy McVeigh trial).

Incapacitation is, in some ways, the entire thrust of the JLWOP sentencing decision; the defendant has already been found guilty and the sentencer is only deciding between life in prison and a chance the offender may one day be released. However, *Montgomery* makes clear that the length of time a juvenile offender needs to be incapacitated should be based entirely on his capacity for rehabilitation, not outside factors like the impact his crime had on the victim's family or community. The *Graham* court noted particularly that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[119]

The penological purpose that impact testimony serves most forcefully is a retributive one.[120] However, even retribution is imperfectly achieved in the juvenile-sentencing context.[121] Impact testimony tends to be emotionally charged and often verges into hostility. The family and friends of murder victims likely expect their testimony about how the defendant's actions affected their lives to be therapeutic, but confronting a child who is not able to fully appreciate the gravity of their actions is unlikely to provide the spiritual healing the victim seeks.

In light of the often-competing interests of victims' rights and juveniles' rights, and in the spirit of *Miller* and *Montgomery's* emphasis on rehabilitation, victims' families and juvenile offenders alike would be better served by a restorative justice model. Restorative justice is an alternative criminal justice model that may serve as a replacement for or supplement to the traditional penological system. It typically involves significant interaction between an offender and their victim, often with the aid of a trained mediator.[122] The main goal of restorative justice is that the offender accept responsibility for the harm they have caused to the victim and community and attempt to make amends for that harm, often through some

119. Graham v. Florida, 560 U.S. 48, 73 (2010).

120. *See generally* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003).

121. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107 (2009). The author notes that the "juxtaposition of victim impact statements against inadequate apologies by young offenders exacerbates the risk that judges will impose purely or primarily retributive sentences at disposition. Power differences between immature youth on the one hand and articulate or well-coached victims on the other often produce imbalanced advocacy." *Id.* at 1144.

122. *Practice Profile: Restorative Justice Programs for Juveniles*, NAT'L INST. OF JUST., https://www.crimesolutions.gov/PracticeDetails.aspx?ID=70 [https://perma.cc/Z9H4-B8KN].

form of community service.[123] In turn, this allows the victim to achieve some measure of healing and in turn offer forgiveness to the offender.[124]

When a juvenile offender has the opportunity to work through the difficult process of being confronted with the pain they caused to the family of their victim with proper support and therapeutic tools, they are more likely to process those emotions in a healthy, constructive way that leads to contrition and genuine rehabilitation.[125] Furthermore, victims who work closely with offenders in restorative justice settings are more likely to experience healing and satisfaction than those who only confront the offender in the courtroom during a sentencing hearing.[126]

Most states have not implemented a restorative justice program, at least not for homicide and other serious crimes, and they are unlikely to do so in the near future. What then can states do to comport with the *Miller* and *Montgomery* decisions within existing sentencing practices? Many states have chosen to eliminate JLWOP as a punishment altogether, which some scholars see as the most logical solution.[127] States that currently do not provide statutory aggravating factors in their JLWOP sentencing statutes[128] and those that explicitly allow impact testimony[129] should, at a minimum, rewrite their statutes to require consideration of the defendant's capacity for rehabilitation or the presence of irreparable depravity. They should also explicitly prohibit the consideration of non-defendant-focused factors such as impact testimony.

CONCLUSION

The Court's mandate that JLWOP only be assigned to juveniles who are entirely incapable of rehabilitation focuses the sentencing decision solely on the juvenile defendant. It thus renders outside factors like victim and community impact irrelevant for sentencing purposes. Furthermore, impact testimony serves little penological purpose but has the potential to result in

123. *Id.*
124. *Id.*
125. *See* Buckingham, *supra* note 117, at 859.
126. *See* Buckingham, *supra* note 117 at 875.
127. *See, e.g.*, Reichman Hoesterey, *supra* note 92, at 185.
128. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209A (2019).
129. *See, e.g.,* ALA. R. CRIM. P. 26.3 (LexisNexis 2018).

arbitrary sentencing. Victim involvement is best when limited to restorative justice programs.

As states strive to rewrite their sentencing statutes to comport with *Miller* and *Montgomery*, those with impact testimony enumerated in their discretionary or mandatory aggravating factors should remove them, and those states lacking statutory aggravating factors altogether should explicitly prohibit the use of impact testimony.

Only with these measures will the spirit of *Miller* and *Montgomery* be upheld. Only then will immature juvenile offenders be assured a meaningful opportunity for rehabilitation and eventual release as mature adults.