

TIPPING POINT:

A MAJORITY OF
STATES ABANDON
LIFE-WITHOUT-
PAROLE SENTENCES
FOR CHILDREN



The **CAMPAIGN** for the
FAIR SENTENCING
of **YOUTH**

EXECUTIVE SUMMARY

A majority of states now ban life without parole for children¹ or have no one serving the sentence. A combination of judicial decisions and state legislative reforms have reduced the number of individuals serving by 60 percent in just three years, and that number continues to decline. Today, approximately 1,100 people are serving life without parole for crimes committed as children.

For the approximately 1,700 individuals whose life-without-parole sentences have been altered through legislative reform or judicial resentencing to date, the median sentence nationwide is 25 years before parole or release eligibility. Nearly 400 people previously sentenced to life without parole for crimes committed as children have been released from prison to date.

Despite national momentum rejecting life-without-parole sentences for children, racial disparities continue to worsen; of new cases tried since 2012, approximately 72 percent of children sentenced to life without parole have been Black—as compared to approximately 61 percent before 2012.

INTRODUCTION

The United States has reached a critical tipping point in the movement to end life-without-parole sentences for children. Today at least twenty-six states and the District of Columbia ban the practice or have no one serving the sentence, even if technically available. The number of states that ban life without parole for children has more than quadrupled since 2012. At that time, only five states did not allow children to be sentenced to life without parole. Today, twenty-one states plus the District of Columbia prohibit life without parole as a sentencing option for children. At least five additional states have no one serving the sentence for a crime committed as a child. This rapid movement away from life-without parole for children—driven by the U.S. Supreme Court, state legislatures, and state supreme courts—reflects emerging national consensus that all children in the United States, regardless of the severity of their crime, must have the opportunity to demonstrate growth and earn a chance for release.

CHILDREN ARE DEVELOPMENTALLY AND CONSTITUTIONALLY DIFFERENT FROM ADULTS

In four decisions in little over a decade—*Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016)—the Supreme Court of the United States established that “children are constitutionally different from adults for purposes of sentencing.” All four opinions highlight the developments in psychology and brain science that show fundamental differences between child and adult minds, recognizing that children are categorically less culpable than adults for their actions.

Roper, *Graham*, *Miller*, and *Montgomery* are critical in defining Eighth Amendment limitations for sentencing a child to die in prison. *Roper* struck down the death penalty for children, finding that it violated the Eighth Amendment prohibition on cruel and unusual punishment. The Court in *Roper* emphasized empirical research demonstrating that children are developmentally different than adults and have a unique capacity for positive growth as they mature. *Graham* struck down life-without-parole sentences for children who commit non-homicide offenses, requiring states to give children who commit non-homicide offenses a realistic opportunity to obtain release. *Miller* struck down mandatory life-without-parole sentences for homicide offenses committed by children, holding that sentencing courts must “take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”² Most recently in *Montgomery*, the Court applied *Miller* retroactively, holding that life without parole is unconstitutional for the vast majority of youth who commit homicide—all but those incapable of positive growth and change.

Increased understanding of the adolescent brain served as the foundation for *Roper*, *Graham*, *Miller*, and *Montgomery*. Though a teenager may resemble an adult externally, his or her brain does not. The Supreme Court recognized three primary characteristics that distinguish a child’s development from an adult’s.

First, the Supreme Court recognized that children lack maturity and have an underdeveloped sense of responsibility, leading to

recklessness, impulsivity, and heedless risk-taking. The prefrontal cortex of the brain, which controls executive functioning, continues to develop through adolescence.³ So does the limbic system, where emotions, rewards, and punishments are processed.⁴ Reward sensitivity and sensation-seeking peak between ages 15 and 17, and then gradually decline until they reach adult levels in a person's mid-20s.⁵

Second, the Supreme Court recognized that children are more vulnerable to negative influences and outside pressures, including from their family and peers. Children are developmentally less capable of making sound decisions in the face of peer pressure.⁶ Children also have limited control over their own environment and have less capacity to extricate themselves from potentially violent or criminal settings.⁷

Third, the Supreme Court recognized that a child's character is not as well formed as an adult's; his or her character traits are less fixed. Adolescence is a period of heightened neuroplasticity, meaning that the brain has a heightened capacity for positive change.⁸ Although adolescents are predisposed to engage in the risky behavior and immature decision-making that can result in crime,⁹ risk-taking behavior and crime both follow an inverted U-shaped curve that increases from childhood to adolescence, peaks in mid-late adolescence, and then declines.¹⁰ As such, 18 is the peak age for criminal behavior, and 90 percent of all juvenile offenders desist from crime by their mid-20s, evidencing likely rehabilitation for children and teenagers who commit serious crimes.¹¹

The Supreme Court reasoned that these “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”¹²

The Supreme Court has not yet reached the question of whether life without parole categorically constitutes cruel and unusual punishment when imposed on children.¹³ Instead, the Court held in *Miller* and *Montgomery* that life without parole is unconstitutional for youth whose crimes reflect “transient immaturity” as opposed to “irreparable corruption.”¹⁴ Given what adolescent brain science reveals about

children’s developmental capacity for change, the vast majority of—if not all—crimes committed by youth reflect transient immaturity by simple virtue of the individual’s age at the time of the crime. Indeed, Justice Scalia believed that the *Montgomery* decision was a “way of eliminating life without parole for juvenile offenders,” because it “makes imposition of [life without parole on children] a practical impossibility.”¹⁵

NATIONAL LANDSCAPE OF REFORM IN THE MOVEMENT TO ABOLISH LIFE WITHOUT PAROLE FOR CHILDREN

In the six years since *Miller* was decided, the United States has experienced sweeping change in the practice of sentencing children to die in prison. When *Miller* was decided, 45 states and the District of Columbia permitted life without parole as a sentencing option for children.¹⁶ In many states, life without parole was the only sentence available if a child was convicted of homicide.

Remarkably, the number of states that do not allow life without parole to be imposed on children has more than quadrupled since 2012, from five states to twenty-one states and the District of Columbia.¹⁷ And in at least five additional states, no one is serving the sentence for an offense committed as a child.¹⁸ Today a majority of states ban life without parole for children or have no one serving the sentence.

The movement to end life without parole sentences for children is notable not just for its rapid change, but also for the geographic and cultural diversity of states enacting reform, the bi-partisan nature in which bills have passed, and the overwhelming support within the state legislatures that have acted to ban life sentences for children. Laws enacted in the past five years have received broad bi-partisan support and have passed in historically Republican states like Arkansas, Utah, and West Virginia, and in historically Democratic states like Hawaii and Vermont. Moreover, laws that ban life-without-parole sentences for children have garnered support and co-sponsorship by Republican and Democratic lawmakers.¹⁹

State supreme courts have also contributed to the rapid national momentum rejecting life-without-parole sentences for children. The state supreme courts in Massachusetts (2013),²⁰ Iowa (2016),²¹ and Washington (2018)²² have held that under their state constitutions, life without parole is an unconstitutional sentence when imposed upon a child. In the most recent state supreme court decision categorically banning the imposition of life without parole sentences on children, the Washington Supreme Court recognized that “[t]here is a clear trend of states rapidly abandoning or curtailing juvenile life without parole sentences,” which “weighs in favor of finding that sentencing juvenile offenders to life without parole is cruel punishment.”²³

THE NUMBER OF INDIVIDUALS SERVING LIFE WITHOUT PAROLE FOR CRIMES COMMITTED AS CHILDREN HAS BEEN REDUCED BY 60 PERCENT

When the U.S. Supreme Court decided *Montgomery* in 2016, approximately 2,800 individuals around the United States were serving life without parole for offenses committed as children. Since *Montgomery*, that number has been reduced by 60 percent because of the legislative and judicial advances described above. Today, approximately 1,100 people convicted of crimes committed as children are serving life without parole around the country.

For the approximately 1,700 individuals whose life-without-parole sentences have been altered through legislative reform or judicial resentencing to date, the median sentence nationwide is 25 years before parole or release eligibility.²⁴ This means that most individuals who were sentenced to die in prison as children now have an opportunity for release, but they will not be eligible for a review opportunity or release until they are at least in their 40s or older.²⁵

As a result of both legislative reforms and judicial resentencing, nearly 400 individuals sentenced as children to life without parole have been released from prison as of December 2018, and that number continues to grow.

OUTLIER JURISDICTIONS PERSIST IN SENTENCING CHILDREN TO LIFE WITHOUT PAROLE

Despite the rapid rejection of life without parole for children at the state legislative and state supreme court level, and despite the extremely high threshold for imposing life without parole on a child under the Eighth Amendment, children continue to receive life without parole at a disproportionate rate in a handful of jurisdictions around the country.

For example, prosecutors in Louisiana and Michigan continue to seek life without parole at a rate that far surpasses the rest of the country. Of the approximately 70 new life-without-parole sentences imposed on children since *Miller*, nearly a third have been imposed in Louisiana.²⁶ And among the individuals already serving life without parole in Michigan and Louisiana when *Montgomery* was decided, the prosecutors in both states have sought to re-impose life without parole in approximately 30 percent of cases in Louisiana and 60 percent of cases in Michigan—despite the Supreme Court mandate that the penalty be imposed rarely.²⁷

In Mississippi, 26 percent of resentencings to date have resulted in the re-imposition of life without parole.²⁸ By contrast, in Pennsylvania, the state that historically has sentenced more children to life without parole than any other, fewer than two percent of resentencings have resulted in the re-imposition of life without parole.²⁹

Whether an individual is sentenced to die in prison for a crime committed under the age of 18 is more dependent on the state and county in which the crime was committed than whether a child indeed is capable of positive change, as required by the Constitution. The Associated Press reported as part of a 50-state survey on life without parole for children that the “odds of release or continued imprisonment vary from state to state, even county to county, in a pattern that can make justice seem arbitrary.”³⁰

LIFE WITHOUT PAROLE DISPROPORTIONATELY IMPACTS MARGINALIZED AND TRAUMATIZED CHILDREN

Life without parole is imposed on the most marginalized and vulnerable children in American society. Children sentenced to life without parole are significantly likelier than the general population to have been exposed to adverse childhood experiences, defined by researchers as emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, household substance abuse, household mental illness, parental separation, and having an incarcerated household member. New research demonstrates that this exposure to trauma greatly impacts brain development and chemistry.³¹

In the general population, it is estimated that 25-34 percent of children have experienced at least one childhood trauma. In contrast, 93 percent of youth entering the criminal justice system have experienced some form of trauma.³² Among children sentenced to life without parole, 80 percent have witnessed violence in their homes, almost 50 percent have been physically abused, and 20 percent have been sexually abused.³³ For girls, the statistics are even more staggering. Eighty percent of girls sentenced to life without parole have been physically abused, and 77 percent have been sexually abused.³⁴ Moreover, justice-involved youth are considerably likelier to have experienced multiple forms of abuse.³⁵

Trauma can alter a child's brain significantly, and exposure to trauma is associated with an increase in adolescent interpersonal violence and a lack of capacity for emotional self-regulation.³⁶ Specifically, studies have found that children with histories of child abuse and other trauma often demonstrate impulsive behavior, risk-taking behavior, and decreased self-control.³⁷ Trauma can reshape a child's brain, priming survivors of trauma to respond excessively to minor triggers. And while the impacts of trauma provide critical context for children who commit serious crimes, the plasticity of children's brains makes them especially amenable to rehabilitation, therapy, and positive growth.³⁸

LIFE WITHOUT PAROLE DISPROPORTIONATELY IMPACTS CHILDREN OF COLOR

Before the 1980s, life without parole was imposed on children infrequently. However, an uptick in violent crime in the 1980s and 1990s inspired harsher sentencing policies for both children and adults.³⁹ And the rise in violent crime coincided with the rise of the “superpredator” theory in the 1990s, which influenced harsher sentencing policies specific to children.⁴⁰ The now-debunked superpredator theory was developed by an academic criminologist, John Dilulio, who predicted a wave of adolescents who would commit senseless violent crimes without remorse or reason. The superpredator theory, which predicted “tens of thousands” of “super crime-prone young males” who would rise up and usher in never-before seen levels of violence,⁴¹ gained traction in the national media and was perpetuated by high-level policymakers and elected officials from both major political parties.

The ubiquity of the superpredator narrative disproportionately impacted young people of color, as many academics, mainstream media, and politicians perpetuated a highly racialized image of superpredators. The term “superpredator” became code for “Black teenage boy.” As Dilulio wrote in 1996: “My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien.”⁴²

Criminologists who created and perpetuated the superpredator myth have since recognized that their characterizations and predictions of superpredator children were wrong. In an amicus brief filed in the U.S. Supreme Court in 2012, Dilulio and other criminologists acknowledged that “the juvenile superpredator was a myth and the predictions of future violence were baseless,” and that no scholarly research in the past decade provides any support for the juvenile superpredator.⁴³ The very criminologists who in the 1990s had decried youth who commit serious crimes as monsters incapable of reform instead petitioned the U.S. Supreme Court for relief on behalf of children sentenced to life without parole.⁴⁴

Although superpredator children were entirely fictitious, state legislatures responded to increased levels of crime and fear of superpredator teenagers in the 1990s with harsher mandatory sentencing laws, and the rate of children sentenced to life without parole spiked. Between 1980 and 1993, the rate of life without parole per homicide arrest of a child was between one and two percent.⁴⁵ By 1999, 11 percent of children arrested for homicide were sentenced to life without parole.⁴⁶ Over 75 percent of all children ever sentenced to life without parole were sentenced in the 1990s or later.⁴⁷

An overwhelming majority of children sentenced to life without parole have been children of color. Seventy percent of all youth ever sentenced to life without parole are people of color—primarily Black and Latinx.⁴⁸ Strikingly, racial disparities in the imposition of life without parole on children continue to worsen. The Supreme Court in *Miller* banned mandatory life-without-parole sentences for children and guaranteed all children an individualized sentencing hearing before life without parole can be imposed. Yet despite the now-discretionary nature of life without parole, and the Supreme Court’s unequivocal language that the penalty may be imposed only if a child has no capacity for rehabilitation, racial disparities have increased under this new framework. Of new cases tried since *Miller*, approximately 72 percent of children sentenced to life without parole have been Black—as compared to approximately 61 percent before *Miller*.⁴⁹

SENTENCING CHILDREN TO LIFE WITHOUT PAROLE VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

The United States is the only country in the world that sentences children to die in prison, and the imposition of life without parole on children unequivocally violates international human rights law. Article 37 of the United Nations Convention on the Rights of the Child (“CRC”) prohibits subjecting children to “to torture or other cruel, inhuman or degrading treatment or punishment,” including the use of “capital punishment and life without the possibility of release” as a sentencing option for children under 18 years of age. Following Somalia’s ratification of the CRC in 2015, the United States became the only country in the world that has not ratified the treaty. Moreover, the

imposition of life without parole on children violates the United Nations International Covenant on Civil and Political Rights, which requires children to be treated distinct and apart from adults in the criminal justice system, taking into account children’s age and capacity for rehabilitation.⁵⁰

A 2015 report by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment called out the United States as the only country in the world that continues to sentence children to life without parole. The report concluded that “[l]ife imprisonment and lengthy sentences . . . are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child. Life sentences or sentences of an extreme length have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment.”⁵¹

THE UNITED STATES MUST END THE PRACTICE OF SENTENCING LIFE WITHOUT PAROLE FOR CHILDREN

Now that over half of all states do not have life without parole as a sentencing option for children or have no one serving, the United States has reached a critical tipping point. State legislatures, state supreme courts, and ultimately, the U.S. Supreme Court, must recognize what a majority of the country already has: that life without parole cannot and should not be imposed on any child.



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¹ This report uses child, children, adolescent, and youth to describe people under the age of eighteen.

² *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

³ See Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescent* (2014); Elizabeth Scott et al., *The Supreme Court and the Transformation of Juvenile Sentencing*, Models for Change (2015), available at modelsforchange.net/publications/778; BJ Casey et al., *Braking and Accelerating of the Adolescent Brain*, J. Res. Adolesc. (2011), available at ncbi.nlm.nih.gov/pmc/articles/PMC3070306/.

⁴ See Steinberg, *Age of Opportunity*.

⁵ *Id.*

⁶ See Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13(2) Psychol. Pub. Pol'y & L. 115, 119 (2007).

⁷ Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003).

⁸ Arain M. et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease Treatment 449 (2013); Scott, *The Supreme Court and the Transformation of Juvenile Sentencing at 9*.

⁹ See Scott, *The Supreme Court and the Transformation of Juvenile Sentencing at 7*.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Miller*, 567 U.S. at 472.

¹³ This is in contrast with *Roper* and *Graham*, which *did* institute categorical bans on punishments imposed on children.

¹⁴ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

¹⁵ *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

¹⁶ In 2011, only five states did not permit children to be sentenced to life without parole. Alaska and Kentucky had never permitted life without parole for individuals who committed offenses while under age 18, while Colorado, Kansas, and Montana were early leaders and outliers in the national landscape, passing bills to abolish life without parole for children between 2006 and 2010.

¹⁷ *States that Ban Life without Parole for Children*, The Campaign for the Fair Sentencing of Youth, available at fairsentencingofyouth.org/media-resources/states-that-ban-life/.

¹⁸ No one is serving life without parole for offenses committed as children in Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island as of December 3, 2018.

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- ¹⁹ In Delaware, Hawaii, New Jersey, Utah, Vermont, Washington, D.C., West Virginia, and Wyoming, legislation passed one chamber unanimously, and in Nevada and North Dakota, legislation passed both chambers unanimously.
- ²⁰ *Diatchenko v. DA*, 1 N.E.3d 270 (Mass. 2013).
- ²¹ *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).
- ²² *State v. Bassett*, No. 94556-0, 2018 Wash. LEXIS 704 (Wash. 2018).
- ²³ *Bassett*, 2018 Wash. LEXIS 704, at *21.
- ²⁴ Data on file with The Campaign for the Fair Sentencing of Youth.
- ²⁵ Moreover, the quality of the review depends significantly by state.
- ²⁶ Data on file with The Campaign for the Fair Sentencing of Youth.
- ²⁷ *Id.*
- ²⁸ Office of the State Public Defender, *Juvenile Life without Parole in Mississippi* (August 2018), available at <http://www.ospd.ms.gov/REPORTS/Juvenile%20Life%20without%20Parole%20report%2008-2018.pdf>.
- ²⁹ Data on file with The Campaign for the Fair Sentencing of Youth.
- ³⁰ Sharon Cohen & Adam Geller, *Parole for Young Lifers Inconsistent Across US*, Associated Press (July 31, 2017), available at <https://apnews.com/a592b421f7604e2b88a170b5b438235f/AP-Exclusive:-Parole-for-young-lifers-inconsistent-across-US>.
- ³¹ See M.T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACES) in the Lives of Juvenile Offenders*, OJJDP Journal of Juvenile Justice (2014), available at <https://pdfs.semanticscholar.org/9466/b7ff1b7dd08ecb668a5836f89ed03d3638d5.pdf>; Michelle Evans-Chase, *Addressing Trauma and Psychosocial Development in Juvenile Justice-Involved Youth: A Synthesis of the Developmental Neuroscience, Juvenile Justice and Trauma Literature* (2014), available at <https://www.mdpi.com/2075-471X/3/4/744>.
- ³² See Evans-Chase.
- ³³ Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, The Sentencing Project (2012), available at <https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.
- ³⁴ *Id.*
- ³⁵ See Baglivio.
- ³⁶ See Evans-Chase.
- ³⁷ See Annette Streeck-Fischer et al., *Down Will Come Baby, Cradle and All: Diagnostic and Therapeutic Implications of Chronic Trauma on Child Development*, 34 *Austl. & N.Z. J. Psych.* 903, 915 (2000).
- ³⁸ See Scott, *The Supreme Court and the Transformation of Juvenile Sentencing* at 9.
- ³⁹ Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. Times (Apr. 6, 2014), available at <http://www.nytimes.com/>
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2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=1.

⁴⁰ John Mills et al., *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing* (2015) at 585, available at <https://ssrn.com/abstract=2663834>.

⁴¹ John Dilulio, *The Coming of the Superpredators*, *Weekly Standard* (Nov. 27, 1995), available at <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>.

⁴² John Dilulio, *My Black Crime Problem, and Ours*, *City Journal* (Spring 1996), available at city-journal.org/html/my-black-crime-problem-and-ours-11773.html.

⁴³ Brief for Jeffrey Fagan et al. as Amicus Curiae Supporting Petitioner, *Miller v. Alabama*, No. 10-9646 (U.S. Jan. 17, 2012).

⁴⁴ *Id.*

⁴⁵ Mills, *Juvenile Life Without Parole in Law and Practice* at 562.

⁴⁶ *Id.*

⁴⁷ Data on file with The Campaign for the Fair Sentencing of Youth.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ United Nations Treaty Collection, *International Covenant on Civil and Political Rights*, United States of America: Reservations, para. 5; see also *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Human Rights Watch (2005), available at hrw.org/reports/2005/us1005/9.htm; see also Maria Ann Magnuson, *Taking Lives: How the United States Has Violated the International Covenant of Civil and Political Rights by Sentencing Juveniles to Life without Parole*, 14 UC Davis J. Juv. Law & Pol. 163 (2010), available at jjlp.law.ucdavis.edu/archives/vol-14-no-1/Magnuson.pdf.

⁵¹ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/28/68, available at ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_E.doc.