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2019

Constitutionally Incapable: Parole Boards as Sentencing Courts

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CONSTITUTIONALLY INCAPABLE: PAROLE BOARDS AS SENTENCING COURTS

Mae C. Quinn*

ABSTRACT

Courtroom sentencing, as part of the judicial process, is a long-standing norm in the justice system of the United States. But this basic criminal law precept is currently under quiet attack. This is because some states are now allowing parole boards to step in to decide criminal penalties without first affording defendants lawful judicial branch sentencing proceedings and sentences. These outside-of-court punishment decisions are occurring in the cases of youthful offenders entitled to sentencing relief under Miller v. Alabama, which outlawed automatic life-without-parole sentences for children. Thus, some Miller-impacted defendants are being sentenced by parole-boards as executive branch agents, rather than by the judicial branch of government.

Parole board punishments serve as a somewhat shocking turn of events, particularly since the right to be sentenced in a courtroom, rather than some other government-run venue, seems so unquestionable. But quite surprisingly, that right is not contained in the text of the U.S. Constitution. Nor has the matter been squarely addressed by legal scholars or the Supreme Court. Instead, both the Court and respected commentators have been writing around the issue for years.

Nevertheless, allowing executive branch bodies to become sole deciders of penalty terms— up to and including life without parole—is more than highly unusual. It is deeply problematic as a matter of law, policy, and precedent. Failing to take action to rein in this emerging practice could result in serious consequences, not just in Miller matters, but beyond.

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As executive branch agencies, the parole boards have not been called upon to entirely displace the judicial branch to serve both as front-end penalty adjudicators responsible for proportionality, narrowing, and mitigation assessments, as well as early-release gatekeepers evaluating reform and risk for reoffending.

In fact, parole-grant determinations are seen as highly informal proceedings, made behind closed doors, without court-level due process protections or even involvement of defense counsel. And the interests, roles, and experiences of parole agency officials are far different from the legally trained judiciary who oversee court-based penalty processes. For all these reasons, permitting parole board displacement of sentencing courts in Miller matters, or otherwise, is not just inadvisable, but highly injudicious.

This article, therefore, calls for recommitment to the right of court-centered sentencing practices for Miller cases and beyond. It is the first scholarly account of why this is the constitutionally required path in cases involving the punishment of imprisonment as well as the preferred policy given contemporary parole board practices and culture.

TABLE OF CONTENTS

I. INTRODUCTION	567
II. EMERGING PROBLEM OF STATE PAROLE BOARD PUNISHMENTS	571
A. <i>MILLER V. ALABAMA</i>	571
B. <i>MONTGOMERY V. LOUISIANA</i>	572
C. PUNTING TO PAROLE BOARDS—A CASE STUDY	575
III. CONSTITUTIONALIZATION OF STATE COURT SENTENCING RIGHTS	578
A. EARLY SUPREME COURT SENTENCING CASES	579
B. DEVELOPMENT OF PROCEDURAL SENTENCING PROTECTIONS	580
1. <i>Due Process and Individualization</i>	580
2. <i>Critical Stage and Right to Counsel</i>	582
3. <i>Jury Determinations</i>	583
C. ESTABLISHMENT OF SUBSTANTIVE SENTENCING REQUIREMENTS	585
1. <i>Cruel, Arbitrary, or Discriminatory</i>	585
2. <i>Proportionality and Special Individualization</i>	586
IV. PAROLE BOARDS AS LIMITED AND LARGELY EXTRA-LEGAL EXECUTIVE AGENCIES	588
A. ESTABLISHMENT OF THE EXECUTIVE BRANCH MERCY FUNCTION	588
B. BRIEF SHIFT TO INDETERMINACY AND LIMITED POWER TO PAROLE BOARDS	589
C. DE-COURTIFICATION OF STATE PAROLE BOARDS	591
D. RETURN TO DETERMINACY AND RECOMMITMENT TO COURTS	592

V.	CONSTITUTIONAL SENTENCING INCAPACITY OF CONTEMPORARY PAROLE BOARDS.....	594
A.	OVERVIEW OF STATE PAROLE BOARDS TODAY	594
B.	PENUMBRAL RIGHT TO JUDICIAL BRANCH PENALTY PHASE	598
C.	PAROLE BOARDS AND PROCEDURAL INABILITY TO PUNISH.....	600
	1. <i>Jury Determinations</i>	600
	2. <i>Critical Stage and Right to Counsel</i>	602
	3. <i>Due Process and Individualization</i>	603
D.	SUBSTANTIVE SHORTCOMING OF PAROLE BOARD PENALTIES	606
	1. <i>Arbitrary, Discriminatory, or Cruel</i>	606
	2. <i>Proportionality and Heightened Individualization</i> ..	609
VI.	SYSTEMIC IMPLICATIONS OF PAROLE BOARD PUNISHMENTS AND CALL FOR REFORM.....	611
A.	CRIMINAL PRACTICE NORMS, PUBLIC APOLOGY, AND PROCEDURAL JUSTICE.....	611
B.	MILLER MATTERS AS SUI GENERIS OR SECOND-BEST SENTENCING SENTINELS?	614
C.	SOME POSSIBLE PATHS FORWARD	616
VII.	CONCLUSION	619

I. INTRODUCTION

IN the United States, criminal defendants, once convicted, will be—and should be—sentenced in a court of law. At least, this is what most people believe. This is more than a lofty legal concept or theoretical ideal. It is a truism embedded in the public conscience. From classical literature¹ to modern television dramas,² courtroom sentencing has been depicted as a well-known feature of the American criminal justice system.

But this touchstone practice is currently under quiet attack. This is because some states are now allowing parole boards to step in to decide criminal penalties without first affording defendants lawful judicial branch sentencing proceedings and sentences. These outside-of-court punishment decisions are occurring in the cases of youthful offenders entitled to relief under *Miller v. Alabama*.³

1. See, e.g., HARPER LEE, *TO KILL A MOCKINGBIRD* 232 (J.B. Lippencott Co. ed., 1960) (describing Jem protesting that “the jury didn’t have to give him death—if they wanted to they could’ve gave him twenty years”); RICHARD WRIGHT, *NATIVE SON* 348–49 (1940) (describing Bigger Thomas’s court hearing leading to death sentence).

2. See, e.g., *Law and Order: Special Victim’s Unit* (NBC television series 1999–present); see also, e.g., *American Crime* (ABC television series 2015–2017), *The Wire* (HBO television series 2002–2008). See generally Samantha Parker, *The Portrayal of the American Legal System in Prime Time Television Crime Dramas*, 4 ELON J. UNDERGRADUATE RES. COMM. 108 (2013) (describing media depiction of courtroom cases and sentencing).

3. 567 U.S. 460 (2012).

In *Miller*, the U.S. Supreme Court outlawed automatic juvenile life-without-parole sentences, requiring immaturity and youthful characteristics to be considered in a meaningful proceeding before such penalties could be imposed.⁴ Moreover, it made clear that a life-without-parole sentence—the worst that may be imposed upon any child—was to be incredibly rare in this country and allowed only when a young person was shown to be “irreparabl[y] corrupt[].”⁵

Parole board punishments serve as a somewhat shocking turn of events, particularly since the right to be sentenced in a courtroom, rather than some other government-run venue, seems so unquestionable. But quite surprisingly, that right is not contained in the text of the U.S. Constitution. Nor has the matter been squarely addressed by legal scholars or the Supreme Court. Instead, both the Court⁶ and respected commentators⁷ have been writing around the issue for years.

Nevertheless, allowing executive branch bodies to become sole deciders of penalty terms— up to and including life without parole—is more than highly unusual. It is deeply problematic as a matter of law, policy, and precedent. Failing to take action to rein in this emerging practice could result in serious consequences, not just in *Miller* matters, but beyond.

To be sure, parole boards have historically played a limited mercy-granting role focused narrowly on the issue of inmate rehabilitation. But that was on the back end of the punishment process after the sentence was formally imposed by way of final court judgment. As executive agencies, they have not been called upon to entirely displace the judicial branch to serve both as front-end penalty adjudicators responsible for proportionality, narrowing, and mitigation assessments, as well as early-release gatekeepers evaluating reform and risk for reoffending.

In fact, parole-grant determinations are seen as highly informal proceedings, made behind closed doors, without court-level due process protections or even involvement of defense counsel. And the interests, roles, and experiences of parole agency officials are far different from the le-

4. *See id.* at 470.

5. *Id.* at 479–80.

6. *See, e.g.,* *Hughes v. United States*, 138 S. Ct. 1765 (2018) (discussing usual role and rights of the district court at sentencing in the context of remanding case for possible sentence reduction, without specifically holding that court must serve as venue for imposition of sentence in the first instance); *see also* *Mistretta v. United States*, 488 U.S. 361 (1989).

7. *See, e.g.,* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006); William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019); Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447 (2016); Cara H. Drinan, *Misconstruing Graham & Miller*, 91 WASH. U. L. REV. 785 (2014); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47 (2011); Aaron Rappaport, *The Institutional Design of Punishment*, 60 ARIZ. L. REV. 913 (2018); *see also* William W. Berry III, *Discretion without Guidance: The Need to Give Meaning to §3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 635 (2008) (noting in passing “the United States Constitution does not specify which branch of government has the responsibility for federal sentencing”).

gally trained judiciary who oversee court-based penalty processes. For all these reasons, permitting parole board displacement of sentencing courts in *Miller* matters, or otherwise, is not just inadvisable, but highly injudicious.

This article, therefore, calls for recommitment to the right of court-centered sentencing practices for *Miller* cases and beyond. It is the first scholarly account of why this is the constitutionally required path in cases involving the punishment of imprisonment as well as the preferred policy given contemporary parole board practices and culture.

Part II surfaces the dilemma, outlining ongoing efforts across the country to implement *Miller*, the Supreme Court decision that banned mandatory life-without-parole prison sentences for juveniles. It describes how some jurisdictions have opted for administrative reassessment of penalties for *Miller*-impacted youthful offenders rather than resentencing in courts. This is, in part, based upon Supreme Court dicta in the case that made *Miller* retroactive, *Montgomery v. Louisiana*.⁸ This article uses one state, Missouri, as a case-study. However, rather than serve as a model, the Missouri experience demonstrates that state parole board punishments run afoul of constitutional law, reflect poor policy, and provide troubling precedent for the days ahead.

Indeed, while surveying nearly 200 years of Supreme Court case law, Part III shows that trial court sentencing is a constitutional cornerstone of the criminal justice process. It recounts how the Court has developed and stitched together a robust patchwork of penalty phase protections for criminal defendants—both procedural and substantive—under individual provisions of the U.S. Constitution. More than merely establishing a laundry list of rights, however, in creating this blanket of punishment-related promises, the Court has clearly instantiated the judicial branch as constitutional sentencing norm. Yet, neither this list of protections nor the underlying right to be sentenced in court are being provided in *Miller* remedy matters in states that have opted for parole board sentence review processes.

Part IV describes executive branch parole boards in the United States, beginning with colonial conceptions of clemency and moving through contemporary correctional agencies. In doing so, it explains the historic role of executive actors as secondary to the sentencing process, with limited power to exercise mercy on the back end of criminal cases. Moreover, as Part IV further recounts, the federal government and many states actually abandoned the parole model during the 1980s and 1990s. As a result, in recent years, there has been even greater emphasis on the primacy of the judicial branch for sentencing purposes.

Part V argues that parole boards today are constitutionally incapable of serving as sole sentence adjudicators in *Miller* matters or any other. It articulates, for the first time, a set of constitutional theories that establish

8. 136 S. Ct. 718, 736 (2016).

a free-standing fundamental right to be sentenced by a state court. It also explains how parole systems unquestionably fail to provide each of the specific procedural constitutional protections required at sentencing for *Miller* matters in particular, but in criminal cases generally. Given their well-documented disorder, political bias, and lack of expertise, parole boards as entities are also far more likely to violate substantive sentencing rights of defendants. Further, they lack the kind of nuanced knowledge or guidance required to deliver on *Miller*'s promise of protection against disproportionality.

Beyond the constitutional problems presented by *Miller*-based parole board sentencing, Part VI explains that the practices of such institutions stand in stark contrast to other important justice system norms in the United States. It warns that allowing parole board punishments to continue without question in *Miller* cases potentially paves the way for even wider use of executive branch administrative sentencing proceedings. That is, absent adoption of the arguments advanced here, there would be no reason to stop the spread of parole board penalties to all manner of matters for purposes of expediency—or possibly worse.

This article thus concludes with a call for recommitment to first-order fairness for adjudicating criminal punishment. In this era of rash executive branch actions and politically driven calls for vengeance, wholly agency-based incarceration decisions present serious constitutional issues and other concerns. It thus urges all states to afford *Miller*-impacted inmates the right to sentencing hearings in courts of law, if they so desire. Not only does this respect the constitutional rights of these youthful offenders, but also will protect against parole boards becoming “second best” sentencing courts in other criminal cases in the future.⁹

This said, another alternative would be to use the current morass that is *Miller* and *Montgomery* in the United States as an opportunity to establish greater clarity around youthful offender sentences more generally while ending parole board punishments. Particularly, in light of legislative enactments contemplating youthful offender reintegration and the rise in local prosecutorial rethinking about mass incarceration, state stakeholders might finally come together to release all *Miller*-impacted inmates—and similarly situated youthful offenders—once they have served somewhere between fifteen to twenty-five years of incarceration. Such a lengthy prison term reflects an emerging consensus of what constitutes a sufficient sanction for youthful transgressions, even in the case of causing death. Such release would help avoid wasting further time, energy, and words while attempting to grapple with the riddle of what life means for youth.

9. See generally William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061 (2019).

II. EMERGING PROBLEM OF STATE PAROLE BOARD PUNISHMENTS

A. *MILLER v. ALABAMA*

Beginning in 2005, the Supreme Court handed down a series of decisions establishing that youth are different from adults for purposes of sentencing.¹⁰ Drawing on biological and social science developments—as well as past precedent and the common sense experiences of parents—the Court explained that adolescent brains are different from those of fully grown defendants.¹¹ As a result, youth are now considered categorically less culpable than adults in criminal matters.¹² Youth do not fully appreciate risks, are more susceptible to negative influences and pressures, and do not understand the consequences of their actions in the same way as adults.¹³ They also are more amenable to rehabilitation since they are likely to change over time and grow out of their immaturity and risk-seeking conduct.¹⁴ Relying on these findings, the Court substantively restricted juvenile sentences in a range of ways.

In 2005, in *Roper v. Simmons*, the Court struck down capital punishment for children.¹⁵ The Court held that their still evolving moral compasses and transitory traits made youth “categorically less culpable” than adults, requiring states to exempt them from the country’s most serious criminal sanction available for adults: the death penalty.¹⁶

In 2010, in *Graham v. Florida*, the Court created another sentencing ban for youth, holding that children who do not intentionally kill cannot be sentenced to a prison term of life without parole.¹⁷ The Court noted that a life-without-parole sentence, “the second most severe penalty permitted by law,” was the most serious punishment a child could face.¹⁸ Thus, “likening life-without-parole sentences imposed on juveniles to the

10. *Miller*, 567 U.S. at 471 (noting that children are categorically different from adults for purpose of sentencing); see also *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); Mae C. Quinn, *Introduction: Evolving Standards in Juvenile Justice from Gault to Graham and Beyond*, 38 WASH. U. J.L. & POL’Y 1, 12–13 (2012) [hereinafter Quinn, *Evolving Standards*] (describing the Court’s evolving standards of decency doctrine for youth as “a story still very much in progress”).

11. See generally Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL’Y 17, 23–25 (2012); Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 545–46 (2017).

12. See Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Adolescent Pro Se Advocacy—Ferguson and Beyond*, 2015 BYU L. REV. 1247, 1299–302 (2015) [hereinafter Quinn, *In Loco Juvenile Justice*] (suggesting expansion of the “categorically less culpable” doctrine beyond sentencing proceedings for youth).

13. See *Miller*, 567 U.S. at 490 (Breyer, J., concurring); *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–70. See generally Quinn, *In Loco Juvenile Justice*, *supra* note 12, at 1262.

14. See *Miller*, 567 U.S. at 472, 477 (majority opinion); *Graham*, 560 U.S. at 72–74; *Roper*, 543 U.S. at 571.

15. *Roper*, 543 U.S. at 568; see Quinn, *Evolving Standards*, *supra* note 10, at 12.

16. *Roper*, 543 U.S. at 567–70 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); see Quinn, *Evolving Standards*, *supra* note 10, at 12.

17. *Graham*, 560 U.S. at 82; see also Henning, *supra* note 11, at 17.

18. *Graham*, 560 U.S. at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

death penalty itself,” the Court in *Graham* applied heightened proportionality analysis to categorically narrow the universe of youth who could potentially receive death-behind-bars sentences.¹⁹

In 2012, the Court decided *Miller v. Alabama*, which struck down mandatory life-without-parole prison terms for young people—even those who intentionally kill.²⁰ It reiterated that only “the rare juvenile offender whose crime reflects irreparable corruption,” rather than “transient immaturity,” should be eligible for life without parole.²¹ It explained that it “viewed this ultimate penalty for juveniles as akin to the death penalty,” as for them it was the “most severe punishment” available under law.²² A careful narrowing and proportionality process would be needed, as in death penalty cases, to demonstrate the harshest available sentence could be imposed.²³

Miller also made clear that a child’s circumstances, including mitigating factors relating to youth, had to be considered and evaluated in an individualized sentencing process.²⁴ This would need to occur before a child defendant could be deemed beyond reach such that “irrevocably sentencing them to a lifetime in prison” was appropriate.²⁵ Accordingly, it reversed the state court judgment that upheld Miller’s sentence.²⁶ It did the same for Kuntrell Jackson, the defendant in the companion case to *Miller*.²⁷ Both defendants were remanded for new sentencing hearings in their respective state trial courts.²⁸

B. *MONTGOMERY V. LOUISIANA*

As other commentators have previously catalogued, states that had automatic juvenile-life-without-parole sentences on their books responded to *Miller* in a range of ways,²⁹ with many first resisting³⁰ before attempt-

19. See *Miller*, 567 U.S. at 474–75 (describing the holding in *Graham*); see also *Graham*, 560 U.S. at 48, 75, 82.

20. See *id.* at 489.

21. *Id.* at 479–80.

22. *Id.* at 475.

23. See generally *id.* at 479–80.

24. *Id.* at 476.

25. *Id.* at 480.

26. See *id.* at 489.

27. *Id.*

28. Matt Smith, *Evan Miller Offers Apology as Resentencing Hearing Wraps*, JUV. JUST. INFO. EXCHANGE (Mar. 15, 2017), <http://jjie.org/2017/03/15/brain-science-prison-staff-warden-take-stand-in-evan-miller-resentencing-trial> [<https://perma.cc/G6AA-5W7L>]; see also Associated Press, *Arkansas Court to Hear Case on Past Juvenile Life Sentences*, KUAR ONLINE (Apr. 14, 2015), <https://www.ualpublicradio.org/post/arkansas-court-hear-case-past-juvenile-life-sentences> [<https://perma.cc/CB7L-JFDU>].

29. See generally Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California’s Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245 (2016) [hereinafter Caldwell, *Creating Meaningful Opportunities for Release*]; Moriearty, *supra* note 11.

30. See Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, SENT’G PROJECT (June 25, 2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf> [<https://perma>

ing to bring sentencing codes into compliance for future cases.³¹ As for past cases where automatic death-behind-bars prison terms were already imposed, responses also varied.³² Some jurisdictions quickly held that *Miller*-impacted inmates needed to be remanded to trial courts for constitutional resentencing, as it occurred in the cases of *Miller* and *Jackson*.³³ Others held that *Miller* should not be applied retroactively to past cases because *Miller* was a procedural decision under *Teague v. Lane* and did not announce a new substantive criminal law rule.³⁴ A third group of states, including Missouri, declined to act until the Supreme Court took action to address the question of *Miller*'s retrospective application.³⁵

Finally, in 2016, in *Montgomery v. Louisiana*, the Court held *Miller* applied retroactively to the over 2,000 youth incarcerated under mandatory life-without-parole judgments and orders.³⁶ Writing for the majority, Justice Kennedy addressed the main substantive issue before the Court:

The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*. . . . *Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.³⁷

The Court posited that, “[a]fter *Miller*, it will be the rare juvenile offender who can receive that same sentence.”³⁸

Justice Kennedy also clarified that *Miller* also impacted sentencing procedures.³⁹ Specifically, it demanded a specialized approach to individualization to protect against disproportionality in the cases of juvenile offenders:

To be sure, *Miller*'s holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a

.cc/9KH4-DM4Y]; see also Robert S. Chang et al., *Evading Miller*, 39 SEATTLE U. L. REV. 85 (2015).

31. See Drinan, *supra* note 7, at 787–89; Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1137–39 (2016).

32. See French Russell & Denholtz, *supra* note 31, at 1137–38.

33. See, e.g., Chang et al., *supra* note 30, at 92–93; see also *People v. Davis*, 6 N.E.3d 709, 723 (Ill. 2014) (“We remand for a new sentencing hearing, where the trial court may consider all permissible sentences.”).

34. See generally *Teague v. Lane*, 489 U.S. 288 (1989); Rovner, *supra* note 30.

35. See *Missouri's Failure to Act on Juvenile Life Terms Could Have Expensive Consequences*, ST. LOUIS POST-DISPATCH (Oct. 25, 2015), https://www.stltoday.com/opinion/editorial/editorial-missouri-s-failure-to-act-on-juvenile-life-terms/article_8d37b239-a575-5291-a49a-54b7ab4ae575.html [https://perma.cc/9XSS-PWDA].

36. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–36 (2016).

37. *Id.* at 736.

38. *Id.* at 734.

39. See *id.* at 732–36 (clarifying that *Miller* both imposed procedural requirements for individualized sentencing and “announced a substantive rule of constitutional law”). See generally Beth Caldwell, *Miller v. Alabama as a Watershed Procedural Rule: The Case for Retroactivity*, 10 HARV. L. & POL'Y REV. S1 (2016).

proportionate sentence. . . . The procedure *Miller* prescribes is [a] hearing where “youth and its attendant characteristics” are considered as sentencing factors [and] is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.⁴⁰

Thus, youth previously given mandatory life-without-parole sentences were entitled to relief.⁴¹ And defendant Montgomery, like *Miller* and *Jackson*, had his case remanded and was provided with a resentencing hearing in state court.⁴²

The question of remedy for the other *Miller*-impacted inmates was not before the Court. Yet Justice Kennedy offered a highly unusual suggestion for them. He opined it was possible that not all would need to return to court for resentencing.⁴³ He instead offered:

Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.⁴⁴

Relying on the Wyoming post-*Miller* youthful-offender-parole statute as the Court’s only authority, Justice Kennedy continued: “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.”⁴⁵

But such dicta reached beyond the retroactivity issue presented to the Court. It reflects a highly unusual turn in law and has been read to propose a deeply problematic practice: permitting a state executive branch agency to decide in the first instance the appropriate prison sentence in an individual case.⁴⁶ Moreover, as further discussed below, such a course of action fails to ensure Justice Kennedy’s earlier command—a meaningful process to guarantee youth are very rarely incarcerated for their lifetime.

Indeed, most states with *Miller*-impacted inmates in need of relief did

40. *Montgomery*, 136 S. Ct. at 734–35 (internal citations omitted).

41. *See id.* at 736–37.

42. *See id.*; Jody Kent Lavy, *Montgomery v. Louisiana: America’s Racist History Means Even a Supreme Court Victory Does Not Guarantee Justice*, NEWSWEEK (May 29, 2019), <http://newsweek.com/montgomery-louisiana-americas-racist-history-supreme-court-opinion-1437465> [<https://perma.cc/U4HC-2S6S>] (describing Montgomery’s resentencing in court, resulting in a parole eligible sentence).

43. *See Montgomery*, 136 S. Ct. at 736.

44. *Id.* (citing WYO. STAT. ANN. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years)).

45. *Id.*

46. *See id.*

not embrace this approach⁴⁷—including Wyoming. The 2013 Wyoming provision cited by Justice Kennedy was not expressly retroactive.⁴⁸ Rather, in 2018, Wyoming’s high court sent a *Miller*-related case to the trial court for resentencing and declined to apply its parole statutes retroactively or follow the parole path proposed by Justice Kennedy.⁴⁹

A few states have adopted this unorthodox practice. In those jurisdictions, impacted defendants are placed before executive branch agencies for non-judicial actors to decide whether life without parole is the appropriate punishment for them. And they are doing so, as further discussed below, without regard for any particular sentencing scheme or judicial understanding of constitutional law. Nor are they required to conduct themselves like a court of law.⁵⁰ Missouri is one of the jurisdictions that has adopted this approach.⁵¹

C. PUNTING TO PAROLE BOARDS—A CASE STUDY

After *Miller* was decided, a collective of attorneys and law students litigated throughout the courts of Missouri on behalf of the nearly 100 *Miller*-impacted inmates in that state. They also appeared several times before the legislature to try to bring the state’s criminal code into constitutional compliance.⁵² Both branches of government avoided the issue

47. See, e.g., *Harris v. State*, 547 S.W.3d 64, 70–71 (Ark. 2018) (acknowledging *Montgomery*’s dicta, declining to directly send *Miller*-impacted youthful offender to parole board for review, and instead ordering court resentencing); see also *Stevens v. State*, 422 P.3d 741, 750 (Okla. Crim. App. 2018) (where state seeks to expose juvenile murderer to life without parole, it must prove beyond a reasonable doubt at a jury sentencing that the defendant is “irreparably corrupt”); Kimberly Thomas, *Random If Not “Rare”? The Eighth Amendment Weaknesses of Post-Miller Legislation*, 68 S.C. L. REV. 393, 403 (2017) (“Of the states that have passed legislation that still permits life without parole, by far the most common approach has been to change the sentencing hearing itself, instead of, for example, the parole board process.”).

48. Joshua Wolfson, *Juvenile Killer Law Won’t Change 8 Sentences*, CASPER STAR TRIB., Feb. 25, 2013, at A1, A10.

49. See *Davis v. State*, 415 P.3d 666, 677 (Wyo. 2018) (at request of both prosecution and defense, expressly declining to accept Justice Kennedy’s proposed “solution” of sending juvenile life without parole matter to the parole board for review before allowing for resentencing hearing in court).

50. ASS’N OF PAROLING AUTHS. INT’L & NAT’L INST. OF CORR., *A HANDBOOK FOR NEW PAROLE BOARD MEMBERS* 25 (Peggy Burke ed., 2003) [hereinafter *A HANDBOOK FOR NEW PAROLE BOARD MEMBERS*] (noting that “[t]he paroling authority is an executive branch agency” and that most state parole board members are appointed by and/or report to the governor).

51. See Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 30, 2017), <https://seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/> [https://perma.cc/98JA-4QXR] [hereinafter *A State-by-State Look at Juvenile Life Without Parole*]. Although each has taken a somewhat slightly different approach to the issue, as further discussed below, Connecticut, Massachusetts, and Nevada are among the other states that are using parole board review proceedings. *Id.*

52. This state-wide collective was organized, in part, by this author during her tenure as Director of the Juvenile Rights and Re-Entry Project and Professor of Law at Washington University at St. Louis. The collective included over 100 attorneys; law students; mitigation support experts, other law school faculty members such as Sean O’Brien and Kathryn Pierce; public defenders organized under the leadership of Melinda Pendergraph; private attorneys such as Elizabeth Carlyle and Kent Gipson; Amy Breihan and Jim Wyrsh as pro bono counsel at Bryan Cave; and Matt Knepper, Denyse Jones, and Sarah

over the course of many years until the Supreme Court decided *Montgomery*.⁵³ Once *Montgomery* was handed down, *Miller*-impacted inmates in Missouri—including a youthful offender by the name of Norman Brown—filed further emergency applications with the state’s supreme court, urging immediate remand for trial court resentencing.⁵⁴

During the 1990s, Norman Brown had been lured by an older father figure, nearly twice his age, to accompany him during a jewelry store theft in the St. Louis area.⁵⁵ Tragically, the theft resulted in the shooting death of the store’s owner at the hands of the armed adult codefendant.⁵⁶ Yet Brown, an unarmed, non-trigger man—only fifteen years old at the time of the crime—received a mandatory life-without-parole prison term based upon an accessory liability theory for murder in the first degree, a Class A felony.⁵⁷ Brown and the other Missouri *Miller*-impacted inmates argued that, as a result of *Montgomery*, Missouri’s mandatory life-without-parole language needed to be struck from the criminal code when applied to their cases.⁵⁸ Further, they sought trial court resentencing under Missouri’s remaining lawful sentencing provisions for Class A felonies, which provided for determinate terms of between ten to thirty years’ incarceration or, if appropriate given the circumstances, a life sentence with parole eligibility.⁵⁹

The Missouri Attorney General’s Office did not oppose petitioners’ ap-

Zimmerman and other pro bono counsel at Husch Blackwell. In collaboration with Bryan Stevenson’s Equal Justice Initiative, Marcia Levick’s Juvenile Law Center, and other national youth-justice organizations, the collective advocated on behalf of Missouri’s approximately 100 *Miller*-impacted clients over several years. Post-*Montgomery*, this author left academia for a period of time to serve as founding Director of the MacArthur Justice Center at St. Louis, which further litigated on behalf of Missouri’s *Miller*-impacted youthful offenders.

53. See, e.g., Jennifer S. Mann, *Juvenile Life Terms Still Up in the Air After Court Case*, ST. LOUIS POST-DISPATCH (Oct. 18, 2015), https://www.stltoday.com/news/local/crime-and-courts/juvenile-life-terms-still-up-in-air-after-court-case/article_661f1662-6246-55f6-b025-beba9a87dc1e.html [<https://perma.cc/YK8X-XXUZ>].

54. See, e.g., Petitioner’s Motion for Summary Judgment & Issuance of Writ of Habeas Corpus at 1, *Brown v. Bowersox*, No. SC 93094 (Mo. Feb. 4, 2016).

55. Second Amended Complaint for Declaratory & Injunctive Relief at ¶ 128, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Nov. 1, 2017).

56. *Id.* at ¶ 129.

57. *Id.* at ¶ 128. Brown’s story, including further features of his sentence, has garnered national attention. See, e.g., Katie Rose Quandt, *The False Hope of Parole*, OUTLINE (Mar. 8, 2018), <https://theoutline.com/post/3625/the-false-hope-of-parole?zd=1&zi=mc1g6cf7> [<https://perma.cc/ZTU4-T3EA>]. The decedent’s wife, also present during this terrible criminal episode, was a victim too.

58. Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 55, at ¶ 128.

59. See, e.g., Petitioner’s Motion for Summary Judgment & Issuance of Writ of Habeas Corpus, *supra* note 54, at 2 (describing how Missouri law provides for striking language deemed unlawful and reading the remaining provisions along with any other existing laws); Petition for Writ of Habeas Corpus at 7–9, *Lotts v. Wallace*, No. SC 92831 (Mo. Sept. 7, 2012) (same arguments as above, first advanced by attorneys from the Equal Justice Initiative); see also MO. REV. STAT. § 565.020(2) (1993) (“Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole”); MO. REV. STAT. § 558.011(1)(1) (1993) (“For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment . . .”).

plications for immediate resentencing under *Montgomery*.⁶⁰ Yet, the Missouri Supreme Court denied the requests.⁶¹ Instead, it held that all *Miller*-impacted youthful offenders could apply to the Missouri Department of Probation and Parole to seek review of their existing mandatory life-without-parole sentences after serving twenty-five years.⁶² It did not strike any existing judgment or sentence orders nor were matters sent back to trial courts for new sentencing proceedings. Moreover, in its individual orders on the post-*Miller* habeas corpus applications, the Court extended a strange invitation to the Missouri Governor or Legislature to weigh in on the situation.⁶³

The Missouri Legislature accepted the Missouri Supreme Court's suggestion and hastily passed Senate Bill 590, which was signed into law by Governor Jay Nixon.⁶⁴ Senate Bill 590 endorsed the framework of an administrative body—the Missouri Department of Probation and Parole—reviewing the existing mandatory life-without-parole sentences of *Miller*-impacted youthful offenders after they served twenty-five years.⁶⁵ On its own motion, the Missouri Supreme Court then withdrew its prior orders in all individual *Miller* matters, declaring the habeas requests now moot.⁶⁶ Missouri's *Miller*-impacted inmates were therefore left serving unconstitutional mandatory life-without-parole prison terms—unless and until the state's parole board, as sole adjudicator, decided otherwise.

These unprecedented actions were challenged in state and federal proceedings on constitutional and other grounds.⁶⁷ For instance, the *Miller* defendants asserted ex post facto claims given the new bill's attempt to override existing sentencing laws.⁶⁸ They further pointed out that the bill improperly delegated legislative power to parole officials who were left

60. See, e.g., Petition for Writ of Habeas Corpus at 6, *Lotts v. Steele*, No. SC 97025 (Mo. Mar. 13, 2018) (describing how “[t]he State did not file any opposition” to the motions for Summary Judgment filed by Missouri's *Miller*-impacted youthful offenders following the decision in *Montgomery*).

61. See, e.g., Order at 2, *Brown v. Bowersox*, No. SC 93094 (Mo. Mar. 15, 2016).

62. *Id.*

63. *Id.* (“[P]etitioner shall be eligible to apply for parole after serving 25 years’ imprisonment on his sentence of life without parole unless his sentence is otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation.”).

64. See Kurt Erickson, *Future Unclear for Juvenile Murder Sentencing Changes*, ST. LOUIS POST-DISPATCH (Apr. 27, 2016), https://www.stltoday.com/news/local/govt-and-politics/future-unclear-for-juvenile-murder-sentencing-changes/article_23f348dc-611d-589f-b7fc-407d3d2cf82b.html [<https://perma.cc/TYP6-9WXG>] (reporting on hurried efforts to enact Missouri Senate Bill 590).

65. See S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (codified at MO. REV. STAT. §§ 558.047, 565.033).

66. See, e.g., Order at 3, *supra* note 61 (“On the Court’s own motion, the Court’s March 15, 2016, order is vacated. The motion for rehearing is overruled as moot. The petition is denied. See Senate Bill No. 590 . . .”).

67. See, e.g., Petitioner’s Supplement to Motion for Rehearing at 2, *Brown v. Bowersox*, No. SC 93094 (Mo. May 20, 2016) (urging Missouri Supreme Court to remedy the further “confusion and unconstitutionality” created by the passage of Senate Bill 590).

68. See *id.* See generally Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593 (2018) (describing certain parole board actions as violative of ex post facto provisions).

without any real term-of-year guidelines or legal standards for sentencing review.⁶⁹

Beyond all of this, and most significantly for purposes of this article, Missouri's *Miller*-impacted inmates argued that executive branch parole board decision-making could not entirely displace constitutionally rooted judicial branch sentencing processes—in other words, that they were constitutionally entitled to be sentenced in a court of law.⁷⁰ But this application was denied too.⁷¹ And a small minority of states around the country—including Connecticut, Massachusetts, Nevada, and West Virginia—have adopted similar parole board sentence review procedures.⁷²

The remainder of this article will explore why this practice—allowing contemporary parole boards to single-handedly decide correct terms of imprisonment—is constitutionally problematic in *Miller* resentencing cases. It thus urges a rethinking of this process to allow courtroom sentencing assessments in *Miller* remedy cases, when requested. Such changes are also needed to prevent other potentially negative consequences as a result of this shift, including deployment of executive branch punishment procedures in other kinds of criminal cases.

III. CONSTITUTIONALIZATION OF STATE COURT SENTENCING RIGHTS⁷³

Neither the Constitution's express language nor the case law interpreting it reference a right to be sentenced in a court of law. Even the Eighth Amendment to the United States Constitution, entitled "Further Guarant-

69. See Reingold & Thomas, *supra* note 68 and accompanying text.

70. As inaugural Director of the MacArthur Justice Center, this author advanced these arguments in *Brown v. Bowersox*, No. SC 93094 (Mo. 2016), *cert. denied*, 137 S. Ct. 637 (2017). The Juvenile Law Center joined this application as amicus. See *Legal Docket: Brown v. Bowersox*, JUV. L. CTR. (Nov. 17, 2016), <https://jlc.org/cases/brown-v-bowersox> [<https://perma.cc/U89Q-8JKB>]; see also *Polk v. Lewis*, No. SC 96917, 2018 Mo. LEXIS 268 (Mo. July 3, 2018), *cert. denied*, 139 S. Ct. 466 (2018) (advancing similar arguments relating to the right to sentencing before a court); Order at 1, *Lotts v. Steele*, No. SC 97025 (Mo. July 3, 2018) (denying petition for habeas corpus of Equal Justice Initiative, arguing Senate Bill 590, as implemented, denied petitioner his constitutional right to an adversarial sentencing process within a court of law).

71. See Sharon Cohen & Adam Geller, *After 2016 Ruling, Battles Over Juvenile Lifer Cases Persist*, ASSOCIATED PRESS (Jan. 20, 2019), <https://www.apnews.com/422236ad63c64636a2e9f3622abed55d> [<https://perma.cc/HZT2-JPNZ>].

72. *A State-by-State Look at Juvenile Life Without Parole*, *supra* note 51; see also, e.g., *State v. Williams-Bey*, 144 A.3d 467, 470, 475 (Conn. App. Ct. 2016); *Commonwealth v. Brown*, 1 N.E.3d 259, 261 n.4 (Mass. 2013); Michael Erb, *W.Va. Law Change to Give Seven Lifers Parole Shot*, W. VA. PRESS (Aug. 14, 2014), <https://wvpress.org/copydesk/insight/wva-law-change-give-seven-lifers-parole-shot/> [<https://perma.cc/8REQ-3VF6>]; Stephen T. Watson, *Teen Who Murdered a Kenmore Native in 1998 Is up for a Pardon. His Victim's Loved Ones Are Outraged*, BUFFALO NEWS (June 15, 2019), <https://buffalonews.com/2019/06/15/teen-who-murdered-a-kenmore-native-in-1998-is-up-for-a-pardon-his-victims-loved-ones-are-outraged/> [<https://perma.cc/J8HP-ZZ5H>] (describing Nevada's process for seeking release following mandatory juvenile life without parole sentence—application to the Pardon Board).

73. For more on the concept of "constitutionalization" of state criminal processes, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 295 (1993).

tees in Criminal Cases” is silent on the issue.⁷⁴ Yet for generations, Supreme Court decisions have been written as if this is the case. This has been so in federal and state matters dating back to the 1800s, and the practice continued throughout the twentieth century as the Court developed its doctrines relating to constitutional sentencing rights and into the present day.

A. EARLY SUPREME COURT SENTENCING CASES

In 1830, a defendant challenged the legality of his imprisonment for allegedly defrauding the federal government in *Ex Parte Watkins*.⁷⁵ This case serves as an early example of the Court’s understanding of the centrality of the judicial branch to sentencing. Specifically, the Court held that it was without power to look behind the sentence judgment.⁷⁶ Instead, it explained:

If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not is among the most unquestionable of its powers and duties.⁷⁷

That is, since the defendant was sentenced by a court of law with jurisdiction, the process and related imprisonment was not wrongful or illegal.⁷⁸ This commitment to judicial-branch-responsibility-for-sentence imposition continued into the 1900s.⁷⁹ For instance, in 1916, the prosecution successfully challenged a trial court’s refusal to impose a sentence as required by statute in *Ex Parte United States*.⁸⁰ There the Court noted,

Indisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority.⁸¹

This narrative of the judicial branch as locus for sentencing was strengthened as the Court announced specific procedural and substantive constitutional rights for state court sentencings under the Incorporation

74. See U.S. CONST. amend. VIII.

75. 28 U.S. (1 Pet.) 193, 195–96 (1830).

76. See *id.* at 209.

77. *Id.* at 203.

78. See *id.* at 209; see also *Ex Parte Parks*, 93 U.S. 18, 23 (1876) (relying on *Watkins* to further uphold the “unquestionable” powers of the court system to punish).

79. See, e.g., *Graham v. West Virginia*, 224 U.S. 616, 627 (1912) (reiterating the role of the judge, not the prison warden, in ensuring correct and individualized sentence); *Dimmick v. Tompkins*, 194 U.S. 540, 549 (1904) (surveying with approval the court-based sentencing practices across states including Illinois, Indiana, North Carolina, and Massachusetts).

80. 242 U.S. 27, 41–42 (1916).

81. *Id.*

Doctrine. Still, the Court has never formally declared a fundamental constitutional right to sentencing by a court of law.

B. DEVELOPMENT OF PROCEDURAL SENTENCING PROTECTIONS

Rather, procedural sentencing rights have emerged over time in the United States by way of individual Supreme Court cases. As described below, a patchwork of penalty-phase protections has resulted with recognized rights stitched together by the Court one by one. Taken as a whole, these cases blanket the penalty phase to instantiate court as a constitutional setting. Thus, even if the Court has not explicitly held these rights and protections must be delivered by a court of law—rather than some other government venue—it is clearly assumed. However, many *Miller*-impacted inmates are not receiving a lawful court-based sentencing process, or the individual procedural protections outlined below.

1. *Due Process and Individualization*

Well before the Supreme Court began incorporating specific Bill of Rights protections into state criminal proceedings, it acknowledged that the Fourteenth Amendment's Due Process Clause created a floor below which local governments could not fall.⁸² For instance, in *Williams v. New York*, the “leading ruling on the content of due process as it applies to procedures in traditional discretionary sentencing,”⁸³ the Court acknowledged the need for certain protections during sentencing proceedings.⁸⁴

In *Williams*, the trial court discounted the jury's life sentence recommendation and instead ordered execution based, at least in part, upon hearsay evidence in a presentence report.⁸⁵ The Court, noting the defendant never sought to contest the claims nor argued they were factually incorrect, found there was no due process violation.⁸⁶ However, even as it did so, the Court reiterated its expectation that state punishment proceedings would be handled by the judicial branch, describing the “grave responsibility of fixing sentence[s]” as one belonging to the courts.⁸⁷

Nearly thirty years later in *Gardner v. Florida*, another case raising concerns about a pre-sentence report, the Court vacated a death sentence imposed in violation of due process.⁸⁸ Unlike *Williams*, the defendant in *Gardner* did not have access to all of the information considered at sen-

82. See *Powell v. Texas*, 392 U.S. 514, 536–37 (1968) (describing the benefit of “fruitful experimentation” across states in the field of criminal justice).

83. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1253 (5th ed. 2009).

84. *Williams v. New York*, 337 U.S. 241, 251 (1949).

85. *Id.* at 244.

86. *Id.* at 252; see also LAFAVE ET AL., *supra* note 83, at 1253 (noting *Williams* was “decided at a time when the process of capital sentencing was not much different than the sentencing procedure typically followed in non-capital cases”).

87. *Williams*, 337 U.S. at 251.

88. See *Gardner v. Florida*, 430 U.S. 349, 404–05 (1977). Although there was no majority opinion in *Gardner*, three Justices signed a decision to reverse and remand for “further proceedings at the trial court not inconsistent with this opinion.” *Id.* at 405.

tencing.⁸⁹ Instead, the judge reviewed information in a pre-sentence report marked “confidential” and kept it from the defendant and his attorney.⁹⁰ In reaching its decision, not only did the plurality distinguish *Gardner* from *Williams* on its facts, but it ultimately embraced the “death is different” framework for Eighth Amendment cases that, as discussed, has since been expanded to juvenile sentencing matters.⁹¹ It therefore held some level of heightened due process protection was necessary to avoid arbitrary outcomes in cases involving the most serious sentence available.⁹² Again, judicial branch sentencing was implied as the norm in this decision for both death and non-death matters.

The Court has also expressly required basic due process protections in non-capital sentencing proceedings. In 1948, in *Townsend v. Burke*, the Court held the state court sentencing process lacked fundamental fairness.⁹³ Townsend was subjected to a hurried guilty plea without access to counsel and then was quickly sentenced.⁹⁴ During the in-court sentencing colloquy, the trial judge relied on the defendant’s alleged past conviction record—ignoring the fact that some information presented was simply incorrect and related to another defendant.⁹⁵

Townsend based his subsequent Supreme Court challenge on the right to counsel.⁹⁶ However, the Court did not go so far as to find that the Sixth Amendment applied to state criminal sentencing proceedings—something that happened decades later.⁹⁷ Instead it found that “while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.”⁹⁸ This serves as one of the Court’s first articulations of the constitutional right to an individualized sentencing determination based upon specific characteristics of the defendant and facts of his case. Due process individualization has been considered in many cases since.⁹⁹

89. *Id.* at 351.

90. *Id.* at 353.

91. *Id.* at 357–58 (“[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country.”); see also *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (per curiam) (striking down Georgia and Texas death penalty statutes under the Eighth Amendment because they were not “evenhanded, nonselective, and nonarbitrary” in determining who should be executed).

92. *Gardner*, 430 U.S. at 358; see also, e.g., *Lankford v. Idaho*, 500 U.S. 110, 124–25 (1991).

93. See *Townsend v. Burke*, 334 U.S. 736, 737–740 (1948).

94. *Id.* at 737–39.

95. *Id.* at 737, 739–40 (addressing the imposition of “two indeterminate sentences, not exceeding 10 to 20 years”).

96. *Id.* at 738–41.

97. See *infra* notes 100–104 and accompanying text.

98. *Townsend*, 334 U.S. at 740–41.

99. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Keenan v. Burke*, 342 U.S. 881, 881 (1951) (per curiam); see also *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (“Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”).

In all these cases—both capital and non-capital—by repeatedly referencing the role played by trial courts in deciding appropriate punishments, the Court also advanced the expectation that sentences would be imposed by the judicial branch of government. Over time, the Court has expanded the list of rights afforded at sentencing by way of the incorporation doctrine. Here too, the Court’s language and discussions assume sentencing in a courtroom.

2. *Critical Stage and Right to Counsel*

Starting with *Mempa v. Rhay* in 1967, the Supreme Court held defendants have the right to counsel in state prosecutions at both trial and sentencing.¹⁰⁰ Using the Fourteenth Amendment as a bridge to the Sixth Amendment,¹⁰¹ the Court declared that the post-trial punishment phase is a “critical stage” of the criminal process where an accused facing incarceration must be afforded the “effective assistance of counsel” if requested.¹⁰² The Court went on: “[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.”¹⁰³ In this way, criminal defendants in state-level sentencing cases are now entitled to the same right of court-appointed counsel as those involved in Article III federal court punishment proceedings.¹⁰⁴

Mempa involved two Washington state probation revocation matters.¹⁰⁵ Petitioners pleaded guilty and were placed on probation with imprisonment deferred.¹⁰⁶ However, because of alleged violations, they were brought before the court without counsel and had their deferred term-of-years sentences summarily imposed.¹⁰⁷ The probation revocation and sentencing occurred in a court of law and was not administratively determined or imposed by Washington’s executive branch probation agency.¹⁰⁸ Moreover, when the Court later held that *Mempa* established a retroactive rule, it remanded similar matters so that the defendants in those cases could avail themselves of resentencing proceedings in a court

100. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

101. *See* *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (extending for the first time Sixth Amendment protections, which previously applied only to federal prosecutions, to state criminal trials by way of Fourteenth Amendment incorporation doctrine). *See generally* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185 (2014) [hereinafter Quinn, *Giving Kids Their Due*].

102. Quinn, *Giving Kids Their Due*, *supra* note 101, at 2199.

103. *Mempa*, 389 U.S. at 135.

104. *See* U.S. CONST. art. III, § 2; *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *see also* *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004) (“The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process.”); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

105. *See Mempa*, 389 U.S. at 136–37.

106. *Id.*

107. *Id.*

108. *Id.*

with the assistance of counsel.¹⁰⁹

In the *Gardner* death penalty case described above, which the Court took up a decade after *Mempa*, it not only demanded due process fairness but also reaffirmed its commitment to representation rights during sentencing.¹¹⁰ Since portions of the presentence report had been withheld from defense counsel, the Court remanded the matter with specific instructions to hold a resentencing hearing where counsel would be allowed to more meaningfully advocate for his client.¹¹¹ The Court specifically rejected the possibility of allowing Gardner's original death judgment to stand and have the state appellate court merely review the sentence.¹¹²

During the 1980s, the Court was asked to evaluate representational effectiveness under the Sixth Amendment in the context of a capital murder matter, *Strickland v. Washington*.¹¹³ The Court reinstated a death sentence at the request of the state, finding the record failed to demonstrate deficient attorney performance impacting the outcome of the proceedings.¹¹⁴ Although the accused did not prevail, the Court noted the constitutional significance of the sentencing process, particularly where a defendant faced the most serious penalty allowed by law.¹¹⁵ Specifically, the capital sentencing process was "like a trial in its adversarial format and . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result . . ."¹¹⁶ Thus it drew a clear picture of capital sentencing occurring only under the auspices of the judicial branch.

In the non-capital context, the threshold for ineffective representation for sentencing is not as clear.¹¹⁷ Yet, no Sixth Amendment sentencing decision has ever suggested that incarceration might be imposed outside of the judicial setting. Rather, just as in-court "debate between adversaries is often essential to the truth-seeking function of trials," in all cases meaningful representation should include "giving counsel an opportunity to comment on facts which may influence the sentencing decision."¹¹⁸

3. Jury Determinations

The Supreme Court has not imposed an absolute right to jury findings beyond a reasonable doubt at all state sentence proceedings, even where

109. See *McConnell v. Rhay*, 393 U.S. 2, 3–4 (1968).

110. See *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977).

111. See *id.* at 362.

112. *Id.*

113. See 466 U.S. 668, 671 (1984).

114. *Id.* at 700–01.

115. See *id.* at 685–87.

116. *Id.*; see also John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1987 (2005) (noting the Court "took pains to link the world of capital sentencing to the world of trial"); Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 352–57 (2009) (describing features of effective assistance of counsel for death-eligible cases).

117. See generally Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069 (2009).

118. *Gardner v. Florida*, 430 U.S. 349, 360 (1977).

there is a right to jury trial.¹¹⁹ However, in both state and federal matters, capital and non-capital, the Court has guaranteed a right to jury determination for facts or aggravating circumstances that enhance a jail or prison sentence beyond that ordinarily contemplated by controlling law. For instance, in *Apprendi v. New Jersey*, the Court granted relief after a sentencing judge—and not a jury—made findings of fact that exposed the defendant to a sentence higher than the statutory maximum.¹²⁰ In addition, the Court held that such sentence enhancement findings—as with any element of a crime—must be proven by the prosecution beyond a reasonable doubt.¹²¹ This differentiates enhancement cases from run-of-the-mill criminal matters where a preponderance standard for contested sentencing facts is sufficient.¹²²

In *Ring v. Arizona*, the Court further explained that under the Sixth Amendment, a jury—and not a judge—must decide beyond a reasonable doubt whether aggravating factors exist that make a murder case eligible for a death sentence.¹²³ In doing so, the Court invalidated death penalty statutes and sentencing practices in several states.¹²⁴ More recently, in *Hurst v. Florida*, decided the same year as *Montgomery*, the Court struck down Florida death penalty procedures that allowed judicial imposition of death after an advisory recommendation from the jury.¹²⁵ This was because a court's judgment favoring death could rest on aggravating factors different from those the jury determined beyond a reasonable doubt.¹²⁶ Overruling earlier decisions to the contrary, the Court plainly held: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."¹²⁷

Here, again, beyond establishing specific procedural requirements, these decisions imply a belief in sentencing as a judicial-branch function—whether it is one to be exercised by judge or jury given the specifics of a given case—and a process that involves a hearing in a court of law. Neither are being provided in *Miller* remedy cases sent directly to parole boards for penalty review.

119. See, e.g., *Jones v. United States*, 526 U.S. 227, 251–52 (1999); see also *United States v. Booker*, 543 U.S. 220, 226 (2005).

120. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *Jones*, 526 U.S. at 251–52.

121. *Apprendi*, 530 U.S. at 483–84.

122. See generally *id.*; *United States v. Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd*, 579 F.2d 707 (2d Cir. 1978).

123. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

124. See LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 350–51 (2004).

125. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

126. *Id.*

127. *Id.* at 619.

C. ESTABLISHMENT OF SUBSTANTIVE SENTENCING REQUIREMENTS

The Court has also established a range of substantive rights that apply to state criminal punishments, in addition to procedural protections. Even if these cases do not expressly announce such a requirement, they also rest on a penalty phase process under judicial watch—not executive authority. They also provide further understanding of constitutional protections being denied in *Miller* sentence review matters that were sent directly to parole boards without in-court resentencing.

1. Cruel, Arbitrary, or Discriminatory

In *Wilkerson v. Utah*, decided in 1878, the Court permitted death by firing squad as ordered by the trial judge because it was consistent with the options provided by statute.¹²⁸ But it indicated that acts of “unnecessary cruelty”—such as being “embowelled alive” or “quartered”—would be inconsistent with community norms in the United States at the time.¹²⁹ In *Furman v. Georgia*, the Court’s per curiam opinion struck not just one death sentence as unconstitutional but death sanctions for a group of defendants whose cases were appealed from both Georgia and Texas.¹³⁰ In individual concurring decisions, Justices explained the death sentence schemes in these jurisdictions generated highly arbitrary results. For instance, Justice Douglas noted that their modes of execution might not be “inhuman and barbarous,”¹³¹ as described in *Wilkerson*, but the method for deciding who would be executed lacked the rationality needed to survive a constitutional challenge.¹³²

Outside of the death penalty context, the Court has seldom applied the Eighth Amendment analyses used in *Wilkerson* or *Furman*. However, in *Robinson v. California*, the Court did grant relief for a defendant sentenced to ninety days under a California statute based upon his status as a drug addict.¹³³ In his concurring opinion, Justice Douglas explained that imprisonment due to being diseased is the kind of “barbarous action” the Court warned about in past decisions.¹³⁴ On the other hand, Justice Harlan’s concurrence expressed concern about “arbitrar[iness]” inherent in jailing a drug-addicted person for the passive act of merely being present in a state.¹³⁵

These death and non-death cases relating to cruel or arbitrary punishments also demonstrate an embrace of judicial branch criminal penalty

128. *See Wilkerson v. Utah*, 99 U.S. 130, 132–33 (1878).

129. *Id.* at 135–36.

130. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

131. *Id.* at 241 (Douglas, J., concurring).

132. *Id.* at 253; *see also* Olivia B. Waxman, *The Story of the Last U.S. Execution Before a Nationwide Moratorium Took Effect 50 Years Ago*, TIME (June 2, 2017), <https://time.com/4801239/last-execution-before-moratorium/> [<https://perma.cc/HC6H-J9DM>].

133. *Robinson v. California*, 370 U.S. 660, 667–68 (1962).

134. *Id.* at 675–78 (Douglas, J., concurring) (comparing Robinson’s sentence to the “rack and thumbscrew” condemned in earlier Eighth Amendment cases).

135. *Id.* at 678–79 (Harlan, J., concurring).

determinations. For instance, the *Wilkerson* Court spent a great deal of time describing the actual sentencing hearing held before “the presiding justice in open court,” as wholly consistent with the Constitution.¹³⁶ It further noted “the duty” of describing the mode of punishment “is devolved upon the court authorized to pass the sentence.”¹³⁷ Similarly, in both *Furman* and *Robinson*, when finding the sentences constitutionally problematic, the Court clearly proceeded on the assumption that any subsequent lawful sentencing processes would need to occur in a court.¹³⁸

The Court also has held “invidious discrimination” at sentencing violates constitutional equal protection principles.¹³⁹ In 1970, it set aside the incarcerative sentence in *Williams v. Illinois*, where the defendant failed to pay his fine due to indigence.¹⁴⁰ The Court warned that the poor could not be sentenced to longer terms for failure to satisfy their fines.¹⁴¹ To do so would be to create improper classification based upon wealth or lack thereof.¹⁴²

To date, the Court has not invalidated a sentence or sentencing scheme based upon racial discrimination. It side-stepped such a finding in *McCleskey v. Kemp*, noting the defendant needed evidence of purposeful discrimination in his case to support an equal protection claim.¹⁴³ Instead, he offered generalized data about the system as a whole.¹⁴⁴ Notably, in both *Williams* and *McCleskey*, the Court assumed that sentencing proceedings would be part of a trial court record and, thus, would be available to review.¹⁴⁵

2. Proportionality and Special Individualization

Finally, under the Eighth Amendment’s Cruel and Unusual Punishments Clause,¹⁴⁶ the Court has developed a separate body of law that focuses on the issue of excessiveness of a sanction: proportionality jurisprudence. As previously noted, for years the Court applied two different tests for such matters—one for death penalty cases where the court considered evolving standards of decency, which included bringing its own independent judgment to bear.¹⁴⁷ It used another for non-death cases, where the Court reviewed matters for gross disproportionality with great

136. *Wilkerson v. Utah*, 99 U.S. 130, 130–31 (1878).

137. *Id.* at 137.

138. *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (per curiam) (describing sentencing in the judicial branch); *Robinson*, 370 U.S. at 664 (majority opinion) (describing the role of the court in interpreting and applying criminal sentencing laws).

139. *Williams v. Illinois*, 399 U.S. 235, 242–44 (1970).

140. *Id.* at 241.

141. *Id.* at 241–42.

142. *See id.* 240–41.

143. *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

144. *Id.* at 293.

145. *See, e.g., id.* at 255–56.

146. U.S. CONST. amend. VIII.

147. *See discussion infra* Part III.C.2.

deference to state sentencing determinations.¹⁴⁸ In both sets of cases, however, it was clear from the context and Court's analyses that the judicial branch was the intended site of sentencing.¹⁴⁹

In extending its evolving standards of decency test outside of the execution arena to cases of youthful offenders, the Court reiterated common understandings of the role of the judiciary at sentencing. In *Miller*, writing for a five-member majority which included Justice Kennedy, Justice Kagan noted, "*Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."¹⁵⁰ Thus, the Court suggested a specialized individualized narrowing and proportionality approach in juvenile sentencing cases, akin to those applied in death penalty matters.¹⁵¹

This language in *Miller*, of course, offers a very different vision of penalty assessments than Justice Kennedy's passing parole board proposal in *Montgomery*. Cases decided after *Montgomery* also align with the view that juvenile matters need to be carefully evaluated at the time of sentencing within the judicial branch. *Adams v. Alabama*, for instance, describes specialized sentencing processes in a court of law.¹⁵² *Adams* was decided along with several consolidated matters where most of the youthful offenders had initially faced the death penalty, but whose sentences were converted to life without parole after the decision in *Roper*. In all of the cases, certiorari was granted, the judgments were vacated, and the matters were remanded for "further consideration in light of *Montgomery v. Louisiana*."¹⁵³

Justices Sotomayor and Ginsburg, who were part of the majority in *Montgomery*, clarified that even these cases needed to be reviewed anew in courts of law.¹⁵⁴ That is, an "exacting" fact-finding would need to take place in court before any such defendant could be seen as among the rare few for whom future release could be denied.¹⁵⁵ There is "no shortcut," Justice Sotomayor wrote, for lower courts weighing "the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"¹⁵⁶ Justices Alito and Thomas, who dissented in *Montgomery*, agreed:

As a result of *Montgomery* and *Miller*, States must now ensure that prisoners serving sentences of life without parole for offenses committed before the age of 18 have the benefit of an individualized sen-

148. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991); *Solem v. Helm*, 463 U.S. 277, 290 (1983).

149. See *Harmelin*, 501 U.S. at 993; *Solem*, 463 U.S. at 283–84.

150. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

151. *Id.*

152. See generally *Adams v. Alabama*, 136 S. Ct. 1796 (2016).

153. *Id.* at 1796–97.

154. *Id.* at 1799 (Sotomayor, J., concurring).

155. *Id.*

156. *Id.* at 1801 (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)).

tencing procedure that considers their youth and immaturity at the time of the offense.¹⁵⁷

Such recent recommitment to courtroom penalty phase proceedings renders Justice Kennedy's suggestion—that parole proceedings might replace court sentencing in at least some *Miller* remedy cases—even more puzzling. When further contextualized within the historically limited role and ongoing problematic activities of parole boards, it becomes more apparent they are patently incapable of displacing sentencing courts in *Miller* cases or any other criminal imprisonment matters.

IV. PAROLE BOARDS AS LIMITED AND LARGELY EXTRA-LEGAL EXECUTIVE AGENCIES

A. ESTABLISHMENT OF THE EXECUTIVE BRANCH MERCY FUNCTION

Our federal tripartite system of government dates back to the colonial era. *The Federalist Papers* provide that the federal legislature, judiciary, and elected executive should each have separate designated tasks.¹⁵⁸ This was meant to protect against many of the abuses that occurred in common law England.¹⁵⁹ This included overreach by the crown, which at times exerted absolutist control over the British court system, leading at times to imposition of overly harsh and horrific punishments for those who dared to dissent.¹⁶⁰

The Federalist Papers thus articulated an extremely restricted role for the federal executive branch when it came to criminal sanctions—intervening after a penalty was imposed only to grant reprieves or pardons as

157. *Id.* at 1797 (Alito, J., concurring). This separate concurrence does suggest some juvenile life without parole sentences might be upheld without another resentencing hearing, but that would only occur where the “original sentencing jury fulfilled the individualized sentencing requirement that *Miller* subsequently imposed.” *Id.* at 1798.

158. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”).

159. *Id.* at 247 (“Were the power of judging joined . . . to the executive power, the judge might behave with all the violence of an oppressor.”) (quoting Montisquieu). In this way, the families of early immigrants to the United States shaped and informed new governmental practices based upon their prior negative life experiences—rather than being punished or ostracized because of them. Cf. Eugene Scott, *Trump’s Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [https://perma.cc/9N7W-U3RP].

160. See *Harmelin v. Michigan*, 501 U.S. 957, 967–68 (1991) (“Most historians agree that the ‘cruel and unusual Punishments’ provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II. They do not agree, however, on which abuses.”) (internal citations omitted). For more on the terms “unusual” and “cruel,” see generally Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969); John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441 (2017); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910).

a form of benevolence and mercy.¹⁶¹ These ideas were largely formalized in Article II, Section 2 of the Constitution, which provides the president with power to grant reprieves or pardons in federal criminal cases.¹⁶² But this provision makes clear that executive intervention is solely for the purpose of softening or reducing a given sentence, not to impose a penalty or expand it.¹⁶³

As further discussed below, individual states have not been required to comply with Article I, II, and III separation-of-powers principles.¹⁶⁴ Yet, most jurisdictions have adopted the same tripartite system,¹⁶⁵ with state judicial branches serving as sentencing entities and governors as executive actors having power to grant clemency from harsh determinate sanctions.¹⁶⁶

B. BRIEF SHIFT TO INDETERMINACY AND LIMITED POWER TO PAROLE BOARDS

At the start of the twentieth century, indeterminate sentencing was introduced as a new method of sanction to allow for greater focus on defendant rehabilitation.¹⁶⁷ Under this new model, rather than select a set term of imprisonment—such as three years—courts were called upon to impose an appropriate sentencing range—such as three to twenty years’ incarceration.¹⁶⁸ This resulted in the birth of parole and parole boards as executive branch agencies becoming involved on the back end of punishment process.¹⁶⁹

161. See generally THE FEDERALIST NO. 74 (Alexander Hamilton); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589–95 (1991).

162. U.S. CONST. art. II, § 2.

163. See, e.g., *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (upholding presidential decision to convert death sentence to life in prison; “inflicting less [punishment] than what the judgment fixed” within the executive’s power); see also *Schick v. Reed*, 419 U.S. 256, 263–64 (1974).

164. See U.S. CONST. art. I, II, III; see also Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1188 (1999) (“Despite the Federalist views of separation of powers, the U.S. Constitution fails to dictate a specific form of separation of powers for state governments.”).

165. See John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1219–21 (1993) (describing how state courts generally look to federal separation of powers cases for guidance—but that the two sets of doctrines are independent).

166. See DIRK VAN ZYL SMIT & CATHERINE APPLETON, *LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS* 163 (2019) (“[A] peculiarity of life sentences is that they may be imposed by the executive, when commuting death sentences.”).

167. See Reingold & Thomas, *supra* note 68, at 598 (during the first part of the last century, determinate penalties were replaced with indeterminate sentencing schemes in both the federal and state systems); see also Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 OHIO N.U. L. REV. 263, 266 (2018).

168. See Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–51 (2018) (describing shift from retributive system to one that allowed for more utilitarian concerns, like rehabilitation, by way of indeterminate sentences).

169. See Matthew Drecun, Note, *Cruel and Unusual Parole*, 95 TEX. L. REV. 707, 709 (2017) (indicating that by 1930, nearly all states and the federal government maintained their own parole systems).

Parole agencies and parole boards were tasked with determining, within the period already imposed by the court, when an inmate should be released from prison.¹⁷⁰ Such thinking was also applied in life-sentence matters. At least in theory, these decisions were based upon personal progress and defendant rehabilitation, as well as current safety risk.¹⁷¹ Despite these supposed benevolent concerns, parole systems drew criticism from the beginning.¹⁷²

Some state-level parole board models were successfully challenged as legislative encroachments upon the limited right of reprieve granted to governors.¹⁷³ For instance, in 1901, Vermont's governor sought an advisory opinion from the state's high court regarding the legality of the Board of Prison Commissioners, which was established under a new state legislative enactment.¹⁷⁴ In response, the Vermont Supreme Court found the act unconstitutional under the state separation of powers doctrine.¹⁷⁵ Specifically, it held: "The effect of this act would be to transfer the power of conditional pardon from the governor to the Board of Prison Commissioners, which, as before seen, cannot be done by legislative action"¹⁷⁶ Similar successful challenges were advanced in Utah and Michigan.¹⁷⁷

But as such matters percolated up to the Supreme Court, it found they did not implicate the federal Constitution.¹⁷⁸ Specifically, in 1902, Illinois's system was challenged in *Dryer v. Illinois* for conferring "judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invest[ing] them with the pardoning power committed by the constitution to the Governor of the State."¹⁷⁹ But the Court made clear that states were free to structure their state governments as they wished. Accordingly, federal separation of powers principles were not deployed to address the issue.¹⁸⁰ Parole boards and

170. See Bierschbach, *supra* note 168, at 1779; see also Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guidelines Formation*, 84 TEX. L. REV. 1973, 1991 (2006) ("Parole officials also exercised authority over sentencing in these indeterminate regimes, though their authority was derivative of judicial authority. Specifically, while parole officials determined an offender's ultimate release date, the judicial sentence set the parameters within which parole officials operated.").

171. See Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 170 J. CRIM. L. & CRIMINOLOGY 213, 216–17 (2017) (during "most of the eighteenth and nineteenth centuries, parole as we know it today did not exist"); see also Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 77 (1998).

172. See Puzauskas & Morrow, *supra* note 167, at 270–71.

173. See, e.g., *People v. Cummings*, 50 N.W. 310, 311–12 (Mich. 1891); *State ex rel. Bishop v. State Bd. of Corrs.*, 52 P. 1090, 1090 (Utah 1898); *In re Conditional Discharge of Convicts*, 51 A. 10, 13 (Vt. 1901).

174. See *Conditional Discharge of Convicts*, 51 A. at 12.

175. *Id.* at 15.

176. *Id.* at 12.

177. See generally *Cummings*, 50 N.W. 310; *Bishop*, 52 P. 1090.

178. See Puzauskas & Morrow, *supra* note 167, at 270–71.

179. *Dreyer v. Illinois*, 187 U.S. 71, 83–84 (1902).

180. See *id.*

sentencing courts were left to coexist in the states.

Over the next few decades, both the federal government and individual states tweaked their parole systems in response to legal concerns.¹⁸¹ And parole boards became a regular part of the correctional landscape. As a result, many studies and scholars referred to them as working in tandem with courts and playing a significant role in indeterminate sentencing.¹⁸² But they remained limited in power—allowed only to discharge defendants from incarceration, not pronounce penalties in the first instance.

Over time the parole system drew further criticism.¹⁸³ For instance, in 1967, the President’s Crime Commission documented wide-spread problems of recidivism despite the use of indeterminate sentencing and parole supervision.¹⁸⁴ And during the 1970s, “[b]ecause few parole boards had explicit criteria or policies for their release decisions, those decisions were criticized as arbitrary and capricious.”¹⁸⁵ Data demonstrated the agencies were producing vast differences among similar cases, including racial disparities in release outcomes.¹⁸⁶ It seemed everyone from attorneys to academics to religious organizations believed that, overall, the parole model undermined fairness in the punishment process.¹⁸⁷

C. DE-COURTIFICATION OF STATE PAROLE BOARDS

In contrast to earlier litigation that challenged the existence of parole boards, by the 1970s cases now attacked their increasingly lax processes. But rather than correct what was seen as growing irrationality in the parole grant system, the Supreme Court somewhat inscrutably gave state parole agencies greater license to engage in ad hoc activities.

181. See Puzauskas & Morrow, *supra* note 167, at 271–72.

182. See, e.g., Jon O. Newman, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814 (1975) (“Although parole release decisions have been regarded as virtually autonomous from sentencing per se, parole is an integral part of the sentencing and correctional process.”).

183. See Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 279 (2016) (“Starting in the 1970s and continuing through the 1990s, parole boards witnessed a precipitous loss of legitimacy.”).

184. See Puzauskas & Morrow, *supra* note 167, at 271.

185. A HANDBOOK FOR NEW PAROLE BOARD MEMBERS, *supra* note 50, at 5 (“It was asserted that these decisions were driven more by the individual prejudices and idiosyncrasies of board members than by research-based predictions of parole success.”).

186. See Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1042–43 (2010); see also Puzauskas & Morrow, *supra* note 167, at 271.

187. See generally Anne M. Heinz et al., *Sentencing by Parole Board: An Evaluation*, 67 J. CRIM. L. & CRIMINOLOGY 1 (1976) (cataloging complaints about parole boards from various groups). Both Heinz’s report, which focused on the Illinois parole system, and a *Yale Law Review* study of federal parole provided harsh critiques of existing frameworks and practices. See generally Newman, *supra* note 182. Yet, strangely, both publications also noted that parole boards, at least theoretically, might be given additional sentencing responsibility including involvement in front-end penalty decisions. Not surprisingly, as further described in the next section, decision makers at the time entirely discounted such possibilities.

Most notably, in *Greenholtz v. Inmates of Nebraska*, the Court acknowledged the largely discretionary nature of the parole grant process that had emerged across the states.¹⁸⁸ Instead of reining in such activities, the Court held, “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”¹⁸⁹ Instead, unless the state created a promise of release by way of statute, an inmate possessed no recognized constitutional “liberty interest” in early discharge.¹⁹⁰

Significantly, the Court contrasted the informal administrative parole release process with adversarial proceedings where a court decides whether to “convict or confine” a defendant. Accordingly, it noted state parole boards were free to establish whatever system they believed appropriate for their limited roles—including relying exclusively on information in their own files and withholding such “evidence” from inmates under review.¹⁹¹ Nor did states have to provide appointed counsel for such hearings.¹⁹² In this way, parole grant “hearings” demanded far fewer formalities and protections than what the Court described just a few years earlier in *Morrissey v. Brewer*¹⁹³ and *Gagnon v. Scarpelli*.¹⁹⁴ Those cases addressed parole board revocation of conditional parole and ending liberty where a rational process was required and the right to counsel presumed.¹⁹⁵

D. RETURN TO DETERMINACY AND RECOMMITMENT TO COURTS

As a result of *Greenholtz*, parole board work was essentially split into two very different domains with revocation proceedings requiring heightened protections for defendants¹⁹⁶ while parole grant processes became

188. See *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7–9 (1979); see also Thomas & Reingold, *supra* note 171, at 214–15.

189. *Greenholtz*, 442 U.S. at 7.

190. *Id.* at 12.

191. See *id.* at 7–12.

192. See *id.*

193. 408 U.S. 471 (1972).

194. 411 U.S. 778 (1973).

195. *Greenholtz*, 442 U.S. at 9 (“The fallacy in respondents’ position is that parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.”).

196. This said, today there are widespread problems in the country’s parole revocation practices that further reflect the system dysfunction. For instance, this author filed a successful class action lawsuit challenging Missouri’s parole revocation policies and practices. See Matthew Clarke, *MacArthur Justice Center Files Lawsuit Over Missouri Parole Revocations*, PRISON LEGAL NEWS (June 5, 2018), <https://www.prisonlegalnews.org/news/2018/jun/5/macauthur-justice-center-files-lawsuit-over-missouri-parole-revocations/> [https://perma.cc/EXL7-2P2S]; Dan Margolies, *Thousands of Missouri Inmates Whose Paroles Were Revoked May Be Entitled To Relief, Judge Rules*, KCUR (Feb. 28, 2019), <https://www.kcur.org/post/thousands-missouri-inmates-whose-paroles-were-revoked-may-be-entitled-relief-judge-rules#stream/0> [https://perma.cc/U92K-ZDVD] (announcing summary judgment class win on parole revocation challenge and finding Missouri’s entire parole revocation system unconstitutional for lack of hearings or attorney appointments).

essentially extra-legal.¹⁹⁷ In fact, some states—like Missouri—revisited their parole laws to remove language and ensure inmates could not argue they had a “liberty interest” in early release.¹⁹⁸ However, other states decided to simply abolish their parole systems, as did the federal government.¹⁹⁹ Thus, by the 1980s, determinate sentencing largely came back into vogue.²⁰⁰ And in many places, sentencing became informed by guidelines that attempted to promote fairness and avoid the unpredictability of the parole process.²⁰¹

For instance, in 1984, the Sentencing Reform Act created the Federal Sentencing Commission (the Commission), which promulgated guidelines to promote proportionality and sentence uniformity.²⁰² But while the Commission had a great deal of power,²⁰³ the trial court remained the locus of sentencing.²⁰⁴ The Act retained a fundamental commitment to judicial branch criminal punishment proceedings.²⁰⁵

The Commission was also challenged for violating separation of powers principles by abdicating congressional power to agency-like actors housed in the judicial branch.²⁰⁶ The Supreme Court rejected the claim, explaining that the Commission fell within a “twilight” area of systemic innovation and judicial rule-making.²⁰⁷ It did not encroach upon the judicial branch’s core function as primary arbiter of individual cases and controversies.²⁰⁸

Recent cases have also reiterated the primacy of the judicial branch

197. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 366–67 (1998) (reiterating informal nature of parole grant proceedings); Thomas & Reingold, *supra* note 171, at 225–27 (describing recent cases post-*Greenholtz* that arguably increase parole board autonomy); see also Victoria Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 578–79 (1994).

198. See *Bd. of Pardons v. Allen*, 482 U.S. 369, 378 n.10 (1987) (finding Montana to be an outlying state that retained a parole grant liberty interest while many more states did not); see also, e.g., *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993) (noting that Missouri law now provides “almost unlimited discretion” to the parole board, without any “liberty interest” in release for inmates).

199. See Rhine et al., *supra* note 183, at 279.

200. See *id.*; see also Beth Schwartzapfel, *Parole Boards: Problems and Promise*, 28 FED. SENT. R. 79, 80 (2015) (reporting that “truth in sentencing” became a mantra for many during this period).

201. See generally SENTENCING REFORM IN OVERCROWDED TIMES (Michael Tonry & Kathleen Hatlestad eds., 1997) (collecting essays on emergence of sentencing guidelines schemes across the country and reemergence of determinate sentencing).

202. Sentencing Reform Act of 1984, 18 U.S.C. § 3551; 28 U.S.C. §§ 991–998.

203. See *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (describing United States Sentencing Commission).

204. See 18 U.S.C. § 3553 (section titled, “Imposition of a Sentence”).

205. See *id.*; see also Jack B. Weinstein, *A Trial Judge’s First Impressions of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 1 (1997) (describing adoption of the Sentencing Commission’s Federal Sentencing Guidelines as an effort to create greater “consistency, uniformity and fairness” in federal sentencing).

206. See *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

207. *Id.* at 386.

208. See *id.* at 389–90.

when it comes to setting individual sentences.²⁰⁹ For instance, in 2005, the Court declared once and for all, in *United States v. Booker*, that the federal Sentencing Guidelines were merely advisory.²¹⁰ In doing so, it reminded criminal justice stakeholders that the Commission “makes political and substantive decisions” about recommended sentencing ranges, “rather than performing adjudicatory functions,” which firmly remain with the judicial branch.²¹¹

Booker further clarified when a jury would need to hear sentencing facts and render a judgment beyond a reasonable doubt.²¹² Read together with the other jury sentencing cases decided during this period—such as *Apprendi*, *Ring*, and *Hurst* described above—the Court’s assumption that federal and state imprisonment terms would always be imposed in a courtroom is plain.²¹³ On the state level, a similar shift away from agency influence on criminal penalties and parole board impact on sentences took place during this time.²¹⁴

V. CONSTITUTIONAL SENTENCING INCAPACITY OF CONTEMPORARY PAROLE BOARDS

A. OVERVIEW OF STATE PAROLE BOARDS TODAY

Given this history, state corrections leadership has been forced to admit that today, “parole occupies a somewhat ambiguous place” in the criminal justice system.²¹⁵ More than this, criticisms of parole practices, which in many places have become more like an “assembly line” than a legal proceeding, have increased.²¹⁶ As the Robina Institute on Criminal Justice at the University of Minnesota has documented, currently:

The right to be heard during the parole consideration process . . . is minimal. A personal interview with a prisoner will suffice; in addition, parole hearings do not need to be public and the inmate does not have a universal right to be present. The hearing itself may be

209. See *Hughes v. United States*, 138 S. Ct. 1765, 1776 (“To be sure, the Guidelines are advisory only, and so not every sentence will be consistent with the relevant Guidelines range.”).

210. See *United States v. Booker*, 543 U.S. 220, 245 (2005).

211. *Id.* at 242.

212. *Id.* at 244.

213. See *supra* Part III.B.3.

214. See, e.g., A HANDBOOK FOR NEW PAROLE BOARD MEMBERS, *supra* note 50, at 1 (“[O]ver 55 percent of all releases from state prisons were as a result of a discretionary decision by a paroling authority” in 1980 while “only about 25 percent of such releases were made by paroling authorities” in 1999).

215. *Id.*

216. Robert Gebeloff et al., *A Parole Decision in Minutes*, N.Y. TIMES (Dec. 4, 2016), <https://nytimes.com/interactive/2016/12/04/nyregion/new-york-parole-decision-in-minutes.html> [<https://perma.cc/22GM-LEPC>]; see also Beth Schwartzapfel, *Life Without Parole*, MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/life-without-parole> [<https://perma.cc/VH6D-WLP5>] (interviewing former Georgia parole board member who admitted to voting on 100 cases a day, noting the “public would be astounded” how little time is spent on even “life and death cases”).

conducted by a board representative, rather than a member of the board.²¹⁷

For instance, an investigation of New York parole hearings in 2016 demonstrated that “inmates [were] given mere minutes to make a case for their freedom,” often by way of video conference, and decisions denying parole were issued on “boilerplate” forms and seemed “arbitrary” given similarity in facts.²¹⁸ Further review of New York state parole decisions during this time showed that, while one in four white men were released at their first hearing, first time release was granted for only one in six men of color.²¹⁹

In 2017, the New Hampshire Parole Board was outed for its utter lack of professionalism and abuse of prisoners who appeared before it. Rather than conduct hearings with “civility,” board members insulted and intimidated inmates with profanity, foul language, and mockery of mental health issues.²²⁰ Among other things, those seeking release were confronted with statements like: “I know I shouldn’t be chewing your ass like this but you know damn well what I’m talkin’ about”; “[t]he thing about a good car salesman is they know how to blow smoke up your ass while smiling to your face and telling you absolutely lies”; and “I think you’re full of shit, and I think you’re trying to sell a nice boat down the river.”²²¹ In the latter instance, the New Hampshire board member went on to question the defendant about his medication.²²² When the defendant indicated he took pills for anxiety, the board member declared he presented more like someone who had bipolar disorder and needed more sleep.²²³

Unfortunately, reports of ad hoc, unprofessional, and unreliable parole board decision-making permeate the news and contemporary criminal justice landscape.²²⁴ This is true even in states that have shifted absolute

217. Alexis Watts, *Parole Release Reconsideration in States with Discretionary Release*, ROBINAINST. (Apr. 7, 2017), <http://robinainstitute.umn.edu/news-views/parole-release-reconsideration-states-discretionary-release> [<https://perma.cc/D9YJ-WL4X>].

218. Gebeloff et al., *supra* note 216.

219. Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html> [<https://perma.cc/9LJE-CHDU>].

220. Emily Corwin, “You’re Full of #\$\$@!” *At N.H. Parole Board, Tough Talk Can Veer to the Profane*, N.H. PUB. RADIO (June 27, 2017), <https://www.nhpr.org/post/youre-full-nh-parole-board-tough-talk-can-veer-profane> [<https://perma.cc/QR8E-G9YC>].

221. *Id.*

222. *Id.*

223. *Id.*

224. *See, e.g.,* VAN ZYL SMIT & APPLETON, *supra* note 166, at 251 (“[P]arole mechanisms in the United States have striking shortcomings at all levels.”); Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/5JZ3-T39F>] (giving the grade of “B” to only one state parole system, while all others achieved grades of “C,” “D” or “F” based upon “fairness and equity” factors, such as providing in-person hearings); Quandt, *supra* note 57 (asserting that as of 2018, “corruption and malfeasance” are getting in the way of parole decisions around the country). *See generally* SENT’G PROJECT, *DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES* (2017), <https://sentencingproject.org/publications/delaying-second-chance-de>

resentencing authority to parole boards in *Miller*-impacted, youthful offender matters.²²⁵ For instance, returning to our Missouri case study, the MacArthur Justice Center in St. Louis filed freedom of information requests to investigate practices of Missouri's Parole Board in 2017, based upon rumors among inmates and others. Those requests surfaced documents confirming what had been reported—that countless Missouri release hearings had turned into literal games for the enjoyment of one of the parole board members, Don Ruzicka.²²⁶

Ruzicka had coaxed colleagues to inject nonsensical words into the proceedings—such as “platypus” or “armadillo”—or song lyrics—such as “Folsom Prison Blues” or “Soul Man.” Each staff member who managed to get an inmate to repeat the word or lyric would earn a point.²²⁷ The goal was to earn the most points by the end of day's parole hearing docket.²²⁸ Ruzicka and other hearing officers could be heard laughing on tapes of the proceedings, joking during testimony, and saying things like, “I just got four points.” Although the state had conducted its own internal investigation substantiating these actions, no serious disciplinary action was taken.²²⁹

It was not until a press conference was called to shed light on these activities months after the fact, resulting in national attention, that the offending board member was pressured to resign.²³⁰ And that was only after that official oversaw at least some of Missouri's *Miller*-related sentence review hearings—including in the case of Norman Brown referenced above.²³¹

Brown was denied access to his parole file in advance of his *Miller* parole board sentence review hearing, precluded from meaningfully challenging erroneous or unreliable information that might be in the file, and allowed to bring only one person with him into the hearing room—either

clining-prospects-parole-life-sentences/ [https://perma.cc/C2NU-HFD7] (documenting a variety of problems impacting parole board decision-making, including informal prosecutorial and political influence that may dictate outcomes).

225. See Renaud, *supra* note 224, at app. (giving failing grades to states like Connecticut, Massachusetts, and Missouri, in part because prosecutors and victims can unduly influence parole board decision-making).

226. Jesse Bogan, *Missouri Parole Board Played Word Games During Hearings with Inmates*, ST. LOUIS POST-DISPATCH (June 9, 2017), https://www.stltoday.com/news/local/crime-and-courts/missouri-parole-board-played-word-games-during-hearings-with-in-mates/article_ce6c9b-5932-52a4-899a-f7644ec4d7d8.html [https://perma.cc/FDT9-2NE9] (reporting on this author's work as Director of the MacArthur Justice Center, its parole investigation, and subsequent press conference calling for Ruzicka's removal).

227. *Id.*

228. *Id.*

229. *Id.*

230. See, e.g., Dakin Andone, *Missouri Parole Board Member Resigns for Playing Word Games During Hearings*, CNN (June 12, 2017), <https://www.cnn.com/2017/06/12/us/missouri-parole-board-hootenanny-trnd/index.html> [https://perma.cc/7FNV-NCDX]; Associated Press, *Missouri Officials Toyed with Inmates During Parole Hearings, Report Says*, ABC ACTION NEWS (June 9, 2017), <https://www.abcactionnews.com/news/national/missouri-officials-toyed-with-inmates-during-parole-hearings-report-says> [https://perma.cc/AFZ2-RPND].

231. See *supra* Part II.C; see also Bogan, *supra* note 226.

an attorney or a supporter.²³² And his attorney was met at the door of the hearing area and directed to leave pen and paper outside as she would not be permitted to take notes during the hearing.²³³

Traditional attorney advocacy on Brown's behalf was not permitted—other than to explain in just a few minutes any re-entry support plans that might be in place.²³⁴ In contrast, the parole panel heard extensive comments from the wife of the decedent, also a victim of the crime, along with the original prosecutor who tried the case.²³⁵ The prosecutor did not serve as an attorney. Instead, he was permitted to testify as a witness, offer his views on why Brown should not be released, and even introduce diagrams of the crime scene that he drew himself but that had never been introduced at trial.²³⁶ Not surprisingly, just a few days later, Brown learned that the parole board accepted the prosecutor's recommendations and, based solely on the seriousness of his offense, would remain imprisoned.²³⁷

MacArthur Justice, along with pro bono counsel at the law firm of Husch Blackwell, filed a class action on behalf of Brown and the other youthful offenders directed to the Missouri parole board under Senate Bill 590.²³⁸ Without conceding that parole review could displace courtroom sentencing, the lawsuit argued the hearings denied youthful offenders sufficient process and protection.²³⁹ And, indeed, Missouri's *Miller*-impacted youthful offenders prevailed on summary judgment in 2018.²⁴⁰

Yet, the Missouri parole board still fails to provide the same procedures and protections during *Miller* sentence review hearings as would be provided in a court of law at sentencing.²⁴¹ Other states that have punted *Miller*-fix matters to parole boards also fail to provide impacted youthful offenders with all of the rights and protections they would be given by the

232. See, e.g., Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 55, at ¶¶ 128–146.

233. This author was that attorney. See *Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2017 WL 4980872, at *1 (W.D. Mo. Oct. 31, 2017) (class action filed by a group of attorneys in 2017, including this author as co-counsel, challenging unfairness of Missouri parole board sentence review practices on behalf of all of Missouri's *Miller*-impacted inmates).

234. *Id.* at *5.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at *1.

239. *Id.* at *6.

240. Order at *10, *Brown v. Precythe*, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018) (No. 2:17-cv-04082-NKL) (ordering state to submit plan to provide *Miller*-impacted inmates with meaningful and constitutionally compliant sentence review process).

241. See generally, e.g., Plan for Compliance with Applicable Requirements, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Mar. 4, 2019) (proposing, among other things, that *Miller*-impacted inmates would now be allowed to have up to four individuals attend their life without parole review hearing—including counsel and an expert—but that the state would not provide funds for representation or experts for the sentence review process). The State of Missouri's Attorney General's Office is also now seeking to appeal the trial court's finding that *Miller* created a liberty interest for youthful offenders for purposes of parole consideration.

judicial branch.²⁴² Thus, contemporary state parole boards remain largely incapable of serving as the sole resentencers in *Miller*-impacted matters. And permitting parole board punishment practices to continue over objections presents a serious threat to the historic norms and integrity of the justice system.

B. PENUMBRAL RIGHT TO JUDICIAL BRANCH PENALTY PHASE

It is impossible to imagine federal courts having their sentencing authority entirely stripped and re delegated to an executive body.²⁴³ If this issue arose on the federal level, it seems likely that the Supreme Court would declare, once and for all, that sentencing is a judicial branch function under Article III of the Constitution—even during this era of increased federal agency autonomy.²⁴⁴ But because the federal government no longer actively maintains a parole system, this will not occur.²⁴⁵ Nevertheless, federal separation-of-powers norms should be instructive when considering the constitutionality of this practice on the state level—despite older state parole cases like *Dryer*.²⁴⁶

As noted, every state now maintains a tripartite government in the image of the federal system.²⁴⁷ To be sure, there are subtle differences in branch powers at the state level as compared to the federal system.²⁴⁸ But

242. See, e.g., *State v. Williams-Bey*, 144 A.3d 467, 489 (Conn. App. Ct. 2016).

243. See Michael S. Greco, President's Message, *Lawyers Have a Lot to Teach*, 91 ABA J. 6, 6 (2005) (ABA President urges attorneys to help educate public about the importance of separation of powers and independent judiciary as part of the "fabric of our republic").

244. See generally Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (providing an account of administrative agencies as an extra-constitutional component of government that may be seen as part of the "new separation of powers" landscape); see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517 (2015).

245. Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305, 313 (2015) (the term "separation of powers . . . is not mentioned in the text but permeates the constitutional structure as an architectural theme").

246. Indeed, the issue in *Dreyer v. Illinois*, 187 U.S. 71 (1902), was not whether a parole board could serve as a sentencing body to the exclusion of courts. The case challenged the creation of the parole system—which involved court-based sentencing in the first instance, followed by possible discretionary release akin to clemency. *Id.* at 78–85. In addition, much has changed since *Dryer* was decided in 1902. In these ways, perhaps *Dryer* and similar cases are now open to question. See Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 961–62 (2017) (suggesting deference to state autonomy might need to give way because of "slippage" taking place around substantial Eighth Amendment rights); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1053 (noting that, to date, "the Supreme Court and scholars have overlooked the importance of separation of powers in the criminal context").

247. See Devlin, *supra* note 165, at 1205 ("The three-part division of sovereign authority among largely independent legislative, executive, and judicial branches, and the competing principle of 'checks and balances' among those branches, have been and remain cornerstones of the American system of government, both state and federal.").

248. See, e.g., Rossi, *supra* note 164, at 1190–91; see also Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1109 (2004) (noting differences between the California Constitution and the federal Constitution).

common sense suggests that some actions on the part of individual states would so offend our respect for separation of powers that they should be prohibited under the U.S. Constitution.²⁴⁹ For instance, if states decided to do away with their judicial government branches entirely, it is safe to assume the Supreme Court would stop such actions if asked to do so. If this did not occur based upon a strict separation-of-powers claim, more generalized due process arguments would likely be brought to bear to ensure state judiciaries were not dismantled.²⁵⁰

Even if constitutional separation-of-powers doctrine or some close approximation does not require the state judicial branch to impose criminal penalties in the first instance, this does not end the discussion. The concept of court-centered sentencing is more than mere backdrop in the Court's criminal punishment cases described in Part III. Application of the Court's past penumbral reasoning provides further grounds for deeming the judicial branch the only constitutionally appropriate entity for sentencing.²⁵¹ No different from individual liberties jurisprudence in other areas, the overlap and reverberations of recognized rights give rise to the further free-standing constitutional right of punishment imposition in a court of law.²⁵²

Both the right to counsel at sentencing and due process fairness have been mandated by the Supreme Court in federal and state criminal cases.²⁵³ These mandates imply oversight by the court system to ensure delivery of these protections around criminal punishment. Indeed, the Court has recognized many other rights and requirements not contained in the Constitution's text—from privacy,²⁵⁴ to specially worded warnings,²⁵⁵ to specific timeframes.²⁵⁶ And it has done so by either situating them within existing provisions where they seem most at home—like Mi-

249. See Robert A. Shapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998) (acknowledging “federal precedent sets the terms for much state separation of powers debate, and federal principles provide a presumptive standard for state constitutional decisions”); cf. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State . . . a Republican Form of Government . . .”); Quinn, *In Loco Juvenile Justice*, *supra* note 12, at 1294–95 (advancing similar analysis regarding states dismantling their juvenile courts).

250. Fortunately, this is merely a hypothetical. It is hard to conceive of a state giving all judicial authority to the executive—even from a strong state's rights perspective. Zasloff, *supra* note 248, at 1098 (“Whatever an executive might be, it certainly is not the ‘dispenser of justice’ in most people's minds. That title—whether deserved or not—belongs to a court.”). In addition, as further analyzed below, core functions of courts in criminal cases—largely required in each of the states because of the incorporation doctrine—would further preclude such a move.

251. Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1096 (1997) (noting Justices on both the Right and the Left have turned to “penumbral reasoning” to advance constitutional rights).

252. See David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 854–55 (1996) (explaining that *Roe v. Wade*, like “[m]ost of the Court's privacy decisions,” involved “a leap away from logic founded on strict constitutional premises”).

253. See *supra* Parts III.B.1–2.

254. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

255. *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966).

256. *Maryland v. Shatzer*, 559 U.S. 98, 116–17 (2010).

randa rights living mostly within the Fifth Amendment²⁵⁷—or establishing their existence at the intersection of recognized rights under the Constitution.²⁵⁸ With sentencing recognized as a critical stage of the criminal process where counsel and due process protections must be afforded,²⁵⁹ the Court has provided more than adequate support for a related fundamental right to sentencing in a court of law to emanate therefrom.²⁶⁰

Thus, separate and apart from the individual procedural or substantive rights guaranteed during sentencing, reading the Sixth and Fourteenth Amendments together should provide for a right to a court-centered penalty phase in all criminal cases involving incarceration—*Miller*-fix or otherwise. This is so even when the right to jury determination at sentencing is not implicated.²⁶¹ But as further explained below, *Miller* very much implicates the right to jury determination during the penalty phase. Even if existing constitutional sentencing rights are not read together to create an instantiated and free-standing right to a penalty phase in a court of law, each of the individual rights standing alone should preclude states from merely redirecting *Miller* resentencing decisions to existing parole boards.

C. PAROLE BOARDS AND PROCEDURAL INABILITY TO PUNISH

Regardless of any new free-standing claim to a constitutional right to be sentenced in a court of law, parole boards fall far short in *Miller* sentence review matters—or any other—to serve as sole sentencers. Some jurisdictions are providing more process than others to try to come close to looking like judicial branch resentencing hearings. Yet, state parole boards are unable due to their structures and current practices to wholly satisfy all the specific procedural rights and substantive protections summarized in Part III.

1. Jury Determinations

For instance, as described earlier, when sentence enhancements are implicated or fact-finding beyond the trial jury's elements determination is needed, defendants have a constitutional right to sentencing by jury with the beyond a reasonable doubt burden placed squarely on the prosecution.²⁶² Several states post-*Miller* have already provided for jury determi-

257. *Miranda*, 384 U.S. at 457, 494, 499.

258. See *Griswold*, 381 U.S. at 484 (finding “zones of privacy,” protecting the right to contraception, inherent in the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution); see also David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 27–28 (1999).

259. See *supra* notes 100–104 and accompanying text.

260. Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1344 (1992) (“[P]enumbral reasoning is almost certainly more appropriate in the context of individual rights than anywhere else.”).

261. See *supra* Part III.A.3.

262. See *supra* Part III.C; see also W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV.

nation on the question of whether lifetime incarceration without release is warranted.²⁶³

Life without parole is the most serious sentence that may be imposed on a child. Consistent with *Roper*, *Graham*, and *Miller*, where life without parole is a possibility for a juvenile, sentencing must be handled with the same heightened concerns as with the death penalty for an adult. Appropriate narrowing must take place, and “irreparable corruption” should be treated like an enhancement above any other term of incarceration as in *Apprendi*, *Ring*, and *Hurst*. A jury must find beyond a reasonable doubt that a child is beyond rehabilitation in order to permit lifetime incarceration. Indeed, Missouri utilizes such an approach for new juvenile first degree murder matters.²⁶⁴

But, of course, petit juries have not been involved in the work of executive agencies.²⁶⁵ Contemporary parole boards are unable to lawfully summon and convene jury venires.²⁶⁶ Nor does it appear that any kind of special process for jury determinations at parole board hearings, post-*Miller*, is occurring.²⁶⁷

In fact, Missouri youthful offenders are not even permitted to have a hearing before the entire parole board.²⁶⁸ Instead, the hearings are held before a small parole board panel.²⁶⁹ Yet, the entire board is given the opportunity to decide on the defendant’s release or continued incarceration—potentially for the rest of their life.²⁷⁰ Other states, including Con-

893, 921 (2009) (analyzing parole board “second-guessing” facts as Sixth Amendment jury right issue).

263. See *Moore v. Mississippi*, No. 2017-KA-00379-SCT, 2019 WL 4316161, at *8–9 (Miss. May 30, 2019); see also *Johnson v. Elliott*, No. PR 2018-1203, 2019 WL 2251707, at *7 (Okla. Crim. App. May 24, 2019) (“The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived.”).

264. MO. ANN. STAT. § 565.033 (West 2016) (providing for jury sentencing in juvenile first-degree murder cases); see also *State v. Hart*, 404 S.W.3d 232, 239 (Mo. 2013) (remanding for resentencing of youth who received mandatory life without parole, with right to jury finding beyond a reasonable doubt to uphold life without parole sentence).

265. Cf. *Cox v. United States*, 332 U.S. 442, 453 (1947) (holding that federal juries are without power to pass judgment on actions of federal agencies).

266. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 1, <https://www.flmd.uscourts.gov/sites/flmd/files/documents/handbook-for-trial-jurors.pdf> [<https://perma.cc/CP2K-38HV>] (last visited Nov. 5, 2019) (“The judge determines the law to be applied in the case while the jury decides the facts. Thus, in a very important way, jurors become a part of the court itself.”); see also FLA. STAT. ANN. § 40.001 (West 2004) (“The chief judge of each judicial circuit is vested with overall authority and responsibility for the management, operation, and oversight of the jury system . . .”).

267. See, e.g., MO. ANN. STAT. § 558.047 (West 2016) (codification of Senate Bill 590, which allows for jury determinations in new juvenile first degree murder cases but not those matters redirected to the parole board for sentencing review); *Diatchenko v. Dist. Attorney for Suffolk*, 1 N.E.3d 270, 276, 280 (Mass. 2013).

268. See BD. OF PROB. & PAROLE, MO. DEP’T OF CORRECTIONS, PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES 6 (2017) [hereinafter MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES].

269. *Id.* (describing use of small panel hearings followed by full board votes).

270. *Id.* See generally Declaratory & Injunctive Relief Order, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Aug. 8, 2019).

necticut and Nevada, also allow a subset of the entire board to conduct the actual review hearing—never mind full-blown jury hearings and determinations of elements and enhancement facts.²⁷¹

2. *Critical Stage and Right to Counsel*

But even if somehow not all *Miller*-impacted inmates are entitled to jury determinations beyond a reasonable doubt at resentencing,²⁷² existing parole boards are still ill-suited to deliver on the other individual procedures insured during a courtroom-based penalty phase. For instance, as sentencing is now seen as a critical phase of the criminal process, free appointed counsel is available to indigent defendants facing incarceration during court sentencing. Historically, inmates are not entitled to free counsel at parole grant hearings—or even meaningful representation by retained counsel.

Instead, as a matter of parole policies and customs, attorneys are frequently expected to step away from their traditional role when they accompany clients before the parole board.²⁷³ As already described, the standing practice in Missouri has been to relegate counsel to the role of friend or supporter who is able to shed light on community reentry plans. They generally are not permitted to cross-examine witnesses, challenge evidence, or make objections.²⁷⁴

Even after Missouri's *Miller*-impacted plaintiffs prevailed on their class action, attorneys for the parole board filed papers with the district court seeking to impose limits on the process. The board only agreed to allow up to four individuals to attend the review hearings for *Miller*-impacted inmates, including counsel and an expert—a position adopted by the district court.²⁷⁵ In addition, the state of Missouri continues to refuse to furnish counsel or funds for lawyers.²⁷⁶ Other states also fail to provide appointment of counsel for *Miller*-impacted inmates receiving life-without-parole sentence review hearings before the state's parole board, including Nevada.²⁷⁷

271. CONN. GEN. STAT. ANN. § 54-125a-(f)(1) (West 2015) (providing that panel of the board may make release decision); NEV. REV. STAT. ANN. § 213.133 (West 2013) (outlining method for delegating authority of the full board to a small panel, which may include one board member along with parole staff).

272. See Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 586 (2015) (cataloging states that have been resistant to jury determinations at sentencing in *Miller*-related court matters); see also Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1064 (2014).

273. See, e.g., Corwin, *supra* note 220 (recounting experience of defense attorney who saw parole hearings as a kind of "wild west" where board members controlled the process).

274. See, e.g., MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES, *supra* note 270, at 6 (describing the limited role of the inmate delegate, who may be a friend, family member, or attorney).

275. See generally Declaratory and Injunctive Relief Order, *Brown v. Precythe*, 2019 WL 3752973 (W.D. Mo. Aug. 8, 2019) (No. 2:17-cv-04082-NKL).

276. See *id.*

277. See, e.g., NEV. REV. STAT. ANN. § 213.131(10)(a) (West 2020) (providing generally that individuals who will be seen by the parole board may be accompanied by counsel, at

In Massachusetts and Connecticut, attorneys are provided to indigent *Miller*-impacted inmates before the parole board.²⁷⁸ But in both states, the role of counsel as advocate is greatly reduced as compared to a courtroom sentencing where a defendant is facing the possibility of the rest of her life in prison.²⁷⁹ This is in part because of the amorphous role of prosecutors at these hearings.²⁸⁰ For instance, during an April 2018 Massachusetts sentence review hearing before parole officials, the prosecutor was allowed to personally opine that the youthful offender had a look of “pure evil” in his eyes at the time of his trial and that he “will kill again” if released.²⁸¹

3. *Due Process and Individualization*

Obviously, lack of defense counsel or limitations on representation, along with the unusual role of prosecutor as witness, also impacts the meaningfulness and adequacy of the process provided. But it is not just inflammatory opinions of the prosecutor that result in unreliable evidence or unfairness in the proceedings. Many inmates are precluded from seeing the contents of their correctional files or other materials that the parole board may consider during its decision-making process.²⁸² And in states like Nevada, it appears board members may receive information outside of the hearing itself.²⁸³

Parole boards historically have claimed to have special understanding of rehabilitation and risk assessments of inmate reoffending. However,

their own expense); *see also* Katya Cengel, “*You Guys Are Coming Home*”, *NATION* (Jan. 9, 2019), <https://www.thenation.com/article/juvenile-lwop-prison-california/> [<https://perma.cc/KK8A-FLME>] (describing how volunteer youth advocates are working to help prepare California youthful offenders to appear before the parole board pro se to seek possible release).

278. *See* *Diatchenko v. Dist. Attorney for Suffolk*, 1 N.E.3d 270, 287 n.18 (Mass. 2017) (indicating public defenders would be expected to handle sentencing review proceedings for *Miller*-impacted inmates before the Massachusetts parole board); *see also* *CONN. GEN. STAT. ANN.* § 54-125a(f)(3) (West 2015).

279. *See* Renaud, *supra* note 224 (giving both Connecticut and Massachusetts grades of “F,” in part because of the ability of prosecutor and victim to influence parole grant proceedings).

280. *See, e.g.*, Shaun Chaiyabhat, *Parole Hearing for Man Convicted of Killing Family 40 Years Ago*, *WCVB-TV* (Apr. 26, 2018), <https://www.wcvb.com/article/parole-hearing-for-man-convicted-of-killing-family-40-years-ago/20079081> [<https://perma.cc/CS9T-ZJMT>] (video excerpts from parole board hearing, with transcript).

281. *Id.*

282. *See, e.g.*, Rebecca Rivas, *MacArthur Justice Center Files Lawsuit Against Missouri Dept. of Corrections, Argues Parole Proceedings for Juvenile Offenders Are Unconstitutional*, *ST. LOUIS AMERICAN* (Dec. 30, 2016), http://www.stlamerican.com/news/local_news/macarthur-justice-center-files-lawsuit-against-missouri-dept-of-corrections/article_69d0cc16-cee0-11e6-8339-87131f81103a.html [<https://perma.cc/V9UR-ZNF6>] (reporting on lawsuit in non-*Miller* youthful offender case which challenged Missouri parole board practice of refusing to allow inmates to review information submitted by victims, notes of prison staff, or any other information in file other than disciplinary record); *see also* ALEXIS LEE WATTS ET AL., *ROBINA INST., PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: TENNESSEE 8* (2019) (“While the Board has discretion to release some documents to offenders, it does not appear that they are required to release the records used to make a parole decision.”).

283. *See generally* *NEV. REV. STAT. ANN.* § 213.131 (West 2020).

such assertions are dubious at best given the quality of the risk assessment instruments administered and used in some states—as well as the absolute lack of formal assessments in others.²⁸⁴ States like Missouri have not been using formal risk assessment instruments in connection with *Miller* sentence review hearings. Instead, an inmate interview is completed by a parole board staffer who may or may not have a college degree—let alone specialized psychological or risk assessment training.²⁸⁵ That staff member then offers a written report and opinion to the board based upon that short interview, which is then relied upon during the sentence review process by board members rendering a decision.²⁸⁶

After Missouri's *Miller*-impacted youthful offenders prevailed on their class action lawsuit against the parole board, the board offered to start using formal risk assessment instruments. But it is not at all clear who would administer them or how.²⁸⁷ In addition, it promised to have its staff engage in more youth-focused inquiries before providing written opinions to the board regarding issues like these: “What is the mitigating effect of any details of their background? How did it impact their developmental status at the time of crime? How did it impact their culpability? How did it impact their capacity for rehabilitation?”²⁸⁸ Of course, presenting such questions to a single parole staffer—who does not know the defendant, the law, or have any training or guidance relevant to assessing such weighty proportionality issues—allows that person to serve as a sort of rogue, single juror operating on instincts rather than jury instructions.

Similarly, some states use risk assessment instruments that fail to adequately account for youth. In fact, under some risk tools, features of youth are used as aggravating factors rather than mitigators.²⁸⁹ Others are intended for adult offenders alone—not juveniles. Thus, risk assessment outcomes presented by parole staffers for youthful offenders can be skewed and unreliable.²⁹⁰

Courtroom sentencing hearings do not afford defendants all the same rights as at trial. But they receive far more process than what is provided by parole boards generally—or in *Miller*-impacted matters specifically. As noted, Supreme Court decisions from as early as the middle of the last

284. Cf. 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, 188 (2017) (opining that “[a] future parole board, with the added knowledge that only comes with time, will be in a better position to determine whether or not a juvenile can be rehabilitated”).

285. See Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 55, at ¶ 80.

286. *Id.*

287. Plan for Compliance with Applicable Requirements, *supra* note 241, at 10.

288. *Id.*

289. Kate Wheeling, *Prisoners Sentenced to Life as Kids Get a Shot at Parole in California*, *PAC. STANDARD* (Oct. 13, 2017), <https://psmag.com/social-justice/california-bans-life-sentences-for-juvenile-offenders> [<https://perma.cc/RA8N-7D3G>].

290. *Id.*; see also Caldwell, *Creating Meaningful Opportunities for Release*, *supra* note 29, at 299–302.

century, including *Townsend v. Burke*, and more recently *Gardner v. Florida*, set aside sentences based upon lack of due process when questionable information was presented or defense counsel was not provided an opportunity to review and challenge evidence.²⁹¹

It could be argued non-death penalty sentencing matters generally require less process than in capital cases. But the sentencing process provided in even run of the mill felony matters is greater than what is provided in parole board hearings in *Miller* cases or otherwise. Moreover, as *Graham* and *Miller* teach, any youthful offender cases where lifetime incarceration may be possible is akin to a death case. Therefore, sufficient narrowing and proportionality analysis is needed to determine the rare youth who is irredeemable. Clearly, this is not occurring.

Parole board sentencing review processes also fail to allow for direct appeal or meaningful post-hearing review.²⁹² While each state is slightly different, parole hearings as administrative proceedings do not allow for the same kind of direct review as in criminal sentencing matters. Rather, inmates are often instructed to seek further administrative relief through the agency or that they have no right to challenge outcomes at all.²⁹³ Even where specialized rules or practices have been put in place for *Miller*-fix parole board hearings, this has been the case.²⁹⁴ And while the constitutional right to counsel during direct appeal in criminal cases applies,²⁹⁵ there is no similar right to counsel to challenge *Miller*-impacted parole board outcomes.²⁹⁶ Instead, affirmative litigation seeking extraordinary relief is required.²⁹⁷

291. See *supra* Part III.B.

292. See SENTENCING REFORM IN OVERCROWDED TIMES, *supra* note 201, at 11 (“[S]entencing guidelines, backed up by appellate sentence review, can reduce racial, gender, and other unwanted disparities.”).

293. See *Types of Hearings*, LA. DEP’T PUB. SAFETY & CORR., <https://doc.louisiana.gov/types-of-hearings/> [<https://perma.cc/T7K7-JVN6>] (last visited Nov. 5, 2019) (“[T]his process does not establish a formal appeal process as parole is an administrative discretionary decision that is not subject to appeal.”); see also *Parole Denial*, PRISONERS’ LEGAL SERVS. MASS., <http://www.plsma.org/parole/parole-denial/> [<https://perma.cc/5CGY-3XHC>] (last visited Nov. 5, 2019) (explaining that Massachusetts inmates’ right to appeal parole decisions involves seeking review within the parole system itself).

294. See CONN. GEN. STAT. ANN. § 54-125a(f)(6) (West 2015) (providing that youthful offender parole board sentence review hearing outcomes “shall not be subject to appeal”); Rachel Lippmann, *Parole Anything but Certain for Juvenile Lifers a Year After Missouri Changed Law*, ST. LOUIS PUB. RADIO (Aug. 3, 2017), <https://news.stlpublicradio.org/post/parole-anything-certain-juvenile-lifers-year-after-missouri-changed-law#stream/0> [<https://perma.cc/8TLK-JAZF>] (article including a copy of Missouri Parole Board decision paperwork from *Miller* sentencing review matter, noting “THIS DECISION IS NOT SUBJECT TO APPEAL”).

295. See Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 289–90 (2009) (discussing constitutional right to appointed counsel in criminal appeal matters despite lack of constitutional right to criminal appeal in the first instance).

296. See *id.*

297. See, e.g., Rivas, *supra* note 282; Alexis Watts & Edward E. Rine, *Parole Board Held in Contempt After Failing to Follow State’s Parole Release Laws*, ROBINIA INST. (June 6, 2016), <https://robinainstitute.umn.edu/news-views/parole-board-held-contempt-after-failing-follow-state’s-parole-release-laws> [<https://perma.cc/UCC9-EHGF>].

In summary, parole board punishment proceedings fall far short of delivering the constitutional procedural protections promised in a court of law. Whether or not jury determinations would be required during an in-court hearing, the processes provided in parole proceedings generally, and *Miller*-fix matters specifically, are insufficient to satisfy constitutional procedural protections for sentencing.

D. SUBSTANTIVE SHORTCOMING OF PAROLE BOARD PENALTIES

Given the above descriptions, parole hearing processes also raise serious questions about satisfying substantive constitutional requirements when it comes to juvenile life-without-parole review matters. Current structures, staffing, and culture make parole boards ill-equipped to offer individualized proportionality analyses to make sure youth will rarely be incarcerated until the end of their lives. And examining the substantive constitutional question of proportionality in the context of parole review hearings highlights further incoherency inherent in the existing arrangement.

1. *Arbitrary, Discriminatory, or Cruel*

Given the impact of *Greenholtz*, granting parole boards near carte blanche to create release hearing mechanisms most entirely eschew formal legal standards. As will be further discussed below, it is the rare parole board member who has any legal training—let alone a law degree that would provide an assurance of competence in legal analysis. This is obviously the case as it pertains to the doctrines directly applicable to criminal sentencing processes. Constitutional doctrines ancillary to criminal processes, such as equal protection, are likely even more foreign and far afield from boards.²⁹⁸

Lack of training, belief that their actions are beyond challenge, and other shortcomings provide a high risk that parole board members will ask about, or take account of, facts that would be substantively prohibited at a criminal sentencing. For instance, as the New Hampshire Parole Board record above suggests, parole officials may inquire about mental health diagnoses, disabilities, and other issues in a manner that would surely trigger concerns in a courtroom setting, potentially rising to the level of discrimination.²⁹⁹

This is no different in *Miller*-related sentence review cases. During the April 2018 hearing in Massachusetts described above, parole board members told the youthful offender, “[Y]ou do have personality disorders that

298. See Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/nine-things-you-probably-didn-t-know-about-parole> [https://perma.cc/KK2A-6VVK] (“If you are a farmer, auto salesman, DuPont executive or personal fitness trainer, you too can be on a parole board.”); see also *infra* Part VI.A (further describing lack of legal training or ethical mandates for parole board members).

299. See *supra* text accompanying notes 220–223.

contribute [to your actions], but society would say, well so what,” and then asserted incredulously, “[A]nd now you are here asking us to parole someone who has mental health issues”³⁰⁰ Similarly, active substance abuse might also be considered in the course of review hearings involving the possibility of life without parole.³⁰¹ Yet, as *Robinson* suggests, criminally punishing the disease of addiction with imprisonment is cruel, arbitrary, and prohibited in the criminal justice system.³⁰²

Given the lack of counsel in many of these hearings, mentally impaired inmates may face direct or subtle forms of discrimination. Many of the youth previously sentenced to life without parole were especially vulnerable to peer pressures because of brain damage, low IQ scores, or other deficits considered disabilities.³⁰³ And these conditions may prevent such inmates from fully understanding standard protocols or social cues; or make them seem defiant, aloof, or even come across as disrespectful.³⁰⁴ Absent meaningful advocacy to ensure such issues around competence are not used against clients, mentally disabled youthful offenders may have their deficits used against them—essentially as aggravating factors warranting denial of a sentence reduction.³⁰⁵

Inmates may also face discrimination before the parole board based upon their poverty. Across the country, parole boards take account of inmate reentry plans when reviewing requests for release. These focus to a large degree on where the inmate plans to live if discharged.³⁰⁶ Some states, like Nevada, may financially assist inmates in seeking housing when they are unable to pay for it on their own.³⁰⁷ But this is not the

300. Chaiyabhat, *supra* note 280.

301. *See supra* note 280 and accompanying text. Unfortunately, illicit drugs and alcohol are frequently introduced as contraband by prison staff and others. *See, e.g.*, Sam Ruland, *Drugs in Crosswords and 5 Other Ways Prison Staff Allegedly Tried to Smuggle Contraband*, YORK DAILY REC. (Mar. 18, 2019), <https://www.ydr.com/story/news/2019/03/18/pa-state-prison-staff-guards-smuggling-drugs-6-ways-they-allegedly-tried/3138348002/> [<https://perma.cc/B6NH-NA7N>].

302. *See supra* Part III.C.1 (discussing *Robinson*).

303. ASHLEY NELLIS, SENT’G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 8–13 (2012) (describing history of trauma, lack of education, and mental health challenges of many youth serving life sentences).

304. Beth Schwartzapfel, *The Secret Hints for Winning Parole*, MARSHALL PROJECT (Jan. 26, 2016), <https://www.themarshallproject.org/2016/01/25/the-secret-hints-for-winning-parole> [<https://perma.cc/PA7Q-NBTW>] (noting how mentally ill, illiterate, and otherwise vulnerable inmates may do most poorly during parole interviews, regardless of their level of rehabilitation or readiness for release).

305. This author represented one youthful offender before the Missouri Parole Board who had an IQ score reflecting intellectual disabilities. Absent attorney investigation and participation, this fact and the inmate’s associated lack of comprehension would have not been known by the board, which does not conduct psychological evaluations.

306. CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, PAROLE PREPARATION TOOLKIT 13 (2018) (providing advice for youthful offenders who may appear unrepresented before parole boards after *Graham* and *Miller*, including how to develop re-entry housing plans).

307. NEV. REV. STAT. ANN. § 213.140 (West 2017) (“If a prisoner is indigent and the prisoner’s proposed plan for placement upon release indicates that the prisoner will reside in transitional housing upon release, the Division may, within the limits of available resources, pay for all or a portion of the cost of the transitional housing for the prisoner based upon the prisoner’s economic need, as determined by the Division.”).

norm, and most youthful offenders will not have money for transitional housing.³⁰⁸ Thus, board members may wind up considering inmate poverty in a manner that would violate *Williams v. Illinois* in a courthouse sentencing.³⁰⁹

As described above, in some states where parole boards have stepped into the shoes of sentencing courts, review hearings are conducted in public and meaningfully recorded. Places like Missouri, however, conduct hearings inside of prisons, outside of public view, and even preclude prisoners or their lawyers from accessing hearing transcripts as a matter of course.³¹⁰ Thus, attempting to bring to light prohibited sentencing bias or discrimination, as contemplated by *Williams* and *McCleskey*, would be next to impossible.³¹¹

Arbitrariness can further creep into parole board assessments in *Miller*-fix cases through the layered and bureaucratic processes employed by such agencies.³¹² From inflammatory claims of victims and prosecutors, to incorrect information in parole files, to unsubstantiated “expert” opinions about risk or maturation made by untrained staff, parole board decisions may rest upon information that would be deemed wholly irrelevant or unduly prejudicial during court proceedings.³¹³

Similarly, such proof would not satisfy the preponderance standard applied at most individual sentencing hearings, much less the beyond a reasonable doubt bar that likely applies to *Miller* sentence matters where lifetime incarceration is possible. The widespread nature of such practices renders the parole system rife with the kind of randomness and caprice that resulted in the Supreme Court’s ruling in *Furman* and the death penalty moratorium that followed.³¹⁴

308. See generally NELLIS, *supra* note 303, at 36 (noting that most youth with life sentences come from poor families who may not be able to financially support them upon their release as adults).

309. See *supra* Part III.B.1 (discussing *Williams*).

310. See Quandt, *supra* note 57 (reporting on the closed nature of Missouri parole hearings, even in *Miller* sentence review matters).

311. The limited number of transcripts that have been obtained in Missouri are of generally poor quality and fail to ensure all statements made are memorialized. For instance, records relating to the “word game” hearings conducted by board member Ruzicka were filled with notations that part of the proceedings were simply inaudible. See Bogan, *supra* note 226.

312. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 376–77 (2014) [hereinafter French Russell, *Review for Release*] (describing ad hoc practices of parole boards, including application of unwritten rules and agency norms at hearings).

313. See *id.*; see also *Chapman v. United States*, 500 U.S. 453, 464–65 (1991) (in upholding federal drug sentencing structure for LSD as an illegal narcotic, the Court noted, “so long as the penalty is not based on an arbitrary distinction,” it would not be unconstitutional); OFFICE OF THE LEGAL AUDITOR GEN., ST. OF UTAH, REP. TO THE UTAH LEGIS.: A PERFORMANCE AUDIT OF THE BOARD OF PARDONS AND PAROLE, L. 2016-01, 1st Sess., at 21–29 (documenting the lack of transparency and possible errors in parole proceedings).

314. See *supra* Part III.B.1 (discussing *Furman*); cf. Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 66–68 (2013) (urging application of *Furman*’s anti-arbitrariness principles to juvenile transfer hearings).

2. Proportionality and Heightened Individualization

Although some parole board sentence review states, such as Massachusetts, have created special units or protocols for youthful offender cases, underlying culture and thinking has changed little. No matter what the board members claim, youthful characteristics at the time of the crime may not be sufficiently weighed or understood, and subsequent maturation may not be meaningfully assessed.³¹⁵ Other states, by and large, have failed to create special juvenile parole board units.³¹⁶ In fact, Missouri's parole board went so far as to decline free training on the adolescent development process, offered by the Campaign for Fair Sentencing on Youth—the nation's leading organization dedicated to the issue of juvenile life without parole.³¹⁷

To date, nothing suggests that parole boards handling *Miller*-fix matters in lieu of sentencing courts are equipped to accurately evaluate “the difficult but essential question whether [those who appear before them] are among the very ‘rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.’”³¹⁸ Connecticut, for instance, has its parole board members apply two standard parole release considerations to *Miller*-impacted matters but adds this additional set of factors for consideration:

[S]uch person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including but not limited to, such person's correctional record, 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, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correction system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the na-

315. See *supra* notes 284–290 and accompanying text.

316. See, e.g., CONN. GEN. STAT. ANN. § 54-125a(f)(1) (West 2015) (establishing parole board review hearings for offenders who committed crimes while under the age of eighteen); see also Katherine Barrett & Richard Greene, *To Work on Parole Boards, No Experience Necessary*, GOVERNING (Sept. 2016), <https://www.governing.com/columns/smart-mgmt/gov-parole-boards-hiring-decisions.html> [<https://perma.cc/4QXS-3RFV>] (lamenting that many parole boards are untrained in law and ill-equipped to make the kinds of decisions they are presented); Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST, (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8ea61_story.html [<https://perma.cc/8EWV-37FC>].

317. The author had a conversation with Nikola Nable Juris, former policy attorney with the Campaign for Fair Sentencing of Youth.

318. See *Adams v. Alabama*, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)).

ture and circumstances of the crime or crimes.³¹⁹

And this inquiry is conducted based only upon the following evidence permitted by the same statute: (a) a statement by the youthful offender; (b) statements, reports or documents submitted by his attorney; (c) statements of the victims; (d) a risk assessment instrument; (e) testimony from a mental health professional or other witnesses the board might like to hear from; and (f) reports from the Commissioner of Corrections.³²⁰

Rather than creating a presumption against the existing life-without-parole sentence, these provisions clearly suggests the burden is on the youthful offender to “demonstrate” all the many confusing requirements set forth in the parole board review law. The statute offers parole board members the ability to expand the universe of necessary showings with language such as “including, but not limited to.” And it conflates disconnected concepts in ways that gut *Miller*’s meaning, such as equating demonstration of remorse with maturity. Worse, in trying to meet this amorphous burden by some unknown quantum of proof, the defendant is not able to call any witnesses to help prove he is worthy of a second chance. Rather, he is limited to his own words and documentary evidence—unless the board itself asks to hear from a mental health expert or receive other testimony.³²¹

Sadly, it is obvious that sending cases to the parole board was motivated by convenience and approximation of *Miller*’s proportionality promise. This can be seen in the explanation of the Connecticut court when, post-*Montgomery*, it changed course and denied the request in *Williams-Bey* for trial court resentencing in a *Miller*-impacted matter.³²² The court expressed great concern about exposing the victims to “emotional burdens” or requiring trial courts to hold complex or “cumbersome” resentencing hearings.³²³ Further, it claimed it would be “exceedingly difficult” for the trial judge to make the findings needed by *Miller*—because the resentencing “would in reality be more akin to a parole hearing.”³²⁴ The difficulties—or unconstitutionality—of a parole board being transformed into an impromptu substitute judicial branch were not discussed.

319. CONN. GEN. STAT. ANN. § 54-125a(f)(4) (West 2015); see also *Youth Offender Hearings*, CAL. DEP’T CORR. & REHAB., <https://www.cdcr.ca.gov/bph/youth-offender-hearings-overview> [<https://perma.cc/GQ3P-GCF9>] (last visited Nov. 5, 2019) [hereinafter *California Youth Offender Hearings*] (the parole review board is required to “give great weight to factors specific to youth offenders,” but this is “in addition to the factors the Board must consider at regular, non-youth offender parole hearings”).

320. See CONN. GEN. STAT. ANN. § 54-125a(f)(3).

321. *Id.*

322. *State v. Williams-Bey*, 114 A.3d 467, 489–90 (Conn. App. Ct. 2016).

323. *Id.* at 488–89.

324. *Id.* at 488.

VI. SYSTEMIC IMPLICATIONS OF PAROLE BOARD PUNISHMENTS AND CALL FOR REFORM

These “close enough” or “second best” criminal punishment practices have ramifications beyond the cases of individual *Miller*-impacted youthful offenders.³²⁵ There will be lasting effects for years to come given the departure of these cases from criminal justice norms.³²⁶ They also raise serious questions about the durability of our criminal justice system and whether the right to sentencing in a court of law might give way in other matters for the sake of convenience—or worse. Accordingly, this section urges recommitment to trial court sentencing when requested. This is not only to respect the constitutional rights of *Miller*-impacted inmates who were unlawfully condemned to die behind bars as children but to protect against further unfairness and erosion of time-honored justice system principles.

A. CRIMINAL PRACTICE NORMS, PUBLIC APOLOGY, AND PROCEDURAL JUSTICE

Constitutionality aside, sending cases to parole boards for sentencing flies in the face of a wide range of norms built into state criminal justice systems over many decades.³²⁷ Such protocols shed professional conduct requirements and ethical frameworks imposed on lawyers and judges working within sentencing courts. They also conflict with existing criminal code provisions, rules of procedure, and other expectations held by a range of criminal justice system stakeholders.³²⁸ In these ways parole board penalty phase proceedings further undermine the fairness that should be afforded to *Miller*-impacted inmates—in addition to doing damage to the integrity of our already challenged criminal justice system.

It is no secret that our state criminal court systems need improvement. Racial bias, indiscriminate use of cash bail, and the imposition of fines and fees on the indigent are all matters on the nation’s radar and are being attacked by way of policy changes and civil rights prosecutions.³²⁹ These efforts have been undertaken by zealous attorneys, working in collaboration with impacted communities.³³⁰ And the calls for improvement have informed the practices of prosecutors’ offices and even judicial

325. See generally Ortman, *supra* note 9.

326. See generally Bierschbach, *supra* note 168.

327. Cf. *id.*

328. See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 405 (2004) (“While in some situations, constitutional rights (including any developing rights under *Apprendi*) may be an essential part of sentencing process, in most cases the principle procedures will be nonconstitutional, guided by statute and, to an even greater extent, by rules of procedure, prosecutorial policies, and local judicial culture.”).

329. See, e.g., Mae C. Quinn & Eirik Cheverud, *Civil Arrest? (Another) St. Louis Case Study in Unconstitutionality*, 52 WASH. U. J.L. & POL’Y 95, 95–96 (2016) (describing efforts of activist attorneys to stand with protesters and others in the face of overzealous policing and prosecution in the St. Louis region).

330. *Id.*

trainings.³³¹ In addition, even where court systems are flawed in their operations, individual attorneys maintain a duty to advance the causes of their clients at sentencing;³³² prosecutors are prohibited from trying to win over seeking justice;³³³ and judges may be held to account for unethical behavior and misdeeds on and off the sentencing bench.³³⁴

Unfortunately, the same caveats cannot be offered for the broken parole system. Relatively speaking, particularly since *Greenholtz*, few attorneys file lawsuits to try to improve parole practices. Investigations and press conferences like the one involving Ruzicka are the exception. And challenges are largely brought by pro se inmates whose cases are quickly dismissed on technical issues.³³⁵ This is in part because absent a constitutional mandate for counsel, parole release hearings remain far below the law and lawyering radar.³³⁶ Most inmates lack resources to hire attorneys to assist them; public defender services generally are not afforded for these hearings; and just a few entities across the country—such as law school clinics—will consider taking such cases without a fee.³³⁷

Beyond this, as noted, most parole boards are staffed by lay persons who are not just non-judges,³³⁸ but who lack any meaningful legal training.³³⁹ The University of Minnesota's Robina Institute recently found that 19 of 45 states “had no mandated qualifications at all” for parole board members.³⁴⁰ And “[o]f the 25 states that had mandated qualifica-

331. See, e.g., *Ethics for Judges Tutorial: Bias or the Appearance of Bias—Ex. 2*, UNIV. N.M. SCH. L. JUD. EDUC. CTR., <http://jec.unm.edu/education/online-training/ethics-for-judges/discrimination-in-the-courtroom> [<https://perma.cc/927P-URRG>] (last visited Nov. 5, 2019).

332. See generally MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); see also DAVID J. KEEFE, SEN'G PROJECT, SENTENCING ADVOCACY AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL 12–14 (2003) (focusing on features of effective non-capital sentence advocacy in state courts); Hughes, *supra* note 116, at 343–47 and accompanying text (regarding death penalty sentencing advocacy).

333. See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . .”).

334. See CYNTHIA GRAY, ST. JUST. INST., A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 1 (2002).

335. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1588–89 (2003).

336. MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES, *supra* note 270, at 6 (describing the limited role of the inmate delegate, who may be a friend, family member, or attorney). See generally Plan for Compliance with Applicable Requirements, *supra* note 241.

337. See, e.g., *Representation at Hearings*, PRISONER LEGAL SERVS. MASS., <http://www.plsma.org/parole/representation-at-parole-hearings/> [<https://perma.cc/7LS6-NR4E>] (last visited Nov. 5, 2019) (informing inmates that they generally do not have a right to counsel at a parole grant hearing, but that some law school clinics might provide free representation); see also JESSICA STEINBERG & KATHRYN RAMSEY, PAROLE PRACTICE MANUAL FOR THE DISTRICT OF COLUMBIA 1–2 (2018) (extensive manual for volunteer and other attorneys handling parole cases in the District of Columbia).

338. Gavin Rozzi, *Lesniak Calls State Parole Board “Dumping Ground” for Patronage*, OCEAN CTY. POLITICS (June 22, 2016), <https://politicsoc.com/2016/06/lesniak-says-state-parole-board-dumping-ground-patronage/> [<https://perma.cc/YR2K-MXT2>].

339. See Barrett & Greene, *supra* note 316.

340. *Id.*

tions, 10 required a college degree but no pertinent experience. Only 14 required some years of experience in criminal justice or aligned fields of endeavor.”³⁴¹ Thus, lawyer and judicial ethics norms fail to serve as a floor to maintain professionalism and legal standards in the parole hearing room or beyond—as is the case in courtroom sentence proceedings.

Similarly, although they may not yet rise to the level of constitutional guarantees,³⁴² criminal defendants across the country are provided with public sentencing hearings and the right of allocution.³⁴³ Yet, states that have bypassed court penalty phase hearings in favor of parole board sentence review do not necessarily respect these time-honored expectations.³⁴⁴ For instance, as already noted, some states conduct parole hearings in private, denying defendants the experience of sentence proceedings that are mostly open to public view and scrutiny. In these ways, such proceedings are shrouded in secrecy and prevent the community from seeing, hearing, or understanding the process.³⁴⁵

In addition, the broad latitude afforded parole boards under *Greenholtz* has resulted in defendants appearing before parole boards via video camera and having very limited time to make their case.³⁴⁶ But court sentencing hearings have historically respected a defendant’s right to in-person and individualized allocution on all issues relating to punishment.³⁴⁷ This might include clarification about the facts of the crime, evidence in mitigation, or powerful statements of remorse. But this practice, too, has been hampered by the administrative “assembly line” parole process. In these ways and others, parole review hearings may fail to allow for individualized holistic reckoning on the part of the youthful offenders in *Miller* cases³⁴⁸ or deny the victim the opportunity to receive an authentic apology.³⁴⁹

341. *Id.*

342. See generally David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382 (1992).

343. See, e.g., Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2678–79 (2007) (noting sentencing hearings are open to the public to allow transparency and public engagement).

344. Even the most recent draft of the *Sentencing Provisions for the Model Penal Code*—written by current judges and legal scholars—talks about discretion for individual sentences residing within the trial court system, not an administrative agency. MODEL PENAL CODE, SENTENCING § 7.XX (AM. LAW INST., Proposed Final Draft 2017).

345. See *id.*

346. See, e.g., *Parole Hearing Schedule for July 2019*, CONN. BD. PARDONS & PAROLES (July 2019), https://portal.ct.gov/-/media/BOPP/Hearings/Parole-Hearings/July_2019.pdf?la=en [<https://perma.cc/BXJ5-WU87>].

347. See Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges’ Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 741 (2014) (dating back to 1600s England, allocution was embraced in the United States in 1940s).

348. *Id.* at 778 (summing up the importance of allocution with the following quote from a sentencing judge: “There are no magic words. There is no formulaic correct allocution. Every case is different and the suggestion that there is some type of ‘best’ way takes away from the individualistic nature of sentencing.”).

349. See Jean HAMPTON, A NEW THEORY OF RETRIBUTION, IN LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 377, 404, 412 (R.G. Frey & Christopher W. Morris eds., 1991). Indeed, in Missouri, *Miller*-impacted inmates and their counsel have been instructed not to direct statements or apologies to the victim but to look straight

To be certain, procedural justice can present its own problems as a theory and mode of operating.³⁵⁰ Form over substance and impressions over reality can paper over deep-rooted problems in the justice system.³⁵¹ For those reasons, procedural justice considerations should not singularly drive legal outcomes or structures. But sentencing or resentencing processes that undermine everyone's faith in the system—victims, defendants, attorneys, and the public alike—surely should be avoided. Such is the situation presented by parole board punishment practices currently.

B. *MILLER* MATTERS AS SUI GENERIS OR SECOND-BEST SENTENCING SENTINELS?

Parole board sentence review hearings in *Miller* relief matters present another set of significant concerns for the justice system. Parole boards take no action to address underlying orders or commitment mandates that set forth unconstitutional mandatory terms of life without parole.³⁵² Indeed, they have no power to modify or issue a proper criminal sentencing “judgment” in the manner described by the Supreme Court as early as 1830 in *Ex Parte Watkins*.³⁵³ And yet, somehow these administrative agencies are supposed to review and then amend the mandatory death-behind-bars sentences of youthful offenders if they determine that such sentences are inappropriate. This presents an irreconcilable catch-22.

This dilemma was astutely presented in a recent public letter to the press by Cedrik Clerk, one of Missouri's *Miller*-impacted inmates who still awaits relief. He wrote: “How can we possibly make parole on a life without parole sentence?”³⁵⁴

On one hand, it might be argued that these cases are really no different from ordinary life sentence matters. Except, of course, inmates like Clerk have not appeared in court for a sentence modification that imposes a single life sentence. Moreover, this claim only brings into sharper focus an underlying conundrum created by juvenile life sentence matters after *Graham*, *Miller*, and *Montgomery*.

ahead and address the parole board only. Again, this is based upon the actual experience of this author.

350. See generally Mae C. Quinn, “*Post-Ferguson*” *Social Engineering: Problem-Solving Justice or Just Posturing*, 59 *How. L.J.* 739 (2016).

351. See *id.*

352. See, e.g., *California Youth Offender Hearings*, *supra* note 319 (nothing that inmates who were under the age of eighteen when they committed their controlling offense and who were sentenced to life without the possibility of parole are eligible for a parole hearing during their twenty-fifth year of incarceration).

353. *Ex parte Watkins*, 28 U.S. (1 Pet.) 193, 193 (1830).

354. Cedric Clerk, *Missouri Ignores US Supreme Court Ruling Requiring Resentencing of Prisoners Given Life Without Parole as Juveniles*, S.F. BAY VIEW (July 20, 2017), <https://sfbayview.com/2017/07/missouri-ignores-us-supreme-court-ruling-requiring-resentencing-of-prisoners-given-life-without-parole-as-juveniles/> [<https://perma.cc/B6C2-5MVA>]; see also *State v. Williams-Bey*, 144 A.3d 467, 490 (Conn. App. Ct. 2016) (“[T]he case is remanded with direction to render judgment denying the defendant’s motion to correct an illegal sentence.”).

On the other hand, *Graham* suggests that youth sentenced to ordinary life sentences need to be provided only with a meaningful opportunity of release—not necessarily actual release.³⁵⁵ But *Miller* goes further, providing the state is precluded from keeping any youthful offender behind bars until their death—absent a finding of “irreparable corruption.”³⁵⁶ But none of the inmates being sent directly to parole boards have had a full and meaningful sentencing hearing where irreparability was found beyond a reasonable doubt. Therefore, this part of the Court’s proportionality standard for juvenile defendants is not being applied. And there is nothing to stop parole boards from holding these youthful offenders until they die. Thus, whether they might look like ordinary life sentence matters means very little in the context of *Miller* youthful offender cases.

If the response to Clerk’s question is that the status of these cases is ambiguous or in flux, this just highlights one of the original arguments advanced in Missouri to challenge Senate Bill 590—that parole agencies appear to be operating not just as courts but as a quasi-legislature. They are selecting terms to be served in individual cases while also creating unwritten sentencing schemes from whole cloth. And *Miller*-impacted youthful offenders are, therefore, living in legal limbo behind bars with no lawful sentence order or term in place at all.³⁵⁷ Such a grave state of affairs presents a further affront to our justice system as a whole—in addition to violating the rights of *Miller*-impacted inmates who remain unlawfully imprisoned without a clear sentence or remedy.

A final response to the arguments presented here might be that *Miller*-impacted youthful offenders are a unique group of defendants whose situation is *sui generis*. Given that they are an exception, then we should not be concerned; the problems presented by their cases will not be seen again in our justice system. It is true that parole board punishments are currently occurring in only a narrow band of cases that have unique features. But absent embrace of the constitutional analyses advanced by this article regarding a fundamental right to sentencing in a court of law, there appears to be no impediment to using parole board punishment proceedings in other kinds of cases.

That is, if parole board punishments are permitted here—in some of the most sensitive, specialized, and conceptually complex matters in the justice system—state legislatures surely would not be constitutionally prohibited from delegating ultimate sentencing power to parole boards in other less serious criminal cases. This could allow wide-spread departure from long-standing practices of public hearing, defendant allocution, judicial oversight of the penalty phase, and the other time-honored expectations addressed above. This systemic implication alone suggests current practices in *Miller*-impacted matters must be reconsidered.

355. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

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

357. *See supra* note 355 and accompanying text.

C. SOME POSSIBLE PATHS FORWARD

Many fine scholars, some of whom have been on the front lines of *Miller* implementation litigation for many years, have grappled with the challenges presented by the Supreme Court's decisions in *Graham*, *Miller*, and *Montgomery*—trying to make sense of the Court's various rulings. Among other things, they helped shed light on the informality of parole processes that could undermine the right to a “meaningful opportunity for release” post-*Graham*, the lack of juvenile justice expertise among parole staff, and the difficulty of trying to square the special proportionality considerations mandated by *Miller* with administrative, post-sentencing practices of parole boards.³⁵⁸

Read together, these analyses have also helped to drive home the doctrinal problem of reconciling a mere promise of potential release, as offered by *Graham*, with the requirement in *Miller* that only the rare juvenile may be deemed to be wholly irredeemable such that they may be held behind bars until death. But to date, scholars have not considered the further emerging constitutional crisis identified in this article—when contemporary parole boards formally displace the judicial branch to actually become the state sentencing body. This development exacerbates an already nearly impossible situation.

As described in the earlier sections above, the individualized and proportionality-protecting penalty phase required by *Miller* in life-without-parole cases has been wholly and very clearly sacrificed for convenience.³⁵⁹ The same is true for all other constitutional, statutory, and other criminal justice system protections provided at sentencing in ordinary criminal cases. These things have been replaced with rough approximations of process—in cases that are already mired in the conundrums and conceptual confusion identified by others who have attempted to reconcile *Graham*, *Miller*, and *Montgomery* for purposes of court sentencing processes and post-sentencing parole review.³⁶⁰

Thus, to be sure, current parole boards and their practices lack credibility and accountability. Parole grant hearings must be infused with additional standards and due process features. And executive branch parole

358. See Cohen, *supra* note 272, at 1031; Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 976 (2015) (explaining that *Miller* “restored sentencing discretion to the trial courts” in addition to compelling courts to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”); Thomas & Reingold, *supra* note 171, at 249 (“The due process protections extended (or not extended) at parole should reference, if not parallel, the protections extended (or not) at sentencing.”); see also French Russell, *Review for Release*, *supra* note 312, at 373–74.

359. See, e.g., *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (“The trial court on remand will be in the best position to craft whatever instructions will best ensure that the jury’s determination is guided by and firmly rooted in the type of circumstances and factors discussed throughout *Miller* and that the jury’s determination, therefore, will be the product of the individualized assessment that *Miller* holds is guaranteed to juvenile offenders by the Eighth Amendment.”).

360. See *supra* notes 321 and accompanying text; see also Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1635 (2019).

agents need additional training in constitutional law, adolescent development, and other subjects.³⁶¹ But no matter what states do to try to improve the integrity of their parole systems—and again, much needs to be done, as these cases have helped to demonstrate—this simply will not make up for unilaterally denying inmates their fundamental right to be sentenced in a court of law, along with all of the process and protection that such a proceeding would entail, when requested.

Now it may be that some *Miller*-impacted inmates are granted release when they appear before parole boards for purposes of sentence review. For these defendants, the fact that they have not been formally resentenced may not present an immediate concern.³⁶² Provided with their liberty, they may be willing to waive their right to further formal court process. But *Miller*-impacted youthful offenders who have been denied release following parole board sentence review—which has been the vast majority of *Miller*-impacted inmates so far³⁶³—or who want to be formally resentenced before appearing before a parole board should be permitted the opportunity to have their cases remanded for purposes of a lawful hearing in a court of law. Such resentencing hearings should include jury fact-finding, appointed counsel, robust due process protections—as well as application of the special narrowing and juvenile proportionality considerations provided by *Miller*. Thereafter, depending upon the sentence imposed by the judicial branch, they should be afforded continuing parole board assessments for possible early release that continues to account for the defendant's youthful characteristics.

It might be argued that the situation could be rectified with simple judicial review of *Miller*-impacted matters after the parole board penalty phase. Indeed, a similar course has been recommended by scholars Dirk van Zyl Smit and Catherine Appleton in their recent work: for all persons

361. Brianna Weis, Note, Meaningful Opportunity for Release: Parole Board Standards for Juveniles Under the *Graham*, *Miller*, and the Eighth Amendment 14–20 (Feb. 1, 2019) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327612 [<https://perma.cc/4A75-873S>].

362. There is, of course, the long-term concern of just how long they may remain on parole. That is, what is their sentence term? And if they are to violate parole, do they face reincarceration until death based upon their current underlying sentence order reflecting a mandatory life without parole prison term? See, e.g., Order at 1, *Lotts v. Steele*, No. SC 97025 (Mo. July 3, 2018).

363. See Sarah Lustbader & Vaidya Gullapalli, *Missouri's Parole Board Can No Longer Ignore the Rehabilitation of People Sentenced to Life Without Parole*, APPEAL (Oct. 16, 2018), <https://theappeal.org/missouris-parole-board-can-no-longer-ignore-the-rehabilitation-of-people-sentenced-to-juvenile-life-without-parole/> [<https://perma.cc/3PLW-HX6T>] (reporting that 85% of *Miller*-impacted inmates who appeared before the board for sentence review were denied release); see also *A State-by-State Look at Juvenile Life Without Parole*, supra note 51 (as of 2017, only 17 of the 210 youthful offenders qualified for parole review in Connecticut were released; in Massachusetts, 10 of 63 were paroled); Samantha Michaels, *The Supreme Court Said No More Life Without Parole for Kids. Why Is Antonio Espree One of the Few to Get Out of Prison?*, MOTHER JONES (Dec. 26, 2018), <https://www.motherjones.com/crime-justice/2018/12/tony-espree-cyntoia-brown-mandatory-life-without-parole-juvenile-lifers-justice-kennedy-miller-alabama/> [<https://perma.cc/C8HU-WLUQ>] (“Of the roughly 2800 juvenile lifers serving time in 2016, only about 400 have been freed.”).

servicing any kind of life sentence, “[j]udicial review of the decisions of parole boards is particularly important if the criteria that they are supposed to apply are not stated clearly.”³⁶⁴ But, of course, in the van Zyl Smit and Appleton scenario, adult offenders who are serving ordinary life sentences have already had the opportunity for a full and constitutional sentencing hearing in a court of law. And when it comes to youthful offender cases, absent a *de novo* sentencing hearing, it is unclear what exactly a reviewing court would be reviewing. Given the near absolute discretion provided parole boards and the heightened narrowing and proportionality process needed in *Miller* matters, what standards would apply when looking for errors or reasons to reverse the parole board’s determination? Moreover, a similar process method has been described as fairly meaningless when applied in death penalty cases. Critics have reported that proportionality reviews in death penalty matters have become perfunctory, and that arbitrary and capricious outcomes continue with official imprimatur.³⁶⁵

This article is primarily concerned with assuring the constitutional right to sentencing hearings in a court of law if requested by the defendant and preventing the further unilateral deployment of executive branch parole board punishments. But there may be a straightforward resolution for the remaining *Miller*-impacted matters—and other youthful offender cases. That is, commutation or sentence modification reflecting a single term of years of somewhere between fifteen and twenty-five years’ incarceration, depending upon what is currently provided by the state’s statutory scheme.³⁶⁶ Such a remedy, while at first blush might seem radical, could be accomplished by way of gubernatorial clemency or agreed sentencing

364. VAN ZYL SMIT & APPLETON, *supra* note 166, at 255.

365. See, e.g., Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUST. SYS. J. 257, 270 (2008).

366. There might be some argument that a determinate term of between fifteen and twenty-five years does not comport with the sentencing schemes in place at the time of the crimes committed by the currently incarcerated, *Miller*-impacted inmates. For instance, when the mandatory life without parole language is struck from Missouri’s sentencing scheme, what remains is an option of between ten and thirty years’ incarceration or ordinary life imprisonment (which, under the law at the time of the charged crimes might allow for release before twenty-five years). See *supra* note 59 and accompanying text. However, by and large, this still places *Miller*-impacted inmates in a better position than they are now. In addition, agreed sentencing to such a term with a local prosecutor or gubernatorial action along these lines should not trigger *ex post facto* considerations. See NAZGOL GHANDNOOSH, SENT’G PROJECT, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES 17 (2019), <https://www.sentencingproject.org/publications/the-next-step-ending-excessive-punishment-for-violent-crimes/> [https://perma.cc/3YN7-34LD] (reporting on actions of Jerry Brown, the Attorney General of California who has commuted a number of life sentences and granted relief for youthful offenders). *But see States Adopt Sentencing Changes Following Supreme Court Ruling on Juvenile Lifers*, PRISON LEGAL NEWS (May 19, 2014), <https://www.prisonlegalnews.org/news/2014/may/19/states-adopt-sentencing-changes-following-supreme-court-ruling-juvenile-lifers/> [https://perma.cc/L87D-F5XC] (reporting that Iowa courts set aside effort by Iowa governor to commute juvenile life without parole sentences to sixty-year term).

orders with local prosecutors, as is already happening in some states.³⁶⁷ It would also be far less costly than the current state of affairs.

At this time, most of the states using parole board sentence reviews in *Miller* cases, in place of court sentencing, have settled upon terms of between fifteen or twenty-five years as a time for release application.³⁶⁸ Such a determinate term also allows for both defendant accountability and maturation. For those who have already completed such lengthy terms, immediate “time served” sentences in the trial court could be substituted for their currently unconstitutional sentences. And indeed, such determinate terms appear to be the right resolution, not just for those youthful offenders who were unconstitutionally sentenced to mandatory life-without-parole terms, but for any youth serving any life sentence or a de facto equivalent.

Given the Supreme Court’s findings in *Roper*, *Graham*, and *Miller*, as well as subsequent legislative enactments signaling the significance of such periods, it is hard to imagine that any sentence of beyond fifteen to twenty-five years would be an appropriate sanction for criminal conduct of any child at this point—or that any additional time would be needed to complete the maturation and rehabilitation process contemplated by the Court. Moreover, given the current unfortunate state of affairs of our nation’s parole system, it is hard to imagine parole staff adding value to rehabilitation with post-release supervision of these youthful offenders. Thus, reasonable determinate terms would help end, once and for all, trying to determine the meaning of life for youthful offenders,³⁶⁹ while helping head off at the pass the continuing use of unconstitutional parole board punishments.

VII. CONCLUSION

While the nation focuses on the somewhat shocking unilateral expansion and deployment of executive branch actions on the federal level, another unexpected although much more muted turn is occurring on the state executive branch level. In the wake of *Miller v. Alabama*, some states have side-stepped the long-understood venue of sentencing—trial courts—to place punishment decision-making into the hands of parole agency bureaucrats. To be sure, parole boards have become a relatively regular part of the correctional landscape in this country, sharing some

367. See GHANDNOOSH, *supra* note 366, at 40 (describing “bold action” taken by Philadelphia’s new District Attorney, Larry Krasner, who is making reasonable “resentencing offers in juvenile life-without-parole cases”).

368. See, e.g., *Diatchenko v. Dis. Attorney for Suffolk*, 1 N.E.3d 270, 286 (Mass. 2013) (providing for parole review at fifteen years); *supra* note 62 and accompanying text (noting Missouri *Miller*-impacted inmates may seek parole board sentence review at twenty-five years).

369. See Transcript of Oral Argument, *Mathena v. Malvo*, No. 18-217 (U.S. argued Oct. 16, 2019) (oral argument relating to juvenile offender Lee Boyd Malvo’s potential right to resentencing following imposition of life without parole sentences based upon his role in the D.C. “sniper” incident, reflecting Court’s apparent disagreement about the meaning of its prior precedent).

part in release decisions in some jurisdictions for already sentenced inmates. But they have never previously been empowered to serve as criminal sanctioners in the first instance.

Although this is currently occurring in only a narrow band of cases—those involving youthful offenders entitled to sentencing relief under *Miller v. Alabama*—the implications are significant and potentially far-reaching. It is, therefore, important to ensure that this practice is not allowed to take further hold to displace sentencing courts across America.

As this article has explained, such recommitment would not be at all remarkable. Court-based sentencing has been the norm in this country for nearly two centuries. And most already believe that it is a fundamental component of the criminal process under our constitutional form of government. But the Supreme Court has never expressly made such a finding—nor have legal scholars directly addressed this foundational sentencing question.

The move to expressly designate courts as the branch of government singularly empowered to impose criminal penalties naturally flows from several already existing strands of constitutional jurisprudence. First, it grows from our nation's commitment to the practice, which derives from the penumbral features of the Sixth and Fourteenth Amendments. Second, federal separation of powers helps formalize implied understandings that state judicial branches hold the power to pronounce sentences in the first instance. Finally, such recommitment is wholly consistent with each of the individual constitutional protections the Court has extended to state court sentencing proceedings by way of the incorporation doctrine.

Indeed, given the ad hoc and problematic nature of many parole board practices—many making front page news over the last decade—it is clear courts of law should be favored as sentencing venues, even as a matter of pure public policy. To be sure, our nation's courts are in no way perfect arbiters of justice. But they are the far superior choice, compared to parole agencies, when it comes to the important task of imposition of criminal punishments.

Sentencing as a critical stage of the criminal process should occur in a public courtroom overseen by professional jurists trained in the law and include due process protections and the right to counsel. Absent an affirmative waiver of sentencing rights by defendants, agency actors should not be allowed to unilaterally impose criminal sanctions in processes that lack fundamental fairness, legal ethics mandates, or protections against arbitrariness in *Miller*-impacted matters or any other. Therefore, currently incarcerated *Miller*-impacted youthful offenders should either be provided with sentencing hearings, if they wish, or released upon completion of a determinate term of between fifteen and twenty-five years. This will stop executive branch actors from serving in a sentencing role for which they are constitutionally incapable. It will also bring to an end the current conceptual morass that is retroactive *Miller* implementation.³⁷⁰

370. *See id.*