

TO PUNISH OR NOT TO PUNISH? JUVENILE OFFENDERS AND MURDER
IN AID OF RACKETEERING

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Juveniles sometimes commit heinous crimes and can potentially be charged federally. Some of those crimes, like murder in aid of racketeering, mandate sentences of life imprisonment (without the possibility of parole) or death. Yet, the Supreme Court has determined that these sentences are cruel and unusual, and thus unconstitutional, as applied to juveniles. In the wake of the Court’s rulings, and in the absence of congressional action, federal courts are dividing over the propriety of prosecuting and punishing juvenile offenders for murder, especially murder in aid of racketeering. For instance, some courts hold they do not have jurisdiction. Other courts, though, permit prosecutions to go forward and subject juveniles to incarceration for a term of years, even if no term of years is explicitly authorized in the charged statutes. This potentially violates due process’s notice requirement and the separation of powers between Congress and the judiciary. This Article explains the ongoing dilemma and proposes enactment of a new statute giving clear guidance to federal courts and resolving the split among federal courts.

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INTRODUCTION

Alex, Brady, and Corey, each of whom is sixteen years old, are members of a street gang that traffics in narcotics and commits egregious acts of violence throughout their state. Dana, an adult leader of the gang, ordered the trio to kill a fellow member who had fallen out of favor. The teens followed orders, killed their fellow, and were subsequently arrested along with Dana. Given the nature of their crime and its relationship to the gang, federal authorities want to charge and punish Alex, Brady, and Corey as adults along with Dana. One of the applicable federal statutes, 18 U.S.C. § 1959, prescribes a narrow sentencing range for murder in aid of racketeering—death or life imprisonment without the possibility of parole (LWOP).¹ Yet, as a consequence of Supreme Court rulings in *Roper v. Simmons* and *Miller v. Alabama*, both sentences are *per se* unconstitutional as applied to juvenile offenders, even if the offenders are tried and convicted as adults.²

Should the federal government be allowed to prosecute Alex, Brady, and Corey for murder in aid of racketeering even though they were minors when they committed the homicide? If the teens are prosecuted, can a federal court

¹ 18 U.S.C. § 1959(a)(1).

² *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Miller v. Alabama*, 567 U.S. 460, 463 (2012).

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impose a lesser sentence on them, perhaps thirty years in prison, even though the statute does not permit it to impose any sentence less than life imprisonment on Dana? Problems created by unconstitutional provisions in federal statutes can sometimes be resolved through excision. Under these circumstances, is excision a viable option for all federal statutes? The Supreme Court's decisions heretofore leave these compelling questions unanswered.

Roper and *Miller* created dilemmas for both state and federal authorities. Many state legislatures responded by amending statutes that mandated either capital or LWOP sentences to permit lesser punishments for juveniles. In some cases, states have authorized sentences for a term of years up to life or life sentences with the possibility of parole. The United States Congress, however, has taken no action. As federal prosecutors continue charging juvenile offenders with murder under statutes that mandate one of the two harshest penalties—both of which are unconstitutional as applied to juveniles—federal courts are left to resolve the consequent quandaries, and they have not reasoned and ruled consistently.

The constitutionality of charging juveniles with murder may vary from one statute to another, but it is either permissible to charge a person who commits murder in violation of Section 1959(a)(1), or other federal provisions, before his or her eighteenth birthday or it is not. Further, a minor can either be punished by a sentence other than one(s) specifically authorized in a given statute, or a minor cannot. Federal jurisdiction and sentencing authority do not rightly vary from one federal district or circuit to the next. Yet, the initial rulings by lower federal courts evince a developing—or developed—split regarding the severability of one of the United States' most punitive statutes and its applicability for juvenile offenders.

This Article explains the divergence that is occurring and proposes a concise resolution. Part I summarizes recent changes in the constitutional boundaries for punishing juvenile offenders. Part II notes responses by state legislatures to quandaries created by the changes. Part III introduces 18 U.S.C. § 1959 and its limited sentencing options for murder. Part IV describes and critiques the reasoning of federal courts that have considered the viability of excision as an option for resolving the dilemmas. Part V contrasts the severability of Section 1959(a)(1) and Section 1111(b), which also proscribes murder. Finally, Part VI proposes a new federal statute that resolves the constitutional problem with applying Section 1959(a)(1) and similarly constructed provisions to minors.

I. SUPREME COURT RESTRICTIONS ON SENTENCING JUVENILE OFFENDERS

With its landmark decisions in *Roper v. Simmons* and *Miller v. Alabama*, the Supreme Court substantially reshaped the constitutional boundaries of punishments imposed on juvenile offenders.³ As a consequence of these rulings, the harshest potential criminal sanctions—capital punishment and LWOP—are no longer available for even the most heinous crimes committed by minors.

A. Capital Sentences for Juvenile Offenders

The death penalty is the most severe official sanction for criminal behavior.⁴ Until recently, it was available for adults and minors.⁵ Between 1642 and 1986, there were 281 confirmed executions in the United States for conduct committed by people before their eighteenth birthdays.⁶ The vast majority of the offenders committed their crimes as sixteen or seventeen-year-olds.⁷ In 1988, a plurality of the United States Supreme Court concluded that executing people who commit crimes before their sixteenth birthdays is cruel and unusual punishment in violation of the Eighth Amendment.⁸ The next year, in *Stanford v. Kentucky*, the Court affirmed the death penalty's constitutionality for sixteen or seventeen-year-olds who murder.⁹

A decade and a half after *Stanford*, the Supreme Court reconsidered its holding.¹⁰ In *Roper v. Simmons*, a seventeen-year-old was convicted of first-degree murder in Missouri, and, on the jury's recommendation, the trial judge imposed the death penalty.¹¹ There, the Supreme Court held that the Eighth Amendment proscription of cruel and unusual punishment categorically

³ *Roper*, 543 U.S. at 578; *Miller*, 567 U.S. at 463.

⁴ See *Roper*, 543 U.S. at 568 (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”).

⁵ See VICTOR L. STREIB, DEATH PENALTIES FOR JUVENILES, 54 (1987) (“Juvenile executions ended temporarily in 1964 and did not resume until 1985.”).

⁶ See *id.* at 55, 57–58.

⁷ See *id.* at 57.

⁸ See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion).

⁹ See 492 U.S. 361, 380 (1989), *abrogated by Roper*, 543 U.S. at 554.

¹⁰ *Roper*, 543 U.S. at 555.

¹¹ *Id.* at 558.

prohibits capital punishment for juvenile offenders.¹² Along the way, it observed that general differences between juveniles and adults demonstrate that juveniles cannot reliably be classified among the worst offenders.¹³ Juveniles are comparatively immature and irresponsible; are more susceptible to negative influences and outside pressures, including peer pressure; and have less well-formed character.¹⁴ No other country officially sanctions the death penalty for juveniles, and the United States joined the rest of the world community with the Court's ruling in *Roper*.¹⁵

B. Life Sentences for Juvenile Offenders

Five years after categorically banning capital punishment for juveniles, the Supreme Court began circumscribing the availability of LWOP sentences—the second harshest penalty in the United States.¹⁶ In *Graham v. Florida*, the Court held imposition of an LWOP sentence on juvenile offenders for non-homicide crimes is a *per se* violation of the Eighth Amendment.¹⁷ There, Graham, age sixteen, was convicted as an adult of armed burglary and attempted armed robbery.¹⁸ The sentencing court imposed the maximum sentence, life imprisonment, and executive clemency was Graham's only hope of release since Florida had abolished parole.¹⁹

Graham challenged his sentence, contending that, as a juvenile who did not commit or intend to commit homicide, the LWOP sentence was cruel and

¹²*Id.* at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”); *United States v. Jefferson*, 816 F.3d 1016, 1018 (8th Cir. 2016) (“*Roper* categorically prohibited imposing the death penalty on a juvenile offender.”).

¹³*Roper*, 543 U.S. at 569–70.

¹⁴*Id.*

¹⁵*Id.* at 575–77; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”).

¹⁶*Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (describing LWOP sentences as “the second most severe known to the law” and life imprisonment with the possibility of parole as “the third most severe”); *United States v. Young*, No. 19-50355, 2022 U.S. App. LEXIS 18288, at *10 (9th Cir. June 30, 2022) (Watford, J., concurring) (describing life without parole as “the law’s most severe sanction short of death”).

¹⁷*Graham v. Florida*, 560 U.S. 48, 82 (2010).

¹⁸*Id.* at 53–54.

¹⁹*Id.* at 57.

unusual.²⁰ The Supreme Court agreed and reasoned that, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.”²¹ The Court ultimately held that the Constitution categorically prohibits LWOP sentences on juvenile offenders for non-homicide crimes.²²

Two years after *Graham*, the Supreme Court restricted the availability of LWOP sentences even further. *Miller v. Alabama* involved separate cases of fourteen-year-olds receiving life sentences following state murder convictions.²³ In one case, Kuntrell Jackson remained outside while two other youths entered a store to rob it. One of the boys killed the store clerk, and the group subsequently fled.²⁴ When Jackson was convicted of capital murder, the judge imposed the mandatory minimum LWOP sentence.²⁵

In the other case, Evan Miller robbed his victim, beat him with a baseball bat, and set fire to the victim’s trailer.²⁶ He was convicted of murder in the course of arson and, like Jackson, received a mandatory minimum LWOP sentence.²⁷ The Supreme Court held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, even for homicide offenses.²⁸

Notably, the holdings in *Graham* and *Miller* do not altogether foreclose the possibility that juvenile offenders might serve life terms.²⁹ A person who

²⁰ *Id.* at 58.

²¹ *Id.* at 69.

²² *Id.* at 82.

²³ 567 U.S. 460, 465 (2012).

²⁴ *Id.* at 465–66.

²⁵ *Id.* at 466.

²⁶ *Id.* at 468.

²⁷ *Id.* at 468–69.

²⁸ *Id.* at 465, 470, 479.

²⁹ See *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016) (“Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence.”); *Miller*, 567 U.S. at 483 (“Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (“A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”); see also Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 554 (2015) (“[A]lthough *Roper* places an absolute ceiling on punishment for juveniles

commits a homicide offense before turning eighteen can receive an LWOP sentence “if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment.”³⁰ Still, these cases changed the sentencing landscape in historically significant ways for juveniles who murder. Capital punishment and mandatory LWOP sentences are generally permissible under the Eighth Amendment but are now *per se* unconstitutional as applied to minors.³¹ Consequently, the highest potential criminal sanctions for crimes committed by juveniles in the United States—like most countries in the world—are mandatory life imprisonment with the possibility of parole and, in extraordinary cases, discretionary LWOP sentences.³²

II. STATE RESPONSES AND CONGRESSIONAL INACTION

Roper, *Graham*, and *Miller* impacted state and federal prosecutions and sentences because, in many instances, the trilogy outlawed the only statutory sentencing options.³³ For example, when the Court held the death penalty categorically unconstitutional for juvenile offenders in *Roper*, more than seventy juvenile offenders were awaiting execution on death row in thirteen states, and at least seven states had statutes specifically authorizing executions for sixteen- and seventeen-year-olds.³⁴ *Graham* was decided five years later, when more than 120 juvenile non-homicide offenders were

(i.e., no death penalty for any juvenile), *Graham* and *Miller* lower the punishment ceiling further for some categories of juveniles.”)

³⁰Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021); see also United States v. Jefferson, 816 F.3d 1016, 1018–19 (8th Cir. 2016) (“The Court in *Miller* did not hold that the Eighth Amendment categorically prohibits imposing a sentence of life without parole on a juvenile offender.”); Croft v. Williams, 773 F.3d 170, 171 (7th Cir. 2014) (holding that *Miller* was inapplicable where life sentences for murder were discretionary under Illinois law); Evans-García v. United States, 744 F.3d 235, 240 (1st Cir. 2014) (concluding that *Miller* applies to mandatory life sentences for juvenile perpetrators).

³¹See *Miller*, 567 U.S. at 481.

³²Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (describing life imprisonment with possibility of parole as the third most severe punishment known to law); *Graham*, 560 U.S. at 81 (noting that the United States was the only nation that imposed life without parole sentences on juvenile non-homicide offenders).

³³Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225, 225 (2006) (“In many states, life without parole and death are the only two options when sentencing homicide offenders.”).

³⁴543 U.S. 551, 595–96 (2005) (O’Connor, J., dissenting).

serving LWOP sentences.³⁵ When *Miller* was decided in 2012, “Congress and the legislatures of 43 States ha[d] concluded that at least some [juvenile] murderers should be sentenced to prison without parole, and 28 States and the Federal Government ha[d] decided that for some of these offenders life without parole should be mandatory.”³⁶ Consequently, nearly 2,500 prisoners were serving LWOP sentences for murders they committed as minors and more than 2,000 of those sentences were mandated by a legislature.³⁷

A. Responses among the Several States

State authorities moved expeditiously to correct previously imposed sentences rendered unconstitutional by the *Roper*, *Graham*, and *Miller* triad. In most cases, they either commuted capital and mandatory LWOP sentences imposed on juvenile offenders or re-sentenced them.³⁸ Some legislatures passed statutes either automatically making juvenile offenders serving LWOP sentences eligible for parole or mandating hearings to determine whether the sentences should be imposed with or without parole eligibility.³⁹

More was required, however, to address post-*Miller* prosecutions for murder, among other offenses, where the relevant statutes mandated LWOP sentences. Some states, like Arkansas, Hawaii, Utah, West Virginia, and Wyoming, eliminated LWOP sentences for juvenile offenders altogether.⁴⁰ This remedy is broader than the Constitution requires. Several states, including Florida, Michigan, and Pennsylvania, took a more measured approach to ensuring the constitutionality of prospective sentences by

³⁵ 560 U.S. at 64; see also John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 588–605 (2016).

³⁶ 567 U.S. at 513–14 (Alito, J., dissenting).

³⁷ *Id.* at 493–94 (Roberts, C.J., dissenting).

³⁸ See Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 963 n.133 (2017); Mills *et al.*, *supra* note 35, at 552 (“In the states that retain JLWOP policies, the legislatures and courts have diminished its impact through retroactivity rulings that provide every juvenile an opportunity to receive a lesser sentence, reforms to narrow the application of JLWOP, or a combination of the two.”); see, e.g., *Davis v. Jones*, 441 F. Supp. 2d 1138, 1149 (M.D. Ala. 2006).

³⁹ See Moriearty, *supra* note 38, at 1006 (“Thus far, most of the remedies created by states simply make juvenile offenders eligible for parole under existing state parole practices.”); see, e.g., LA. CODE CRIM. PROC. ANN. art. 878.1(B) (2017).

⁴⁰ See Moriearty, *supra* note 38, at 1006 (“Since *Miller*, nine states have eliminated juvenile life without parole.”); see, e.g., ARK. CODE ANN. § 5-4-104 (West 2021); HAW. REV. STAT. § 706-656 (2014); UTAH CODE ANN. § 76-3-207.7 (West 2016); W. VA. CODE § 61-11-23 (2018); WYO. STAT. ANN. § 6-2-101(b) (West 2021).

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making LWOP sentences discretionary for minors even when the sentences are mandatory for adults.⁴¹

North Carolina and Nebraska provide good examples of statutes enacted by states to protect minors commensurate with *Roper*, *Graham*, and *Miller*. North Carolina's general murder statute, N.C. Gen. Stat. §§ 14–17, authorizes a mandatory minimum sentence of life imprisonment and a maximum sentence of death for first-degree murder.⁴² The state enacted N.C. Gen. Stat. § 15A-1340.19A in 2012 to comply with *Miller*.⁴³ It provides the following:

Notwithstanding the provisions of [General Statute] 14-17, a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part. For the purposes of this Part, 'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.⁴⁴

Similarly, Class IA felonies in Nebraska carry a mandatory LWOP sentence.⁴⁵ Revised Statute § 28-105.02 became effective in 2013 and creates an alternative minimum punishment for juvenile offenders:

Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.⁴⁶

⁴¹ See FLA. STAT. ANN. § 775.082 (LexisNexis 2019); LA. CODE CRIM. PROC. ANN. art. 878.1 (2017); MICH. COMP. LAWS SERV. § 769.25 (LexisNexis 2014); compare 18 PA. STAT. AND CONS. STAT. ANN. § 1102 (West 2012), with 18 PA. STAT. AND CONS. STAT. ANN. § 1102.1 (West 2012).

⁴² N.C. GEN. STAT. §§ 14–17(a) (West 2017).

⁴³ 2012 N.C. Sess. Laws 148; see *State v. James*, 786 S.E.2d 73, 76 (N.C. Ct. App. 2016), *aff'd as modified*, 813 S.E.2d 195 (N.C. 2018) (“The new sentencing guidelines, originally designated to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes as N.C. GEN. STAT. §§ 15A–1476 to 15A–1479, are now codified in Part 2A of Chapter 81B of Chapter 15A of the North Carolina General Statutes as N.C. GEN. STAT. §§ 15A–1340.19A to 15A–1340.19D.”).

⁴⁴ N.C. GEN. STAT. § 15A-1340.19A (West 2012).

⁴⁵ See NEB. REV. STAT. ANN. § 28-105 (LexisNexis 2019).

⁴⁶ *Id.* § 28-105.02 (LexisNexis 2013).

State legislatures acted promptly to ensure compliance with the Supreme Court's restrictions on maximum sentences for juvenile offenders. One of the most common approaches was to leave substantive criminal statutes intact while separately authorizing constitutional penalties for minors.

B. Lack of Response by the United States Congress

Like the several states, the United States Congress has enacted a number of criminal statutes that prescribe mandatory minimum LWOP sentences and might be committed by minors, especially minors recruited by street gangs and drug trafficking organizations. Many of these offenses involve extreme acts of violence like first-degree murder;⁴⁷ murder in aid of racketeering;⁴⁸ killing a witness, victim, or informant;⁴⁹ murder-for-hire;⁵⁰ and kidnapping resulting in death.⁵¹ Unlike the states, though, the United States Congress has not acted—more than a decade post-*Miller*—to ensure compliance with the Supreme Court's rulings.

Congress's failure to act is particularly egregious since, like many states, the federal system of punishment does not include the possibility of parole.⁵² All federal life sentences are effectively LWOP sentences.⁵³ Consequently, federal LWOP sentences cannot simply be commuted to life sentences with the possibility of parole. Furthermore, judges cannot unilaterally add “with the possibility of parole” language when determining punishment for juvenile offenders since parole is never authorized and there is no federal apparatus for evaluating prisoners' continuing confinement and either granting or denying parole.

Since Congress has not acted, federal courts are grappling with concerns that states have largely, if not entirely, resolved. In state prosecutions, legislatures have equipped courts with constitutional sentencing options for

⁴⁷ See 18 U.S.C. § 1111.

⁴⁸ See *id.* § 1959(a)(1).

⁴⁹ See *id.* § 1512(a).

⁵⁰ See *id.* § 1958(a).

⁵¹ See *id.* § 1201(a) (kidnapping resulting in death).

⁵² Moriearty, *supra* note 38, at 1005 (“[N]early half the states and the federal government have largely dismantled their parole systems.”).

⁵³ See *United States v. Under Seal*, 819 F.3d 715, 719 n.4 (4th Cir. 2016) (“A ‘life sentence’ in the federal sentencing scheme is the same as ‘life without possibility of parole’ because the federal government has abolished parole.”); *United States v. Bethea*, 841 F. App'x 544, 555 n.12 (4th Cir. 2021) (“Congress also abolished parole in 1984, and therefore ‘life’ and ‘life without possibility of parole’ mean the same thing in the federal system.”) (internal citations omitted)).

juvenile offenders post-*Roper*, *Graham*, and *Miller*. In federal prosecutions, however, courts must make an initial determination regarding whether they can exercise jurisdiction over minors accused of crimes that mandate LWOP sentences. Furthermore, if courts decide to exercise jurisdiction, the question of permissible punishments remains because the entire universe of explicit statutory options is constitutionally impermissible.

III. OVERVIEW OF VICAR MURDER

Extreme acts of violence by minors are not new.⁵⁴ However, youth violence tends to increase with the presence of gangs and drug trafficking organizations.⁵⁵ These groups actively recruit, groom, and dispatch minors to commit extreme acts of violence.⁵⁶ In this context, violent acts committed by

⁵⁴John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 CRIME & JUST. 365, 377 (1998) (“What emerges is a picture of increasing and more violent gang activity almost everywhere: in large cities, small cities, and towns; among African Americans, Asians, Latinos, whites, and Native Americans; and among both women and men. Gang members appear to be being recruited at younger ages and to be leaving gangs at older ages.”); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (“We are not unaware of the extent to which minors engage increasingly in violent crime.”).

⁵⁵Jeffrey J. Mayer, *Individual Moral Responsibility and The Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 944 (1993) (“The last two decades have witnessed unprecedented youth violence. Much of the youth violence has been savage. A prominent cause of the violence, according to many observers, is the supposedly dramatic expansion in the number and power of youth street gangs.”); *see, e.g.*, *United States v. Juvenile Male*, 610 F. Supp. 3d 474, 478 (E.D.N.Y. 2022) (affirming defendant’s transfer for adult prosecution where the defendant was an MS-13 gang member charged with participation at age sixteen in two VICAR murders); *Asberry v. Spearman*, No. 1:17-cv-00150-LJO-JDP (HC), 2019 U.S. Dist. LEXIS 78778, at *2 (E.D. Cal. May 8, 2019) (involving a juvenile male shooting two victims in an attempt to prove himself worthy of joining the Eastside Crips gang); *United States v. Y.A.*, 42 F. Supp. 3d 63, 79 (D.D.C. 2013) (affirming defendant’s transfer for adult prosecution where the defendant was an MS-13 gang member charged with participation at age seventeen in two VICAR murders); *Commonwealth v. Batts*, 163 A.3d 410, 415 (Pa. 2017) (discussing potential life without parole sentence for defendant convicted of first-degree murder committed when he was fourteen years old at the direction of a senior Bloods gang member); *United States v. Juvenile Male #2*, 761 F. Supp. 2d 27 (E.D.N.Y. 2011) (affirming transfer to adult status of defendant MS-13 member charged with participation at age sixteen in the VICAR murders of a woman and her two-year-old son); *United States v. Juvenile Male*, 754 F. Supp. 2d 569 (E.D.N.Y. 2010) (affirming transfer to adult status of defendant MS-13 member charged with participation at age seventeen in the VICAR murders of a woman and her two-year-old son).

⁵⁶David Jaffe, *Strategies for Prosecuting Juvenile Offenders*, 66 U.S. DEP’T OF JUST. J. FED. L. & PRAC. 91, 91 (2018) (“Juvenile offenders in transnational criminal organizations and violent street gangs are not new phenomena. Federal prosecutors and agents are learning, however, of organizations and gangs actively recruiting juveniles to commit the group’s more heinous acts, in

minors potentially violate one of several federal statutes affected by the holdings in *Roper* and *Miller*, including Title 18 U.S.C. § 1959.⁵⁷

Title 18 U.S.C. § 1959, captioned “violent crimes in aid of racketeering activity” and colloquially referred to as “VICAR,”⁵⁸ is a violent crime corollary to the more robust RICO statute.⁵⁹ In recent years, both RICO and VICAR have routinely been charged in street gang prosecutions. One consequence of this shift away from archetypal organized crime groups like La Cosa Nostra towards street gangs is increased prosecution of acts committed by minors. According to the United States Department of Justice, “[i]t is not uncommon in gang-related RICO prosecutions to encounter juvenile defendants.”⁶⁰ This is true for prosecutions of large national gangs, like MS-13, and smaller, more localized groups.⁶¹

part based upon the belief that a juvenile will receive leniency or no punishment for their crimes.”); Giuseppe A. Finelli, *Slash, Shoot, Kill: Gang Recruitment of Children and the Penalties Gangs Face*, 57 FAM. CT. REV. 243, 246–47 (2019) (discussing the reasons criminal street gangs target minors).

⁵⁷ See *United States v. Leija-Sanchez*, 820 F.3d 899, 900 (7th Cir. 2016) (“We held that 18 U.S.C. § 1959(a)(1), a part of RICO that forbids murder in aid of racketeering, applies to gangs whose activities are designed to affect commerce in the United States, even though some important acts take place abroad.”).

⁵⁸ See *United States v. Manning*, No. CR 19-00313 WHA, 2021 WL 4461599, at *1 (N.D. Cal. Sept. 29, 2021) (observing that murder in violation of 18 U.S.C. § 1959(a)(1) “is colloquially known as a VICAR murder”); *United States v. Cervantes*, No. 16-10508, 2021 WL 2666684, at *7 n.7 (9th Cir. June 29, 2021), *cert. denied*, 142 S. Ct. 730, 211 L. Ed. 2d 411 (2021) (“Because § 1959’s title is ‘Violent crimes in aid of racketeering activity,’ that section is sometimes referred to as the ‘VICAR statute.’”); *United States v. Tisdale*, No. 2:17-CR-20640-06, 2022 WL 1481850, at *2, n.1 (E.D. Mich. May 10, 2022) (“VICAR is the abbreviation for ‘Violent Crimes in Aid of Racketeering.’”); Title 18 U.S.C. § 1959 is referred to as “VICAR” and “Section 1959” throughout this article.

⁵⁹ See *United States v. Jones*, 566 F.3d 353, 361 (3d Cir. 2009); “RICO” is the common acronym for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961–1968 (1982 & Supp. IV 1986).

⁶⁰ ORGANIZED CRIME & GANG SECTION, U.S. DEP’T OF JUST., CRIMINAL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL PROSECUTORS 460 (6th rev. ed. 2016) [hereinafter RICO MANUAL]. The United States’ interest in prosecuting gang-related crimes as racketeering offenses was signaled by, among other things, the merger of the Organized Crime and Racketeering Section—the U.S. Department of Justice section formerly tasked with oversight of racketeering RICO and VICAR prosecutions—and the Gang Unit in 2008. The new section, resulting from this merger, is the Organized Crime and Gang Section.

⁶¹ For examples of gangs that recruit juveniles, see *United States v. Cruz-Ramirez*, 782 F. App’x 531, 537–38 (9th Cir. 2019) (La Mara Salvatrucha (MS-13)); *United States v. Scott*, 681 F. App’x 89, 91–92 (2d Cir. 2017) (Chain Gang); *United States v. Guerrero*, 768 F.3d 351, 354 (5th Cir.

A. Elements of VICAR Murder

Section 1959 was initially codified at 18 U.S.C. § 1952B and renumbered in 1988.⁶² The statute is legally distinct from RICO,⁶³ but it complements RICO and has a similar structure.⁶⁴ In order to establish a VICAR violation, the government must prove (1) the existence of an enterprise; (2) the enterprise's engagement in racketeering activity; (3) a predicate crime of violence; and (4) the defendant's participation in the predicate crime of violence for one of two prescribed motives.⁶⁵ It is rather easy to prove violent gangs and drug organizations are enterprises engaged in racketeering activity, so these requirements constitute a low threshold for establishing federal jurisdiction over minors who kill in association with such groups.

2014) (Texas Mexican Mafia); *United States v. Delatorre*, 157 F.3d 1205, 1207 (10th Cir. 1998) ("Albuquerque street gang"); *Williams v. United States*, No. 5:17-CV-860 (NAM), 2018 U.S. Dist. LEXIS 230463, at *1 (N.D.N.Y. Aug. 27, 2018) (Bricktown Gang).

⁶² See *United States v. Salerno*, 108 F.3d 730, 733 n.1 (7th Cir. 1997); *United States v. Mills*, 378 F. Supp. 3d 563, 570 n.4 (E.D. Mich. 2019); *Stantini v. United States*, 268 F. Supp. 2d 168, 180 (E.D.N.Y. 2003). Title 18 U.S.C. § 1959(a) reads, in part, as follows:

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both.

⁶³ See *United States v. Merlino*, 310 F.3d 137, 141 (3d Cir. 2002) (observing that RICO and VICAR are not the "same offense" for purposes of the Double Jeopardy Clause); *United States v. Ayala*, 601 F.3d 256, 265–66 (4th Cir. 2010) (concluding that VICAR murder conspiracy and racketeering conspiracy are distinct offenses under the *Blockburger* test); *United States v. Basciano*, 599 F.3d 184, 198 (2d Cir. 2010); *United States v. Garfinkle*, 842 F. Supp. 1284, 1291 (D. Nev. 1993), *aff'd sub nom.*, *United States v. Bracy*, 67 F.3d 1421 (9th Cir. 1995) ("Even if Defendant Garfinkle were acquitted of all acts of racketeering activity, a conviction under 18 U.S.C. § 1959 would still be valid.").

⁶⁴ *United States v. Pastore*, 36 F.4th 423, 429 (2d Cir. 2022).

⁶⁵ See 18 U.S.C. § 1959; *United States v. Velasquez*, 881 F.3d 314, 332 (5th Cir. 2018); *United States v. Kamahale*, 748 F.3d 984, 1007 (10th Cir. 2014); *United States v. Umaña*, 750 F.3d 320, 334–35 (4th Cir. 2014); *United States v. Jones*, 566 F.3d 353, 363 (3d Cir. 2009); *United States v. Fernandez*, 388 F.3d 1199, 1220 (9th Cir. 2004); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *United States v. Rolett*, 151 F.3d 787, 790 (8th Cir. 1998).

The federal nexus for the act of violence is contingent on its relationship to an “enterprise,” which “includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.”⁶⁶ RICO and VICAR “enterprises” are practically synonymous.⁶⁷ Each potentially includes drug trafficking organizations⁶⁸ and violent gangs⁶⁹ along with ethnic organized crime groups⁷⁰ and terrorist organizations.⁷¹ As long as such groups are involved in “racketeering activity,” violent acts committed on their behalf might qualify as VICAR predicates. Racketeering activity includes, among other things, (1)

⁶⁶ See 18 U.S.C. § 1959(b)(2).

⁶⁷ See *United States v. Millán-Machuca*, 991 F.3d 7, 21 (1st Cir. 2021) (“[W]e analyze VICAR enterprises under the same standard as RICO enterprises.”); *United States v. Saavedra*, 223 F.3d 85, 91 (2d Cir. 2000) (“[Section] 1959 is aimed at those kinds of violent crimes committed as part and parcel of membership in a RICO enterprise.”); S. Rep. No. 98–225, at 307 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3486 (“The definition is very similar to that in 18 U.S.C. 1961, the Racketeer Influenced and Corrupt Organizations (RICO) statute, which has been held to include illegal organizations such as organized crime ‘families’ as well as legitimate business organizations. The Committee intends that the term enterprise here have the same scope.”). RICO also includes a commerce requirement, but the requirement is not incorporated in the enterprise definition. See 18 U.S.C. § 1961(4) (2018) (“[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]”); *Concepcion*, 983 F.2d at 380 (“[The] definition [of VICAR] differs from the RICO definition of enterprise only in that it includes the commerce requirement, whereas in RICO that requirement appears in each of the sections stating substantive prohibitions of activities with respect to enterprises, rather than in the definition of enterprise.”).

⁶⁸ See, e.g., *United States v. Praddy*, 725 F.3d 147, 151 (2d Cir. 2013) (RICO prosecution of a member of the Raleigh Place Crew marijuana trafficking group).

⁶⁹ See, e.g., *United States v. Nieto*, 721 F.3d 357, 362 (5th Cir. 2013) (RICO prosecution of members of the Barrio Aztecas gang); *United States v. Olson*, 450 F.3d 655, 668 (7th Cir. 2006) (Almighty Latin Kings Nation); *United States v. Martinez*, 657 F.3d 811, 815 (9th Cir. 2011) (Mexican Mafia).

⁷⁰ See, e.g., *United States v. Pizzonia*, 577 F.3d 455, 467 (2d Cir. 2009) (Gambino organized crime family of La Cosa Nostra).

⁷¹ See, e.g., *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1328 (M.D. Fla. 2004) (denying motion to dismiss RICO conspiracy charge against alleged members of the Palestinian Islamic Jihad-Shiqaqi Faction); *United States v. Marzook*, 426 F. Supp. 2d 820, 821 (N.D. Ill. 2006) (denying motion to dismiss RICO conspiracy count against alleged member of Hamas).

state crimes like murder, kidnapping, gambling, robbery, bribery, extortion, and dealing in controlled substances, and (2) federal crimes of the same ilk.⁷²

Of course, not all violent crimes committed by members and associates of racketeering enterprises are VICAR offenses. There are two substantial limitations. First, in order to secure a VICAR conviction, the United States must prove that a defendant committed an enumerated crime of violence either for pecuniary gain from the qualifying enterprise or because of his or her position in relation to such an enterprise.⁷³ Second, only certain serious crimes of violence are covered by the statute. For instance, it proscribes murder, kidnapping, certain aggravated assaults and batteries, and attempts and conspiracies to commit these crimes.⁷⁴ Rape, robbery, and manslaughter, however, are not chargeable under Section 1959.⁷⁵

The underlying violent acts must constitute a “violation of the laws of any State or the United States.”⁷⁶ Consequently, VICAR, like RICO, incorporates by reference various definitions of murder from state and federal statutes forbidding conduct that generically qualifies as murder.⁷⁷ Therefore, in order to prove VICAR murder, the government must prove that a person committed an act of murder in violation of a different statute either in exchange for actual

⁷²See 18 U.S.C. § 1961(1)(B)–(G). Section 1959 adopts RICO’s definition of “racketeering activity.” See 18 U.S.C. §§ 1959(b)(1), 1961(1); *United States v. Pimentel*, 346 F.3d 285, 296 (2d Cir. 2003); *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999).

⁷³See *United States v. Nascimento*, 491 F.3d 25, 31 (1st Cir. 2007) (“VICAR requires that a defendant have committed a crime of violence in return for something of pecuniary value from, or in order to advance or maintain his position within, an enterprise affecting interstate commerce that is engaging in a pattern of racketeering activity.”); *United States v. DeLeon*, No. CR 15-4268 JB, 2021 WL 6134696, at *34 (D.N.M. Dec. 29, 2021).

⁷⁴See 18 U.S.C. § 1959(a).

⁷⁵For a discussion of rape’s absence as a VICAR predicate, see Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 L. & PSYCHOL. REV. 91 (2010).

⁷⁶See 18 U.S.C. § 1959(a).

⁷⁷*United States v. Ferriero*, 866 F.3d 107, 115 (3d Cir. 2017) (“When a federal scheme incorporates state law, whether a state-law violation qualifies as a federal predicate depends on whether the state offense falls within that crime’s generic definition.”); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016) (“Section 1959 reaches the generic conduct described therein, without concern for the labels a state may use in criminalizing the conduct that qualifies as a VICAR predicate.”); *United States v. Barbeito*, No. 2:09-cr-00222, 2010 U.S. Dist. LEXIS 55688, at *73 (S.D. W. Va. June 3, 2010) (“Murder for the purposes of a VICAR charge is whatever the state law defines it to be.”).

or anticipated remuneration from a racketeering enterprise or to gain, maintain, or increase position in a racketeering enterprise.⁷⁸

B. Penalties for VICAR Murder

VICAR provides scaled punishments based on the nature of the underlying predicate. For instance, assault either with a dangerous weapon or resulting in serious bodily injury subjects one to imprisonment for a maximum of twenty years.⁷⁹ Maiming is punishable by imprisonment for up to thirty years,⁸⁰ and kidnapping is punishable by imprisonment for a term of years up to the remainder of the defendant's life.⁸¹ VICAR also prescribes penalties for threats to commit the aforementioned crimes of violence by up to five years in prison; attempts and conspiracies to murder or kidnap by up to ten years in prison; and attempts and conspiracies to maim or assault with a dangerous weapon or resulting in serious bodily injury by up to three years in prison.⁸²

Predictably, the penalties for murder are most severe. According to 18 U.S.C. § 1959(a)(1), murder shall be punished “by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both.” Some federal statutes, like 18 U.S.C. § 1111, distinguish between first- and second-degree murder. Others, like Section 1959, do not.⁸³ As long as VICAR's other elements are satisfied, traditional categories of first- and second-degree murder qualify and are punished, as “murder.”⁸⁴ It is

⁷⁸ See *United States v. Millán-Machuca*, 991 F.3d 7, 19 (1st Cir. 2021); *United States v. Crenshaw*, 359 F.3d 977, 991 (8th Cir. 2004).

⁷⁹ See 18 U.S.C. § 1959(a)(3).

⁸⁰ See *id.* § 1959(a)(2).

⁸¹ See *id.* § 1959(a)(1).

⁸² See *id.* § 1959(a)(2)–(3).

⁸³ See *Duarte v. United States*, 289 F. Supp. 2d 487, 491 (S.D.N.Y. 2003), *aff'd*, 137 F. App'x 423 (2d Cir. 2005) (observing that 18 U.S.C. § 1959(a)(1) “draws no distinction between murder in the first and second degrees”).

⁸⁴ See *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999) (“We do not believe that section 1959 reaches only murders that were committed intentionally. Instead, it is sufficient for the government to prove that the defendant committed murder—however that crime is defined by the underlying state or federal law—and that he engaged in the *conduct* that resulted in murder, however defined, with the purpose or motivation prescribed in the statute.”); *United States v. Martinez*, No. CR 19-3725 JB, 2021 WL 926911, at *3 (D.N.M. Mar. 11, 2021) (“The Court concludes that New Mexico's second-degree murder corresponds to generic murder, and is therefore properly included in the jury instructions.”); *Owens v. United States*, 236 F. Supp. 2d 122, 138 (D. Mass. 2002) (“The

“syntactically possible” the penalty language for VICAR murder authorizes a fine without any term of incarceration,⁸⁵ but courts consistently reject arguments for this interpretation.⁸⁶ The only statutorily authorized punishments for murder under 18 U.S.C. § 1959(a)(1), then, are death and life imprisonment.⁸⁷ Consequently, LWOP is the mandatory minimum statutory penalty.⁸⁸

statute is not restricted to first or second degree murder. Accordingly, inasmuch as the charged offense’s elements are concerned, whether the jury found him guilty of second or first degree murder, [defendant] violated 18 U.S.C. § 1959(a)(1).”; U.S. DEP’T OF JUST., VIOLENT CRIMES IN AID OF RACKETEERING 18 U.S.C. § 1959: A MANUAL FOR FEDERAL PROSECUTORS 133 (2006) [hereinafter VICAR MANUAL] (“[F]or sentencing purposes it is immaterial what degree of murder is the basis for the defendant’s conviction under Section 1959 provided that the elements of the murder offense charged fall within the generic definition of murder.”).

⁸⁵ United States v. Rollness, 561 F.3d 996, 998 (9th Cir. 2009).

⁸⁶ See United States v. Under Seal, 819 F.3d 715, 720 n.5 (4th Cir. 2016) (“[W]e do not believe Congress intended a fine to be a stand-alone penalty for committing this offense.”); *Rollness*, 561 F.3d at 998 (acknowledging that the fine only interpretation of the VICAR statute is “syntactically possible” but rejecting it because of the “absurd results” that would flow from it); United States v. James, 239 F.3d 120, 126 (2d Cir. 2000) (describing the fine only interpretation of the statute as “deeply problematic” and explaining that “[t]he notion that the statute contemplates the imposition of a fine without imprisonment cannot be reconciled with the extremely harsh punishments—death or life imprisonment—otherwise available”); United States v. Carson, 455 F.3d 336, 385 n.44 (D.C. Cir. 2006) (“We, like the Second Circuit, reach the common sense conclusion that the VICAR statute does not permit a fine to be levied in lieu of imprisonment or death.”); Lucy Gray-Stack, *Miller in Federal District Court: What the Stories of Six Juvenile Lifers Reveal About the Need for New Federal Juvenile Sentencing Policy*, 44 N.Y.U. REV. L. & SOC. CHANGE 581, 625 n.380 (2021) (“Though this appears to allow a sentencing Court to impose a fine only, this construction has been rejected by various Circuits.”).

⁸⁷ See VICAR MANUAL, *supra* note 84, at 132 (“[A] defendant convicted of a predicate crime of murder may not be sentenced to a term of years. Rather, the permissible sentence is either death or a mandatory minimum of life imprisonment.”); Gray-Stack, *supra* note 86, at 625 n.380 (“The prevailing understanding is that life imprisonment or the death penalty are the only two statutorily authorized penalties.”).

⁸⁸ See 18 U.S.C. § 1959(a)(1); United States v. Gardner, No. 21-6863, 2022 U.S. App. LEXIS 7703, at *1–2 (4th Cir. Mar. 23, 2022) (reasoning that a district court could not consider a sentence of less than life imprisonment for a VICAR murder conviction); United States v. Millán-Machuca, 991 F.3d 7, 29 (1st Cir. 2021) (“[C]onviction for murder in aid of racketeering carries a mandatory life sentence.”); United States v. Mahdi, 598 F.3d 883, 897 (D.C. Cir. 2010) (“VICAR requires a minimum sentence of life for . . . murder.”); United States v. Franklin, 663 F.3d 1289, 1290 (D.C. Cir. 2011); *Carson*, 455 F.3d at 385 (“VICAR itself imposes a mandatory life sentence quite apart from anything required by the Guidelines.”); *James*, 239 F.3d at 127 (“18 U.S.C. § 1959(a)(1) carries a mandatory minimum sentence of life in prison.”); United States v. Feliz, 201 F. App’x 814, 817 (2d Cir. 2006) (observing that murder in aid of racketeering mandates either life imprisonment or the death penalty); *Under Seal*, 819 F.3d at 720 (“[L]ife imprisonment is the mandatory minimum

IV. APPROACHES TO EXCISION FOR VICAR MURDER

As the Fourth Circuit Court of Appeals noted, the Supreme Court's restrictions on sentencing for minors "affected multiple state and federal statutes [but] the Court did not proceed to this next step of a possible severability remedy."⁸⁹ Consequently, the "important constitutional question" of remedy was left unresolved.⁹⁰ VICAR murder prosecutions illustrate the potential difficulties of shaping a remedy for some federal statutes. The narrow sentencing options for these crimes create a "basic tension between *Miller*, which requires discretion at sentencing for juveniles, and Section 1959(a)(1), which provides for fixed-penalty sentencing."⁹¹

A. *Excision Generally*

When a statute has a constitutional flaw, federal courts typically will not invalidate it if a less drastic remedy will suffice. They proceed cautiously because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary."⁹² Instead of wholesale invalidation, courts typically follow one of two approaches. First, if a statute is only unconstitutional as applied to certain persons or in particular circumstances, courts will leave it intact and merely enjoin its unconstitutional applications.⁹³ The Supreme Court has explained that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."⁹⁴

punishment for this offense."); *United States v. Devine*, No. 20-4280, 2022 WL 2517206, at *9 (4th Cir. July 7, 2022); *United States v. Cordova*, 25 F.4th 817, 822 (10th Cir. 2022) (noting that the statutory minimum term for VICAR murder is life in prison); *United States v. Flores*, 572 F.3d 1254, 1268 (11th Cir. 2009) ("Life sentences are expressly permitted for RICO conspiracy and are required for VICAR murder.").

⁸⁹ *Under Seal*, 819 F.3d at 721.

⁹⁰ *Jackson v. Vannoy*, 981 F.3d 408, 415 (5th Cir. 2020) (quoting *Sealed Appellee 1 v. Sealed Juvenile 1*, No. 15-20262, 2018 WL 11335611, at *6 (5th Cir. Mar. 9, 2018).

⁹¹ *United States v. Conyers*, 227 F. Supp. 3d 280, 288 (S.D.N.Y. 2016).

⁹² *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

⁹³ *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921) ("A statute may be invalid as applied to one state of facts and yet valid as applied to another.").

⁹⁴ *United States v. Raines*, 362 U.S. 17, 21 (1960).

Second, if portions of a statute are unconstitutional, then courts prefer excision—severing the unconstitutional portions and leaving the remainder intact.⁹⁵ The traditional rule is that “the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”⁹⁶ Generally, courts may retain one portion of a statute while severing another “unless the two are so connected, or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad.”⁹⁷ For instance, the Supreme Court found “no reason to invalidate the [Federal Kidnaping Act] in its entirety simply because its capital punishment clause violates the Constitution.”⁹⁸

Completely severing the penalty language in a criminal statute, as is potentially required for VICAR murder and federal statutes with similarly narrow options for punishment, raises constitutional concerns. Due process prohibits laws that are so general that ordinary people do not have notice of the proscribed conduct or potential punishments.⁹⁹ Other statutes, like 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire), present a similar challenge, but VICAR is an excellent statute to consider when examining the efficacy of excision as a judicial remedy in this context because it is charged and litigated against juvenile offenders more often post-*Miller*. The first reported cases addressing

⁹⁵ *United States v. Booker*, 543 U.S. 220, 245 (2005); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *Dorcy v. Kansas*, 264 U.S. 286, 289–90 (1924) (“A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad.”); *Loeb v. Trustees of Columbia Twp.*, 179 U.S. 472, 490 (1900) (“As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad.”).

⁹⁶ *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

⁹⁷ *Loeb*, 179 U.S. at 490.

⁹⁸ *United States v. Jackson*, 390 U.S. 570, 572 (1968).

⁹⁹ *See Johnson v. United States*, 576 U.S. 591, 595–96 (2015) (“The Fifth Amendment provides that ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’ Our cases establish that the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’ These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.”).

severance for prosecutions where the range of statutory sentences is wholly unconstitutional as applied to juvenile actors involved alleged VICAR murders.¹⁰⁰

B. The Importance of Excision in Juvenile Prosecutions

Following the Supreme Court's decisions in *Roper* and *Miller*, people suspected of committing murder before their eighteenth birthdays began contesting federal prosecution under statutes that, like VICAR, mandate LWOP sentences for murder.¹⁰¹ In new prosecutions, the challenges first arise in transfer proceedings. Most juvenile offenders are afforded protections under the Juvenile Delinquency Act (JDA) and do not face criminal prosecution.¹⁰² In fact, minors suspected of committing federal crimes are presumptively exempted from criminal prosecution.¹⁰³

The JDA contains transfer provisions that either require or permit certain juveniles to be transferred to district courts and prosecuted as adults rather than potentially being adjudicated delinquent.¹⁰⁴ For instance, juvenile recidivists must be transferred for criminal prosecution if they commit a felonious violent crime after turning sixteen.¹⁰⁵ Juveniles fifteen years or older may be transferred when the Attorney General certifies, among other things, there is a substantial federal interest to warrant federal prosecution of a felony crime of violence.¹⁰⁶ When the Attorney General or his designee moves to transfer an alleged offender along with a qualifying certification, a

¹⁰⁰ See, e.g., *United States v. Doe*, 58 F.4th 1148, 1153 (10th Cir. 2023).

¹⁰¹ See *id.*

¹⁰² See *id.* at 1156 (“In general, children who commit crimes before the age of 18 should be tried as juveniles.”). For further discussion of the Juvenile Delinquency Act, see 18 U.S.C. § 5032 and Melvin L. Otey, *A Paradigm for the Proper Use of Pre-Majority Conduct in Prosecuting Continuing Crimes*, 28 GEO. MASON L. REV. 307, 309–15 (2020).

¹⁰³ See 18 U.S.C. § 5032; see also *United States v. Flores*, 572 F.3d 1254, 1268–69 (11th Cir. 2009) (“The district court dismissed [charges of VICAR murder, conspiracy to commit the VICAR murder, and use of a firearm during the VICAR murder] for lack of jurisdiction because [the defendant] was 16 years old at the time of the alleged murder and the government failed to get Department of Justice approval to prosecute him for these crimes, as required by the Juvenile Delinquency Act.”).

¹⁰⁴ See 18 U.S.C. § 5032 (outlining juvenile criminal prosecution transfers).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*; *United States v. Juvenile Male*, 554 F.3d 456, 461 (4th Cir. 2009); *United States v. Ceja-Prado*, 333 F.3d 1046, 1048 (9th Cir. 2003).

minor who apparently committed a crime after turning fifteen can be subjected to prosecution as an adult.¹⁰⁷

If it is possible to sever the unconstitutional punishments from Section 1959(a)(1) and still enforce its proscription on murder, then juveniles—who would normally be afforded substantial protections under the JDA—may be transferred to district courts, prosecuted as adults, and punished accordingly.¹⁰⁸ If severance is not possible, though, federal courts have no jurisdiction over the alleged offenders because VICAR murder is unenforceable against them. Courts grappling with this dilemma have reached diametrically opposing conclusions.

C. Approach #1: Excision is Impermissible for 18 U.S.C. § 1959(a)(1)

The United States Court of Appeals for the Fourth Circuit was the first federal appellate court to rule on the propriety of prosecuting someone for a homicide committed as a juvenile where the only statutory sentencing options were precluded under *Roper* and *Miller*.¹⁰⁹ In *United States v. Under Seal*, the Fourth Circuit reviewed the district court’s denial of the government’s motion to transfer a juvenile offender—seventeen years old at the time of a gang-related homicide—for prosecution as an adult for murder in aid of racketeering.¹¹⁰ The district court denied the motion because, although

¹⁰⁷ See 18 U.S.C. § 5032 (“Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile’s prior delinquency record; the juvenile’s present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile’s response to such efforts; the availability of programs designed to treat the juvenile’s behavioral problems.”); *United States v. Under Seal*, 819 F.3d 715, 718 (4th Cir. 2016).

¹⁰⁸ *United States v. Thomas*, 114 F.3d 228, 263 (D.C. Cir. 1997) (noting that juveniles proceeded against under the Juvenile Delinquency Act “receive special rights and immunities, are shielded from publicity, are confined apart from adult criminals and are protected from certain consequences of adult conviction.”); *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980) (affirming that the Juvenile Delinquency Act “creates a special procedural and substantive enclave for juveniles accused of criminal acts”); *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990) (“[The Act] provides special procedures for the prosecution of persons who are juveniles at the time a federal crime is committed.”).

¹⁰⁹ *Under Seal*, 819 F.3d at 721 (“[T]he specific issue before us appears to be one of first impression in the federal courts: that is, no case has arisen where the criminal act charged against a juvenile is alleged to have been committed after *Miller* was decided.”).

¹¹⁰ *Id.* at 717–18.

typical interest-of-justice factors supported transfer, the statutory penalties for VICAR murder—life imprisonment and death—were unconstitutional as applied to the offender.¹¹¹ The government, however, argued on interlocutory appeal the transfer should have been granted because the trial court could have sentenced the juvenile to a term of years up to life.¹¹²

The Court of Appeals rejected the government’s argument. It reasoned that, “[u]nder the plain language of Section 1959(a)(1), Congress has authorized two penalties—and only two penalties—for the crime of murder in aid of racketeering: ‘death or life imprisonment[,]’” and district courts do not ordinarily have discretion to impose a sentence outside of the range established by Congress.¹¹³ The issue on appeal, then, was whether a judicial remedy existed to permit prosecution of juvenile offenders for VICAR murder and subject them to a punishment other than those specifically authorized by Congress.¹¹⁴

According to the government, since Section 1959(a)(1) prescribes two offenses—murder and kidnapping—and their attendant penalties, merely severing the specific penalty provisions for murder in Section 1959(a)(1) was a viable solution.¹¹⁵ The resulting reconstruction would make VICAR murder punishable like VICAR kidnapping, “by imprisonment for any term of years or for life, or a fine under this title, or both.”¹¹⁶ The constitutional concerns are ostensibly obviated under this approach because both imprisonment for a term of years and a discretionary life sentence for juvenile offenders are still permissible after *Miller*.

The Fourth Circuit acknowledged that severance of the murder penalties in juvenile prosecutions potentially resolves the problems created by *Roper* and *Miller*.¹¹⁷ However, the maneuver was impermissible because it would create a new dilemma. Once each of the penalties prescribed by Congress is removed, no authorized punishments remain. The court acknowledged that excision would have been viable during the intervening period between the *Roper* and *Miller* decisions since, during that interim, mandatory life

¹¹¹ *Id.* at 718.

¹¹² *Id.* at 717, 720.

¹¹³ *Id.* at 720.

¹¹⁴ *Id.* at 721.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 723.

imprisonment remained a constitutional sentence for juveniles.¹¹⁸ After *Miller*, though, the Constitution requires severance of both sentencing options for juvenile offenders.¹¹⁹ “In short,” the court reasoned, “a criminal statute is not operative without articulating a punishment for the proscribed conduct.”¹²⁰ Thus, VICAR murder was unenforceable for the accused.¹²¹

The court declined to, in effect, substitute the kidnapping penalty in Section 1959(a)(1) for the unconstitutional murder penalties because doing so would violate the principles of severance.¹²² Section 1959(a)(1) creates two distinct crimes—murder and kidnapping—and substituting prescribed penalties of one for another “treads into the legislative role.”¹²³ The court would have to, essentially, create a punishment of its own,¹²⁴ and it concluded that this would violate due process since juveniles lacked notice post-*Roper* and *Miller* that they could be subject to imprisonment for a term of years or that the punishment provided for a different crime might apply in cases of murder.¹²⁵ This was true even though the maximum penalty following severance was lower than the authorized penalty for murder.¹²⁶

In holding the punishments for VICAR murder inseparable, the Fourth Circuit relied on a principle espoused in *United States v. Evans*.¹²⁷ There, the Supreme Court held a federal statute unenforceable for certain of its

¹¹⁸ *See id.* at 724 (“[P]ost-*Roper*, the murder in aid of racketeering statute effectively could have been excised to read: [Violators] shall be punished—(1) for murder, by ~~death or~~ life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both[.]”).

¹¹⁹ *See id.* at 721 (The result would be precisely what the United States advocated in this case, “[Violators] shall be punished—(1) for murder, ~~by death or life imprisonment, or a fine under this title, or both~~; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both[.]”).

¹²⁰ *Id.* at 723.

¹²¹ *Id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 724–25.

¹²⁵ *Id.* at 726 (“When the crime at issue in this case occurred, Congress unambiguously informed individuals that murder in aid of racketeering was punishable by death or mandatory life imprisonment. Congress provided for no other penalty.”).

¹²⁶ *Id.* at 727 (“The *only* authorized statutory punishment was mandatory life imprisonment, not an indeterminate punishment capped at life imprisonment. That the authorized penalty for murder in aid of racketeering is greater than the Government’s proposed alternate penalty may lessen, but does not obviate, the concern as to notice.”).

¹²⁷ 333 U.S. 483, 495 (1948); *see id.* at 722–23, 728.

enumerated offenses because it contained no corresponding penalties.¹²⁸ Statutes must clearly specify applicable penalties.¹²⁹ In *Under Seal*, the circuit court determined that, “while excising the penalty provisions may cure the problem created by *Miller* and *Roper*, it simultaneously creates a vacuum that renders the statute unenforceable as pertaining to juveniles because what would remain of the statute is ‘incapable of functioning independently.’”¹³⁰

The net effect of *Under Seal* is to invalidate a portion of Section 1959(a)(1) entirely as applied to juveniles. Killings may be prosecuted in state courts or under federal statutes that permit lesser sentences, but courts in the Fourth Circuit do not have jurisdiction to punish juvenile offenders for VICAR murder.¹³¹ While the Eleventh Circuit Court of Appeals has not taken a definitive position on the issue to date, it has stated that a juvenile “arguably could not be prosecuted for” VICAR murder.¹³² Although the Fourth Circuit Court of Appeals was understandably hesitant to engage in what it perceived as the legislative function of fashioning a punishment out of whole cloth,¹³³ some courts have harshly criticized the holding in *Under Seal* and declined to follow it.¹³⁴

D. Approach #2: Excision is Permissible for VICAR Murder

Months after the Fourth Circuit’s decision in *Under Seal*, the United States District Court for the Southern District of New York confronted the

¹²⁸ *Evans*, 333 U.S. at 494–95.

¹²⁹ *Beckles v. United States*, 580 U.S. 256, 262 (2017) (“[T]he Court has explained that statutes fixing sentences, must specify the range of available sentences with sufficient clarity.”) (internal quotations and citations omitted).

¹³⁰ 819 F.3d at 723.

¹³¹ See *United States v. Reyes-Canales*, No. JKB-17-0589, 2019 U.S. Dist. LEXIS 174108, at *5–6 (D. Md. Oct. 4, 2019) (“An individual may not be prosecuted in federal court for crimes committed as a juvenile if the mandatory maximum penalties for those crimes would be unconstitutional as applied to a juvenile.”) (citing *Under Seal*, 819 F.3d at 728)).

¹³² *Alfaro-Granados v. United States*, No. 20-11581-G, 2020 U.S. App. LEXIS 27520, at *7 (11th Cir. Aug. 27, 2020).

¹³³ See *Evans*, 333 U.S. at 486 (“In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.”).

¹³⁴ See, e.g., *United States v. Conyers*, 227 F. Supp. 3d 280, 290 (S.D.N.Y. 2016) (“It would be to seriously lose sight of the forest for the trees to argue that Congress would prefer the Court to invalidate Section 1959 entirely as applied to juveniles who commit such murders than to allow the sentencing court discretion to sentence such defendants to a term less than life.”); *United States v. Lee*, No. 19 C 641, 2022 U.S. Dist. LEXIS 136967, at *10–11 (N.D. Ill. Aug. 2, 2022) (declining to follow *Under Seal* and quoting *Conyers*).

same issue in *United States v. Conyers* and did precisely what the Fourth Circuit found it could not do to permit enforcement of VICAR murder against minors.¹³⁵ There, the defendant was charged with beating a rival gang member to death.¹³⁶ Relying on *Under Seal*, he moved to dismiss the murder charge, arguing it was unconstitutional as applied to him.¹³⁷ As the district court framed the issue, “[t]he question presented [was] whether, in light of *Miller*, there is any constitutionally valid portion of Section 1959(a) as applied to juveniles that will function independently and ‘in a manner consistent with the intent of Congress.’”¹³⁸

The United States again contended that minors are susceptible to VICAR murder prosecutions post-*Miller*.¹³⁹ However, it offered a modified version of the solution rejected by the Fourth Circuit in *Under Seal*.¹⁴⁰ This time, instead of arguing to replace VICAR murder penalties with those provided for VICAR kidnapping in the same sub-section, the government argued for application of the penalties in two other statutes, 18 U.S.C. §§ 3559(a) and 3581.¹⁴¹ This move would achieve the result previously advocated by the government in *Under Seal*—a juvenile offender would face incarceration for a term of years up to life in prison.¹⁴²

The district court rejected the argument for two reasons. First, the approach “would require the Court to excise the unconstitutional penalty in Section 1959 and then add to the statute two other provisions that do not currently apply.”¹⁴³ Second, both the legislative history and cases interpreting 18 U.S.C. § 3581 “make clear that Congress did not intend Section 3581 to

¹³⁵ *Conyers*, 227 F. Supp. 3d at 291.

¹³⁶ *Id.* at 282.

¹³⁷ *Id.* at 282–83.

¹³⁸ *Id.* at 285.

¹³⁹ *Id.* at 283.

¹⁴⁰ *Id.* at 290 (“[T]he Court believes that the reasoning in *Under Seal* rules out the Government’s argument in this case.”).

¹⁴¹ *Id.* at 283–84. Title 18 U.S.C. § 3559(a) provides, in part, that “[a]n offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—(1) life imprisonment, or if the maximum penalty is death, as a Class A felony.” Among other things, 18 U.S.C. § 3581 authorizes a term of imprisonment for “the duration of the defendant’s life or any period of time” for a Class A felony, the duration of the defendant’s life or any period of time.

¹⁴² *Conyers*, 227 F. Supp. 3d at 283–84.

¹⁴³ *Id.* at 290.

be used as a default penalty provision in the manner advocated by the Government.”¹⁴⁴

Although the court acknowledged that *Miller* makes the mandatory life sentence provision unconstitutional as applied minors, it agreed with the government that this did not invalidate all applications of VICAR murder for juvenile offenders.¹⁴⁵ It reasoned that, because *Miller* did not preclude discretionary life sentences for acts committed by juveniles, “a juvenile who commits a sufficiently heinous act and who has a sufficiently severe history of criminal conduct may be constitutionally sentenced under Section 1959(a), as enacted by Congress, so long as the Court is not bound by Section 1959(a)’s mandatory minimum.”¹⁴⁶ In its estimation, VICAR creates “a separable minimum and maximum penalty” for juveniles who murder, and the maximum permissible penalty for juveniles—life imprisonment—remains valid so long as it is not mandatory.¹⁴⁷

The district court permitted prosecution of the VICAR murder charge because it did not believe Congress preferred invalidating the provision as applied to juveniles rather than redefining its penalty provisions.¹⁴⁸ The *Conyers* opinion acknowledges the speculation inherent in fashioning a constitutional penalty after excision:

The possibility that Congress might choose a different scheme than the Court can provide in light of *Miller* is inherent in severance analysis and reflects Congress’s legislative authority. The Court’s task is to consider whether the statute, as constitutionally construed, will serve Congress’s “basic purposes” and is consistent with—not necessarily perfectly reflective of—Congress’s intent had it legislated with *Miller* in mind.¹⁴⁹

¹⁴⁴ *Id.* at 291.

¹⁴⁵ *Id.* at 290.

¹⁴⁶ *Id.* at 287.

¹⁴⁷ *Id.* at 287–88.

¹⁴⁸ *Id.* at 290 (“It would be to seriously lose sight of the forest for the trees to argue that Congress would prefer the Court to invalidate Section 1959 entirely as applied to juveniles who commit such murders than to allow the sentencing court discretion to sentence such defendants to a term less than life.”).

¹⁴⁹ *Id.* at 288; *see also* *United States v. Evans*, 333 U.S. 483, 486–87 (1948) (“But given some legislative edict, the margin between the necessary and proper judicial function of construing

According to the district court, *Miller* still permits discretionary life sentences for juveniles, and “[t]radition and historical practice suggest that in the absence of more specific guidance, authorization of a maximum penalty permits the Court to sentence a defendant to any term of years up to the maximum authorized penalty.”¹⁵⁰

The court concluded that its reading of Section 1959(a)(1) is consistent with congressional intent since the VICAR statute, as originally codified at 18 U.S.C. § 1952B, prescribed the same sentencing range for kidnapping and murder—“imprisonment for any term of years or for life or a fine of not more than \$50,000, or both[.]”¹⁵¹ This former language was thought to corroborate the conclusion that imprisonment for a term of years up to life is permissible following severance of life imprisonment as the mandatory minimum punishment.¹⁵²

Under *Conyers*, VICAR murder still applies to minors who kill on behalf of, or in association with enterprises like gangs and drug trafficking organizations, but without a mandatory minimum sentencing provision.¹⁵³ While no federal circuit courts have endorsed *Conyers*’ reasoning in VICAR murder prosecutions, the Fifth Circuit Court of Appeals has endorsed its application to another murder statute, 18 U.S.C. § 1111(b), and would presumably apply it in VICAR murder cases as well.¹⁵⁴ This, of course, would bring the Fifth Circuit into direct conflict with the Fourth Circuit.

The approach taken by the United States District Court for the Southern District of New York in *Conyers* is inviting because it creates a constitutional sentencing option for juvenile offenders, but it is not wholly satisfactory. First, it is based on a significant fiction. Section 1959(a)(1) does not contain three penalty provisions for murder—(1) a minimum sentence of life imprisonment; (2) a maximum sentence of life imprisonment; and (3) death.¹⁵⁵ Rather, the sub-section authorizes only two penalties for murder—

statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree.”).

¹⁵⁰ *Conyers*, 227 F. Supp. 3d at 289.

¹⁵¹ *Id.*; 18 U.S.C. § 1959 amended by 18 U.S.C. § 1952(b) (Supp. II 1984).

¹⁵² *Conyers*, 227 F. Supp. 3d at 289 (“Congress has previously considered and enacted the exact sentencing scheme the Court adopts today. The fact that Congress previously endorsed a penalty of up to life imprisonment in Section 1959(a) is strong evidence that the Court’s approach is consistent with the basic purposes of the statute and is preferable to invalidating the statute entirely.”).

¹⁵³ *Id.* at 291.

¹⁵⁴ *United States v. Bonilla-Romero*, 984 F.3d 414, 419 (5th Cir. 2020).

¹⁵⁵ 18 U.S.C. § 1959.

death and life imprisonment without the possibility of parole.¹⁵⁶ When the Supreme Court determined that both punishments are unconstitutional for minors, no third option remained.

The district court considered the sentencing language from 18 U.S.C. § 1952B, which authorized imprisonment for a term of years, an endorsement of its conclusion.¹⁵⁷ However, this rationale ignores the fact that, upon further reflection, Congress intentionally removed judicial discretion regarding the term of incarceration following VICAR murder convictions.¹⁵⁸ By mandating an LWOP sentence or death, Congress certainly did not intend to afford trial courts the broad discretion that comes with a statutory maximum sentence of life imprisonment alone.¹⁵⁹ As the court acknowledged, “[T]he basic purpose of Section 1959 is to prohibit murder in furtherance of violent organized crime and to deter such murders *by providing for the harsh penalty of life imprisonment.*”¹⁶⁰

Second, the district court did not address the due process concerns articulated by the Fourth Circuit Court of Appeals and necessarily inherent in severing statutory penalties. Presumably, it declined to do so because it did not wholly invalidate the “life imprisonment” language for murder in violation of Section 1959(a)(1).¹⁶¹ The holding in *Conyers*, though, requires reimagining the language in an unprecedented manner that does not give notice to minors. As the sub-section is written, it simply “does not authorize any punishment that may be constitutionally imposed on juvenile offenders.”¹⁶² Under the circumstances, imposing any sentence other than mandatory life imprisonment or death, both of which are unconstitutional as applied to juveniles, potentially violates due process’s notice requirement.¹⁶³

¹⁵⁶Jackson v. Vannoy, 981 F.3d 408, 414 (5th Cir. 2020) (“That statute provides for only two punishments: death or life without parole.”).

¹⁵⁷*Conyers*, 227 F. Supp. 3d at 289.

¹⁵⁸United States v. Under Seal, 819 F.3d 715, 720 (4th Cir. 2016).

¹⁵⁹In contrast, RICO does not provide minimum sentences for violations. See 18 U.S.C. § 1963(a) (“Whoever violates any provision of [18 U.S.C. § 1962] shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both[.]”).

¹⁶⁰*Conyers*, 227 F. Supp. 3d at 289–90 (emphasis added).

¹⁶¹*Id.* at 289.

¹⁶²Jackson v. Vannoy, 981 F.3d 408, 414 (5th Cir. 2020).

¹⁶³United States v. Batchelder, 442 U.S. 114, 123 (1979) (“[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.”)

V. CONTRASTING EXCISION FOR 18 U.S.C. § 1111(B)

Section 1959 is not the only federal statute affected by *Roper* and *Miller*. Others, including 18 U.S.C. § 1111, are relatively easier to excise. The Fifth Circuit Court of Appeals was the second federal appellate court to address the propriety of charging a juvenile offender with murder where the statutory penalties are completely proscribed.¹⁶⁴ In *United States v. Bonilla-Romero*, the defendant pled guilty to participation in a gang-related murder as a seventeen-year-old in violation of Section 1111(b), which requires, in part, “[w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.”¹⁶⁵

The United States initiated proceedings against the defendant under the Juvenile Delinquency Act, then moved to transfer him for adult criminal prosecution.¹⁶⁶ The district court granted the transfer, and he pled guilty pursuant to a plea agreement.¹⁶⁷ However, he objected to the presentence report determination that he was subject to a term of imprisonment up to and including life.¹⁶⁸ He contended that juvenile offenders may not constitutionally receive the only authorized punishments for first-degree murder under Section 1111(b)—mandatory life imprisonment or death.¹⁶⁹ Despite the defendant’s objection, the district court sentenced him to 460 months in prison and five years of supervised release.¹⁷⁰

The defendant appealed and challenged his sentence, claiming, *inter alia*, the district court fashioned an unauthorized punishment for first-degree murder committed by juveniles in violation of the Due Process Clause’s notice requirement and the separation-of-powers doctrine.¹⁷¹ These are essentially the same reasons the Fourth Circuit Court of Appeals declined to find a constitutionally valid punishment for VICAR murder as applied to minors in *Under Seal*.¹⁷² Unlike Section 1959(a)(1), however, Section

¹⁶⁴ *United States v. Bonilla-Romero*, 984 F.3d 414, 418 (5th Cir. 2020).

¹⁶⁵ *Id.* at 416; 18 U.S.C. § 1111(b).

¹⁶⁶ *See Bonilla-Romero*, 984 F.3d at 416; Under the Juvenile Delinquency Act, minors suspected of committing federal crimes are presumptively exempted from criminal prosecution. However, the exemption is not absolute. The Act contains both mandatory and discretionary transfer provisions. *See* 18 U.S.C. § 5032 (outlining juvenile criminal prosecution transfers).

¹⁶⁷ *See Bonilla-Romero*, 984 F.3d at 416.

¹⁶⁸ *Id.* at 417.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 418.

¹⁷¹ *Id.*

¹⁷² *United States v. Under Seal*, 819 F.3d 715, 725–26 (4th Cir. 2016).

1111(b) recognizes two categories of murder. It provides “[w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.”¹⁷³

The Fifth Circuit offered two rationales for concluding that severance was appropriate. First, it read the first-degree murder penalty provision of Section 1111(b) just as the Southern District of New York District Court read Section 1951(a)(1) in *Conyers*.¹⁷⁴ After *Roper*, the statutory maximum and minimum for first-degree murder was life imprisonment. *Miller* prohibited application of the mandatory minimum life provision, but not the statutory maximum of life imprisonment.¹⁷⁵ According to the Fifth Circuit, then, “excising the mandatory minimum nature of the life sentence is all that is needed to satisfy the constitutional issue for juveniles under § 1111.”¹⁷⁶

Alternatively, the court asserted that the same result could be achieved by substituting the authorized penalty for second-degree murder—also contained in Section 1111(b)—in punishing first-degree murder since second-degree murder is a lesser-included offense of first-degree murder.¹⁷⁷ For each offense, Congress prescribes punishment for unlawful killings with malice aforethought, but the statute requires a higher penalty for murders that occur under enumerated aggravating circumstances.¹⁷⁸ The Fifth Circuit found it permissible to apply the penalty for a lesser-included offense in the same sub-section to an offense that would otherwise have no penalty provision but stated that the approach was untenable for VICAR murder since kidnapping is not a lesser-included offense of murder.¹⁷⁹ The court agreed

¹⁷³ 18 U.S.C. § 1111(b).

¹⁷⁴ *Bonilla-Romero*, 984 F.3d at 419; *United States v. Conyers*, 227 F. Supp. 3d 280, 291 (S.D.N.Y. 2016).

¹⁷⁵ *Bonilla-Romero*, 984 F.3d at 419.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See* 18 U.S.C. § 1111(a) (“Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.”).

¹⁷⁹ *Bonilla-Romero*, 984 F.3d at 420 (“*Under Seal* is also distinguishable from the instant case. As discussed above, an offense that meets the elements for first-degree murder would also satisfy

with *Under Seal* that “[g]rafting the kidnapping penalty onto a murder offense would ‘run[] counter to the Constitution’s guarantee of due process’ because the statute does not provide notice that any other penalty could be applicable for the murder.”¹⁸⁰

The Fifth Circuit’s observation about the difference between VICAR murder and murder under 18 U.S.C. § 1111(b) is important for understanding the limits of severance in this context. Section 1111(b) contains penalties for both first-degree murder and a lesser-included offense—second-degree murder.¹⁸¹ In that case, when a person is charged and convicted of first-degree murder, the elements of second-degree murder will necessarily have been charged and proven as well.¹⁸² This satisfies the notice of charges required for due process because “an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”¹⁸³

Moreover, when a court severs the unconstitutional penalties in prosecutions of juvenile offenders for first-degree murder, the penalties for second-degree murder remain.¹⁸⁴ While both punishments for first-degree murder are prohibited under the Eighth Amendment, the punishments for second-degree murder include imprisonment “for any term of years or for life.”¹⁸⁵ Under these circumstances, a person who is charged with first-degree murder has fair notice that he or she might be subject to imprisonment for a term of years or a discretionary life sentence.

Title 18 U.S.C. § 1959(a)(1), like Section 1111(b), prescribes two crimes. However, unlike Section 1111(b), the second offense in Section 1959(a)(1)—kidnapping—is not a lesser-included offense of the first.¹⁸⁶ A VICAR murder charge alleges different elements than a VICAR kidnapping charge, a subsequent murder conviction will not necessarily require proof of

the elements for second-degree murder. With that aspect of the statutory scheme in mind, the statute provides notice that the conduct of murder could result in a term of imprisonment for any term of years.”).

¹⁸⁰ *Id.*

¹⁸¹ 18 U.S.C. § 1111(b).

¹⁸² *Bonilla-Romero*, 984 F.3d at 419.

¹⁸³ *Hamling v. United States*, 418 U.S. 87, 117 (1974).

¹⁸⁴ *Bonilla-Romero*, 984 F.3d at 418.

¹⁸⁵ 18 U.S.C. § 1111(b).

¹⁸⁶ Compare 18 U.S.C. § 1111(b) with 18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 1201(a). See generally *Schmuck v. United States*, 489 U.S. 705, 716 (1989).

kidnapping, and a person convicted of murder does not have notice that he or she might be subject to the penalties for kidnapping.¹⁸⁷ Consequently, severing the penalties for VICAR murder leaves no mechanism for enforcing the prohibition when juveniles engage in qualifying conduct.¹⁸⁸ Therefore, excision of the penalties for VICAR murder is not a viable option for holding juvenile offenders culpable.¹⁸⁹ The approach raises serious due process concerns that are not present with excision in the Section 1111(b) context.¹⁹⁰

VI. PROPOSED STATUTORY SOLUTION

Courts face a unique challenge when trying to apply VICAR to juveniles who commit murder after *Roper* and *Miller* rendered the only prescribed penalties—death and life imprisonment without the possibility of parole—unconstitutional. Of course, other statutes are affected by these decisions as well. However, the structure of Section 1959(a)(1) makes excision a less-viable remedy for VICAR murder than it is for some other statutes.

The United States Congress is responsible for promulgating constitutional penalties for the crimes it creates. Because the Supreme Court determined that death and mandatory life sentences are unconstitutional for crimes committed by minors, the universe of authorized punishments for some offenses is completely inapplicable for people who commit crimes before their eighteenth birthdays. Congress has had more than a decade to act and needs to follow the example set by its state counterparts. Several state legislatures moved promptly to rectify unconstitutional sentencing

¹⁸⁷ Compare 18 U.S.C. § 1111(b) with 18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 1201(a).

¹⁸⁸ Cf. *Redding v. State*, 85 N.W.2d 647, 652 (Neb. 1957) (“A penalty is a necessary part of a statutory offense. One may not be convicted for a purported criminal offense where the statute provides no penalty for its violation.”).

¹⁸⁹ Cf. *Mil-Ray v. EVP Int’l, L.L.C.*, No. 3:19-cv-00944-YY, 2020 U.S. Dist. LEXIS 107588, at *18 n.3 (D. Or. Mar. 17, 2020) (“Here, severing the penalty provisions of O.R.S. 646A.097 would leave no other penalty to enforce the purpose of the statute. The ‘remaining parts’ would be ‘incomplete and incapable of being executed in accordance with the legislative intent.’ O.R.S. 174.040(3). As such, the penalty provisions cannot be successfully severed.”).

¹⁹⁰ See *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in [the Supreme Court’s] constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”); *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (“[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.”).

provisions, but Congress “has taken no action to alleviate the sentencing conundrum now existing in section 1959(a)(1) as applied to juveniles.”¹⁹¹

Federal courts should not have to preempt the legislative process by gerrymandering the most punitive federal statutes or fashioning penalties to permit enforcement. When a statute lacks a constitutional penalty, courts must speculate regarding what Congress intends.¹⁹² The legislature is uniquely qualified to fix sentencing boundaries and, when necessary, to revise the statutes it enacts. The longer Congress fails to do its job, the more federal courts will be pressed to speculate regarding the punishments it prefers post-*Roper* and *Miller*. Greater judicial speculation will likely beget more judicial disagreements.

Congress can resolve the problem in multiple ways. First, it could rewrite the VICAR statute so the penalty provision for subsection (a)(1) provides punishments, as it originally did, “for murder or kidnaping, by imprisonment for any term of years or for life or a fine of not more than \$50,000, or both.” This would make life sentences for VICAR murder discretionary and allow the penalties to apply equally to both adult and juvenile defendants.¹⁹³ An amendment like this would resolve the discrete constitutional problem. Yet, it is broader than is absolutely necessary and will likely be disfavored since Congress provided the current narrow language—“for murder, by death or life imprisonment, or a fine under this title, or both”—in 1994. That change evinces a considered legislative judgment to punish VICAR murder more severely than VICAR kidnapping and to limit judicial discretion.

Second, Congress could leave the current mandatory minimum LWOP language in place while adding alternative sentencing language for juveniles. The resulting language in Section 1959(a)(1) might read as follows: “For murder, by death or life imprisonment if the defendant was at least eighteen years old at the time of the offense, or a fine under this title, or both; for murder, if the defendant was less than eighteen years old at the time of the offense, by imprisonment for any term of years or for life, or a fine under this

¹⁹¹United States v. Under Seal, 819 F.3d 715, 721 (4th Cir. 2016).

¹⁹²United States v. Booker, 543 U.S. 220, 246 (2005) (“We seek to determine what ‘Congress would have intended’ in light of the Court’s constitutional holding.”); United States v. Evans, 333 U.S. 483, 495 (1948) (“It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.”).

¹⁹³See *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (“We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”).

title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both.” This approach is narrowly tailored to address the specific dilemma created by applying mandatory LWOP sentences to juveniles in VICAR prosecutions. However, it is also without precedent in the United States Code since no other statutes are structured in this way.

Perhaps more importantly, by inserting language of this kind in one subsection of one federal statute, Congress would invite more work for itself. It would need to insert analogous clauses into all federal statutes where the mandatory minimum LWOP provisions could not be readily severed because the proscribed offenses are not contained in the same section or sub-section with a lesser-included offense. Many statutes are either structured like 18 U.S.C. § 1111(b) or explicitly adopt the punishment framework provided in Section 1111(b).¹⁹⁴ Presumably, they would also be operable following excision. Several others, though, are like Section 1959(a)(1), where the crime affected by *Roper* and *Miller* is not coupled with a lesser-included offense.¹⁹⁵ Each of these statutes requires immediate attention.

The simplest and most comprehensive solution leaves Section 1959 and all other statutes defining federal crimes untouched. Like some state legislatures, Congress should enact a new statute that limits sentences for juvenile offenders to a maximum term of life imprisonment. Title 18 U.S.C. §§ 3581–3586 deal generally with imprisonment.¹⁹⁶ A new section—Title 18 U.S.C. § 3581.1—would contain the alternative language and read substantially as follows: “Notwithstanding any other provision of law, the maximum sentence for any person convicted of an offense for which the minimum penalty would otherwise be life imprisonment shall be imprisonment for any term of years or for life if the offense was committed when such person was under the age of eighteen years.”

If Congress prefers, the new proposed statute could include a mandatory minimum sentence. In that case, the proposed statute might read: “Notwithstanding any other provision of law, any person convicted of an offense for which the minimum penalty would otherwise be life imprisonment shall be imprisonment for not less than thirty years if the offense was committed when such person was under the age of eighteen

¹⁹⁴See, e.g., 15 U.S.C. § 1825(2)(c); 18 U.S.C. §§ 115(b)(1)(3), 351(a), 1114(a)(1), 1116(a), 1118–1121; 21 U.S.C. §§ 461(c), 675, 1041.

¹⁹⁵See, e.g., 18 U.S.C. §§ 1958(a), 175c(c)(3), 229A, 1203, 1651–1653, 1655, 1661, 1751(a).

¹⁹⁶See, e.g., 18 U.S.C. §§ 3581–3586.

years.” These suggestions include language substantially similar to state provisions enacted to redeem statutes with otherwise unconstitutional penalties for juvenile offenders.¹⁹⁷

There are several benefits to promulgating a version of the proposed statute. First, it is the most efficient solution because it allows Congress to simultaneously correct the potential excesses of all current and future federal statutes. This approach requires much less effort than would be needed to individually scrutinize and amend dozens of federal statutes that currently have a mandatory minimum LWOP sentence. It also obviates the continual need to wrestle with sentencing provisions for new statutes that might be enacted. If the proposed statute were enacted, Congress could promulgate new criminal statutes without individually accounting for their constitutionality as applied to juveniles.

Second, the omnibus-style language in the proposed 18 U.S.C. § 3581.1 will relieve federal courts of a burden that rightly belongs to Congress. Legislatures are responsible for affixing constitutional sentencing boundaries for crimes they define. Courts do the best they can in the absence of clear guidance from Congress, but they must necessarily speculate when no permissible punishments are provided. Regarding VICAR murder, for instance, “reasonable minds could differ as to what Congress would intend. . . . Congress could choose from a spectrum of potential penalties and different penalty schemes, including a lesser mandatory minimum or mandatory sentencing factors designed specifically in light of *Miller*.”¹⁹⁸

Courts prefer that Congress establishes sentencing limitations.¹⁹⁹ If nothing else, this helps courts avoid the tortured eisegesis sometimes required to give effect to toothless statutory prohibitions. It also takes away an unnecessary basis for circuit splits like the one that is occurring, and

¹⁹⁷ See, e.g., NEB. REV. STAT. ANN § 28-105.02 (LexisNexis 2013) (“Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years’ imprisonment.”); N.C. GEN. STAT. § 15A-1340.19A (West 2012) (“Notwithstanding the provisions of G.S. 14-17, a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part. For the purposes of this Part, ‘life imprisonment with parole’ shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.”).

¹⁹⁸ *United States v. Conyers*, 227 F. Supp. 3d 280, 291 (S.D.N.Y. 2016).

¹⁹⁹ See *id.* at 289 (“In the absence of more specific (and constitutional) guidance from Congress, the Court treats the authorization of a maximum penalty as providing discretion to the sentencing judge to sentence anywhere between no penalty and the maximum penalty.”).

potentially expanding, around application of VICAR murder to juveniles. Even when courts sever unconstitutional statutory provisions in order to allow the remaining portions to stand, their “severability analysis does not foreclose Congress from pursuing alternative responses to the problem.”²⁰⁰ Congress needs to respond here.

CONCLUSION

The Supreme Court’s decisions in *Roper* and *Miller* dramatically changed the boundaries for sentencing juvenile offenders. The cases hold that the death penalty and mandatory LWOP sentences, respectively, violate the Eighth Amendment’s Cruel and Unusual Punishment Clause, as applied to minors. Hence, people who commit the most serious crimes before their eighteenth birthdays are categorically protected from the two most severe punishments. In protecting juveniles, though, the Supreme Court wholly invalidated the lone sentencing options in a myriad of state and federal statutes. State legislatures promptly responded by amending existing statutes or enacting new ones to provide constitutional sentencing options for minors where none remained after *Roper* and *Miller*. The United States Congress, however, never responded.

Because of Congress’s inaction, federal courts are left to wrestle with either declining jurisdiction over crimes like murder in aid of racketeering or constructing sentencing ranges on their own. Some courts, like the Fourth Circuit Court of Appeals have declined jurisdiction. Other courts, like the United States District Court for the Southern District of New York, have reimagined the meaning of a mandatory life sentence in order to retain jurisdiction. Neither of these outcomes is ideal. On the one hand, punishing serious crimes becomes more difficult, albeit not impossible. On the other hand, though, courts impinge on the legislative function of creating sentencing boundaries and deprive minors of the notice required by due process.

Congress, not the courts, should resolve this dilemma. It can modify each of the individual statutes affected by *Roper* and *Miller*, or it can enact a new statute to fill in the gaps created by the cases. Enacting a new statute that prescribes punishment for juveniles for a term of years or for life in lieu of mandatory minimum LWOP sentences is the simplest legislative remedy, and there is no excuse for Congress neglecting to promulgate such a statute. Until legislative action is taken, federal courts should follow the Fourth Circuit in

²⁰⁰Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

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declining to do Congress's job. More judicial attempts to create constitutional penalties for juveniles where none remain requires the courts to perform a task delegated to Congress, discourages Congress from doing its duty, and invites further division among federal courts.