DISTURBING THE FINALITY OF A SENTENCE: HOW STATES WITH HIGH RATES OF JUVENILE LIFE WITHOUT PAROLE ("JLWOP") RESPONDED TO *MONTGOMERY V. LOUISIANA*

*Alexandra Fahringer**

I. INTRODUCTION

It is no secret that the American criminal justice system favors finality over disturbance of a sentence. As the social and legal atmospheres change, however, developments in constitutional law require sentences to be revisited.[1] In 2012, in *Miller v. Alabama*, the Supreme Court proclaimed that mandatory sentencing of life without parole for juveniles is considered cruel and unusual punishment under the Eighth Amendment and is therefore unconstitutional.[2]

After *Miller,* state courts struggled to determine whether this rule applied retroactively.[3] The answer to the question lied in determining whether this change was a substantive or procedural rule of constitutional law.[4] If the change was substantive, states would be required to apply the rule retroactively. However, if the change was procedural, states would apply the rule prospectively. Unsurprisingly,

* J.D., May 2018, Rutgers Law School.

1. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 470–73 (2012); *id.* at 471 (stating that "children are constitutionally different from adults for purposes of sentencing" because they have lessened culpability and are less likely to be deterred by sentences (citing Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 571 (2005))).

2. *Id.* at 479–80; *see infra* Section III.

3. *See* Commonwealth v. Cunningham, 81 A.3d 1, 11 (Pa. 2013) (Castille, C.J., concurring) (noting that "the *Miller* Court did not address the inevitable aftermath in states, such as Pennsylvania, with an existing (and substantial) roster of defendants currently serving [life without parole] for murders committed while they were juveniles.").

4. *See* Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

states with high rates of juvenile lifers[5] were reluctant to interpret this change as substantive.[6]

However, in 2016, the Supreme Court revisited this issue in *Montgomery v. Louisiana*, specifically addressing the retroactivity of juvenile lifers who were sentenced before 2012.[7] The Court held that *Miller* created a new rule of substantive constitutional law, which therefore needed to be applied retroactively.[8]

After this ruling, states which previously refused to apply *Miller* retroactively were forced to take measures to ensure that all the juveniles in their state, who had previously been sentenced to life without parole, would receive resentencing in accordance with *Miller*.[9] For a majority of the states, the *Montgomery* holding was a non-issue since the state either outlawed life without parole for juveniles,[10] did not have a mandatory sentencing statute,[11] or did not incarcerate any juvenile lifers.[12] A

5. I will use the term "juvenile lifers" throughout this article to refer to inmates who committed a crime before their eighteenth birthday and are currently serving a life without parole sentence. This article will not address any issues pertaining to those juveniles who committed the crime before their eighteenth birthday who are serving *de facto* life sentences or life with parole sentences. *See* AM. CIVIL LIBERTIES UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 2 (2016), https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlinesingle.pdf#page=87 (explaining "12 states alone" have over 8,300 inmates "serving sentences of at least 40 years or life with parole" who were sentenced as juveniles).

6. *See, e.g.*, Cunningham, 81 A.3d at 9–10. However, California did apply *Miller* retroactively. *See infra* Section IV.

7. 136 S. Ct. 718, 725 (2016).

8. *Id.* at 729.

9. *See infra* Section IV.

10. *See, e.g.*, KAN. STAT. ANN. § 21-6618 (2011). Kansas outlawed life without parole for anyone under eighteen in 2011. *Id.*

11. *See* ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 28 (2012), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf. States with mandatory JLWOP sentencing are: "Alabama, Arkansas, Delaware, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Carolina, and South Dakota." *Id.* at 28 & 42 n.38. As Dr. Nellis explains in her article, and as this article touches on in Section IV, the mandatory juvenile life without parole sentence was a "statutory accident." *Id.* at 28. Mandatory life without parole for juveniles was a consequence of other sentencing statutes. *Id.* Some states have a mandatory removal to adult court for certain crimes (e.g., murder). *Id.* Those same states have mandatory sentencing for murder convictions, where a judge cannot impose a sentence other than the mandatory life without parole. *Id.* This scheme of sentencing creates mandatory life without parole, which will often be referred to in this article.

12. *See* John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 588–602 (2016). As of 2015, New Jersey Department of Corrections reported no JLWOP inmates. *Id.* at 597. Rhode Island has no one serving JLWOP. *Id.* at 599. In Iowa,

minority of the states, including Pennsylvania, Michigan, and Louisiana, which each had hundreds of juveniles in their prisons, needed a procedural mechanism to ensure that each juvenile received constitutionally proscribed treatment under *Miller* and *Montgomery*'s mandate.[13]

This article will review the importance of retroactivity in the context of a brief review of *Teague v. Lane*, the Supreme Court case detailing a framework for determining whether a new pronounced rule is substantive or procedural constitutional law, which was the basis for the retroactivity rule used in *Montgomery*.

Next, this article will outline the juvenile justice jurisprudence over the past decade under the Eighth Amendment, which provided the foundation for the monumental rulings in *Miller* and *Montgomery*, and made the application of *Miller* difficult before *Montgomery* was decided.

Further, this article will independently examine four states—Pennsylvania, Michigan, California,[14] and Louisiana—and their answers to the following inquiries: (1) how their prisons filled with hundreds of juvenile lifers,[15] (2) their policy response post-*Miller*, (3) their policy response post-*Montgomery*, and (4) whether their state policies are cost-efficient and fulfilling the constitutional standard pronounced in *Miller* and *Montgomery*.

Governor Terry Branstad attempted to cure the need for resentencing by granting commutation to the thirty-eight juvenile lifers in Iowa. *Id.* at 593; *see* Mike Bell, *Paroled After 29 Years in Prison, Ragland Again Living and Working in Council Bluffs*, DAILY NONPAREIL (Nov. 11, 2016), http://www.nonpareilonline.com/news/local/paroled-after-years-in-prison-ragland-again-living-and-working/article_82377e04-6155-5ed1-b5fb-e5410e8b5027.html. However, the Iowa Supreme Court found the effect of the commutation avoided *Miller*'s application and amounted to mandatory life without parole. State v. Ragland, 836 N.W.2d 107, 118 (Iowa 2013).

13. *See infra* Section IV. This article is narrow in scope and will not address implications in the parole process.

14. The section on California will not include separate post-*Miller* and post-*Montgomery* discussions since the California legislature recognized retroactive resentencing immediately after *Miller*. *See infra* Section IV.C.

15. Detailing sentencing trends, patterns, or philosophies for juveniles being treated as adults is beyond the scope of this article. This article will specifically address the statutory schemes for each of these individual states. For more information on nationwide sentencing trends, see DEBORAH LABELLE, ANNA PHILLIPS & LAURAL HORTON, AM. CIVIL LIBERTIES UNION OF MICH., SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 2–3 (2004) [hereinafter *Second Chances*], http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf (providing an overview of sentencing trends and patterns nationwide which increased the juvenile lifers population in adult prison).

In concluding, the article will suggest a way to combine different approaches to develop a guide for states which is both efficient and constitutional.

II. IMPORTANCE AND RECENT HISTORY OF RETROACTIVITY

When approaching a new criminal law, whether substantive or procedural, courts and government officials are reluctant to consider applying the rule retroactively, perhaps because there is a deeply engrained view of finality in the American criminal justice system.[16] The government and society have an interest in preserving finality because "any re-litigation is costly and likely inefficient, may not be more accurate, and may damage the reputation of the criminal justice system."[17] Unfortunately, there comes a time when retroactivity is mandated by new constitutional law.

The Supreme Court in *Teague v. Lane* recognized two exceptions to the general rule of not retroactively applying new rules on collateral review.[18] The first exception is "if [the new rule] places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[19] The second exception is "that a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'"[20]

The second exception has been interpreted to declare that only new rules of substantive constitutional law are required to be applied retroactively.[21] The difference between procedural and substantive constitutional law is beyond the scope of this article and was a great debate among the states in the wake of *Miller*.[22]

Although disturbing finality is not ideal in most situations, retroactivity is of the utmost importance when it comes to matters of constitutional law.[23] First, recognizing retroactivity is necessary to

16. Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 169 (2014).

17. *Id.*

18. 489 U.S. 288, 311 (1989) (plurality opinion).

19. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

20. *Id.* (quoting Mackey, 401 U.S. at 693).

21. *See, e.g.*, Welch v. United States, 136 S. Ct. 1257, 1263–65 (2016).

22. *See* Brandon Buskey & Daniel Korobkin, *Elevating Substance over Procedure: The Retroactivity of* Miller v. Alabama *Under* Teague v. Lane, 18 CUNY L. REV. 21, 24 (2014).

23. Berman, *supra* note 16, at 155.

ensure that the Constitution protects every citizen.[24] Second, retroactive application of the law can reflect changing "societal perspectives on just punishment."[25] Third, reviewing old criminal laws can be more efficient in considering long-term punishment costs, "may result in a more accurate assessment of a fair and effective punishment," and might even change the public perception of a criminal justice system that is willing to reconsider old decisions.[26]

Instead of an emphasis on finality and financial burdens, the benefits of retroactivity are

important to consider when situations such as *Montgomery* and *Miller* arise. States are given a chance to revisit their criminal statues and sentencing methods in hopes of reconsidering whether they are actually *just* and in compliance with the Constitution, which has the potential of commanding great respect from their constituents.

The next section will explore the shift in the Supreme Court's Eighth Amendment jurisprudence pertaining to juveniles and sentencing.

III. HISTORY OF SUPREME COURT IN JUVENILE SENTENCING AND THE RETROACTIVELY QUESTION BETWEEN *MILLER* AND *MONTGOMERY*

The Supreme Court has long held the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[27] However, the Court did not begin to reconsider its interpretation of the Eighth Amendment toward juvenile punishment until 2005 in *Roper v. Simmons*.[28] Christopher Simmons, then seventeen years old, was convicted of murder in Missouri and was sentenced to death after the jury found aggravating circumstances.[29] The Supreme Court concluded "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[30] While rejecting the use of

24. *See id.*
25. *Id.* at 170.
26. *Id.*
27. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that losing U.S. and state citizenship is "cruel and unusual punishment" and is therefore unconstitutional under the Eighth Amendment).
28. 543 U.S. 551, 573–74 (2005) (holding that juveniles cannot be sentenced to death). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id.* at 560.
29. *Id.* at 556–58.
30. *Id.* at 573–74.

the death penalty for juveniles, the Court also relied on evidence of a national consensus against imposing the death penalty for juveniles.[31]

Roper was only the starting point for the Court's changing views on juveniles' rights under the Eighth Amendment. In 2010, the Court visited the issue of a life without parole sentence for a juvenile when the crime the juvenile committed was a non-homicide offense.[32] In *Graham*, the Court reviewed the case of Terrance Graham, a seventeen-year-old convicted of armed robbery and various probation violations.[33] The trial judge sentenced Graham to life imprisonment and "[b]ecause Florida has abolished its parole system, a life sentence gives a defendant no possibility of release . . . ."[34] The Court in *Graham*, like *Roper*, examined the consensus among the states regarding this issue.[35] However, the Court rejected relying on a national consensus and instead reasoned that juveniles are inherently different than adults, which the Court initially addressed in *Roper*.[36] Ultimately, the Court held the Eighth Amendment does not permit sentencing juveniles to life without parole for a non-homicide offense.[37]

The ruling in *Graham* applied to 123 prisoners nationwide who were incarcerated when *Graham* was decided.[38] Some states, such as Louisiana, did not even visit the issue of retroactivity in applying *Graham*.[39] Instead, the Louisiana Supreme Court charged the

31. *Id.* at 564 (stating that "30 States prohibit the juvenile death penalty.").

32. Graham v. Florida, 560 U.S. 48, 52–53 (2010).

33. *Id.* at 53; *see also* FLA. STAT. ANN. § 985.557(1)(a)–(b) (West 2016) (permitting discretion by the prosecutors to sentence sixteen-and-seventeen-year-olds as adults or juveniles in nineteen specific felonies, including armed burglary and aggravated assault). After resentencing, Graham is still incarcerated and is not eligible for release until 2026. Tessa Duvall, *Jacksonville Man's Case Led to New Sentences for Juvenile Lifers—But He's Still Behind Bars*, FLORIDA TIMES-UNION (Mar. 4, 2017, 4:14 PM), http://www.jacksonville.com/news/metro/2017-03-04/jacksonville-man-s-case-led-new-sentences-juvenile-lifers-he-s-still-behind.

34. *Graham*, 560 U.S. at 57 (citation omitted); *see also* FLA. STAT. ANN. § 921.002(1)(e) (West 2017) ("[P]arole . . . shall not apply to persons sentenced under the Criminal Punishment Code.").

35. *See Graham*, 560 U.S. at 62–69.

36. *Id.* at 68. The Court reasoned that "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

37. *Id.* at 79.

38. *Id.* at 64. Of the 123 prisoners serving life without parole sentences, seventy-seven were sentenced in Florida and the remaining forty-six prisoners were sentenced amongst ten states including California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina and Virginia. *Id.*

39. *See* State v. Shaffer, 77 So. 3d 939, 942–43 (La. 2011).

Department of Corrections with the task of setting a parole eligibility day for the seventeen offenders convicted as juveniles of a non-homicide offense within their jurisdiction.[40] Unfortunately, individual state responses to *Graham* would provide little insight for the future resentencing of juvenile lifers convicted of homicide offenses.

However, within two years, the Supreme Court again reviewed the constitutionality of juvenile life without parole, this time specifically addressing homicide offenses in *Miller v. Alabama*.[41] In *Miller*, a consolidated case, two fourteen-year-old defendants, one in Arkansas and one in Alabama, were sentenced to life without the possibility of parole because of the mandatory sentencing scheme in their respective states.[42] Delivering the opinion of the Court, Justice Kagan heavily relied on the precedent in *Roper* and *Graham* to reason that adolescents are categorically different from adults.[43] Therefore, individualized sentencing and consideration of mitigating factors are necessary in determining the sentence of a juvenile.[44] The Court created a framework of mitigating factors, including "consideration of . . . age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,"[45] consideration of prior family and home life, consideration of the circumstances of the homicide, including defendant's actual conduct or involvement, and finally consideration of whether the juvenile could have been charged with a "lesser offense if not for incompetencies associated with youth."[46]

Nevertheless, the Court did not completely ban life without parole sentences for juveniles, but cautioned "sentencing juveniles to this harshest possible penalty will be uncommon . . . . [B]ecause of the great difficulty . . . of distinguishing at this early age between the 'juvenile

40. *Id.* The lone dissenter rejected the majority's decision to pass discretion to the Department of Corrections. *Id.* at 943–45 (Johnson, J., dissenting). The dissent argued there was no way to calculate a parole eligibility date with a life sentence; therefore, the case should have been remanded to District Court to have a resentencing hearing. *Id.* at 945.

41. 567 U.S. 460 (2012).

42. *Id.* at 465–69.

43. *Id.* at 470–80.

44. *Id.* at 477–78.

45. *Id.* at 477.

46. *Id.* The Court provides, as an example, for the "incompetencies associated with youth," the inability of a youth to strike a plea deal with prosecutors or police. *Id.* at 477–78. These factors outlined by the Court will be referred to as the "*Miller* factors" throughout the article.

offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[47]

After *Miller* was decided, the thirty-two states permitting and/or mandating the sentence of life without parole for juveniles were left to interpret how to implement the "*Miller* factors" in their respective states.[48] States' approaches to interpreting *Miller* fell into four major categories.[49] First, some state legislatures responded by creating a blanket new sentence for all juveniles convicted of homicides, without requiring consideration of any factors outlined in *Miller*.[50] Second, other state legislatures provided a complete ban on life without parole for juveniles.[51] Third, state legislatures incorporated the "*Miller* factors" into their statutory scheme.[52] Finally, a minority of state legislatures remained silent and deferred to the courts for *Miller* sentencing guidelines.[53]

Difficulty in future application was not the only issue that state courts and legislatures faced in the wake of *Miller*.[54] Most importantly,

47. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). The interpretation of this statement has caused turmoil in application among the states when applied retroactively, which will be discussed at length. *See infra* Section IV.B.

48. JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 1–4 (2017), http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf [hereinafter ROVNER, JUVENILE LIFE WITHOUT PAROLE].

49. *See* Mills, Dorn & Hritz, *supra* note 12, at 552–60.

50. *See, e.g.*, HAW. REV. STAT. §706-656 (2016) (requiring all juveniles convicted of first-degree murder or first-degree attempted murder be convicted of life with the possibility of parole); MASS. GEN. LAWS ANN. ch. 279, § 24 (West 2014) (providing that if a person commits a crime between the ages of fourteen and eighteen and is convicted of first-degree murder, the court must impose a sentence between twenty to thirty years, which would otherwise be a life sentence); WYO. STAT. ANN. § 6-2-101(c) (West 2013) (imposing life imprisonment for any juvenile convicted of first-degree murder).

51. *See, e.g.*, KAN. STAT. ANN. § 21-6618 (West 2011) (providing that a defendant under the age of 18 at time of the commission of the crime cannot be sentenced to death or life without parole); VT. STAT. ANN. tit. 13, § 7045 (West 2015) ("A court shall not sentence a person to life imprisonment without the possibility of parole if the person was under 18 years of age at the time of the commission of the offense.").

52. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-1340.19B (West 2012). North Carolina annotates the "*Miller* factors" to be considered only if a juvenile was not convicted of first-degree murder under a felony murder rule. § 15A-1340.19B(a)(1). If the defendant was convicted of first-degree murder under the felony murder rule, the defendant has a mandatory life with parole sentence. *Id.*

53. *See, e.g.*, Aiken v. Byars, 765 S.E.2d 572, 576 (S.C. 2014) (holding the "*Miller* factors" extend to sentencing of juveniles in South Carolina, even though South Carolina's "sentencing scheme *permits* a life without parole sentence . . . but does not *mandate* it.").

54. *See generally* Tiffani N. Darden, *Juvenile Justice's Second Chance: Untangling the Retroactive Application of* Miller v. Alabama *Under the* Teague *Doctrine*, 42 AM. J. CRIM. L. 1, 15–20 (2014); Mills, Dorn & Hritz, *supra* note 12, at 548; Molly F. Martinson, *Negotiating*

states needed to determine if the Supreme Court's mandate applied retroactively. State Supreme Courts across the country heard cases regarding the issue of retroactivity and have come to differing conclusions.[55] At least one state resolved this issue through the state legislature,[56] while another deferred to the court system.[57]

Fortunately, the debate ended in 2016 when the Supreme Court revisited their holding in *Miller* to determine if the holding should be applied retroactively in *Montgomery v. Louisiana.*[58] The Court held "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[59] Even though the *Miller* holding is considered a new substantive rule of constitutional law, the Court recognized that the *Miller* holding does involve "a procedural component."[60] *Miller* simply requires the state hold a hearing to consider a defendant's "youth and its attendant characteristics before determining that life without parole is a proportionate sentence."[61] Justice Kennedy explains "[t]he hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[62] The hearing and procedural process then becomes the state's responsibility to enforce compliance with the new constitutional standard.[63]

In dicta, the *Montgomery* Court attempts to give guidance to states, by explaining all juvenile life without parole offenders do not need a

Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2197–2207 (2013).

55. *Compare* Commonwealth v. Cunningham, 81 A.3d 1, 11 (Pa. 2013) (holding *Miller* does not apply retroactively), *with* State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014) (holding *Miller* should be applied retroactively).

56. *See, e.g.*, NEV. REV. STAT. ANN. § 213.12135(1)(b) (West 2015) (providing retroactive parole eligibility to any juvenile offender whose crime resulted in the death of one person and has served a minimum of twenty years). Of note, Nevada specifically excludes any juvenile offender who is serving a sentence which resulted in the death of two or more victims. *Id*. § 213.12135(2).

57. *See, e.g.*, *Aiken*, 765 S.E.2d at 576; *supra* text accompanying note 51.

58. 136 S. Ct. 718 (2016).

59. *Id.* at 729. "[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." *Id.* "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Id.* at 732.

60. *Id.* at 734.

61. *Id.*

62. *Id.* at 735.

63. *Id.* "[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting Ford v. Wainwright, 477 U.S. 399, 416–417 (1986)).

resentencing hearing.[64] If a state decides to permit all juvenile offenders to be eligible for parole after a specific period of time, the Court affirms this would remedy a *Miller* violation.[65]

Although the Supreme Court provided general guidance, states have had difficulty applying the *Miller* holding retroactively.[66] Specifically, states have considered only age as a factor and not any additional mitigating circumstances or attributes which are associated with youth.[67] Section IV will explain in detail state responses to complying with the mandate of retroactivity as pronounced in *Montgomery* in Pennsylvania, Michigan, California, and Louisiana.[68]

IV. STATE RESPONSES

A. Pennsylvania

Pennsylvania has the highest number of juvenile lifers in the country.[69] Therefore, the state has a unique need of addressing retroactivity in an efficient way.

64. *Id.* at 736.

65. *Id.* As an example, the Court uses a Wyoming statute, which allows juvenile homicide offenders to be eligible for parole after serving twenty-five years of their sentence. *Id.* (citing WYO. STAT. ANN § 6-10-301(c) (West 2013)).

66. *See, e.g.*, Tatum v. Arizona, 137 S. Ct. 11, 11 (2016) (vacating and remanding an Arizona Court of Appeals decision and ordering to not retroactively apply *Miller*).

67. *See, e.g.*, *id.* at 12–13 (Sotomayor, J., concurring) (discussing a case where lower court justices considered Petitioners' age at the time of crime, alone, and did not weigh any factors discussed in *Miller* and *Montgomery*).

68. *See infra* Section IV. This article explores these four states because they have the largest number of current juvenile life without parole inmates. *See* JOSHUA ROVNER, THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 3 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf. Pennsylvania, Michigan, Louisiana, Florida, and California account for two-thirds of the country's juvenile lifer population. *See id.* Florida, Louisiana, and Pennsylvania together account for 40% of juveniles serving life sentences without parole. *See id.* at 4.

69. The exact number of juvenile lifers in Pennsylvania varies depending on the source. *Compare Receive Testimony Regarding the United States Supreme Court Decision, Miller v. Alabama Relating to Juvenile Lifers Before the S. Judiciary Comm.* S.B. 850, 2011-12 Gen. Assemb. Reg. Sess. (Pa. 2012) [hereinafter *Bridge Testimony*] (statement of Bradley Bridge, Assistant Defender, Defender's Ass'n of Pa.) ("Pennsylvania has over 480 juvenile lifers"), *and* OFFICE OF THE VICTIM ADVOCATE, RESENTENCING "JUVENILE LIFERS": HOW DOES THIS AFFECT VICTIMS AND THE PAROLE PROCESS? (2016), http://www.pbpp.pa.gov/About%20PBPP/Documents/Juvenile%20Lifers%20Fact%20Sheet%20FINAL.pdf (explaining Pennsylvania has "approximately 500 persons" who are considered juvenile lifers), *with* Nick Keppler, *Most of Pennsylvania's Juvenile Lifers Are Still Awaiting Their New Day in Court*, PUBLICSOURCE (Dec. 22, 2016),

1. How Did Pennsylvania Prisons Fill with Hundreds of Juvenile Lifers?

Pennsylvania has a unique history of statutes that lead to correctional institutions being overrun with prisoners serving life without parole.[70] From 1860 to 1925, Pennsylvania required all persons convicted of first-degree murder—an intentional killing—to be sentenced to death.[71] In 1925, the Pennsylvania legislature amended the murder statute to include another sentencing opinion, life without parole.[72] By 1974, the state legislature again amended the murder statute and introduced, for the first time, third-degree murder as a sentencing option.[73] This did not replace first- and second-degree murder, which were punishable by mandatory life without parole or death for first-degree murder and mandatory life without parole for second-degree murder.[74] This sentencing scheme resulted in ninety years of a system mandating life without parole, not differentiating between felony murder and an intentional killing, and not considering a minimum age set to be charged as an adult.[75] This sentencing structure could only result in prison system filled with juvenile lifers.

2. How Did Pennsylvania Respond Post-Miller?

In a direct response to *Miller*, the Pennsylvania legislature passed a new sentencing scheme for juveniles.[76] The new sentencing scheme included a statute specifically aimed at addressing the *Miller* factors; however, the statute only applied to juveniles convicted after June 24, 2012.[77] The statute addressed the *Miller* factor of age by breaking down the statute into first-degree murder and second-degree murder convictions, and within each conviction a different mandatory sentence based on the offender's age at the time of the crime.[78] Further, the statute

http://publicsource.org/most-of-pennsylvanias-juvenile-lifers-are-still-awaiting-their-new-day-in-court/ (citing "514 'juvenile lifers' in Pennsylvania.").

70. *Bridge testimony*, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Act of Oct. 25, 2012, No. 204, 2012 Pa. Laws 1655 (codified as amended at tit. no. 18 PA. STAT. AND CONS. STAT. § 1102.1) (West 2012)).

77. *See* tit. no. 18 PA. STAT. AND CONS. STAT. § 1102.1(a), (d) (West 2012). Of note, the date was specifically enumerated in the statute. *See id.* § 1102.1(a).

78. *See id.* § 1102.1(a), (c). If an offender is convicted of first-degree murder and is over the age of fifteen, the sentencing court has the option of life without parole or a minimum

continued by providing a framework for the sentencing court to consider in sentencing a juvenile of first or second-degree murder including "nature and circumstances of the offense,"[79] "degree of the defendant's culpability,"[80] and "[a]ge-related characteristics of the defendant, including . . . [m]ental capacity [and m]aturity."[81]

Although the statute provided for a specific effective date, incarcerated juvenile lifers across Pennsylvania sought relief and resentencing by the courts.[82] However, the Pennsylvania Supreme Court declined to apply the statute and *Miller* holding retroactively.[83]

3. How Did Pennsylvania Respond Post-*Montgomer*y?

In early 2016, after the Supreme Court held *Miller* applied retroactively,[84] Pennsylvania courts and legislatures needed to develop a procedure for resentencing the hundreds of juvenile lifers in Pennsylvania state prisons who would be filing for relief. As of early 2017, Pennsylvania legislatures have not enacted any laws addressing retroactive resentencing.[85] Instead the courts have begun to resentence with the guidelines from *Miller* and *Montgomery*.[86]

In June 2017, the Pennsylvania Supreme Court provided guidance to courts and defense attorneys in *Commonwealth v. Batts*.[87] In *Batts*, the

of thirty-five years. *See id.* § 1102.1(a)(1). If the offender is convicted of first-degree murder and is under the age of fifteen, the sentencing court, again, has the option of life without parole or a minimum of twenty-five years. *See id.* § 1102.1(a)(2). If the offender is convicted of second-degree murder and is over the age of fifteen, the minimum sentence is thirty years. *See id.* § 1102.1(c)(1). If the offender is convicted of second-degree murder and is under the age of fifteen, the minimum sentence is twenty years. *See id.* § 1102.1(c)(2).

79. *Id.* § 1102.1(d)(4).

80. *Id.* § 1102.1(d)(5).

81. *Id.* § 1102.1(d)(7)(ii)–(iii).

82. *See, e.g.*, Commonwealth v. Batts, 66 A.3d 286, 293 (Pa. 2013) [hereinafter *Batts I*].

83. *See, e.g.*, Commonwealth v. Cunningham, 81 A.3d 1, 4–8 (Pa. 2013).

84. Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).

85. Some argue that Pennsylvania should wait until the legislature develops a new sentencing scheme. *See, e.g.*, Steve Esack, *State Supreme Court Again Considers Appeal of an Easton Juvenile Killer*, THE MORNING CALL (Dec. 7, 2016, 8:09 PM), http://www.mcall.com/news/local/police/mc-easton-teen-killer-queed-batts-supreme-court-20161206-story.html (noting the arguments of prosecutor Hugh Burns who, on behalf of the Northampton County district attorney's office and Pennsylvania district attorney's association, argued that "only the Legislature, not the court, can change state law to retroactively order new sentencing guidelines for old cases.").

86. *See, e.g.*, Commonwealth v. Jones, 135 A.3d 175, 175 (Pa. 2016) (remanding the case from the Pennsylvania Supreme Court to the Common Pleas Court for resentencing "consistent with *Montgomery*.").

87. 163 A.3d 410 (Pa. 2017).

Court created a presumption against life without parole.[88] If the Commonwealth wants to overcome the presumption and sentence a juvenile to life without parole, again, the District Attorney "must prove that the juvenile is constitutionally eligible for the sentence beyond a reasonable doubt."[89] The Court directed the Commonwealth to follow the factors set forth in section 1102.1(d) of the Pennsylvania Consolidated Statutes as a guideline, if they want to overcome the presumption.[90]

4. Setting an Example: How Philadelphia Responded to the Montgomery Mandate

Philadelphia sentenced the highest percentage of juvenile lifers over any city in the United States.[91] During his tenure, former Philadelphia District Attorney, Seth Williams, announced that the Philadelphia DA's office would no longer seek life without parole for any juvenile sentenced in Philadelphia.[92] Williams proclaimed his office planned to resentence all of the juveniles who were convicted in the Philadelphia courts who are currently serving life without parole.[93] However, in March 2017, Mr. Williams found a few exceptions.[94] In a letter to a federal court, Mr. Williams explained he intended to seek life without parole in three cases, so far.[95]

88. *Id.* at 452.

89. *Id.* at 455.

90. *Id.*

91. Samantha Melamed, *The End of Life Without Parole for Juveniles in Philadelphia?*, PHILLY.COM (June 5, 2016, 1:09 AM), http://www.philly.com/philly/news/20160605_The_end_of_life_without_parole_for_juveniles_in_Philadelphia_.html. Philadelphia is home to Joseph Ligon, the "longest-serving juvenile lifer in the world." Samantha Melamed, *Court Lays Down the Law for Philly's Juvenile Lifers*, PHILLY.COM (Mar. 6, 2017, 6:32 PM), http://www.philly.com/philly/news/Philly-juvenile-lifers-.html. Mr. Ligon has served sixty-three years in prison for a double murder he committed at the age of fifteen. *Id.*

92. FAIR PUNISHMENT PROJECT, JUVENILE LIFE WITHOUT PAROLE IN WAYNE COUNTY: TIME TO JOIN THE GROWING NATIONAL CONSENSUS? 4 (2016), http://fairpunishment.org/wp-content/uploads/2016/07/FPP-WayneCountyReport-Final.pdf.

93. *Id.*

94. Samantha Melamed, *Philly DA Will Seek Life Without Parole for Some Juveniles, After All*, PHILLY.COM (Mar. 3, 2017, 8:10 PM), http://www.philly.com/philly/news/Philadelphia-District-Attorney-Seth-Williams-juvenile-lifers-resentencings-life-without-parole.html.

95. *Id.* One of the cases for which Mr. Williams intends to seek life without parole is the case of Andre Martin, who was fifteen years old in 1976, when he shot and killed a City of Philadelphia police officer. *Id.* "If Martin [were] resentenced according to the guidelines Williams had previously indicated he would follow . . . he would have been eligible for parole immediately." *Id.* Philadelphia District Attorney, Larry Krasner, vowed to change the face of prosecution in Philadelphia. Samantha Melamed, *A Philly Juvenile Lifer Gets Time*

In furtherance of resentencing, the Philadelphia Court of Common Pleas developed the "Juvenile Lifers Sentenced Without the Possibility of Parole Program."[96] The program provides a procedure for resentencing in compliance with *Miller* and *Montgomery*. First, the cases will be processed as a PCRA[97] conference.[98] At the initial status hearing, the court suggests parties "be prepared to submit a concise statement of the case which shall include, the nature and extent of discovery sought, if any, legal issues, factual disputes, anticipated length of the resentencing hearing, number of witnesses anticipated, etc."[99]

After the initial hearing, the Homicide Team Leader will issue a JLSWOP Conference Order listing an expected date of resentencing or hearing, which must be within 120 days of the JLSWOP initial hearing.[100] A case can only be designated for a second hearing if good cause is shown, or adversely, if parties reach a stipulation, the case can be set before the assigned judge for disposition.[101]

Additionally, the Philadelphia Court of Common Pleas established an *en banc* panel of Common Pleas judges specifically to address all JLSWOP questions of law.[102]

Philadelphia has begun their resentencing process, beginning with the oldest cases.[103] As of November 2016, the Philadelphia DA's office

Served—and a Chance at Exoneration, PHILLY.COM (Jan. 17, 2018, 1:51 PM), http://www.philly.com/philly/news/crime/philly-juvenile-lifer-johnny-berry-da-larry-krasner-offers-time-served-chance-exoneration-20180117.html. So far, he deviated from offers made by the previous administration. *Id.*

96. FIRST JUDICIAL DISTRICT OF PENNSYLVANIA COURT OF COMMON PLEAS TRIAL DIVISION, GEN. COURT REG. NO. 1 OF 2016, JUVENILE LIFERS SENTENCED WITHOUT THE POSSIBILITY OF PAROLE PROGRAM 1 (2016) [hereinafter JLSWOP].

97. *See generally* tit. no. 42 PA. STAT. AND CONS. STAT. § 9541 (West 1988) (codifying Pennsylvania's Post Conviction Relief Act, which is the only state method for litigating any post-conviction issues in state court).

98. JLSWOP, *supra* note 96.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The decisions of the *en banc* panel shall be binding on all trial courts in the First Judicial District. *Id.* The first set of fifteen legal questions went to the *en banc* panel in March 2017. Melamed, *Court Lays Down the Law for Philly's Juvenile Lifers*, *supra* note 90. Among the questions is: "who should decide if an inmate is 'irreparably corrupt?'" Bobby Allyn, *Who Should Decide if an Inmate is 'Irreparably Corrupt' or Deserving of a Second Chance?* WHYY (Mar. 7, 2017), https://whyy.org/articles/who-should-decide-if-an-inmate-is-irreparably-corrupt-or-deserving-of-a-second-chance/.

103. Cherri Gregg, *Juvenile Lifer Re-Sentenced Thanks to Supreme Court Ruling*, CBS PHILLY (Nov. 21, 2016, 8:53 PM), http://philadelphia.cbslocal.com/2016/11/21/juvenile-lifer-re-sentenced-thanks-to-supreme-court-ruling/. On June 3, 2016, the first Philadelphia resentencing agreements were reached for Tyrone Jones and Henry Smolarski, both in their

confirmed sixty-five re-sentencing offers were made and twenty-six re-sentencing hearings were scheduled.[104]

Other counties in Pennsylvania, which do not have the benefit of the procedural system established in Philadelphia, have been struggling to resentence. In Alleghany County, one Common Pleas Judge resentenced a man to twenty years to life.[105] The prosecutor appealed "arguing that a person sentenced to life in prison cannot receive bond pending appeal."[106] The Pennsylvania Superior Court reversed and now the juvenile lifer must wait for a parole hearing.[107] Alleghany County provides an excellent example of issues that arise when there is no appropriate procedural mechanism for resentencing.

B. Michigan

1. How Did Michigan Prisons Fill with Hundreds of Juvenile Lifers?

As of September 30, 2015, Michigan housed 370 juvenile lifers.[108] Prior to Michigan's *Miller* laws, Michigan's statutory scheme required a sentence of life without parole to any individual convicted of first-degree murder.[109] Additionally, Michigan's first-degree murder statute is not only for the individual who "pulled the trigger" but also includes aiding and abetting a murder and felony murder.[110]

fifties and had spent decades in prison. Melamed, *The End of Life Without Parole*, *supra* note 91.

104. Gregg, *supra* note 101. As of March 2017, the offer number rose to eighty-nine confirmed cases. Melamed, *Philly DA Will Seek Life Without Parole for Some Juveniles, After All*, *supra* note 93. Seventy-one of the eighty-nine would be immediately eligible for parole. *Id.*

105. Paula Reed Ward, *Attorneys Want Clarification on Resentencing for Juvenile Lifers*, PITT. POST-GAZETTE (Nov. 28, 2016, 12:00 AM), http://www.post-gazette.com/local/city/2016/11/28/Attorneys-want-clarification-on-resentencing-for-juvenile-lifers/stories/201611280019.

106. *Id.*

107. Paula Reed Ward, *Juvenile Lifer Ricky Olds Denied Bond Pending Appeal by Superior Court*, PITT. POST-GAZETTE (Nov. 30, 2016, 7:54 PM), http://www.post-gazette.com/local/city/2016/11/30/Juvenile-lifer-Ricky-Olds-denied-bond-pending-appeal-by-Superior-Court/stories/201612010122.

108. Mills, Dorn & Hritz, *supra* note 12, at 565, 594.

109. MICH. COMP. LAWS ANN. § 750.316 (West 2014).

110. LABELLE, PHILLIPS & HORTON, *supra* note 14, at 4. The ACLU surveyed 146 offenders who were under the age of seventeen at the time their murder was committed, and nearly half fall under either "aiding and abetting" or "they were not the person who committed the murder." *Id.* Additionally, there was a fifty percent chance that the person who actually pulled the trigger (or their co-defendant) was an adult. *Id.*

2. How Did Michigan Respond Post-Miller?

In response to *Miller*, the Michigan legislature passed two companion statutes, one to be applied prospectively and another to be applied retroactively. The first statute, section 769.25, requires "new sentencing procedures for a youth . . . who was less than 18 years old at the time he committed an enumerated offense, which if an adult would result an automatic life without parole sentence."[111]

Section 769.25 still gives the prosecuting attorney discretion to seek life without parole for a juvenile for certain offenses.[112] After a defendant is convicted, the prosecutor must file a motion within twenty-one days detailing the reasoning for seeking life without parole.[113] The defendant is given the opportunity to respond, and then the court conducts a hearing specifically addressing the factors as described in *Miller*.[114] If the court decides that life without parole is inappropriate, the court may sentence the juvenile to a minimum of twenty-five years and a maximum of sixty years.[115]

Since 2014, the Michigan courts struggled to interpret this statute specifically questioning if a jury or judge should preside over the hearing regarding the "*Miller* factors."[116] In 2016, the Michigan Court of Appeals confirmed that a jury trial was not necessary for a *Miller* factors hearing.[117]

3. How Did Michigan Respond Post-Montgomery?

Although the Michigan legislature provided a separate retroactive statute, it did not take effect until *Montgomery* was decided.[118] This statute, similar to its companion, gives prosecutors the discretion of deciding who will be provided a resentencing hearing.[119] After the decision in *Montgomery* became final, the prosecuting attorneys were required to "provide a list of names to the chief circuit judge of" all

111. Donald v. Woods, No. 09-CV-11751, 2016 WL 7210692, at *1, *8 (E.D. Mich. Dec. 13, 2016).

112. MICH. COMP. LAWS ANN. § 769.25(2) (West 2014).

113. *Id.* § 769.25(3).

114. *Id.* § 769.25(5)–(6). The statute does not enumerate the factors which the court is to consider; instead the statute explicitly references *Miller*. *Id.* § 769.25(6).

115. *Id.* § 769.25(9). Additionally, if the prosecutor does not file a motion for a life without parole hearing to consider the *Miller* factors, the minimum and maximum guidelines for sentencing still apply. *Id.* § 769.25(4).

116. People v. Hyatt, 891 N.W.2d 549, 552 (Mich. Ct. App. 2016).

117. *Id.* at 564.

118. *See* MICH. COMP. LAWS ANN. § 769.25a (West 2014).

119. *Id*.

defendants who required resentencing.[120] Within 180 days, the prosecuting attorneys had to "motion[] for resentencing in . . . cases in which the prosecuting attorney . . . request[ed] the court to impose a sentence of imprisonment for life without the possibility of parole."[121] However, if the prosecutor *did not* file a motion, the circuit court was required to sentence the juvenile to a minimum of twenty-five years and a maximum of sixty years, similar to the other statute.[122]

After *Montgomery* was decided, it was time for action on the part of the prosecuting attorneys.[123] Thirty-two counties in Michigan required resentencing,[124] and the counties with the highest number of juvenile lifers were Wayne County, Oakland County, Genesee County, and Kent County.[125]

Wayne County—home of Detroit—had the largest number of juvenile lifers in the state, coming in at 145.[126] Of the 145 juvenile lifers, Wayne County Prosecutor Kym Worthy is still seeking life without the possibility of parole in over forty percent of the cases.[127] However, Worthy is not alone in her reluctance for resentencing to a term of years, as "15 [Michigan] prosecutors have asked the court to re-impose life without parole sentences on . . . 218 . . . offenders whose original [life without parole] sentences were deemed unconstitutional . . . ."[128] Of the fifteen prosecutors seeking life without parole, again, nine of them are seeking life without parole for every juvenile lifer in their jurisdiction.[129]

Prosecutors have been defending their decisions, by explaining the juvenile lifers in their jurisdiction fit the description of a "rare juvenile

120. *Id.* § 769.25a(4)(a). A list of names needs to be provided to the chief circuit judge within thirty days of the state supreme court's final decision. *Id.*

121. *Id.* § 769.25a(4)(b).

122. *Id.* § 769.25a(4)(c). *See also* MICH. COMP. LAWS ANN. § 769.25(9) (West 2014) (providing similar sentencing scheme for juveniles sentenced pre-*Miller* and post-*Miller*).

123. *See* § 769.25a(4)(a).

124. Brian Dickerson, *Justice Delayed, Again, for Michigan's Juvenile Lifers*, DET. FREE PRESS (Aug. 27, 2016, 11:31 PM), http://www.freep.com/story/opinion/columnists/brian-dickerson/2016/08/27/michigan-juvenile-lifers-sentences/89363426/.

125. Oralandar Brand-Williams & Mike Martindale, *Worthy Seeking Resentencing of Juvenile Lifers*, DET. NEWS (July 23, 2016, 10:09 PM), http://www.detroitnews.com/story/news/local/wayne-county/2016/07/22/worthy-seeking-resentencing-juvenile-lifers/87439616/.

126. *Id.*

127. *See id.*

128. Dickerson, *supra* note 124. Worthy's counterpart in Oakland County, Jessica Cooper, filed for resentencing in forty-four out of her forty-nine cases. Brand-Williams & Martindale, *supra* note 125. Cooper intends to ask the court "for a stay on each case . . . to maintain the life terms." *Id.*

129. Dickerson, *supra* note 124.

offender whose crime reflects irreparable corruption."[130] Additionally, prosecutors cite owing a duty to the victims of the crimes committed by juvenile lifers and safety to the public, as reasons for moving for life without the possibility of parole again.[131]

As previously mentioned, the Michigan Court of Appeals held that a jury trial was not required to resentence juvenile lifers.[132] However, the Michigan Supreme Court granted an appeal on this issue.[133] As of January 2018, no juvenile lifer—who the prosecution has sought to sentence to life without parole for a second time—has been resentenced while the appeal is pending.[134]

4. Setting an Example: Oakland County, Michigan

Michigan prosecutors are denying many juvenile lifers in their various counties the protection afforded to them under the holdings in *Miller* and *Montgomery*. For example, Oakland County Prosecutor Jessica Cooper is "seeking life [without parole] for 44 of [her] 49" juvenile lifers.[135] Cooper is essentially certifying to the judge that, of all the cases her office investigated, there were only five cases where juveniles convicted of first-degree murder could actually be rehabilitated and rejoin society.[136] In the other forty-four cases, where Cooper seeks life without parole, she lists numerous misconducts and descriptions of the

130. Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)); *see* Dickerson, *supra* note 124 (noting that Macomb County Prosecutor Eric Smith claimed that juvenile lifers in his county "epitomize the rare, irreparably corrupt criminals even the Supreme Court has acknowledged").

131. Dickerson, *supra* note 124.

132. People v. Hyatt, 891 N.W.2d 549, 552 (Mich. Ct. App. 2016).

133. *See* People v. Hyatt, 889 N.W.2d 487 (Mich. 2017) (mem.); People v. Skinner, 889 N.W.2d 487 (Mich. 2017) (mem.).

134. *See* Hill v. Snyder, 878 F.3d 193, 202 (6th Cir. 2017). Oral arguments were heard on this issue on October 12, 2017, but as of January 2018, a published decision has not been released. Michigan Supreme Court, *1522448 People v Tia Marie Mitchell Skinner*, YOUTUBE (Oct. 13, 2017), https://www.youtube.com/watch?v=Gju4Ay25a6w.

135. *See* John Wisely & Elisha Anderson, *Jailed as Teens, Some Michigan Murders Get a Shot at Freedom*, DET. FREE PRESS (Feb. 8, 2017, 10:29 PM), http://www.freep.com/story/news/local/michigan/2017/02/08/second-chance-michigans-juvenile-lifers-tough-call-judges/97097890/; *see also* Associated Press, *Prosecutor: No Sentencing Break for Michigan's Oldest Juvenile Lifer*, DET. FREE PRESS (July 23, 2016, 7:31 AM), http://www.freep.com/story/news/local/michigan/oakland/2016/07/23/sheldry-topp-juvenile-parole-michigan/87472384/. Ms. Cooper is seeking life without parole for Mr. Sheldry Topp, who has been incarcerated since 1962 when he was seventeen. *Id.* Mr. Topp has been recommended by the state's parole board for a sentence reduction twice—once in 1987 and again in 2007. *Id.*

136. Dickerson, *supra* note 124.

crimes as evidence that the offender is not capable of rehabilitation.[137] The big question is whether this is enough. By merely describing the crimes, prosecutors are ignoring and not presenting the judge with any evidence of immaturity at the time of the crime, capability of rehabilitation, circumstances of the home environment, and other factors required by the *Miller* decision.[138]

For example, Cooper is still seeking life without parole for now-forty-two-year-old Barbara Hernandez.[139] In 1990, Hernandez, then a sixteen-year-old prostitute, lured a man to an abandoned house so her abusive boyfriend—four years her senior—could stab and rob the man for money to feed his cocaine addiction.[140] Hernandez was forced to grow up quickly in her first sixteen years, enduring years of sexual abuse and an alcoholic mother who often left Hernandez and her sisters alone.[141] For her participation in the murder, a jury convicted Hernandez.[142] The prosecutor in Hernandez's trial urged the jurors not to sympathize with Hernandez and to consider the crime, not the person who committed it.[143] Now, over twenty-six years later, the Supreme Court held that when sentencing juveniles to a crime that could carry life without parole, the court *must* consider "the person" and the circumstances including maturity, role in the crime, family history, and attributes of youth.[144] During her twenty years in prison, Hernandez has been written up for misconducts seventeen times, with the last misconduct occurring in 2007.[145] Hernandez completed college courses and a drug and alcohol treatment program, where she now serves as a mentor for other women.[146]

137. *Id.*

138. *See* Miller v. Alabama, 567 U.S. 460, 480 (2012) ("[W]e require [sentencers] to take into account how children are different, and how those differences counsel against" no-parole life sentences."); Dickerson, *supra* note 124 (explaining how Ms. Cooper failed to include factual distinctions among the many cases in her motions to re-sentence juvenile lifers, and only included the details of their crimes and subsequent misconduct).

139. Dickerson, *supra* note 124.

140. Associated Press, *Sentenced to Life at 16, Woman Hopes for Freedom*, WASH. EXAMINER (Feb. 16, 2013, 12:00 AM), http://www.washingtonexaminer.com/sentenced-to-life-at-16-woman-hopes-for-freedom/article/2521750.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Miller v. Alabama, 567 U.S. 460, 480 (2012); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016).

145. Associated Press, *supra* note 140.

146. *Id.*; Dickerson, *supra* note 124.

This begs the question: why is Jessica Cooper seeking life without parole for Hernandez? Hernandez arguably does not fall into the category of the "rare . . . offender whose crime reflects irreparable corruption."[147]

By requiring the prosecutor alone to decide whom to pursue for life without parole, the defendant is not given the benefit of presenting mitigating evidence to the prosecutor before the resentencing hearing and having a collaborative effort between defense and prosecutors.[148] Instead, Michigan prosecutors, essentially ignoring the Supreme Court holdings in *Miller* and *Montgomery* that juveniles are different, can control and shape how a case is presented based on their motion before a resentencing hearing.[149]

As of February 2017, only five of the juvenile lifers in Michigan have been resentenced and released.[150]

C. California

1. How Did California Jails Fill with Juvenile Lifers?

Unlike Pennsylvania and Michigan, California did not have mandatory life without parole for juveniles at the time *Miller* was decided.[151] However, courts interpreted California's statutory scheme as favoring life without parole sentences for sixteen-and-seventeen-year-

147. *Miller*, 567 U.S. at 479-80 (citations omitted).

148. *See* MICH. COMP. LAWS ANN. § 769.25a (West 2014). Prosecutors decide who needs a resentencing hearing, and they do not confer with defense attorneys or judges before filing a motion. *Id.*

149. The prosecutor's discretion was unsuccessfully challenged between the holdings of *Miller* and *Montgomery*. *See* Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2–4, *12 (E.D. Mich. Jan. 30, 2016). *Hill* was originally a challenge to a Michigan statute which prohibited parole to anyone convicted of first-degree murder. *Id.* at *3. The Sixth Circuit decided this statute was unconstitutional, and while the parties were briefing the court on an appropriate remedy, Michigan passed § 769.25 and § 769.25(a) to rectify *Miller*; *see also* Hill v. Snyder, 821 F.3d 763, 771 (6th Cir. 2016). After *Miller*, the Sixth Circuit remained citing "changes" in the "legal landscape." *Id.* at 770. The 2016 amended complaint cited the unconstitutionality of § 769.25 and 769.25(a). Hill v. Snyder, No. 10-14568, 2016 WL 4119805, at *2 (E.D. Mich. Aug. 3, 2016). The Eastern District of Michigan, however, did not believe deciding this case using an injunctive relief was the appropriate remedy and "that Plaintiffs have not yet been resentenced; none [have] received a life-without-parole sentence." *Id.* at *3.

150. Wisely & Anderson, *supra* note 135.

151. THE PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER MILLER V. ALABAMA 12 (2015), https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf.

olds convicted of murder and sentenced for a long time.[152] As a result, California had an estimated 310 juvenile lifers in need of resentencing.[153]

2. How Did California Respond Post-Miller and Address Resentencing?

In response to *Miller*, California decided to immediately address retroactivity by (1) enacting legislation to provide a resentencing procedure,[154] (2) enacting legislation to revise parole procedures for juvenile lifers,[155] (3) revisiting precedent that life without parole was favored for -sixteen-and-seventeen-year-olds,[156] and (4) requiring a multi-layer system of checks before release including resentencing hearing, parole hearing, and an opportunity for the governor to weigh in.[157]

First, in 2012, the California legislature immediately began working on the California Fair Sentencing for Youth Act—commonly known as SB 9—which was the main piece of legislation to rectify past sentencing for juveniles in life without parole situations.[158] SB 9 provides a procedural

152. PRISON LAW OFFICE, LIFE WITHOUT PAROLE (LWOP) AND OTHER LENGTHY SENTENCES FOR OFFENSES FOR JUVENILES AND YOUTHFUL OFFENDERS 2 (West 1990), http://prisonlaw.com/wp-content/uploads/2016/05/JuviSentences-April-2016.pdf; *see also* CAL. PENAL CODE § 190.5(b) (2016); People v. Guin, 28 Cal. App. 4th 1130, 1141 (Cal. Ct. App. 1994) ("16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life").

153. THE PHILLIPS BLACK PROJECT, *supra* note 151, at 12.

154. CAL. PENAL CODE § 1170(d)(2) (West 2018).

155. *Id.* Changes in the parole hearing process for life without parole sentences are beyond the scope of this article; *see also* Sarah Sloan, Note, *Why Parole Eligibility Isn't Enough: What* Roper*,* Graham*, and* Miller *Mean for Juvenile Offenders and Parole*, 47 COLUM. HUM. RTS. L. REV. 243, 254 n.68 (2016); Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller*, and California's Youth Offender Parole Hearings*, N.Y.U. REV. L. & SOC. CHANGE 245, 245 (2016).

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

157. *See* Marisa Gerber, *California Inmate's Parole Reflects Rethinking of Life Terms for Youths*, L.A. TIMES (Mar. 24, 2015, 10:22 PM), http://www.latimes.com/local/crime/la-me-juvenile-lwop-20150325-story.html. The Governor of California always has the opportunity to review parole board decisions; this is not a unique concept to juvenile lifers, and beyond the scope of this article. However, between 2011 and 2014, almost 1,400 lifers were released from California state prisons. Associated Press, *1,400 'Lifers' Released from California Prisons in Last 3 Years*, CBS NEWS (Feb. 25, 2014, 5:58 PM), http://www.cbsnews.com/news/1400-lifers-released-from-california-prisons-in-last-3-years. Governor Jerry Brown confirmed eighty-two percent of the parole board decisions, while former governor Arnold Schwarzenegger only confirmed twenty-seven percent of parole board decisions. *Id.*

158. *See* CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2018); *see also S-B 9 Sentencing*, CAL. LEGIS. INFO.,

process for resentencing—specifically, it requires juvenile lifers to petition the court instead of creating automatic resentencing.[159] The first qualification to even be considered for resentencing is completion of fifteen years of the original term.[160] Once an offender has met the first qualification, he/she may file a petition for resentencing with the court including a statement expressing remorse and detailing his/her "work towards rehabilitation."[161]

After the submission of the petition and accompanying statement, the prosecuting attorney has sixty days to respond.[162] Incorporating the prosecutor's response and offender's statement, if the court finds by a preponderance of the evidence that a single assertion in the statement is true,[163] the statute requires the court to conduct a resentencing hearing.[164]

The legislature enumerated many of the *Miller* factors in the statute as a guide for consideration in a resentencing hearing.[165] The California statute—unlike those of Michigan, Louisiana and Pennsylvania—allows multiple opportunities for an offender to be resentenced.[166]

If the offender is resentenced to life without parole after his or her first resentencing hearing, he/she is still afforded the opportunity to submit a subsequent petition after twenty years of incarceration and again at twenty-five years of incarceration.[167]

Some argue that SB 9 is still unconstitutional because of the particular stringent parole system in California.[168] Therefore, California juvenile lifers have the potential of receiving *de facto* life sentences.[169] Yet *Miller* does not guarantee release of a juvenile lifer.[170] Instead, *Miller* guarantees "some meaningful opportunity to obtain release based on

http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201120120SB9 (providing senate report on the law's legislative history).

159. § 1170(d)(2)(A)(i)–(ii).

160. § 1170(d)(2)(A)(i).

161. § 1170(d)(2)(B).

162. § 1170(d)(2)(D).

163. The original 2012 statute required the statement in its entirety be true by a preponderance of the evidence. S.B. 1016, 2016 Leg., Reg. Sess. (Cal. 2016).

164. § 1170(d)(2)(E).

165. *See* § 1170(d)(2)(F)(i)–(viii); ROVNER, JUVENILE LIFE WITHOUT PAROLE, *supra* note 48.

166. § 1170(d)(2)(H).

167. *Id.*

168. *See, e.g.*, Evan Reese, Note, *S.B. 9: A Second Chance for Juveniles Serving Life Without Parole in California in Theory—and Why It Won't Make a Difference in Practice*, 41 HASTINGS CONST. L.Q. 927, 928–29 (2014).

169. *See id.* at 952.

170. Miller v. Alabama, 567 U.S. 460, 479 (2012) (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

demonstrated maturity and rehabilitation."[171] Further, compared to Michigan, Pennsylvania, and Louisiana where juvenile lifers have only one chance at resentencing, it appears that California juvenile lifers have exceedingly more opportunity to prove themselves through the *Miller* factors.[172] Also, at least in the State of California, all juvenile lifers must appear before a parole board before being released.[173]

SB 9 mainly addressed resentencing for past juvenile lifers but does not provide a *Miller* remedy for the sentencing juveniles who have the possibility of receiving life sentences prospectively.[174] The California Supreme Court addressed this issue in *People v. Gutierrez* by correcting the presumption that sixteen-and seventeen-year-olds are automatically subject to life without parole unless they present mitigating circumstances.[175] In correcting this presumption, the California Supreme Court directed trial courts to consider the factors as described in *Miller* during their sentencing hearings.[176]

3. Resentencing in Action: Edel Gonzalez

In December 2013, Edel Gonzalez, a former gang member, was resentenced to twenty-five years in prison before an Orange County Judge.[177] Gonzalez was the first person to be resentenced under SB 9 and after parole board review, was the first to be released in 2015.[178]

171. *Id.* (quoting *Graham*, 560 U.S. at 75).

172. *See* CAL. PENAL CODE § 1170(d)(2)(H) (West 2018).

173. *See* Reese, *supra* note 168, at 947–50.

174. *See* THE PHILLIPS BLACK PROJECT, *supra* note 151, at 12, 14. This issue arises because California does not have mandatory life without parole. Reese, *supra* note 168, at 942.

175. 324 P.3d 245, 249 (Cal. 2014); *see also* People v. Guinn, 28 Cal. App. 4th 1130, 1148 (Cal. Ct. App. 1994) (holding a sixteen-or seventeen-year-old convicted of murder shall serve life without parole unless mitigating circumstances are met).

176. *Gutierrez*, 324 P.3d at 268–69.

177. Claudia Koerner, *O.C. Man Receives Parole Eligibility for Teenage Crime*, ORANGE COUNTY REG. (Dec. 18, 2013, 4:11 PM), http://www.ocregister.com/articles/gonzalez-594012-parole-life.html.

178. Kelly Puente, *Former Gang Member Freed After Resentencing for Crime Committed When He Was 16*, ORANGE COUNTY REG. (Mar. 26, 2015, 10:15 AM), http://www.ocregister.com/articles/gonzalez-655731-prison-law.html. After parole approval, Gonzalez, a Mexican citizen, was turned over to immigration officers and was deported to Mexico. *Id.*

D. Louisiana

1. How did Louisiana Prisons Fill with Hundreds of Juvenile Lifers?

As of 2015, the Louisiana Department of Corrections housed 247 inmates sentenced to life without parole as juveniles.[179] Louisiana, like Pennsylvania, has a mandatory sentence of life without parole for both first-degree and second-degree murder.[180]

2. How Did Louisiana Respond Post-*Miller*?

In response to *Miller*, the Louisiana legislature enacted a statute specifically addressing juveniles who were convicted of first-degree and second-degree murder.[181] The statute provided a caveat: that juveniles are entitled to a sentencing hearing specifically addressing the *Miller* factors.[182] The statute even enumerated the sentiment that life without parole should only be applied in the worst cases.[183]

State v. Montgomery and *State v. Tate* tested Louisiana statute 878.1 to answer the question if *Miller* was to be applied retroactively.[184] In *State v. Montgomery,* the Supreme Court of Louisiana originally declined to apply *Miller* retroactively in a ruling of 6-1.[185] In his dissent, Chief Justice Johnson provided an explanation that *Miller* created a new rule

179. Mills, Dorn & Hritz, *supra* note 12, at 564 n.196, 593.

180. LA. STAT. ANN. §§ 14:30(C)(1)–(2), 14:30.1(B) (2015). Although beyond the scope of this article, Louisiana has had a long history of incarceration for business. Some historians argue populating Louisiana prisons was highly politically motivated to provide "semi-skilled 'state slaves.'" MARK T. CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 193 (1971).

181. LA. CODE CRIM. PROC. ANN. art. 878.1 (2017).

182. *Id.* at art. 878.1(C)

> At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant.

Id.

183. *Id.* at art. 878.1(D) ("Sentences imposed without parole eligibility . . . should normally be reserved for the worst offenders and the worst cases.").

184. State v. Montgomery, 141 So. 3d 264 (La. 2014); State v. Tate, 130 So. 3d 829 (La. 2013).

185. Montgomery, 141 So. 3d at 264. The Supreme Court of Louisiana originally visited the issue of retroactivity in *State v. Tate*, where the majority held *Miller* did not apply retroactively. Tate, 130 So. 3d at 831.

of substantive constitutional law, consistent with the eventual holding by the Supreme Court in *Montgomery*.[186]

In *State v. Tate,* the court relied on the plain language of the statute, citing the use of a verb of being "is," rather than a past verb such as "was."[187] The court interpreted this as a deliberate act of the legislature "to apply the statute prospectively only."[188]

Once *Montgomery* was decided by the Supreme Court and remanded, the Louisiana Supreme Court revisited the issue of retroactivity, now with direction.[189] The court noted that the Louisiana legislature proposed a statute for a procedure of retroactive resentencing.[190] However, the legislature was unable to pass a statute before the end of the 2016 legislative session.[191] Therefore, the court directed the trial courts to sentence "Henry Montgomery, and other prisoners like him" in accordance with the "previously enacted provisions."[192] The court still left the door open for the Louisiana legislature to enact a statute for retroactive resentencing.[193]

3. How did Louisiana Respond Post-*Montgomery*

In the 2016 legislative session, House Bill 264, a bill introduced to develop a system of resentencing procedures, passed in the house but ultimately failed in the senate.[194] The legislature re-introduced a similar

186. *Montgomery*, 141 So. 3d at 264–65 (Johnson, C.J., dissenting).

187. Tate, 130 So. 3d at 843.

188. *Id.*

189. State v. Montgomery, 194 So. 3d 606, 606–07 (La. 2016) (per curiam).

190. *Id.* at 608.

191. *Id.* The 2016 Louisiana legislative session ended in a dramatic filibuster, supposedly as "retaliation for the House's handling of the state's construction budget." *Regular Session Ends with Dramatic Moment*, EUNICE NEWS (June 7, 2016, 3:35 PM), http://archive.eunicetoday.com/local/regular-session-ends-dramatic-moment. The hundreds of juvenile lifers, who depended on the bill, became a casualty of Louisiana politics. *Id.*

192. Montgomery, 194 So. 3d at 608. The Court ordered trial courts to use LA. CODE CRIM. PROC. ANN. art. 878.1 (2017), the *same* statute they previously held was specifically *not* for retroactive application. Montgomery, 194 So. 3d at 607.

193. *Id.* at 608.

194. Megan Trimble, *Lawmakers Lose Late Push for Juvenile Lifer Parole Bill*, THE WASH. TIMES (June 7, 2016), http://www.washingtontimes.com/news/2016/jun/7/lawmakers-lose-late-push-for-juvenile-lifer-parole/. The bill ultimately failed due to politics in a filibuster on the last day of the 2016 regular legislative session. Katy Reckdahl, *Louisiana Lawmakers OK Bill to Give Juvenile Lifers Parole Chance After 25 Years*, JUV. JUST. INFO. EXCHANGE (June 9, 2017), http://jjie.org/2017/06/09/louisiana-lawmakers-ok-bill-to-give-juvenile-lifers-parole-chance-after-25-years/.

bill in the 2017 legislative session, which ultimately passed and became effective August 1, 2017.[195]

The law allows District Attorneys to file a "notice of intent to seek a sentence of life imprisonment" within ninety days of August 1, 2017 for any juvenile lifer they believe should not receive parole.[196] The court will conduct a hearing for these individuals.[197] After the hearing, if the court finds the individual is eligible for parole or if the prosecutor never files a notice of intent, the statute states these juvenile lifers are eligible for parole after twenty-five years of incarceration.[198] Further, the offender must have (1) completed over one-hundred hours of prerelease programming, (2) completed high school or have a GED certification,[199] (3) completed a reentry program, (4) not had any serious misconduct offenses in the twelve months prior to the parole hearing,[200] and (5) been determined a low-risk level by the Department of Public Safety and Corrections.[201]

All of this information is presented before a three-judge panel.[202] The panel does not explicitly consider the *Miller* factors.[203] Instead, the panel considers "a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant experience pertaining to the offender."[204]

The statute essentially eliminates a resentencing hearing on *Miller* factors for defendants not afforded a hearing and automatically resentences each defendant to twenty-five years to life with parole eligibility.[205] However, in cases where a hearing was requested by the

195. LA. CODE CRIM. PROC. ANN. art. 878.1 (2017).

196. *Id.* at art. 878.1(B)(1).

197. *Id.* There is little guidance on the substantive hearing provided in the statute, but the legislature does require courts to consider the *Miller* factors and evidence presented by the prosecutor and defense counsel. *See id.*

198. LA. STAT. ANN. § 15:574.4(E)(1)(a) (2017).

199. *Id.* § 15:574.4(E)(b)–(e). The law specifies that if the offender was determined unable to complete a GED program, an adult literacy program, job training program, or basic adult education program will suffice. *Id.*

200. LA. STAT. ANN. § 15:574(E)(b) (2017). A major disciplinary offense is defined as a Schedule B offense. *Id.* A Schedule B offense encompasses a large variety of offenses including: possessing contraband, disobeying direct orders, fighting, attempting escape, gambling, and falsely complaining of being sick. LA. DEP'T OF PUB. SAFETY & CORR., DISCIPLINARY RULES & PROCEDURES FOR ADULT OFFENDERS 20–23 (2008).

201. *Id.* § 15:574.4(A)(4)(f). The statute also provides a requirement for completion of a substance abuse program, if applicable. *Id.* at § 15:574.4(A)(4)(d).

202. *Id.* § 15:574.4(D)(2).

203. *See id.*

204. *Id.*

205. *See id.* § 15:574.4(D)(1)(a).

prosecutor, life without parole should be "reserved for the worst offenders and the worst cases."[206]

Until this law was enacted, Louisiana prosecutors had to address juvenile lifers on a case-by-case basis;[207] a costly and confusing endeavor for prosecutors, defense attorneys, and the state court system.[208] Amidst the painstaking process of individual resentencing, the Supreme Court of Louisiana has emphasized the importance of developing a "solid and thorough" trial record "in order to aid appellate courts."[209] As of January 2018, prosecutors sought life sentences in eighty-four of the state's 255 juvenile lifers.[210]

4. Henry Montgomery

Henry Montgomery—the guinea pig in *Montgomery v. Louisiana,* the ruling that effected thousands of juvenile lifers across the country—is still in prison.[211] Mr. Montgomery, now seventy-one years old, is serving his time at Angola State Penitentiary, but was granted the opportunity of parole at a resentencing hearing in early 2017.[212] However, the parole board delayed Mr. Montgomery's parole hearing as of December 2017.[213]

V. CONCLUSIONS AND RECOMMENDATIONS

While the United States Constitution requires deference to the states for matters of policing and criminal law, the United States Constitution is still the supreme law of the land.[214] Accordingly, states must follow substantive constitutional law, such as *Miller*'s holding that sentencing juveniles to life without parole is considered "cruel and unusual

206. LA. CODE CRIM. PROC. ANN. art. 878.1(D) (2017).

207. Trimble, *supra* note 194.

208. *Regular Session Ends with Dramatic Moment*, *supra* note 191.

209. State v. Alexander, 202 So. 3d 990, 991 (2016) (Crichton, J., concurring).

210. Katy Reckdahl, *Attorneys Struggle to Address JLWOP Resentencing Hearings in Louisiana*, JUV. JUST. INFO. EXCHANGE (Jan. 22, 2018), http://jjie.org/2018/01/22/attorneys-struggle-to-address-jlwop-resentencing-hearings-in-louisiana/.

211. *See id.*

212. *Id.*

213. Michael Kunzelman, *Louisiana Delays Parole Hearing for 71-year-old Inmate*, THE SEATTLE TIMES (Dec. 14, 2017, 1:46 AM), https://www.seattletimes.com/nation-world/at-age-17-he-killed-a-deputy-at-71-he-could-get-parole/.

214. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *But see* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

punishment" under the Eighth Amendment.[215] In a country that values finality of criminal convictions and sentencing,[216] it becomes difficult to develop a procedural method for resentencing which complies with both the new interpretation of the Eighth Amendment *and* an efficient use of state resources.

Michigan, Pennsylvania, California, and Louisiana have developed procedures with varying degrees of compliance with *Montgomery*. Michigan provides deference to prosecutors to determine when to seek life without parole, again;[217] a practice that is certainly not within the constraints imaged by Justice Kennedy.

Further, Justice Kennedy explained "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[218] In Michigan, some prosecutors urged that all of their juvenile lifers were the "rarest" of cases.[219] However, a sentencing court will need to determine the "rarest" of cases, as opposed to the prosecutor. Additionally, this can be very costly to the Michigan court system, which will inevitably have to conduct individualized resentencing hearings for juvenile lifers who could have negotiated a lighter sentence.

In stark contrast, California developed SB 9, which has provided a "meaningful opportunity"[220] for release. All juvenile lifers have the opportunity for a resentencing hearing, not just once, but three times.[221] This will allow the trial court to not only assess the potential for rehabilitation, but see the fruits of actual rehabilitation. Since California no longer presumes sixteen-and-seventeen-year-old first-degree murder defendants will be sentenced to life without parole, this will have a significant impact in reducing future juvenile life without parole issues.[222]

Pennsylvania, specifically Philadelphia, has developed a procedure for resentencing which meets all of the *Miller* requirements. In Philadelphia, the court relies on the thoughtful negotiations between the

215. *See* Miller v. Alabama, 567 U.S. 460, 470 (2012) ("[M]andatory life-without-parole sentences for juveniles violate the Eighth Amendment."); Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion).

216. *See supra* Section II.

217. *See generally* MICH. COMP. LAWS ANN. § 769.25(2) (West 2016). *See also supra* Section IV.B.

218. Montgomery v. Louisiana, 136 S. Ct. 718, 733–34 (2016) (quoting Miller, 567 U.S. at 479).

219. Dickerson, *supra* note 124. Prosecutor Eric Smith of Macomb County said "[w]e've already gotten to the worst of the worst." *Id.* Therefore, he is seeking life without parole again. *Id.*

220. Miller, 567 U.S. at 479.

221. *See supra* Section IV.C.

222. *See supra* Section IV.C.

prosecutor and the defense attorney to drive resentencing.[223] This focus will ultimately allow for an expedited resentencing procedure compared to Michigan, where the prosecutor appears to have the upper hand before stepping foot into the courtroom.[224]

Since Louisiana's sentencing procedure was enacted recently, it is difficult to predict if the law will provide a sufficient framework for resentencing.[225] A strong feature of the statute, similar to California's SB 9, is that the panel hearing is mandated after a certain period of years in prison, although this is not available to all inmates.[226] The delay in a panel hearing ultimately gives the juvenile lifer time to reflect and rehabilitate. Louisiana's new law incorporated some additional factors such as GED and pre-release programming,[227] which, although not specifically required by *Miller* and *Montgomery*, provides an excellent catalyst for predicting if a juvenile lifer will succeed outside the prison walls.[228]

An ideal system for juvenile lifer resentencing would require a resentencing hearing and proof of rehabilitation after a specified length of years, modeled after California. This would allow inmates who were previously not able to take advantage of prison programming to have a meaningful opportunity to do so.

Additionally, the inmate should be required to initiate resentencing if they are below the specified length of years. For example, if the state adopted a statute which required a resentencing hearing after twenty years, any juvenile lifers who had served nineteen years or less would be responsible for initiating the resentencing hearing. Any juvenile lifers who were over the specified number of years would automatically be considered for resentencing. Taking from the previous example, any juvenile lifer who served twenty years or more would automatically be eligible for a resentencing hearing.

This system would allow the courts to comply with the *Miller* factors in consideration of the resentencing, while witnessing evidence of actual rehabilitation. Additionally, by shifting the burden of who should file (juvenile lifer versus the state), this will help to alleviate some of the

223. *See* discussion *supra* Section IV.A.
224. *See* discussion *supra* Section IV.B.
225. *See* discussion *supra* Section IV.C.
226. H.R. 264, 2016 Leg., Reg. Sess. (La. 2016).
227. *Id.*
228. Although, this consideration is not available if the prosecutor sought life without parole, a hearing occurred, and the juvenile lifer was resentenced to life without parole. *See supra* Section IV.

practical concerns and administrative headaches involved with resentencing hundreds of juvenile lifers.

The prosecutor should also not seek life without parole at conception of the resentencing hearing, since this is reserved for the "'rare juvenile offender whose crime reflects irreparable corruption.'"[229] Having to overcome the presumption of life without parole is a difficult task, especially for individuals who have already spent years in prison. This, additionally, detracts attention from a thoughtful consideration of the characteristics of youth and rehabilitation, which is required to be evaluated in juvenile lifer cases.

In an ideal world, all juvenile lifers will get an individualized resentencing under *Miller* and *Montgomery*, but there are obvious practical concerns such as persistent issues with the parole process.[230] Developing an efficient procedure is necessary to ensure that the constitutional liberties of juvenile lifers are not negatively affected.[231]

229. Miller v. Alabama, 567 U.S. 460, 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

230. AM. CIVIL LIBERTIES UNION, *supra* note 5, at 36. "In delegating to parole boards the ultimate responsibility for whether a young offender will be released, states may have solved their constitutional sentencing problem in name only—and given false hope to thousands of individuals serving long sentences since they were children under the age of 18." *Id.*

231. Although beyond the scope of this article, the ultimate success of juvenile lifer resentencing will depend on the mitigation work "includ[ing] re-entry planning." Lauren Fine & Joanna Visser Adjoian, *Making 'Montgomery' Meaningful for Juvenile Lifers*, LEGAL INTELLIGENCER (Aug. 22, 2016).