

# INCORRIGIBLE STUDENTS: A CRIMINAL OXYMORON?

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## INTRODUCTION

Compulsory education laws and juvenile life sentences without the possibility of parole are fundamentally incompatible. Behind each state's compulsory education law, which often demands school attendance until the age of seventeen or eighteen, is an assumption that all children live in a state of dependency upon educators for their cognitive and social development, until they reach adulthood. Behind states' authorization of juvenile-life-without-parole sentences, in contrast, is an assumption that children under the age of eighteen are susceptible to "irreparable corruption" and "incurability," such that no rehabilitative measure, educational program, or support system could possibly restore their potential to reenter society as free, productive members of a democracy. If youth education is compulsory, even for youths in prison, and a primary purpose of education is to prepare youths to be successful, active members of their communities, compulsory education laws and juvenile-life-without-parole sentences cannot rationally coexist. This Note suggests that youth advocates might be wise to capitalize on the conflict between education law and criminal law as they urge state legislatures to eliminate juvenile-life-without-parole sentences from state criminal codes.

The Note proceeds in two Parts. The remainder of the Introduction presents a closed door: the Supreme Court's hesitancy, to date, to find juvenile-life-without-parole sentences unconstitutional under the Eighth Amendment. After exploring the contours of the closed Door, the Introduction turns to an open window: education law. This, I argue, may be wielded to attack the lawfulness of juvenile-life-without-parole sentences on wholly non-constitutional grounds. The Introduction concludes with remarks regarding this Note's relevance and timeliness. Part I tracks the Note's central argument, premise by premise, that state compulsory education laws and juvenile-life-without-parole sentences are wholly incompatible. Part II anticipates objections to the argument, responds, and attempts to fill any lingering logi-

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cal gaps. I then conclude by suggesting contexts beyond the scope of this Note in which the relationship between compulsory education laws and prisoners' rights might prove useful.

### A. *The Door*

As of late 2017, it is not unconstitutional to impose a life sentence without the possibility of parole on a juvenile criminal defendant.<sup>1</sup> Although the Constitution requires states to reserve this sentence as punishment for youths whose crimes reflect "irreparable corruption"<sup>2</sup>—categorically excluding all nonhomicide defendants<sup>3</sup>—judges and juries in most states still have authority to impose life-without-parole sentences on juvenile homicide defendants at their discretion.<sup>4</sup>

The Court's recent discussions of juvenile-life-without-parole ("JLWOP") sentences has revealed, or at least reiterated, rich judicial commentary on juvenile culpability, maturity, and development. Justice Kennedy's admonishment of mandatory JLWOP sentences in *Miller v. Alabama*, for example, turned on the "distinctive attributes of youth . . . [:] immaturity, recklessness, and impetuosity," among others.<sup>5</sup> *Miller* highlighted the plurality's intuitive notion that "incorrigibility is inconsistent with youth."<sup>6</sup> While this sentiment alone could serve as grounds for holding that JLWOP sentences are entirely unconstitutional under the Eighth Amendment, not just for nonhomicide defendants, the broader issue of JLWOP's constitutionality has not yet been squarely presented to the Court. At the very least, it is evident that the Court finds in juvenile defendants "greater prospects for reform" than in their adult counterparts.<sup>7</sup>

The body of juvenile punishment cases arising under the Eighth Amendment, which "turn[ ] on the characteristics of the offender," has produced a set of "categorical rules . . . for defendants who committed their crimes before the age of 18."<sup>8</sup> The Court uses a two-part test to determine whether

1 See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (holding narrowly that "a judge or jury must have the opportunity to consider mitigating circumstances" before sentencing juvenile defendants to life without parole).

2 *Id.* at 2469 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

3 *Graham v. Florida*, 560 U.S. 48, 82 (2010).

4 JOSH ROVNER, SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2017), <http://www.sentencingproject.org/publications/juvenile-life-without-parole/> ("Thirty states still allow life without parole as a sentencing option for juveniles.").

5 *Miller*, 132 S. Ct. at 2465; see also *Johnson v. Texas*, 509 U.S. 350, 368 (1993) ("[S]ignature qualities of youth are transient . . . the impetuosity and recklessness that may dominate in younger years can subside.").

6 *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 73) (internal quotation marks omitted).

7 See *id.* at 2464; see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (reaffirming that "children who commit even heinous crimes are capable of change"); *Roper*, 543 U.S. at 570 ("[T]he character of a juvenile is not as well formed as that of an adult. The personality traits . . . are more transitory, less fixed.").

8 *Graham*, 560 U.S. at 61.

it should establish a new categorical rule governing criminal sentencing practices under the Eighth Amendment. First, the Court asks “whether there is a national consensus against the sentencing practice at issue”; this is an objective inquiry.<sup>9</sup> Second, the Court asks whether, guided by “its own independent judgment” and by the principles of stare decisis, the punishment in issue seems cruel and unusual.<sup>10</sup> Within this framework, the Court has categorically prohibited mandatory JLWOP sentences (*Miller v. Alabama*),<sup>11</sup> JLWOP sentences for youths who commit crimes other than homicide (*Graham v. Florida*),<sup>12</sup> and juvenile capital punishment (*Roper v. Simmons*).<sup>13</sup>

It is quite possible, considering the trend of pushback against harsh criminal sentences for juveniles reflected in these cases, that the Court would adopt a categorical rule against all JLWOP sentences if squarely presented with this issue. Thirty states currently authorize JLWOP sentences.<sup>14</sup> Yet, “just three—Pennsylvania, Michigan, and Louisiana—account for about two-thirds of JLWOP sentences,”<sup>15</sup> and California, “home to one of the largest populations of JLWOP defendants,” recently responded to *Miller* with sweeping reforms to its juvenile sentencing laws.<sup>16</sup> Moreover, abundant research suggests that juveniles are simply unfit to receive permanent prison sentences.<sup>17</sup> Given the overwhelming evidence that children and adolescents do not fully mature or formulate their “personalities” until at least the age of eighteen, there is a consensus, at least among members of the American Psychological and American Psychiatric Associations, that “predictions cannot be made with any accuracy” as to juvenile defendants’ likelihood of recidivism.<sup>18</sup>

Perhaps this evidence would be sufficient to satisfy the first prong of the Court’s Eighth Amendment categorical rule test (“national consensus against the sentencing practice at issue”).<sup>19</sup> Perhaps the justices could also reach a consensus that JLWOP is subjectively cruel, drawing on language from *Graham*, *Miller*, and *Montgomery*, to satisfy the second prong of the test. State

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9 *Id.* (citing *Roper*, 543 U.S. at 563).

10 *Id.*

11 *See Miller*, 132 S. Ct. at 2475.

12 *See Graham*, 560 U.S. at 61.

13 *See Roper*, 543 U.S. at 572–73.

14 *See ROVNER*, *supra* note 4, at 3.

15 *Id.*

16 *Id.* at 5; *see also* CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2017) (granting juveniles sentenced to life without parole the right to “submit to the sentencing court a petition for recall and resentencing” after serving fifteen years, with limited exceptions).

17 *See* ELIZABETH SCOTT ET AL., MODELS FOR CHANGE: SYSTEMS REFORM IN JUVENILE JUSTICE, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING 6–9 (2015).

18 Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 22, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239, at \*22.

19 *Graham v. Florida*, 560 U.S. 48, 61 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

courts have recognized the Court's momentum in this direction; death to JLWOP under the Eighth Amendment might well be on the horizon.<sup>20</sup>

Nonetheless, until a proper JLWOP case reaches the Supreme Court, some juvenile homicide defendants will continue to face life imprisonment for their crimes without the possibility of parole.<sup>21</sup> And even if a proper case does make its way to Washington, there is no guarantee that the Court will adopt a categorical rule against JLWOP. The two-part Eighth Amendment categorical-rule test is a formidable obstacle to abrogating the states' right to sentence criminals as they see fit, made even more formidable by the fact that four justices dissented from Justice Kagan's plurality opinion in *Miller*.<sup>22</sup> A prosecuting state attorney could persuasively argue, if the proper JLWOP case arose, that it is the province of the states—the “principal guardians of community safety”—to determine the lawfulness of JLWOP, not the Court.<sup>23</sup> The Chief Justice argued as much in his dissent in *Miller*, perhaps in a final effort to slow the Court's Eighth Amendment rulemaking momentum toward eliminating JLWOP altogether.<sup>24</sup>

It is also entirely possible that within the next decade, legislatures in states currently issuing JLWOP sentences will choose to independently eliminate these sentences from their criminal codes.<sup>25</sup> Nationwide, there is a

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20 See, e.g., *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (“[*Miller*] suggests . . . in effect, a presumption against imposing a life sentence without parole on a juvenile offender . . . . This presumption logically would extend to discretionary schemes that authorize such a sentence.”).

21 It is worth noting that this category of “homicide crimes” includes felony murder in the JLWOP context; the defendant in *Miller v. Alabama* was himself charged with felony murder. For a discussion of juvenile felony murder rates in tandem with Justice Kennedy's observation that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” *Roper*, 543 U.S. at 569, see Sterling Root, *Juvenile Culpability and the Felony Murder Rule: Applying the Enmund Standard to Juveniles Facing Felony Murder Charges* 62–64 (2016) (unpublished A.B. thesis, Trinity College), <http://digitalrepository.trincoll.edu/theses/562/>.

22 Chief Justice Roberts and Justices Thomas and Alito dissented, and Justice Scalia joined each of their opinions. See *Miller*, 132 S. Ct. at 2477–82 (Roberts, C.J., dissenting); *id.* at 2482–87 (Thomas, J., dissenting); *id.* at 2487–90 (Alito, J., dissenting).

23 Brief for State of Michigan et al. as Amici Curiae Supporting Respondents at 1, *Miller*, 132 S. Ct. 2455, 2012 WL 605831, at \*1 (arguing that states have discretion “to determine which punishment is most appropriate to vindicate justice, deter others from committing crime, and ensure that the perpetrator is unable to reoffend”).

24 *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting) (“Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults . . . . There is no clear reason that principle would not bar all mandatory sentences for juveniles.”).

25 Local courts could also find JLWOP unconstitutional at the state level, but only two state supreme courts (Iowa and Massachusetts) have issued such holdings. See Grant Rodgers, *Court: Juvenile Killers Can't Get Life Without Parole*, DES MOINES REG. (May 27, 2016), <http://www.desmoinesregister.com/story/news/crime-and-courts/2016/05/27/court-juvenile-killers-cant-get-life-without-parole/85025960/>.

strong push among activists to eliminate JLWOP;<sup>26</sup> even states such as California and Louisiana have taken bold legislative steps that reflect this trend.<sup>27</sup> If state legislatures fail to act, perhaps sympathetic state governors could begin exercising executive clemency power to reduce JLWOP sentences at the urging of children's rights advocates across the country.<sup>28</sup>

The foregoing review of JLWOP's legal status should demonstrate that, in the thirty states that still authorize it, JLWOP's fate is at best doomed and at worst uncertain.<sup>29</sup> It is worth asking: are these good odds good enough for juvenile defendants on trial for homicide? Arguably, no.<sup>30</sup>

### B. *The Window*

Fortunately, JLWOP's fate might not rest entirely on the Court's adoption of a new categorical Eighth Amendment rule. *Education law* could serve as a window—a loophole, of sorts—through which state legislatures or courts might justify eliminating JLWOP from state criminal codes while sidestepping Eighth Amendment categorical rule requirements altogether. The argument that compulsory education laws and JLWOP sentences are incompatible would proceed as follows.

The following premises are well established<sup>31</sup>: (A) states require children to attend school until they reach a certain statutory age; (B) among

26 See, e.g., HUMAN RIGHTS INST., COLUMBIA LAW SCH., CHALLENGING JUVENILE LIFE WITHOUT PAROLE: HOW HAS HUMAN RIGHTS MADE A DIFFERENCE? (2014); Katherine Aragon, *A Legal View: Why Juvenile Life Without Parole Sentences Are a Mistake*, RECLAIMING FUTURES (Jan. 18, 2012), <http://reclaimingfutures.org/legal-view-why-juvenile-life-without-parole-sentences-are-mistake>; *End Juvenile Life Without Parole*, ACLU (2017), <https://www.aclu.org/end-juvenile-life-without-parole>.

27 See Kelcy Whitaker, *Legislative Update: A Look at Juvenile Life Without Parole Post-Miller*, 34 CHILD. LEGAL RTS. J. 139, 140 (2013); AP, *Bill to Parole Juvenile Lifers Halted in Final Moments*, WBBJ-TV (June 7, 2016), <http://www.wbbjtv.com/2016/06/07/bill-to-parole-juvenile-lifers-halted-in-final-moments/> (noting that the Louisiana House of Representatives voted eighty-two to three to give juvenile lifers a parole option, but the Senate rejected the proposal); *supra* note 16 and accompanying text.

28 See generally Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641 (2011).

29 See Daja Henry, *Bill to Get Rid of Life Without Parole for Juvenile Offenders Moves Through Senate*, NEW ORLEANS TRIB. (June 1, 2016), <http://www.theneworleanstribune.com/main/news/bill-to-get-rid-of-life-without-parole-for-juvenile-offenders-moves-through-senate/> (“[T]here has been a general trend of loosening laws on [JLWOP] . . . . If the states keep following this trend, it is likely that [JLWOP] sentences will follow the same fate as capital punishment of juveniles. Once state legislatures established a trend of abolishing capital punishment of juveniles, the Supreme Court declared it unconstitutional.”).

30 See generally Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 152 (2013) (noting that, from the perspective of a former inmate sentenced to life without parole at age fourteen, reform is “slow indeed, especially for the prisoner with a now fully-developed brain who recognizes, after decades confined, that each passing day cannot bring him further maturity, but will bring him closer to senility and death”).

31 See *infra* notes 41–108 and accompanying text.

states' justifications for imposing compulsory education requirements are the fundamental goals public education is designed to achieve—preparing citizens for life as productive members of their communities, and preparing them to participate actively in a democratic society; (C) life-without-parole sentences permanently and irreversibly deprive juvenile defendants of the opportunity to become productive members of their communities or to participate actively in their own democracy. The sum of these premises suggests that JLWOP recipients, who enter prison while under the umbrella of state compulsory education laws, are required by law to prepare for futures of which the state permanently deprives them. This result is unsatisfactory. It is arguable, under this framework, that JLWOP sentences should not, and cannot, logically be imposed upon school-age children.

Although JLWOP is legal in most states, juvenile defendants in Pennsylvania, Michigan, and Louisiana account for approximately two-thirds of the nation's JLWOP sentence recipients, and California is home to one of the nation's largest JLWOP populations.<sup>32</sup> This Note accordingly devotes attention to the compulsory education laws, purported goals of education, and criminal education requirements of these four states. The exclusion of other states from this analysis in no way suggests that the argument is inapplicable nationwide. On the contrary, this analysis might serve as a fungible model for juvenile rights activists, politicians, and courts of any state that authorizes JLWOP to apply in the course of their work.

### C. *Relevance: Why Bother?*

As of August 2015, when Michigan and fifteen other states appeared as amici curiae in *Montgomery v. Louisiana* to argue that prosecutors should not be required to apply *Miller v. Alabama* retroactively, 368 prisoners sentenced as juveniles to life without parole were incarcerated in Michigan, 482 in Pennsylvania, and 202 in Louisiana.<sup>33</sup> In July 2016, Wayne County (Michigan) Prosecutor Kym Worthy reviewed each of the 145 unconstitutional mandatory JLWOP sentences that had been issued in her district alone since 1963.<sup>34</sup> Although the Court's holding in *Montgomery* requires prosecutors to reassess the constitutionality of each JLWOP sentence imposed under a mandatory sentencing regime, *Montgomery* does not require those prosecutors to revoke sentences that would have been deemed necessary and appropriate under *Miller's* standards at the time of trial.<sup>35</sup> Kym Worthy assured the Detroit community that some JLWOP prisoners in her jurisdiction would

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32 ROVNER, *supra* note 4, at 3, 5.

33 Brief for Michigan et al. as Amici Curiae Supporting Respondent, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 5169098, at \*13–15.

34 Oralandar Brand-Williams & Mike Martindale, *Worthy Seeking Resentencing of Juvenile Lifers*, DET. NEWS (July 23, 2016), <http://www.detroitnews.com/story/news/local/wayne-county/2016/07/22/worthy-seeking-resentencing-juvenile-lifers/87439616/>.

35 See *Montgomery*, 136 S. Ct. at 736–37. “[T]he sentencing judge must consider not only the youth’s age and its attendant circumstances, but also the youth’s family and home environment and potential for rehabilitation.” Whitaker, *supra* note 27, at 139.

receive new term-of-years sentences under *Montgomery*—“[i]n many of the cases . . . [still] more time than the minimum sentence of 25 years”—but she also promised to “aggressively pursue life without possibility of parole in 60 other cases.”<sup>36</sup> Thus, despite *Montgomery*’s mitigating effect on JLWOP sentencing, many prisoners still stand to benefit from a categorical rule against JLWOP or from other avenues of reform.

In *Miller*’s wake, California introduced swift and generally effective juvenile sentencing reforms. Since 2013, even before the Court issued its opinion in *Montgomery*, many recipients of unconstitutionally mandatory JLWOP sentences in California have been granted a “meaningful chance at parole after 15 to 25 years.”<sup>37</sup> California’s Supreme Court also freely acknowledged in 2014 that lower courts had incorrectly construed the state sentencing guidelines “as creating a presumption in favor of life without parole as the appropriate penalty” for juvenile homicide defendants.<sup>38</sup> The court clarified that although the judges have discretion to issue either a twenty-five-years-to-life sentence or a life-without-parole sentence to a juvenile homicide defendant, there must be no presumption in favor of the harsher penalty.<sup>39</sup> This clarification is helpful prospectively, but the very fact that an “off-the-books” JLWOP presumption existed until 2014 suggests that many youths sentenced to life without parole during this time will have difficulty seeking resentencing hearings under *Montgomery* if they do not qualify for recall and resentencing under the state’s recent reform bill.<sup>40</sup> Despite the faulty presumption in favor of JLWOP, these sentences were not technically mandatory (and thus, not technically unconstitutional under *Miller*) when issued.

Despite *Montgomery* and *Miller*, the urgency of the search for an end to JLWOP sentencing, and any retroactive effects of such reform, has not waned. Education law’s contribution to this effort is both timely and potentially life-altering for those who remain in prison without parole despite recent waves of judicial and legislative reform.

## I. ARGUMENT

### A. *The Rule: Compulsory Education*

In Pennsylvania, education is compulsory for all children under seven-teen years of age.<sup>41</sup> Pennsylvania’s JLWOP recipients, sentenced as adults to

36 Brand-Williams & Martindale, *supra* note 34.

37 ROVNER, *supra* note 4, at 3, 5. JLWOP recipients convicted of torture or crimes against public safety officials, law enforcement, firefighters, or government officers are categorically prohibited from seeking this relief. CAL. PENAL CODE § 1170(d)(2)(A)(ii) (West 2017).

38 *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014).

39 *Id.* at 250.

40 *See supra* note 37 and accompanying text.

41 *See* 24 PA. CONS. STAT. § 13-1326 (2017). While all students are *required* to attend school until age seventeen, all citizens under the age of twenty-one are *entitled* to receive state-sponsored education until the completion of high school. *See* *Brian B. v. Pa. Dep’t of Educ.*, 230 F.3d 582, 584 (3d Cir. 2000). Youths under the age of seventeen who have

serve time in state facilities (as opposed to local facilities), are just as entitled to an education that comports with Pennsylvania's school code as other school-aged youths.<sup>42</sup> Pennsylvania's Department of Corrections specifically provides that "students/inmates under 21 years of age are provided instruction by certified teaching staff."<sup>43</sup> Notably, this Bureau's mission statement reflects the same goals of education offered by many states beyond the criminal context<sup>44</sup>: "To provide educational opportunities which will enable inmates to become responsible and productive citizens in a diverse society."<sup>45</sup>

In Michigan, education is compulsory until a child reaches eighteen years of age.<sup>46</sup> Although youths in adult prisons in Michigan are not statutorily exempt from the state's compulsory education laws,<sup>47</sup> educational opportunities for school-aged prisoners are extremely limited. Michigan's adult prisons (as compared to its juvenile detention centers) are generally ill-equipped to provide educational services that comport with the state's public school requirements.<sup>48</sup> A recent estimate suggests that youths incarcerated in adult prisons in Michigan receive "about eight hours of education a

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completed the equivalent of a high school education are exempt from the compulsory attendance requirement. See 24 PA. CONS. STAT. § 13-1326.

42 In Pennsylvania, state inmates receive a full education, while county inmates receive limited education. A youthful offender's place of incarceration depends on the length of sentence and in certain cases the discretion of the sentencing judge. Those sentenced to two years or less are confined in county facilities. Those sentenced to five years or more go to state facilities. *Brian B.*, 230 F.3d at 585 (interpreting 24 PA. CONS. STAT. § 13-1306.2).

Pennsylvania offers four justifications—all deemed rational—for the discrepancy between educational programming offered in state and local prisons: "1) space limitations in county correctional institutions; 2) higher per-student cost in county correctional institutions; 3) security concerns that would arise in state correctional institutions if education were discontinued; and 4) the greater need for education in state correctional institutions, independent of security concerns." *Id.* at 586–87.

43 JOHN E. WETZEL ET AL., PA. DEP'T OF CORR., EDUCATIONAL PROGRAMS REVIEW 4, <http://www.cor.pa.gov/Inmates/Documents/Education%20and%20Vocation%20Documents/Education%20Programs.pdf> (detailing the rights granted to inmates under the Commonwealth Secondary Diploma Program).

44 See *infra* notes 82–106 and accompanying text.

45 WETZEL ET AL., *supra* note 43.

46 See MICH. COMP. LAWS ANN. § 380.1561(1) (West 2017) (stating compulsory attendance until age eighteen applies to every child "who turns age 11 on or after December 1, 2009 or . . . who was age 11 before that date and enters grade 6 in 2009 or later").

47 See Irene Y. H. Ng et al., *Comparison of Correctional Services to Youth Incarcerated in Adult and Juvenile Facilities in Michigan*, 92 PRISON J. 460, 464 (2012).

48 See generally MICHELLE WEEMHOFF & KRISTEN STALEY, MICH. COUNCIL ON CRIME & DELINQUENCY, YOUTH BEHIND BARS 16–18 (2014) ("MDOC does not have a separate policy directive specifically addressing youthful offenders in prison. Other than separating all youth under age 18 by sight and sound from adults (as required under the [Prison Rape Elimination Act] regulations), MDOC treats youth in much the same way as adult inmates.").

week.”<sup>49</sup> Michigan’s Department of Corrections sets forth an educational programming mission statement similar to that of Pennsylvania’s corrections department; however, Michigan draws more attention to the benefits of education to prisoners *while incarcerated*. Michigan aims “[t]o provide educational opportunities . . . in order for [prisoners] to become contributing, productive members of the prison community while incarcerated and contributing members of their communities upon release from prison.”<sup>50</sup>

California also requires all youths under the age of eighteen to attend school.<sup>51</sup> Juvenile defendants who enter California’s juvenile court system clearly fall within the scope of California’s compulsory education requirements.<sup>52</sup> In terms of access to educational programming in adult prisons, every California Department of Education and Rehabilitation institution offers GED and high school diploma programs.<sup>53</sup> Youths incarcerated in adult prisons have not been excluded from the terms of California’s compulsory education laws.

In Louisiana, as in Michigan and California, education is compulsory until a student reaches the age of eighteen.<sup>54</sup> Louisiana’s Children’s Code explicitly provides that incarcerated youth will be afforded an individualized academic plan.<sup>55</sup> One factor the Department of Public Safety and Corrections considers while developing such a plan is the length of time the Department expects the child to remain in detention.<sup>56</sup> The Department must submit the plan, as well as a report on the child’s academic progress, to the court.<sup>57</sup> No provision of the “Delinquency” chapter of the Children’s Code excludes JLWOP recipients from receiving the same attention as other incarcerated youths. However, the Code does indicate that the individualized academic plans are partially designed to facilitate each child’s reentry into the “school or academic program in which the child is thereafter enrolled.”<sup>58</sup>

The dearth of literature surrounding school-aged inmates’ right and access to education in adult prisons<sup>59</sup> is quite shocking. It does, however,

49 Ted Roelofs, *Is Michigan’s Criminal System, One That Prosecutes Teens as Adults, Wasting 20,000 Lives and at What Expense?*, MLIVE.COM (June 10, 2014), [http://www.mlive.com/politics/index.ssf/2014/06/is\\_michigan\\_wasting\\_20000\\_teen.html](http://www.mlive.com/politics/index.ssf/2014/06/is_michigan_wasting_20000_teen.html).

50 MICH. DEP’T OF CORR., EDUCATIONAL PROGRAMMING, [http://www.michigan.gov/corrections/0,4551,7-119-9741\\_12798-294493—,00.html](http://www.michigan.gov/corrections/0,4551,7-119-9741_12798-294493—,00.html).

51 CAL. EDUC. CODE § 48200 (West 2017).

52 See *Juvenile Court Schools*, CAL. DEP’T OF EDUC. (Oct. 13, 2015), <http://www.cde.ca.gov/sp/eo/jc/> (“County boards of education administer and operate the juvenile court schools . . . . Funding is provided by the state General Fund and is included in the annual apportionment to county offices of education.”).

53 See *Office of Correctional Education (OCE)*, CAL. DEP’T OF CORR. & REHAB., <http://www.cdcr.ca.gov/rehabilitation/oce.html>.

54 LA. STAT. ANN. § 17:221(1) (2017).

55 LA. CHILD. CODE ANN. art. 905.1(B) (2017).

56 *Id.* art. 905.1(B)(4).

57 *Id.* art. 905.1(E)–(F).

58 *Id.* art. 905.1(G).

59 See Christine D. Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 800 (2008).

reflect the fact that “education adequacy for young people incarcerated in adult penal institutions is rarely litigated,” presumably due in part to the difficulty of asserting equal protection claims and jumping hurdles set by the Prison Litigation Reform Act in these cases.<sup>60</sup> It is clear that, “[b]ecause juvenile offenders have a right to a public education, all programs for incarcerated youth include a correctional education component.”<sup>61</sup> Much less clear is a juvenile’s right to educational programming when the state chooses to characterize the youth as an “adult” during his or her trial and sentencing hearing.<sup>62</sup> The education and criminal codes of Pennsylvania, Michigan, California, and Louisiana devote little (if any) attention to this incongruity. Researchers posit that “[i]n most states, it is likely that policymakers and even state agency leaders lack the full picture of what educational and vocational services are available to incarcerated youth; who is responsible for the provision of these services; and what, if any, outcomes students are achieving.”<sup>63</sup>

Of course, state law primarily governs youth education, rather than the Constitution or federal law.<sup>64</sup> The federal government arguably has little authority to enforce compulsory education laws in state prisons. Notably, where the federal government *does* have authority to regulate prison education for youths, it has done so. Almost two decades ago, the Department of Justice assessed juvenile detention in adult prisons and clarified that “[d]espite being placed in adult facilities, minors retain special civil rights to education . . . that may require additional or special programs. These rights have consequences in staffing and access to appropriate programs that are responsive to the developmental . . . needs that are unique to adolescents.”<sup>65</sup> All juveniles with disabilities, for example, have a right to free appropriate public education (FAPE) under the Individuals with Disabilities Education

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60 *Id.* at 811–12.

61 LOIS M. DAVIS ET AL., RAND CORP., HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE? THE RESULTS OF A COMPREHENSIVE EVALUATION iii (2014); *see also id.* at 24 (“A fundamental difference between correctional education for juvenile and adult populations is that juveniles in the United States have a right to a public education. . . . [T]he question facing policymakers is not whether to provide education services for juveniles in correctional facilities, but which types of programs are most effective.”).

62 *See, e.g.*, Caitlin Curley, *Juveniles Tried as Adults: What Happens When Children Go to Prison*, GENFKD (Nov. 11, 2016), <http://www.genfkd.org/juveniles-tried-adults-happens-children-go-prison> (“There are . . . laws granting all juveniles the right to education, which apply to youth in correctional facilities. However, many . . . do not have access to any education. A 2005 survey of adult facilities found that 40 percent of the jails and prisons had no educational services at all.”).

63 COUNCIL OF STATE GOV'TS JUSTICE CTR., LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 14 (2015)

64 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

65 JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 9 (Oct. 2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

Act, even in the adult prison context.<sup>66</sup> Although, states may alter the contours of this right for a “bona fide security or compelling penological interest that cannot otherwise be accommodated.”<sup>67</sup>

In addition, the Obama administration’s Every Student Succeeds Act (ESSA) replaced the No Child Left Behind Act in December 2015, purporting to usher in a new era of bipartisan education reform.<sup>68</sup> Although ESSA contains no provision specifically addressing JLWOP, it does include guidelines intended to grant incarcerated juveniles the “opportunity to meet the same challenging State academic standards that all children in the State are expected to meet.”<sup>69</sup> Particularly pertinent to this Note, the Act expressly offers funding to those states “providing free public education for children and youth . . . in adult correctional institutions.”<sup>70</sup> Moreover, the Act “places a greater emphasis on students in juvenile justice programs earning a traditional high school diploma,” rather than a GED.<sup>71</sup> Practical challenges to implementing federal reforms on both the state and municipal level are manifold, however. ESSA itself acknowledges that a “mish-mash of state and local agencies are responsible for educating these [incarcerated] students”<sup>72</sup> during their time in adult prison.<sup>73</sup> Prison reform advocates cite this type of disorganization as a central flaw in correctional educational programming initiatives nationwide.<sup>74</sup>

On a broader scale, public attitude toward prisoners and popular opinion about the goals and purposes of incarceration have long influenced the

66 Free Appropriate Public Education (FAPE), 34 C.F.R. § 300.101 (2006). Under § 300.102(a)(2), these rights do not extend to a prisoner with disabilities over the age of eighteen whose disabilities were not identified during childhood and who did not have an Individualized Education Plan prior to incarceration. *See also* *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993); *Green v. Johnson*, 513 F. Supp. 965 (D. Mass. 1981). For an unorthodox argument addressing the lack of age-appropriate educational programming in prisons for incarcerated youth, see Patrick A. Keenan & Celeste M. Hammond, *The Institutionalized Child’s Claim to Special Education: A Federal Codification of the Right to Treatment*, 56 U. DET. J. URB. L. 337 (1979) (suggesting that incarcerated children are entitled to all rights extended to special needs students because every incarcerated child can be classified as a student with special needs).

67 34 C.F.R. § 300.324(d)(2)(i) (2017).

68 *See* Frederick M. Hess & Max C. Eden, *States Plan for Sensible School Reform Under an Obama-Era Law*, NAT’L REV. (Mar. 21, 2017).

69 20 U.S.C. § 6421(a)(1) (2012).

70 *Id.* § 6431(3). Notably, the Act requires that “in making services available to children and youth in adult correctional institutions, priority will be given to such children and youth who are likely to complete incarceration within a 2-year period.” *Id.* § 6434(c)(2).

71 Andrew Ujifusa, *The Changes ESSA Makes for Educating Children in the Juvenile-Justice System*, EDUC. WK. (June 16, 2016), [http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa\\_juvenile\\_justice\\_changes\\_education.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa_juvenile_justice_changes_education.html).

72 *Id.*

73 *Id.*

74 *See id.*; *see also* COUNCIL OF STATE GOV’TS JUSTICE CTR., *supra* note 63, at 2 (only nine states designate one state or local agency to oversee educational programming for incarcerated youth).

availability and quality of correctional education for youths in adult prison.<sup>75</sup> Educational programming in adult prisons is not a rare or new phenomenon, nor do many Americans doubt its benefits.<sup>76</sup> Attention to educational programming in adult prisons has grown in recent years, due in part to the increasing number of youths charged as adults nationwide.<sup>77</sup> One recent study suggests that youths incarcerated in adult prisons might often have better access to education than their peers' juvenile detention programs, in part because youths' proportional access to educational programming is much greater in adult prisons where youths are a minority.<sup>78</sup> Nevertheless, while juvenile courts are expressly designed "to turn delinquents into productive citizens through treatment,"<sup>79</sup> adult prisons generally—often by necessity—devote more attention to incapacitation and prison safety; education is a secondary priority.<sup>80</sup> As a practical matter, state budgets also exert strong power over the quantity and quality of educational programming when the priority of such programming is relatively low.<sup>81</sup>

### B. *The Purpose: Preparing Students for Active Membership in Society*

Elementary and secondary education in the United States serve innumerable purposes—likely as many as the number of legislators who formed and continue to reform state education codes—that range from “preparing

75 See RICHARD J. COLEY & PAUL E. BARTON, EDUC. TESTING SERV., LOCKED UP AND LOCKED OUT: AN EDUCATIONAL PERSPECTIVE ON THE U.S. PRISON POPULATION 5 (2006), <https://www.ets.org/Media/Research/pdf/PIC-LOCKEDUP.pdf> (“[W]hen the rehabilitation approach to corrections has been in favor, prison education has prospered.”).

76 See Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 8 (1989).

77 Aaron Kupchik, *The Correctional Experiences of Youth in Adult and Juvenile Prisons*, 24 JUST. Q. 247, 247 (2007) (“[S]tates increasingly rely on adult jails and prisons to house violent adolescent offenders.”); see also AUSTIN ET AL., *supra* note 65, at 1 (noting the “increasing incidence and severity of juvenile crime” since the 1980s, and finding that “this trend appears to have peaked in 1994”).

78 See Kupchik, *supra* note 77, at 266 (“[A] more even distribution of services in juvenile facilities might mean that each young adult actually receives relatively less education and treatment.”). Kupchik emphasizes that educational programming is required by the adult prisons for “[a]ny inmate younger than 21 with no high school degree (or GED).” *Id.* at 260. But see Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 140 (2000) (“The teacher/inmate ratio in adult institutions is 1:100. A national survey of prison inmates in 1991 indicated that fewer than half received any academic instruction.”). Cf. *supra* note 41 and accompanying text.

79 COLEY & BARTON, *supra* note 75, at 11.

80 See, e.g., Kim Chandler, *Budget Cuts Threaten Prison Reform Effort*, WASH. TIMES (Sept. 7, 2015), <http://www.washingtontimes.com/news/2015/sep/7/budget-cuts-threaten-prison-reform-effort/>. But see VERA INST. OF JUSTICE, BUILDING EFFECTIVE PARTNERSHIPS FOR HIGH-QUALITY POSTSECONDARY EDUCATION IN CORRECTIONAL FACILITIES I (2016) (“Post-secondary education in prison improves safety. Facilities with college programs report fewer conduct issues and less violence, making the prison safer for staff and incarcerated people alike.”).

81 COLEY & BARTON, *supra* note 75, at 5.

students to enter the international workforce [ ] to contribute to the global community, economy, and marketplace”<sup>82</sup> to “the advancement of knowledge and the dissemination of truth.”<sup>83</sup> Despite the wide range of purposes underlying education law, federal courts have consistently offered a core, daresay “national” perspective on the purpose of youth education in the United States: education prepares young people to be successful members of a thriving democracy.

Consider the following early perspectives on the goals of state-sponsored education. Even before the Founding, courts and public figures offered robust, community-minded rationales for the project of public education:

As early as 1642, the Massachusetts General Court announced that children were to be educated in order to “read and understand religion and the laws of the [state].” Horace Mann . . . rationalized that the reason to educate the masses was to ensure that citizens were “fit to be a voter.” . . . Benjamin Franklin ascertained that the measure of successful education is what one does with his or her skills and knowledge.<sup>84</sup>

Centuries later, in *Wisconsin v. Yoder*, the Supreme Court considered a similar perspective on education held by Thomas Jefferson at the time of the Founding: “education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . to be self-reliant and self-sufficient participants in society.”<sup>85</sup> The Court embraced Jefferson’s words.<sup>86</sup> *Yoder* pressed the Court to consider whether Wisconsin’s compulsory education law should yield to genuine religious objections by Old Order Amish students and their parents.<sup>87</sup> The Court did recognize a narrow exception to Wisconsin’s law, but in so doing, firmly emphasized that “courts are not school boards or legislatures, and are ill-equipped to determine the ‘necessity’ of discrete aspects of a State’s program of compulsory education.”<sup>88</sup> Despite the Court’s holding, *Yoder* affirms that state compulsory education laws are nearly impossible to circumvent, and further, that such matters should generally be left to the states. A state’s interest in protecting “democratic society [that] rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens” is presumptively too compelling for the court to disturb.<sup>89</sup>

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82 Chelsea Lauren Chicosky, Comment, *Restructuring the Modern Education System in the United States: A Look at the Value of Compulsory Education Laws*, 2015 BYU EDUC. & L.J. 1, 8–9; see also Derek Messacar & Philip Oreopoulos, *Staying in School: A Proposal for Raising High-School Graduation Rates*, 29 ISSUES SCI. & TECH. (2013) (“Increasing high-school attainment should be regarded as part of a more general goal to make youth more competitive in the labor market. . . . [Education is similarly necessary to] drive today’s economy.”).

83 Senator John F. Kennedy, Remarks at Harvard University (June 14, 1956).

84 Chicosky, *supra* note 82, at 6–7 (alteration in original) (footnotes omitted).

85 *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

86 *Id.*

87 *Id.* at 207–09.

88 *Id.* at 235.

89 Reply Brief for Petitioner at 8, *Yoder*, 406 U.S. 205 (No. 70-110), 1971 WL 126409, at \*8 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

In 1987, the Sixth Circuit indicated that public education is an “‘assimilative force’ that brings together ‘diverse and conflicting elements’ in our society” by “teaching fundamental values ‘essential to a democratic society.’”<sup>90</sup> In a similar vein, the Supreme Court has stated that “access to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. . . . ‘[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.’”<sup>91</sup>

Many individual state education codes also set forth states’ unique perspectives on the purposes of education, presumably for the purpose of guiding courts’ interpretation of the codes.<sup>92</sup> For instance, California’s legislature contends that the purpose of education is “to enable each child to develop all of his or her own potential,” and that public schools are “maintained for the benefit of the pupils, their parents, and the community at large.”<sup>93</sup> Although this goal is not facially community- or democracy-oriented, the notion that California requires all youths under the age of eighteen to participate in educational programming that “develop[s]” their “potential” suggests that California believes, contrary to incorrigibility arguments advanced by JLWOP proponents, that all youths within the scope of its compulsory education laws have some potential to *develop*.<sup>94</sup> Moreover, the Code entrusts California to facilitate this development.

The legislatures of Pennsylvania, Michigan,<sup>95</sup> and Louisiana did not explicitly state the purposes of education in their state education codes; apart from time-sensitive, often politically charged goals that develop alongside legislation,<sup>96</sup> the purposes of education in such states have arguably been articulated best by the Supreme Court.

90 *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987) (first quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); then quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

91 *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion) (citations omitted) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

92 LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 34 (2011) (“To apply the principle that statutory language be interpreted consistent with congressional intent, courts may consult the stated purposes of legislation to resolve ambiguities in the more specific language of operative sections.”).

93 CAL. EDUC. CODE § 33080 (West 2017); ROMUALDO P. ECLAVEA ET AL., 56 CAL. JUR. 3D SCHOOLS § 2 (“Purposes of Public Schools”).

94 CAL. EDUC. CODE § 33080.

95 Michigan’s constitution does provide, in establishing the right to education, that “knowledge [is] necessary to good government.” MICH. CONST. art. VIII, § 1 (West 2017). This language derives directly from the Northwest Ordinance of 1787, which attempted to establish on a regional level for inhabitants of the western territories that “education is necessary to become a good citizen.” Kevin VanZant, *The Land Ordinance of 1785 and Northwest Ordinance of 1787*, HISTORY OF AM. EDUC. WEB PROJECT (last updated June 15, 2004).

96 See, e.g., Press Release, Mich. State Bd. of Educ. & Superintendent, State Board Adopts Strategic Goals to Make Michigan a Top 10 Education State in 10 Years (Dec. 8, 2015), [http://www.michigan.gov/mde/0,4615,7-140-5373\\_5379-370853—,00.html](http://www.michigan.gov/mde/0,4615,7-140-5373_5379-370853—,00.html) (fram-

C. *The Tension: JLWOP Precludes Students' Active Membership in Society*

Tragically, “juveniles housed in adult prisons are 36 times more likely to commit suicide than juveniles housed apart from adult offenders.”<sup>97</sup> This alone suggests that states shortchange their most delinquent youths. The same futures in which tax dollars, policy initiatives, and local educators invest are systematically, albeit indirectly, derailed by a criminal process<sup>98</sup> that contradicts the very principles upon which state education laws rest. Although adult prisons do not literally take the lives of most JLWOP prisoners,<sup>99</sup> prisons do strip their inmates of rights considered fundamental to membership in a democratic society. Rather than suffering physical death, young homicide defendants face “civil death” when the state commits them to life without parole for crimes of “irreparable corruption.”<sup>100</sup>

“Civil death” has been defined as “the loss of rights—such as the rights to vote and hold public office—by a person serving a life sentence or awaiting execution.”<sup>101</sup> In all but two states, felons convicted of crimes of moral turpitude lose the right to vote in local, state, and federal elections while incarcerated.<sup>102</sup> The right to vote is essential to membership in democratic society; without eligibility to exert one’s own share of control over the political process, prisoners lose political voice. Most felons regain voting rights

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ing education reform as a tool to raise household incomes and ensure economic security in Michigan).

97 Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, ATLANTIC (Jan. 8, 2016).

98 States reserve the right to try juveniles as adults for crimes of homicide and serious sex offenses. ANNE TEIGEN, NAT’L CONFERENCE OF STATE LEGISLATURES, JUVENILE AGE OF JURISDICTION AND TRANSFER TO ADULT COURT LAWS (2014), <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> (“[A]ll states have transfer laws that allow or require young offenders to be prosecuted as adults for more serious offenses, regardless of their age.”); COLEY & BARTON, *supra* note 75, at 11 (“Through the 1950s, most juvenile courts had exclusive original jurisdiction over all those under age 18 . . .”).

99 *But see* William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1054 (2015) (“For some, an LWOP sentence is worse than a death sentence, as death sentences at least mark an anticipated end to suffering.”). For a scholarly challenge to this observation, see Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1, 6 (2010) (finding that prison inmates’ “positive feelings increase and negative feelings decrease steadily over a period of years”).

100 *See* O’Hear, *supra* note 99, at 5 (“If you intentionally take the life of another person, then the state takes your life away—not literally, of course, but . . . a sort of civil death. Viewed this way, there is an appealing symmetry between LWOP and the underlying offense.”).

101 *Death*, BLACK’S LAW DICTIONARY (10th ed. 2014).

102 In Maine and Vermont, convicted felons never lose the right to vote. NAT’L CONFERENCE OF STATE LEGISLATURES, FELON VOTING RIGHTS (2016), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; *see also* CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 4 (2016).

after completing their sentences and fulfilling additional state-specific requirements, such as asking pardon from the state or refraining from criminal conduct for an additional period of time after their release.<sup>103</sup> JLWOP recipients, who enter prison before ever gaining the right to vote, have been permanently stripped of the chance to acquire, let alone exercise, their political voice. Notwithstanding the political controversy surrounding disenfranchisement,<sup>104</sup> it is indisputable that this restriction limits prisoners' ability to "participate effectively and intelligently in our open political system,"<sup>105</sup> one of the primary purposes for which youths are educated. Other rights associated with membership in democratic society denied to JLWOP recipients include the right to hold political office and all First Amendment rights deemed "inconsistent with . . . status as an inmate."<sup>106</sup>

In addition to the concrete deprivation of rights associated with active membership in democratic society, it is worth noting that "LWOP sends a [strong] message of *permanent* exclusion from . . . the ordinary community of fellow citizenship."<sup>107</sup> Although a youth who enters state prison with a JLWOP sentence never technically loses status as a "social being," (he or she arguably retains the opportunity to become a productive member of the prison community), this qualified productivity and limited sphere of community must not be what states have in mind when they prepare each young citizen for the "pluralistic, often contentious society in which they will soon be adult members."<sup>108</sup>

#### *D. The Result: Compulsory Education Laws and JLWOP Sentences Cannot Coexist*

Together, these premises lead to a single conclusion: JLWOP sentences are incompatible with compulsory education laws. If state law compels all children to receive an education, and if a primary purpose of education is to prepare students for active membership in democratic society, it is senseless to permanently sentence children to life in prison, preventing them from fulfilling the (often) stated purpose of their education. By the same token, if states enforce compulsory education laws to ensure that each child develops

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103 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 102.

104 Compare Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL'Y 235, 235 (2005) (arguing that disenfranchisement is "counter to democratic ideals," and that prisoners' enfranchisement would greatly impact the U.S. political climate, particularly with respect to local elections), with George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 896 (2005) ("Locke's social contract theory has withstood the test of time; it served as a rationale for the enactment of felon disenfranchisement laws in the past, and remains a compelling argument today. When someone commits a crime, he commits it not just against the victim, but against our entire society." (footnote omitted)).

105 *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

106 60 AM. JUR. 2D *Penal & Corr. Etc.* § 26 (West 2017).

107 O'Hear, *supra* note 99, at 6.

108 See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion).

his or her potential to participate actively in community life and democratic society, it is senseless for those states to educate a child after permanently depriving him or her of a life beyond prison walls.

## II. RESISTANCE

Several objections to the foregoing argument remain to be addressed.

First, JLWOP proponents will likely challenge the premise that life-without-parole sentences completely deprive prisoners of the opportunity to fulfill the goals and purposes of their education. One might argue that it is unfair—even false—to suggest that JLWOP prisoners lose the opportunity to become productive members of their communities or democratic society. Youths do not lose their humanity or U.S. citizenship while incarcerated. Prison does not prohibit youths from continuing to develop on an intellectual, emotional, or spiritual level; the educational programming offered by most adult prisons helps to facilitate this development.<sup>109</sup> Indeed, “[l]ife goes on for LWOP inmates.”<sup>110</sup> Such challengers might point to evidence that even JLWOP recipients find creative ways to contribute to their communities behind bars. Groups like KID C.A.T. (“Creating Awareness Together”), for example, established by JLWOP prisoners confined in California’s San Quentin State Prison, “conduct[ ] food and hygiene product drives for the homeless, fundrais[e] to sponsor youth involvement in community programs, rais[e] awareness and money for cancer research, and fol[d] hundreds of origami hearts for kids at Oakland’s Children’s Hospital.”<sup>111</sup> Moreover, although JLWOP does prevent youths from participating in the democratic process in traditional ways, prisoners may assume an active role in the political process by aiding the development of civil rights law from within their prison cells. Prisoners, who remain fully entitled to file actions under 42 U.S.C. § 1983 or *Bivens* while incarcerated, may use these judicial channels to vindicate their own constitutional rights. In so doing, JLWOP recipients might exert an influence over judicial interpretation of those rights or the construction of federal laws like § 1983.<sup>112</sup>

Fortunately, this objection has significant merit. States do not deprive JLWOP recipients of the right to membership in their prison communities or family units; nor does incarceration alter a JLWOP recipient’s citizenship status. JLWOP indeed provides leeway for inmates, imprisoned as youths, to

109 See generally KATHERINE A. CARLSON & MICHELLE M. MAIKE, EDUCATING JUVENILES IN ADULT JAILS: A PROGRAM GUIDE (2010), <http://www.njjn.org/uploads/digital-library/Educating-Juveniles-in-Adult-Jails-Washington-Program-Guide-7.10.pdf>.

110 O’Hear, *supra* note 99, at 5 (“They adapt to prison. They are able to acquire privileges through good behavior . . . [and] enjoy recreational opportunities, a social life, and family visits . . . [and] receive food, shelter, and medical care at state expense.”).

111 Xavier McElrath-Bey, *Redeemed Juveniles Like Me Are Not the Exception*, JUV. JUST. INFO. EXCHANGE (Oct. 13, 2016), <http://jjie.org/2016/10/13/redeemed-juveniles-like-me-are-not-the-exception/>.

112 See, e.g., *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986); see generally *Carlson v. Green*, 446 U.S. 14 (1980).

lead meaningful and purposeful lives. JLWOP does, however, deprive youths of the ability to achieve full social and political potential, as contemplated by education law. JLWOP patently denies youths of “free[dom] to inquire, to study and to evaluate, to gain new maturity and understanding”;<sup>113</sup> in fact, JLWOP is inseparable from a presumption of incorrigibility. It is impossible to reconcile the incorrigibility presumption with the Court’s observation that students, by their very nature, are capable of and deserving of the opportunity to mature and grow. Limited, relatively rare opportunities for community membership and democratic activity within prison walls are insufficient compensation for depriving students of the freedom to grow, both as intellectual creatures and maturing citizens.

Second, a dissenter might object that the argument presented in this Note is moot once a juvenile homicide defendant reaches seventeen or eighteen years of age, depending on the state of incarceration’s compulsory education age requirement. If, after two years or less (perhaps just months or weeks), the state no longer mandates education under compulsory education law, the incompatibility between JLWOP and compulsory education seems inconsequential.

This objection fails to consider the gravity of the incompatibility between JLWOP and compulsory education laws. Until a minor inmate reaches the age cap set within a state’s compulsory education statute, the state’s education code deems that student capable of development. Until the state ceases its education mandate with respect to the inmate, the state’s purported goal is to prepare that inmate for active participation in society. State education law and JLWOP are no less incompatible when the inmate is seventeen than when the inmate is ten years old. Eliminating youths’ chance to fulfill the purpose of the education required of them by law is no less offensive over a span of five weeks than of five years.

Third, wary readers might argue that the difficulty of resentencing hundreds of youths currently serving JLWOP sentences<sup>114</sup> will dissuade states from eliminating JLWOP on the grounds of a novel, nonconstitutional, state-law inconsistency argument. These readers might point to evidence that states such as Pennsylvania already struggle to comply with *Montgomery*, which did not go so far as forbidding JLWOP, by resentencing those who received mandatory JLWOP sentences before *Miller*.<sup>115</sup>

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113 *Pico*, 457 U.S. at 868 (plurality opinion) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

114 See *supra* Section I.C.

115 See generally Jonas Fortune, *Officials Seek Guidance from State Supreme Court Before Resentencing Lancaster County Juvenile Lifers*, LANCASTER ONLINE (Nov. 19, 2016), [http://lancaster-online.com/news/local/officials-seek-guidance-from-state-supreme-court-before-resentencing-lancaster/article\\_3ff6b424e-add4-11e6-9ff8-f3d5498ab4aa.html](http://lancaster-online.com/news/local/officials-seek-guidance-from-state-supreme-court-before-resentencing-lancaster/article_3ff6b424e-add4-11e6-9ff8-f3d5498ab4aa.html). Granted, this form of “participation” in the democratic process is several times removed from the JLWOP recipient’s own power to act. First, another actor must violate the JLWOP recipient’s rights, such that the JLWOP recipient can state a plausible claim for relief. Second, the JLWOP recipient’s case will only bear significant influence on the court’s construction of law, as stated in the proposed objection, if the JLWOP recipient’s case happens to raise a novel issue of

The simple, though not entirely satisfying, response to this concern must implicate *Montgomery* itself. The practical difficulty of resentencing JLWOP recipients under mandatory sentencing guidelines did not stop the Supreme Court from issuing its holding in *Montgomery*, requiring states to apply *Miller* retroactively.<sup>116</sup> And practically speaking, the number of prisoners currently serving JLWOP sentences is limited geographically (and proportionally, with respect to any given prison population). Once states such as Pennsylvania, Michigan, and Louisiana establish clearer resentencing guidelines, which they must in order to comply with *Montgomery*, the burden of conducting resentencing hearings will be far outweighed by the benefit to those sentenced and the achievement of congruence in state law.

Finally, even the most sympathetic critic might attack the foregoing argument on the following grounds. Standing alone, the conclusion that compulsory education and JLWOP are incompatible is not much of a conclusion at all. If a state legislature accepts the above premises, either JLWOP or JLWOP recipients' right to education must be contrary to the goals and purposes of state-sponsored education. States could just as easily, perhaps even more easily, amend compulsory education laws to explicitly remove JLWOP recipients from the umbrella of their protection, as they could amend criminal codes to eliminate JLWOP from sentencing guidelines.<sup>117</sup> States would not only save tax dollars, but also dodge logistical hurdles associated with providing sufficient educational programming to youths in adult prisons.<sup>118</sup> An additional gloss on the argument is thus necessary to move from the soft conclusion of "incompatibility" to the firm conclusion that JLWOP, rather than indiscriminating, mandatory youth education, must lose the fight.

Even if it is simpler, for the sake of argument, to amend a state's education code than to eliminate JLWOP from the state's criminal code, it is difficult to ignore the congruence between principles underlying state compulsory education laws and the Supreme Court's snowballing commen-

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interpretation. Equating this scenario with "active" participation in democratic society is thus a stretch.

116 *Montgomery v. Louisiana*, 136 S. Ct. 718, 736–37 (2016); *see also supra* note 35 and accompanying text.

117 For a complementary argument that states can, and should, reduce the age of compulsory education for all children, see Chicosky, *supra* note 82, at 52 ("[For] future generations to be independent, productive members of society . . . states should consider strengthening vocational-technical (CTE) education, and abolishing compulsory education laws for the types of education we currently mandate at the middle and high school levels."). *But see* Messacar & Oreopoulos, *supra* note 82 (arguing that a "key element" in improving high school graduation rates and closing the achievement gap "is for all states to increase their minimum school-leaving age to 18").

118 *See* RUTH DELANEY ET AL., *VERA INST. OF JUSTICE, MAKING THE GRADE: DEVELOPING QUALITY POSTSECONDARY EDUCATION PROGRAMS IN PRISON* 13–14, 21 (2016) (noting obstacles such as adversarial partnerships between educational institutions and prisons, uncooperative corrections staff, "insufficient financial resources, lack of suitable facilities, and limited staff capacity to purchase, implement, and maintain equipment and software, and monitor advances in technologies").

tary on juvenile malleability and minors' potential for development.<sup>119</sup> Behind every state law requiring children to attend school until age seventeen or eighteen is a logical implication that state legislatures believe all children are presumptively *teachable*. Not only are children in school presumed capable of processing academic information; they are also presumed capable of "gaining a sense of responsibility and reliability" throughout their elementary- and secondary-school tenures.<sup>120</sup> This implication is remarkably compatible with reasoning used by the Supreme Court to establish categorical rules under the Eighth Amendment in the context of juvenile punishment. Recall that these cases "rested not only on common sense—on what 'any parent knows'—but on science and social science as well."<sup>121</sup>

The Court has embraced several blanket characterizations of youths throughout this body of caselaw, including a presumption that juvenile defendants have an "underdeveloped sense of responsibility."<sup>122</sup> State compulsory education laws make the same presumption. On these grounds, it seems only natural for states to permit incarcerated youths to reap the full benefits of their education, allowing them to reenter society and regain rights essential to democracy. Only in this way may incarcerated youths fulfill a primary purpose of their legally mandated education.

Furthermore, to accompany the argument that JLWOP would be more difficult to eliminate from state codes than education for JLWOP prisoners, a challenger might draw attention to the Court's decades-old finding that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."<sup>123</sup> It is indeed arguable that public safety interests, such as the need to incapacitate murderers, trump the state's interest in extending public education to youth prisoners.

However, a state's right to require all children to receive an education, and children's reciprocal rights to receive public education from the state,<sup>124</sup> may not easily be curtailed. Even before the Court held in *Yoder* that Wisconsin could not require Old Order Amish teens to attend school after reaching the age of sixteen, it required the Amish to meet the "difficult burden of demonstrating the adequacy of their alternative mode of continuing infor-

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119 See *supra* Section I.A.

120 Susan B. Bastable & Michelle A. Dart, *Developmental Stages of the Learner*, in *HEALTH PROFESSIONAL AS EDUCATOR: PRINCIPLES OF TEACHING AND LEARNING* 151, 158–73 (Susan B. Bastable et al. eds., 2011).

121 *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

122 *Id.* at 2458 (quoting *Roper*, 543 U.S. at 569) (internal quotation marks omitted).

123 *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)) (weighing the state's interest in compulsory education against petitioners' right to free exercise under the First Amendment).

124 "Nearly every state constitution requires the state to provide its children with an education," with the exception of Mississippi, the state that "causes counting confusion." Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2241 & n.1 (2003).

mal vocational education.”<sup>125</sup> One “must move with great circumspection”<sup>126</sup> to establish an interest compelling enough to override the state’s interest in requiring education for each of its citizens. Here, if a state court happened to accept the argument that JLWOP and compulsory education laws are legally incompatible, it would likely find that JLWOP loses the fight against the state’s right to require education. After all, the state may turn to a wide range of alternative incapacitation, punishment, deterrence, and retribution mechanisms available to protect the public from would-be JLWOP recipients.<sup>127</sup>

#### CONCLUSION

In sum, education law could be a new, powerful tool for youth advocates to wield in their attempts to eliminate JLWOP nationwide. Even beyond the four corners of the battle against JLWOP, the premises set forth in this Note should inform discussions about the purposes of education in the context of youth imprisonment, as well as youths’ right to education in adult prisons, which has been less than clearly defined by courts and scholars. Although it might be possible to advance other prisoners’ rights claims within the framework of the argument presented—such as a claim that all youth incarceration in adult prisons is unlawful if those prisons are unable to establish adequate educational programming, or a claim that adults reaping the benefits of educational programming within prison must have the same opportunity to reenter their communities and regain democratic rights as JLWOP recipients—those arguments are beyond the scope of this Note. Ideally, youth advocates and prison education reformers alike will continue to build on the foundations laid here, incorporating the purposes of education into discussions of school and prison program reform, and enabling state education laws to do what they do best: empower our nation’s youth.

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125 *Yoder*, 406 U.S. at 235.

126 *Id.*; see Ralph D. Mawdsley, *Religion in Public Schools*, in *KEY LEGAL ISSUES FOR SCHOOLS: THE ULTIMATE RESOURCE FOR SCHOOL BUSINESS OFFICIALS* 177, 178 (Charles J. Russo ed., 2d ed. 2013) (“[C]ourts generally limited *Yoder* to only Amish educational settings, thereby upholding state regulations under a reasonableness test.”).

127 The court might look to incapacitation mechanisms used by the eighteen states in which JLWOP is unlawful; it might also consider recent reforms to JLWOP sentencing regimes enacted by states such as California. See *supra* note 37 and accompanying text.

