

## A PROPOSED SOLUTION TO THE RESENTENCING OF JUVENILE LIFERS IN PENNSYLVANIA POST MONTGOMERY

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### ABSTRACT

*The Supreme Court rulings of Roper and Graham held that children are constitutionally different from adults when it comes to the imposition of the death penalty. Miller extended those holdings to imposition of mandatory life sentences without parole (LWOP) to individuals under the age of eighteen when they committed their crimes. The Court held that sentencing courts must take into consideration age and its attendant attributes before imposing a sentence of LWOP; otherwise, the sentence violates the Eighth Amendment's Cruel and Unusual Punishments Clause. For four years after Miller, however, it was unclear whether the holding applied retroactively to the nearly 2000 juvenile lifers whose sentences were final before that decision came down. Some states decided that Miller was retroactive; others decided it was not. In 2016 the Supreme Court held in Montgomery v. Louisiana that Miller's holding was retroactive and that juvenile lifers whose sentences were final before Miller were entitled either to a resentencing or to immediate parole eligibility. Miller affected more juvenile lifers in Pennsylvania than any other state, with nearly 500 individuals in need of resentencing. Pennsylvania is currently grappling with how to conduct these resentencings, particularly considering that sentencing laws passed after Miller do not apply to these individuals. There are numerous, significant issues associated with conducting a retrospective Miller analysis that put juvenile lifers at a severe disadvantage, particularly be-*

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*cause they entered prison without the hope of release. Consequently, juvenile lifers in Pennsylvania should – after serving their current mandatory minimums – automatically be eligible for parole. This solution addresses the unfairness that juvenile lifers are likely to face at resentencing without compromising public safety, promotes efficient use of resources, and remains consistent with the rehabilitative purpose of the juvenile justice system.*

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## INTRODUCTION

Qu'eed Batts was born to a mother who was only twelve years old when she got pregnant.<sup>1</sup> He has never lived with his biological father, who is currently incarcerated in a federal institution in North Carolina.<sup>2</sup> At the age of six, the state of New Jersey removed Qu'eed from his mother's custody when he was found home alone, unsupervised, and without food.<sup>3</sup> For the next six years, Qu'eed bounced back and forth between family members, foster parents, and a homeless shelter.<sup>4</sup> Ultimately, he was removed from the care of his foster parents because they physically abused him.<sup>5</sup>

At school, Qu'eed befriended a member of the Bloods gang, who was later imprisoned.<sup>6</sup> He began associating with the Bloods around the age of twelve or thirteen, and when he was only in ninth grade, Qu'eed was initiated into the gang after being required to fight five gang members.<sup>7</sup> Unfortunately for Qu'eed, many risk factors for gang membership weighed heavily against him: poor parental supervision, low parental education, child abuse and neglect, experiencing life stressors, and associating with peers who engaged in delinquent behavior.<sup>8</sup> Experts would later agree Qu'eed experienced acceptance

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1. Brief for Appellant and Appendices at 10, *Commonwealth v. Batts*, 125 A.3d 33 (Pa. Super. Ct. 2015) (No. 1764 EDA 2014).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 3. For a more thorough description of Qu'eed's upbringing, see *Commonwealth v. Batts*, 163 A.3d 410, 416-17 (Pa. 2017).

6. *Batts*, 163 A.3d at 417, 423. The Bloods is a black gang that began in Los Angeles, though subgroups later developed in other cities across the United States. JAMES C. HOWELL ET AL., OFFICE OF JUVENILE JUSTICE DELINQUENCY PREVENTION, U.S. GANG PROBLEM TRENDS AND SERIOUSNESS, 1996-2009, at 2, 8 (May 2011), <https://www.nationalgangcenter.gov/Content/Documents/Bulletin-6.pdf>. The Bloods was recently reported to be one of the five most frequently reported gangs within state correctional facilities. NAT'L GANG INTELLIGENCE CTR., 2015 NATIONAL GANG REPORT 15 (2015), <https://www.fbi.gov/file-repository/national-gang-report-2015.pdf/view>.

7. *Batts*, 163 A.3d at 417.

8. OJJDP *Strategic Planning Tool, Frequently Asked Questions About Risk Factors*, NAT'L GANG CTR., <https://www.nationalgangcenter.gov/SPT/Risk-Factors/FAQ> (last visited Jan. 29, 2018).

and structure with the gang, “exhibit[ing] the type of group identification often observed by younger people who have experienced abuse and deprivation.”<sup>9</sup> This “pull” to gang life may have been a direct consequence of being abandoned by both of his parents and his extremely unstable living situation growing up.<sup>10</sup>

When he was only fourteen, Qu’eed was riding in a car with other members of the Bloods when they arrived at the home of sixteen-year-old Clarence Edwards, who was on the porch with his father and eighteen-year-old Corey Hilario.<sup>11</sup> An older gang member in the car, Vernon Bradley, asked which other member would “put work in,” as he handed Qu’eed a gun and mask.<sup>12</sup> Afraid that he would be killed if he did not follow Bradley’s instructions, Qu’eed walked up to the porch and instructed the men to get down; instead, all three tried to run away.<sup>13</sup> Edwards’s father escaped unharmed, but Qu’eed shot Hilario, who later recovered from his injuries, and fatally shot Edwards.<sup>14</sup> Qu’eed was found guilty of first-degree murder and sentenced to a mandatory term of life imprisonment without the possibility of parole (LWOP).<sup>15</sup>

In 2012, however, the Supreme Court declared in *Miller v. Alabama* that *mandatory* sentences of LWOP were unconstitutional for juveniles.<sup>16</sup> The Court declared that a sentencer, before imposing a sentence of LWOP, must consider an offender’s age and related characteristics, including: (1) impulsivity and failure to appreciate the risks and consequences of his actions, (2) home environment, (3) circumstances of the offense,

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9. Brief for Appellant and Appendices, *supra* note 1, at 11.

10. See *id.*; see also *Frequently Asked Questions About Gangs*, NAT’L GANG CTR., <https://www.nationalgangcenter.gov/About/FAQ#q13> (last visited Jan. 12, 2018) (describing ways in which youths are “pulled” into gang life).

11. *Commonwealth v. Batts*, 125 A.3d 33, 35–36 (Pa. Super. Ct. 2015), *rev’d*, 163 A.3d 910 (Pa. 2017).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 33, 36; see 18 PA. CONS. STAT § 1102(a)(1) (2017) (now superseded for juveniles by § 1102.1(a)).

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

(4) likelihood of being charged with a lesser crime had the youth been better able to deal with police officers and prosecutors and assist his attorney, and (5) potential for rehabilitation.<sup>17</sup> Consequently, Qu'eed was entitled to a resentencing consistent with the principles espoused in *Miller*.<sup>18</sup>

At resentencing, one of the Commonwealth's experts explained Qu'eed felt a need to belong to something.<sup>19</sup> Another testified Qu'eed was "vulnerable to the demands of an older, more powerful male."<sup>20</sup> Though the Commonwealth's experts believed Qu'eed would not take well to treatment and had little potential for rehabilitation, two of Qu'eed's experts, along with an independent evaluator, argued that he *was* amenable to rehabilitation and had a genuine desire to change.<sup>21</sup> Despite the Supreme Court's warning that imposing a harsh penalty like LWOP for a juvenile should be uncommon—given the difficulty in distinguishing between youth who are capable of change and those who are irreparably corrupt<sup>22</sup>—the court resentenced Qu'eed to life without parole.<sup>23</sup> As the trial court explained, "[t]his was not a crime that resulted from youthful impulsivity, a mistake in judgment, or inability to foresee the consequences of his actions. [Appellant] intended to kill, and he did kill."<sup>24</sup> In reviewing Qu'eed's sentence on appeal, however, Justice Fitzgerald criticized the trial court for not properly taking into consideration the relevant youthful attributes

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17. *Id.* at 477. These are commonly referred to as the "Miller factors." See Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 689 (2016).

18. Qu'eed had appealed his sentence prior to *Miller*, and the Pennsylvania Superior Court affirmed it, but the Pennsylvania Supreme Court delayed ruling until *Miller* was decided. *Commonwealth v. Batts*, 66 A.3d 286, 290 (Pa. 2013). *Miller*'s holding rendered Qu'eed's sentence unconstitutional, and the Pennsylvania Supreme Court held that Qu'eed was entitled to a resentencing which took the *Miller* factors into account. *Id.* at 296–97.

19. *Batts*, 125 A.3d at 52 (Fitzgerald, J., concurring and dissenting).

20. *Id.* (quoting Report by Steven Samuel, Ph.D., 1/12/07, at 6).

21. See *id.* at 53 (noting Qu'eed demonstrated changed thinking and behavior while in prison).

22. *Miller*, 567 U.S. at 478–80.

23. *Batts*, 125 A.3d at 46 (majority opinion).

24. *Id.* at 51 (Fitzgerald, J., concurring and dissenting) (quoting the trial court, N.T., 5/2/14, at 46–47).

that may have led Qu'eed to commit such a crime, explaining "[e]ven if Appellant's decision to join the Bloods was 'volitional,' it was the purposeful decision of a juvenile who was then twelve or thirteen years old."<sup>25</sup>

Qu'eed again appealed his sentence—this time, he won.<sup>26</sup> The Pennsylvania Supreme Court agreed there should be a rebuttable presumption *against* imposing LWOP for a juvenile, which the prosecution can rebut only with proof beyond a reasonable doubt the juvenile is "permanently incorrigible and thus is unable to be rehabilitated."<sup>27</sup> The Pennsylvania Supreme Court pointed out Qu'eed's sentencing court made repeated findings as to his capacity for rehabilitation.<sup>28</sup> Additionally, it determined the sentencing court's decision rested on testimony that directly conflicted with the United States Supreme Court's conclusions that youths' actions often result from "transient immaturity."<sup>29</sup> Therefore, the court held Qu'eed's LWOP sentence violated the Eighth Amendment's Cruel and Unusual Punishments Clause per the *Miller* and *Montgomery* holdings.<sup>30</sup>

After the Supreme Court decided *Miller*, lower courts split over whether *Miller's* holding applied retroactively because the Supreme Court did not specifically address the issue in its opinion.<sup>31</sup> In January 2016, the Court clarified the issue by holding in *Montgomery v. Louisiana* that *Miller's* holding must be given retroactive effect because the holding constituted a substantive rule of constitutional law.<sup>32</sup> As a result, over 2000 individuals sentenced as juveniles to mandatory LWOP, nearly half of whom were sentenced over twenty years ago, be-

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25. *Id.* at 53. The majority, however, upheld Qu'eed's sentence. *Id.* at 33 (majority opinion).

26. *Commonwealth v. Batts*, 163 A.3d 410, 460 (Pa. 2017).

27. *Id.* at 459.

28. *See id.* at 436–37.

29. *See id.* at 438–39.

30. *Id.* at 439.

31. Brianna H. Boone, Note, *Treating Adults Like Children: Re-Sentencing Adult Juvenile Lifers After Miller v. Alabama*, 99 MINN. L. REV., 1159–69 (2015).

32. 136 S. Ct. 718, 723 (2016).

came entitled to resentencings.<sup>33</sup> Although Qu'eed's initial resentencing took place prior to *Montgomery*, his case nevertheless illustrates some of the difficulties associated with interpretation and application of the *Miller* factors, which apply to the resentencings of those individuals eligible under *Montgomery*.<sup>34</sup>

Most of the resentencings that need to take place under *Montgomery* are fraught with even more difficulty, however, because: (1) a complete analysis of the *Miller* factors requires evaluating the defendant at the time the crime was committed, which may have been decades ago, rendering such an evaluation impossible; (2) many psychological assessments currently in use which measure relevant age-related characteristics were not developed at the time most individuals were initially sentenced; (3) relevant school and clinical records may be difficult to find if not completely unavailable; (4) assessing the *Miller* factors may require interviews with friends, family members, or teachers who may have since passed away or whose memories of the defendant will not be as reliable; (5) hindsight might impact an analysis of the defendant's rehabilitative potential; and (6) defendants who previously had no hope of release may not—and, in some instances, could not—have engaged in rehabilitative programs they otherwise would have had they known release was a possible option. Because of these difficulties, defendants who need to be resented under *Montgomery* will be at a significant disadvantage at the time of resentencing.

Pennsylvania revised its sentencing laws in 2012 to be consistent with the *Miller* decision.<sup>35</sup> Though the legislature abolished mandatory LWOP for individuals convicted of first- or

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33. See Brief for Amici Curie State of Michigan, et al. in Support of Respondent at 2, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 516909, at \*4. Alternatively, the Court held that instead of resentencing individuals, states could remedy *Miller* violations by allowing offenders to be eligible for parole. *Montgomery*, 136 S. Ct. at 736.

34. See *Miller v. Alabama*, 567 U.S. 460, 477 (2012) (listing the age-related factors that courts should consider prior to imposition of a sentence of LWOP for a juvenile).

35. See Crimes and Offenses—Omnibus Amendments, Act No. 2012-204, 2012 Pa. Laws 1665 (codified as amended in 18 PA. CONS. STAT. §§ 1102, 1102.1 (2017)).

second-degree murder who were under the age of eighteen at the time they committed their offense, LWOP is *still* a viable sentencing option for these individuals.<sup>36</sup> The legislature also imposed statutory minimum sentences of twenty to thirty-five years to life.<sup>37</sup> Though these laws do not apply retroactively to individuals whose cases were final before *Miller*, the Philadelphia District Attorney's (DA) Office has stated they will use the Commonwealth's new statutes as a guide in resentencing.<sup>38</sup> Although the former District Attorney of Philadelphia initially said he would not seek LWOP sentences,<sup>39</sup> the office has since sought the penalty in at least three cases.<sup>40</sup> Because of the difficulties in conducting a resentencing consistent with the *Miller* principles, a juvenile defendant given a mandatory sentence of LWOP should automatically become eligible for parole after serving the current mandatory minimum penalty for his particular crime. Moreover, because a sentence of life

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36. See 18 PA. CONS. STAT. § 1102.1(a)-(c).

37. Individuals fifteen years of age or older face a minimum of thirty-five years to life for first-degree murder and thirty years to life for second-degree murder; individuals under fifteen years of age face a minimum of twenty-five years to life for first-degree murder and twenty years to life for second degree murder. *Id.*

38. See Phila. Dist. Attorney's Office, *Philadelphia District Attorney Issues Statement on Juvenile Resentencing Protocol in Compliance with SCOTUS*, OFF. DIST. ATT'Y (Jun. 3, 2016), <https://phillyda.wordpress.com/2016/06/03/philadelphia-district-attorney-issues-statement-on-juvenile-resentencing-protocol-in-compliance-with-scotus/>.

39. Samantha Melamed, *The End of Life Without Parole for Juveniles in Philadelphia?*, PHILA. INQUIRER (June 5, 2016, 1:09 AM), [http://www.philly.com/philly/news/20160605\\_The\\_end\\_of\\_life\\_without\\_parole\\_for\\_juveniles\\_in\\_Philadelphia\\_.html](http://www.philly.com/philly/news/20160605_The_end_of_life_without_parole_for_juveniles_in_Philadelphia_.html).

40. See Samantha Melamed, *Philly DA Will Seek Life Without Parole for Some Juveniles, After All*, PHILA. INQUIRER (Mar. 3, 2017, 8:10 PM), <http://www.philly.com/philly/news/Philadelphia-District-Attorney-Seth-Williams-juvenile-lifers-resentencings-life-without-parole.html>. A few days later, an en banc panel of three Common Pleas Court judges met to hear oral arguments on a number of legal issues that may arise in *Miller* resentencings, including whether LWOP is even constitutional for juveniles and who has the burden of proving a juvenile is "irreparably corrupt" and therefore eligible for LWOP. The judges' decision has yet to be published. Samantha Melamed, *Court Lays Down the Law for Philly's Juvenile Lifers*, PHILA. INQUIRER (Mar. 6, 2017, 6:32 PM), <http://www.philly.com/philly/news/Philly-juvenile-lifers-.html>. A month later, the judges decided to adhere to the unconstitutionality of LWOP for juveniles found in *Miller* and "agreed . . . that defendants should receive advance notice if prosecutors will seek life without parole once again at their resentencings." Samantha Melamed, *For Juvenile Lifers, Philly Courts Set a Tough Path Forward*, PHILA. INQUIRER (Apr. 20, 2017, 7:52 PM), <http://www.philly.com/philly/news/Philly-juvenile-lifers-contested-hearings-Philadelphia.html>.



imprisonment, even with the possibility of parole, will—in an overwhelming majority of instances—violate the spirit of *Roper, Graham, Miller, and Montgomery*, life sentences should rarely, if ever, be pursued.

#### I. PURPOSES OF PUNISHMENT AND THE PAROLE SYSTEM

There are a number of different justifications for punishing an individual who has committed a crime, and these traditionally fit into one of two categories: utilitarian and non-utilitarian.<sup>41</sup> Utilitarian purposes for punishment, which include rehabilitation, incapacitation, and deterrence, are intended to decrease the likelihood of future crimes being committed, either by the individual who committed the crime or by society as a whole.<sup>42</sup> Notably, there are important limitations to punishment according to utilitarian theory.<sup>43</sup> For example, a cost-benefit analysis should be conducted wherein the costs of a punishment—whether fiscal or in terms of harms to the individual or society—should not overshadow the benefits of that punishment (e.g., crime control).<sup>44</sup> Additionally, if “less severe or less costly methods” are available, “those methods should be preferred.”<sup>45</sup>

In contrast to utilitarian punishment purposes, non-utilitarian reasons for punishment (e.g., retribution) are ends in and of themselves.<sup>46</sup> Rather than achieving some societal benefit, they are thought to serve principles of justice and fairness in that an offender must receive his “just deserts” or be punished simply because he committed a societal wrong.<sup>47</sup>

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41. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69–70 (2005).

42. *Id.* at 70–71; *cf.* *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind . . . . It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.”).

43. *See* Frase, *supra* note 41, at 72.

44. *See id.*

45. *Id.* at 72–73.

46. *See id.* at 70, 73.

47. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–16 (2000); *see also* Frase, *supra* note

Non-utilitarian purposes have limiting principles as well.<sup>48</sup> For instance, limits may be placed on upper-level punishment to avoid unfairly punishing an individual more harshly than is deserved.<sup>49</sup> Additionally, principles of proportionality and uniformity demand that offenders with different levels of blameworthiness be punished differently and in proportion to their level of blameworthiness.<sup>50</sup> Blameworthiness consists of two elements: “the nature and seriousness of the harm caused or threatened by the crime and the offender’s degree of culpability in committing the crime.”<sup>51</sup>

### A. History of Parole

The purpose of punishment for any given crime or class of offenders is not static; rather, it may change over time based on society’s morals and views.<sup>52</sup> Such is the case with parole.<sup>53</sup> Parole is the process by which inmates can earn early release

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41, at 73 (“[O]ffenders are punished simply because they deserve to be.”).

48. See Frase, *supra* note 41, at 73–74.

49. See *id.* at 74; see also *Furman v. Georgia*, 408 U.S. 238, 303 (1972) (Brennan, J., concurring) (“As administered today [to the crime of rape] . . . the punishment of death cannot be justified as a necessary means of exacting retribution from criminals.”).

50. See Frase, *supra* note 41, at 68, 74; see also *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (“Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”).

51. Frase, *supra* note 41, at 73.

52. See Sarah Sloan, *Why Parole Eligibility Isn’t Enough: What Roper, Graham, and Miller Mean for Juvenile Offenders and Parole*, 47 COLUM. HUM. RTS. L. REV. 243, 255–56 (2015); see also *Ewing v. California*, 538 U.S. 11, 25 (2003) (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”).

53. The purpose of punishment for drug offenders similarly experienced a shift in its rationale. With the War on Drugs declared by President Reagan in the 1980’s, there was a significant push to arrest drug offenders and to sentence them to long, harsh periods of incarceration. See Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 331–34 (2012). Once it was discovered, however, that treating a drug offender’s addiction and mental health problems improved recidivism rates better than traditional incarceration, society shifted to a more rehabilitative view of punishment, as evidenced by the significant increase in the proliferation of drug courts throughout the country. See Hon. Patrick C. Bowler, *A Recovery Plan for Michigan’s Criminal Justice System*, 88 MICH. B.J. 32, 33 (2009). As of June 2015, there were an estimated 3142 drug courts in the United States. *Drug Courts*, NAT’L INST. JUST., <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> (last modified Jan. 10, 2017).

from prison after demonstrating good conduct.<sup>54</sup> Paroled inmates are released under the condition of supervision by parole officers who will, ideally, aid in inmates' reintegration into society, but parole officers can also send individuals back to prison for committing a new crime or for violating the conditions of their release.<sup>55</sup> The parole system quickly became popular as society embraced a rehabilitative view of punishment;<sup>56</sup> however, as the nation began to strongly favor retributive over rehabilitative purposes of punishment, the popularity of the parole system began to fade.<sup>57</sup>

The roots of the parole system first took hold in the United States in the late 1800s as the result of a culmination of several factors: development of a "new penology," which stressed the primary aim of prison as "the reformation of criminals, not the infliction of vindictive suffering";<sup>58</sup> increasing use of good-time laws, which allowed prison officials to reduce inmates' sentences as a result of good conduct;<sup>59</sup> increasing use of executive power to commute sentences;<sup>60</sup> and the rising indeterminate sentencing schemes.<sup>61</sup> In particular, good-time laws and indeterminate sentencing schemes combined to allow judges to set maximum and minimum terms for offenders, with good behavior allowing for the possibility of release after serving the minimum term.<sup>62</sup> Giving inmates an incentive to behave well was thought to correct problems of the earlier peniten-

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54. See Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 109, 117 (Julie Horney ed., 2000).

55. See *id.*; see, e.g., 61 PA. CONS. STAT. § 6138(b)-(c) (2017).

56. See Cullen & Gendreau, *supra* note 54, at 116.

57. See *infra* notes 73-78 and accompanying text.

58. Cullen & Gendreau, *supra* note 54, at 116 (quoting *Declaration of Principles Adopted and Promulgated by the Congress*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 541, 541 (E.C. Wines ed., 1871)).

59. See PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF FEDERAL PAROLE SYSTEM 4-15 (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> (chronologizing the rise of good-time laws); see also G. LARRY MAYS & L. THOMAS WINFREE, ESSENTIALS OF CORRECTIONS 228 (5th ed. 2013).

60. HOFFMAN, *supra* note 59, at 4; see also MAYS & WINFREE, *supra* note 59, at 229.

61. MAYS & WINFREE, *supra* note 59.

62. Cullen & Gendreau, *supra* note 54, at 116.

tiary model—which provided no such incentives to change because release dates were fixed—by providing inmates with hope and the self-interest and power to influence their own destinies.<sup>63</sup>

Around the same time, advances in the social sciences allowed researchers to gain a greater understanding of human behavior and the reasons people commit crimes.<sup>64</sup> Prison officials eagerly embraced these ideas, leading to a widespread adoption of the “rehabilitative ideal”—a model that stressed identifying and addressing the unique psychological and social factors that cause individuals to commit crimes.<sup>65</sup> In 1907, New York became the first state to formally implement a parole system, and other parole systems quickly emerged as the rehabilitative ideal became the penal system’s primary goal.<sup>66</sup> In fact, by 1942, every state, in addition to the federal government, had a parole system in place, and by 1977, over 70% of inmates were released on discretionary parole.<sup>67</sup>

Beginning in the 1960s and 1970s, however, increasing doubt was cast upon not only the effectiveness but also the possibil-

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63. *Id.* The penitentiary model was designed to isolate inmates, either through solitary confinement or silence, from the negative influence of society and other inmates in order to reform them by “creat[ing] genuine regret and penitence in the criminal’s heart” through the use of religion and hard labor. See MARK S. HAMM, *THE SPECTACULAR FEW: PRISONER RADICALIZATION AND THE EVOLVING TERRORIST THREAT* 19 (2013) (emphasis omitted). The use of penitentiaries gained traction in the early 1800s and was based either on Pennsylvania’s Eastern State Penitentiary or on New York State’s Auburn System. See *History of Eastern State Penitentiary, Philadelphia*, EASTERN ST. PENITENTIARY, <http://www.easternstate.org/sites/default/files/pdf/ESP-history6.pdf> (last visited Mar. 12, 2018). Penitentiaries, however, fell out of favor in the early 1900s given critics’ claims that they were inhumane and ineffective. *Id.*

64. Cullen & Gendrau, *supra* note 54, at 116.

65. See *id.* at 116–17; see also MAYS & WINFREE, *supra* note 59, at 44.

66. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 58 (2003); MAYS & WINFREE, *supra* note 59, at 44.

67. PETERSILIA, *supra* note 66. Discretionary parole, as opposed to mandatory parole, is used with an indeterminate sentencing system and allows parole boards to release offenders when the parole board believes they are ready to return to the community. Yan Zhang et al., *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, 60 *CRIME & DELINQ.* 694, 694 (2009). Mandatory parole, on the other hand, is used with determinate sentencing systems and removes discretion from the parole board; an offender is automatically released based on a calculation using length of sentence imposed, time served, and good time earned. *Id.* at 694; PETERSILIA, *supra* note 66, at 59–60.

ity of prisoner rehabilitation.<sup>68</sup> First, there was an increase in inmate uprisings and riots during this time.<sup>69</sup> Additionally, in 1974 Robert Martinson released his notorious “nothing works” report on prison reform, concluding that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”<sup>70</sup> Martinson’s report essentially gave rehabilitation its death knell.<sup>71</sup> Moreover, distrust in the ability of authorities to use their discretion to release inmates in a way that was nondiscriminatory, consistent, and prudent grew enormously, causing indeterminate sentencing to fall out of favor.<sup>72</sup>

Ultimately, the nation began switching its focus from rehabilitation to retribution as the main purpose of penal systems, leading to the demise of parole as a viable opportunity for prisoners.<sup>73</sup> In 1976, Maine was the first state to abolish its discretionary parole system, followed closely by California and

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68. MAYS & WINFREE, *supra* note 59, at 45.

69. *Id.*; Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, PUBLIC INTEREST, Spring 1974, at 22, 22, [http://www.pbpp.pa.gov/research\\_statistics/Documents/Martinson-What%20Works%201974.pdf](http://www.pbpp.pa.gov/research_statistics/Documents/Martinson-What%20Works%201974.pdf). One of the most infamous uprisings occurred at Attica Correctional Facility in 1971 during which 1300 inmates took over the facility to protest prison conditions. In an attempt to regain control, 550 New York State Police Officers plus hundreds of other law enforcement personnel descended upon the facility eager to inflict harm upon the prisoners. After only thirty minutes, 128 men had been shot and twenty-nine prisoners and hostages had been killed. Larry Getlen, *The True Story of the Attica Prison Riot*, N.Y. POST (Aug. 20, 2016), <http://nypost.com/2016/08/20/the-true-story-of-the-attica-prison-riot/>; see also HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* (2016) (chronicling the origins and aftermath of the Attica provision uprising).

70. Martinson, *supra* note 69, at 25 (emphasis omitted). The report was a review of the effects of rehabilitation on incarceration using 231 studies conducted between 1945 and 1967 in the United States and other countries. *Id.* at 24. The report essentially boiled down to the conclusion that “nothing works” in corrections treatment. Cullen & Gendreau, *supra* note 54, at 119.

71. PETERSILIA, *supra* note 66, at 63. *But see* Cullen & Gendreau, *supra* note 54, at 124–30 (critiquing Martinson and colleagues’ techniques and explaining how Martinson himself later withdrew his “nothing works” conclusion).

72. Cullen & Gendreau, *supra* note 54, at 122 (“For conservatives, the problem was that judges and parole boards were too *lenient* . . . . In [liberals’] eyes, judges were free to discriminate against poor and minority offenders, while parole boards used their discretion to punish offenders who challenged the status quo of an inhumane prison regime.”); see also PETERSILIA, *supra* note 66, at 63–64 (detailing various attacks on indeterminate sentencing).

73. MAYS & WINFREE, *supra* note 59, at 45; PETERSILIA, *supra* note 66, at 65; Sloan, *supra* note 52, at 256.

Indiana.<sup>74</sup> By the end of 2002, fifteen states and the federal government had abolished the discretionary parole system for almost all offenders, and another five states had eliminated it for certain violent crimes.<sup>75</sup> For those states that still have parole systems in place, release rates have decreased considerably since the 1970s and 1980s.<sup>76</sup> For example, in 1988, Texas approved 57% of individuals who applied for parole;<sup>77</sup> in 2015, they approved only 35% of individuals.<sup>78</sup>

### B. Pennsylvania's Parole System

Pennsylvania's parole system was officially created in 1941.<sup>79</sup> Its purpose is to divert offenders from prison, allowing them to live in and become productive members of society while under adequate supervision.<sup>80</sup> Parole is considered a privilege, not a right,<sup>81</sup> in that it "is nothing more than a possibility, and, when granted, it is nothing more than a favor granted upon a prisoner by the state as a matter of grace and mercy."<sup>82</sup> Although Pennsylvania did not abolish its parole system (unlike other states mentioned above),<sup>83</sup> the Commonwealth did eliminate parole for certain crimes and offenders. For instance, individuals eighteen years of age or older who commit first- or second-degree murder are automatically ineligible for parole.<sup>84</sup>

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74. PETERSILIA, *supra* note 66, at 65.

75. *Id.* at 65-68. In addition to the states listed, Arizona, Delaware, Illinois, Kansas, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin had abolished discretionary parole by 2002. *Id.* at 66-67.

76. Sloan, *supra* note 52, at 256 n.83.

77. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 480 (1999).

78. TEX. BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT FY 2015, at 5 (2015).

79. Act of Aug. 6, 1941, No. 323, 1941 Pa. Laws 861 (repealed by Act of Aug. 11, 2009, No. 49, 2009 Pa. Laws 494); *Statutes Impacting the Pennsylvania Board of Probation and Parole from 1941 to 2013*, PENN. BD. PROBATION & PAROLE, <http://www.pbpp.pa.gov/Information/Law-Library/Pages/Legislative-History.aspx> (last updated May 16, 2017).

80. 61 PA. CONS. STAT. § 6102(1) (2017).

81. *See id.* § 6139(a)(3.2).

82. *Weaver v. Pa. Bd. of Prob. and Parole*, 688 A.2d 756, 770 (Pa. Commw. Ct. 1997) (citing *Ughbanks v. Armstrong*, 208 U.S. 481, 487-88 (1908)).

83. *See* 61 PA. CONS. STAT. §§ 6102, 6111.

84. *See* 18 PA. CONS. STAT. § 1102.

Individuals under the age of eighteen who commit first-degree murder may also be ineligible for parole.<sup>85</sup>

An inmate in Pennsylvania may become eligible for parole at the expiration of his or her minimum sentence, as set by the court.<sup>86</sup> Generally, the length of an inmate's maximum sentence establishes who has the ability to determine parole: if the maximum sentence is less than two years, the county court has the authority; if the maximum sentence is five years or more, the Pennsylvania Board of Probation and Parole ("Parole Board") has the authority; if the maximum sentence is between two and five years, either the county court or the Parole Board could have the authority.<sup>87</sup> When determining whether an inmate should be paroled, the Parole Board *must* consider a number of different factors, including the nature and circumstances of the offense; the inmate's background, characteristics, and criminal history; written testimony by the victim or victim's family; written testimony from the sentencing hearing; the inmate's behavior while in prison; the inmate's "physical, mental and behavioral condition and history"; and the inmate's history of familial violence.<sup>88</sup> All of these factors are

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85. See *id.* § 1102.1(a). Unlike adults, juveniles cannot be *automatically* sentenced to life without parole (LWOP); however, in Pennsylvania, LWOP still remains a viable sentencing option after consideration of the required factors. *Id.* § 1102.1(d).

86. 61 PA. CONS. STAT. § 6137(a)(3). When determining an individual's minimum sentence, Pennsylvania courts must (1) abide by any statutory mandatory minimums, and (2) take the Pennsylvania Commission on Sentencing's guidelines into account. While judges cannot go below any statutory mandatory minimums, they may impose minimum sentences that are higher than those required by statute, so long as they state on the record the reason for the sentence imposed and the reason for departure (if any) from the sentencing guidelines. 42 PA. CONS. STAT. § 9721(a)-(b). However, the inmate's prosecuting attorney and the court have the ability to file a written objection to the inmate's preliminary parole eligibility. 61 PA. CONS. STAT. § 6137(g)(2)-(3). Additionally, even if the board determines an inmate is preliminarily eligible for parole, the inmate must satisfy additional criteria to become fully eligible, such as maintaining good behavior and not being a threat to public safety. *Id.* § 6137(g)(4).

87. 42 PA. CONS. STAT. § 9762(a)-(b); see also Pennsylvania Board of Probation and Parole, Procedure 3.02.02, Sentence Types and Paroling Authority (effective Jan. 23, 2012), <http://www.pbpp.pa.gov/Information/procedures/Documents/Chapter%203/03%2002%2002%20Sentence%20Types%20and%20Paroling%20Authority.pdf>. This Note will focus on inmates whose maximum sentences were greater than five years. Therefore, this Note will focus on parole procedures as they relate to the Parole Board. For a description of the procedures involved when an inmate is paroled by the court, see 42 PA. CONS. STAT. § 9776.

88. 61 PA. CONS. STAT. § 6135(a)(1)-(7).

considered while giving primary consideration to public and victim safety.<sup>89</sup>

As of December 2016, there were over 33,000 individuals on parole in Pennsylvania.<sup>90</sup> Similar to other states, release rates in Pennsylvania have dropped dramatically since the 1970s and 1980s. For example, in 1990 the Parole Board in Pennsylvania granted parole at a rate of 73.1%; in 1996, the rate dropped to a low of 38.8%.<sup>91</sup> Release rates, however, appear to be on the rise,<sup>92</sup> as of 2016 the release rate had risen to 58%.<sup>93</sup>

## II. THE EIGHTH AMENDMENT AND THE SENTENCING OF JUVENILES

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>94</sup> Rather than being based on historical notions of what would have been considered cruel and unusual at the time the Bill of Rights was adopted, the Eighth Amendment’s Cruel and Unusual Punishments Clause is generally understood to fluctuate with “the evolving standards of decency that mark the progress of a maturing society.”<sup>95</sup> Two tests have been established to determine whether a punishment violates the Eighth Amendment’s Cruel and Unusual Punishments Clause. Nonetheless, there is disagreement over how to determine whether a punishment violates the Eighth Amendment. As such, there is a great deal of evolving case

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89. See *id.* § 2154.5(a)(1)-(7).

90. See COMMONWEALTH OF PA. BD. OF PROB. & PAROLE, MONTHLY STATISTICS REPORT DECEMBER 2016, at 1 (2017) [hereinafter MONTHLY STATISTICS REPORT].

91. See PA. DEP’T OF CORR., ANNUAL STATISTICAL REPORT 45 (2000); see also 12 West’s Pa. Prac., Law of Probation & Parole § 2:12 (3d ed.).

92. See PA. DEP’T OF CORR., ANNUAL STATISTICAL REPORT 45 (2004).

93. See MONTHLY STATISTICS REPORT, *supra* note 90.

94. US CONST. amend. VIII. The Eighth Amendment applies to the states through the Fourteenth Amendment, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

95. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (holding execution of juveniles under age 18 violated the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (holding execution of mentally retarded individuals violates the Eighth Amendment).



law on whether a particular punishment, or whether the *length* of a particular punishment, violates the Eighth Amendment.

A. *Eighth Amendment's Relationship to Sentencing Practices*

Debate over whether the Cruel and Unusual Punishments Clause includes a proportionality principle stems from the 1910 Supreme Court case *Weems v. United States*.<sup>96</sup> Although “cruel and unusual” was typically thought to denote inhumane and barbaric punishment, like torture,<sup>97</sup> the Court held that a sentence of: (1) fifteen years imprisonment, (2) a chain at the ankle and wrist, (3) hard and painful labor, (4) elimination of marital and parental rights, and (5) a fine of 4000 pesetas, for the crime of falsifying a public document and paying out 612 pesos, was cruel—due both to the accessory punishments *and* the length of imprisonment—and also of an unusual character.<sup>98</sup> The Court noted that some believe “it is a precept of justice that punishment for crime should be *graduated and proportioned* to offense,” and explained that under the punishment in question, the defendant would be “forever kept under the shadow of his crime.”<sup>99</sup>

After *Weems*, however, the question remained whether a lengthy term of incarceration alone, without the accompanying punishments, could be a constitutional violation as well.<sup>100</sup> For nearly a century, the Court only twice found a non-capital sentence violated the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>101</sup> Jerry Helm was convicted of passing a

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96. 217 U.S. 349 (1910).

97. *Id.* at 368 (citing *McDonald v. Commonwealth*, 53 N.E. 874 (Mass. 1899)).

98. *See id.* at 366; *see also* William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 642–43 (1979). Six hundred twelve pesos equals approximately \$12.01 in current USD.

99. *Weems*, 217 U.S. at 367 (emphasis added).

100. *See* Mulligan, *supra* note 98, at 643.

101. *Compare* *Solem v. Helm*, 463 U.S. 277, 303 (1983) (finding a sentence of LWOP for uttering a no account check for \$100 a violation of the Eighth Amendment), *and* *Robinson v. California*, 370 U.S. 660, 667 (1962) (finding ninety days imprisonment for being a narcotics addict a “cruel and unusual punishment”), *with* *Ewing v. California*, 538 U.S. 11, 11 (2003) (upholding a sentence of twenty-five years to life for theft of three golf clubs), *Harmelin v. Michigan*,

“no account” check for \$100—a crime that ordinarily carried a maximum punishment of five years imprisonment and a \$5000 fine.<sup>102</sup> Because Helm had six previous nonviolent felonies, however, he was sentenced to life imprisonment without the possibility of parole, as required by South Dakota’s recidivist statute.<sup>103</sup> In a 5–4 decision, the Court found Helm’s sentence unconstitutional, holding the proportionality principle *does* apply to prison sentences, as even “a single day in prison may be unconstitutional in some circumstances.”<sup>104</sup> In the second case, Lawrence Robinson was convicted under a statute which made it illegal to be a narcotics addict and carried a minimum sentence of ninety-days imprisonment.<sup>105</sup> A police officer testified that Robinson had marks and scabs on his arm consistent with repeated injection of hypodermic needles and had admitted to occasional narcotics use.<sup>106</sup> In finding the statute a violation of the Cruel and Unusual Punishments Clause, the Court compared the status of being a narcotics addict to that of being mentally ill, a leper, or a carrier of a venereal disease, and explained “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>107</sup>

More often, however, the Court has neglected to find a lengthy prison sentence a violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>108</sup> For instance, in *Ewing v. California*, the Court upheld a sentence of twenty-five years to life for theft of three golf clubs, each val-

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501 U.S. 957, 957 (1991) (upholding a sentence of mandatory LWOP for possessing over 650 grams of cocaine), *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (upholding a sentence of forty years imprisonment and a \$20,000 fine for possession and distribution of nine ounces of marijuana), *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (upholding a sentence of life imprisonment for a third felony conviction of fraudulently obtaining \$120.75), and *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (upholding a sentence of life imprisonment for a third theft).

102. *Solem*, 463 U.S. at 277.

103. *See id.* Mr. Helm had three previous convictions for third-degree burglary as well as previous convictions for obtaining money under false pretenses, grand larceny, and driving while intoxicated. *Id.* at 279–80.

104. *Id.* at 290 (citing *Robinson*, 370 U.S. at 667).

105. *Robinson*, 370 U.S. at 660 (citing CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972)).

106. *Id.* at 661–62.

107. *Id.* at 666–67.

108. *See supra* note 100 and accompanying text.

ued at \$399, under California's three strikes law.<sup>109</sup> Similarly, in *Harmelin v. Michigan*, the Court upheld a sentence of mandatory LWOP for possession of 672 grams of cocaine.<sup>110</sup>

The Court's reasoning for its Eighth Amendment decisions represented two distinct categories of thought. One view, promoted by Justice Scalia, was that the Eighth Amendment barred certain "modes" of punishment, but did not inherently contain a proportionality principle.<sup>111</sup> Consequently, terms of imprisonment may be severe and cruel, but not unusual.<sup>112</sup> He reasoned that where the Court previously found capital sentences unconstitutional for certain categories of crimes<sup>113</sup> or offenders,<sup>114</sup> it did so not under the Eighth Amendment but rather under the "death is different" reasoning.<sup>115</sup>

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109. 538 U.S. 11, 11 (2003). California's three strikes law stated that a defendant convicted of a felony who had two or more prior serious or violent felony convictions must be sentenced to life imprisonment, with the earliest opportunity for parole at 25 years. *Id.* at 16; CAL. PENAL CODE § 667(e)(2)(A), *invalidated by* *Pinkston v. Lamarque*, 247 F. Supp. 2d 1145 (N.D. Cal. 2003).

110. 501 U.S. 957, 961 (1990). Interestingly, the Michigan Supreme Court later found imposition of mandatory life without parole for possession of over 650 grams of cocaine to be a violation of the *state's* constitution, which bans cruel or unusual punishments. *See* MICH. CONST. art. I, § 16 ("[C]ruel or unusual punishment shall not be inflicted."); *People v. Bullock*, 485 N.W.2d. 866, 872 (Mich. 1992); *cf.* US CONST. amend. VIII (banning cruel and unusual punishments).

111. *See, e.g., Harmelin*, 501 U.S. at 976 ("[T]he Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.").

112. *Id.* at 994–95.

113. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (considering a crime of rape of a child that did not result in death); *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (considering a crime of felony murder when the defendant did not kill or intend to kill the victim); *Coker v. Georgia*, 433 U.S. 584, 586 (1977) (plurality opinion) (considering a crime of rape of an adult).

114. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (pertaining to juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (pertaining to "mentally retarded" individuals).

115. *Harmelin*, 501 U.S. at 994. The phrase "death is different" refers to the Court's opinion that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The Court in *Gregg* used the phrase to refer to its prior reasoning in *Furman v. Georgia, id.*, which struck down states' death penalty schemes as unconstitutional. 408 U.S. 238, 239 (1972). The Court in *Furman* explained that the death penalty is unique in its unusual severity, finality, enormity, physical and mental suffering, denial of a person's humanity, denial of a person's constitutional rights, and degradation of human dignity. *Id.* at 286–91 (Brennan, J., concurring). The "death is different" reasoning has been used to justify the differential treatment of capital cases and defendants, in contrast to noncapital ones, in a variety of contexts. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for*

The opposing view, recently articulated by Justice Kennedy in *Graham v. Florida*, argues that the notion of proportionality is central to the Eighth Amendment.<sup>116</sup> He explains modern-day jurisprudence has demonstrated the emergence of two different classes of Eighth Amendment cases: those examining the length of a sentence for a particular crime, and those banning the death penalty for certain categories of offenders.<sup>117</sup> Each employs its own proportionality test to determine whether a sentence violates the Eighth Amendment.<sup>118</sup> For cases involving length-of-sentence challenges, the test is whether, after consideration of all of the circumstances, the sentence imposed is grossly disproportionate to the crime committed.<sup>119</sup> The test is narrowly applied, however, such that a lack of proportionality is rarely established.<sup>120</sup>

For cases that challenge use of the death penalty, the test requires the Court to first consider objective markers of society's standards—focusing on legislation and state practices—to assess whether a national consensus against the sentencing practice exists.<sup>121</sup> Second, the Court must use precedent and “the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose”<sup>122</sup> to decide whether the sentencing practice is prohibited by the Constitution.<sup>123</sup> This second step includes an analysis of the culpability of the offenders in light of the severity of the punishment, along with an assessment of how that particular punishment for that specific group of offenders serves legiti-

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*Uniformity*, 107 MICH. L. REV. 1145, 1149–62 (2009).

116. 560 U.S. 48, 59 (2010).

117. *Id.*

118. *Id.* at 59–60.

119. *Id.* Circumstances to be considered include the seriousness of the offense, the harshness of the penalty, and sentences received by defendants in the same and other jurisdictions for the same crime. *Id.* at 60 (citing *Harmelin*, 501 U.S. at 1005).

120. *Id.* at 59–60; see also *supra* note 100 and accompanying text (comparing the number of cases that found a lack of proportionality with the number of cases that have not).

121. *Id.* at 61.

122. *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)).

123. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

mate sentencing goals.<sup>124</sup> Notably, though historically only used in the death penalty context, this second test is the one the Court used to ban LWOP in *Graham* (for non-homicide offenses) and *Miller* (for homicide offenses).<sup>125</sup>

### B. History of the Juvenile Justice System

The idea that juveniles are less culpable than adults, and therefore should be treated differently, dates back to the common law.<sup>126</sup> Up until the late nineteenth century, however, youth who found themselves in trouble—even for non-criminal behavior—were housed in jails and penitentiaries alongside adults.<sup>127</sup> Social reformers, distraught with these conditions, began opening up Houses of Refuge, aiming to protect juveniles by housing them separately from adult offenders and to rehabilitate them—instead of punishing them—in an attempt to keep them away from a life of crime.<sup>128</sup> The first House of Refuge opened in New York in 1825, and similar institutions were established in Boston and Philadelphia a few years later.<sup>129</sup>

This increasing focus on rehabilitation led to the establishment of the first juvenile court in Cook County, Illinois in 1899.<sup>130</sup> The juvenile justice system was based on the doctrine

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124. *Id.*

125. *See id.*; *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *see also infra* Section II.C. (explaining the three key Supreme Court cases that determined juveniles are constitutionally different than adults).

126. *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 375 (1998) (explaining the “infancy defense”: children under the age of 7 were presumed incapable of committing a crime; children between ages 7 and 14 were presumed incapable but the presumption could be rebutted); *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., PART 1: THE HISTORY OF JUVENILE JUSTICE 4 [hereinafter ABA DIV. OF PUBLIC EDUC.], [http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DY\]part1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DY]part1.authcheckdam.pdf) (explaining further the history that helped develop the differences between juveniles and adults).

127. *See Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcr.org/education1/juvenile-justice-history.html> (last visited Jan. 25, 2018).

128. *Id.*; ABA DIV. OF PUBLIC EDUC., *supra* note 126, at 5.

129. *See Juvenile Justice History*, *supra* note 127.

130. *See* ABA DIV. OF PUBLIC EDUC., *supra* note 126, at 5; *Juvenile Justice History*, *supra* note 127; *see also* Illinois Juvenile Court Act of 1899, § 5, 1899 Ill. Laws 131 (repealed 1965) (current

of *parens patriae*,<sup>131</sup> and courts were supposed to act based on the “best interests of the child.”<sup>132</sup> Designed to be the “very antithesis of the adult criminal system,” which was seen as “punitive, cruel and non-rehabilitative,”<sup>133</sup> the purpose of the juvenile justice system was to “create a system wherein juveniles were *rehabilitated* rather than incarcerated, *protected* rather than punished.”<sup>134</sup> For example, Pennsylvania’s juvenile justice system is designed:

(1) To preserve the unity of the family whenever possible . . . .

(1.1) To provide for the care, protection, safety and wholesome mental and physical development of children . . . .

(2) [T]o provide for children committing delinquent acts programs of supervision, care and rehabilitation . . . to enable children to become responsible and productive members of the community.

(3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary

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version at 705 ILL. COMP. STAT. 405 (2015)). The purpose of the act was “[t]hat the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.” The Illinois Juvenile Court Act of 1899, 49 JUV. & FAM. CT. J. 1, 5 (1998).

131. *Parens patriae* literally translates to “parent of the country.” ABA DIV. OF PUBLIC EDUC., *supra* note 126, at 5; *see also* *Lanes v. State*, 767 S.W.2d 789, 792 (Tex. Crim. App. 1989) (“The state, instead of prosecuting, was to proceed as *parens patriae*, with the welfare of the child being the penultimate and uniform goal.”) (footnote omitted); *see also* Klein, *supra* note 126, at 376 (“The emerging philosophy . . . was one of *parens patriae* whereby the state had an affirmative duty to intervene to care for ‘its least fortunate citizens.’”).

132. ABA DIV. OF PUBLIC EDUC., *supra* note 126, at 5; *see also* Klein, *supra* note 126, at 377 (“[I]t was hoped that the courts would protect delinquent children and serve their best interests.”).

133. *Lanes*, 767 S.W.2d at 791-92.

134. *Id.* at 791 (emphasis added); *see also In re Gault*, 387 U.S. 1, 15-16 (1967) (“The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”).

for his welfare, safety or health or in the interests of public safety, by doing all of the following:

(i) employing evidence-based practices whenever possible and, *in the case of a delinquent child, by using the least restrictive intervention* that is consistent with the protection of the community, the imposition of accountability for offenses committed and the rehabilitation, supervision and treatment needs of the child; and

(ii) *imposing confinement only if necessary and for the minimum amount of time* that is consistent with the purposes under paragraphs (1), (1.1) and (2).<sup>135</sup>

Juvenile court judges were supposed to be experts in child welfare and, with the assistance of social workers, tasked with developing an individualized treatment plan to meet each child's needs, regardless of the offense committed.<sup>136</sup> Consistent with these beliefs, an entirely new vocabulary was developed for processing juveniles throughout the system to avoid the stigma associated with adult prosecutions.<sup>137</sup> For example, juveniles were not "arrested" but "taken into custody"; they were not given a "trial" but a "hearing"; and they were not to be called "criminals" but "juvenile delinquents."<sup>138</sup> Procedural differences also separated the juvenile from the adult system: hearings were initiated by a petition instead of a criminal complaint; social service personnel replaced lawyers; judges disregarded technical rules of evidence in order to gather as much information as possible about the youth; decisions were based on psychological and social work principles instead of formal rules; and hearings were confidential as op-

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135. 42 PA. CONS. STAT. § 6301 (2017) (emphasis added).

136. See Klein, *supra* note 126, at 377.

137. See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 476-77 (1987); see also Lanes, 767 S.W.2d at 792.

138. Lanes, 767 S.W.2d at 792.

posed to open to the public.<sup>139</sup> Rejecting the terminology and procedures normally reserved for adult criminal prosecutions, the juvenile justice system was supporting the belief that these proceedings were civil – not criminal – in nature.<sup>140</sup>

1. *A shift in constitutional protections for juveniles*

Because of the civil nature of juvenile court proceedings, youths lacked many of the due process protections normally afforded to adults in criminal proceedings.<sup>141</sup> Over time, regardless of whether the lack of these protections was the root cause, it became apparent that the juvenile justice system, in practice, was not accomplishing its goal of individualized treatment of children based on their needs.<sup>142</sup> Rather, children were being treated the same by judges and institutions regardless of their backgrounds, histories, situations, and treatment needs,<sup>143</sup> which produced arbitrary and unfair results.<sup>144</sup> Such treatment culminated in two key Supreme Court cases, which extended many due process protections to juveniles: (1) *Kent v. United States*, which provided juveniles with the rights to a hearing, to counsel, and to see their own records prior to being transferred from juvenile to adult court;<sup>145</sup> and (2) *In re Gault*, which provided juveniles with the privilege against self-incrimination and the rights to notice of charges, to counsel, to confrontation, and to cross-examine witnesses.<sup>146</sup>

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139. Feld, *supra* note 137; see also Lanes, 767 S.W.2d at 792 (emphasizing the role of social service personnel, probation officers, and clinicians in the juvenile justice system).

140. Feld, *supra* note 137, at 476; Klein, *supra* note 126, at 376–77.

141. Due process protections initially not afforded to juveniles included the right of confrontation, the right to a jury trial, the right to proof beyond a reasonable doubt, and the right to counsel. Lanes, 767 S.W.2d. at 793.

142. See Klein, *supra* note 126, at 377–78.

143. See *id.*

144. *In re Gault*, 387 U.S. 1, 18–19 (1967) (holding “[t]he absence of procedural rules based on constitutional principle has not always produced fair, efficient, and effective procedures” and that “[d]epartures from established principles of due process have frequently resulted in . . . arbitrariness”).

145. 383 U.S. 541, 561 (1966).

146. See Feld, *supra* note 137, at 479; see *In re Gault*, 387 U.S. at 1. Additional protections which were extended to juvenile proceedings included raising the burden of proof to the



## 2. *Juvenile justice system becomes more punitive*

Many scholars believe that expanding constitutional protections for juveniles resulted in a system that focused more on punishment and less on rehabilitation.<sup>147</sup> Additionally, new legislation has created a more punitive system and shifted the focus away from rehabilitation. For instance, historically, most states utilized limited waiver statutes, which gave judges discretion to transfer juveniles to the adult system for criminal processing.<sup>148</sup> Moreover, before 1970, automatic transfer statutes were extremely rare.<sup>149</sup> Legislatures in subsequent decades, however, expanded the scope of juvenile transfer laws under the misguided fear that juvenile delinquents were dangerous criminals incapable of rehabilitation.<sup>150</sup> By 2000, thirty-eight states had automatic transfer laws and fifteen had prosecutorial discretion laws.<sup>151</sup> As a result, around 200,000 youths are tried, sentenced, or incarcerated as adults in the United States every year, despite research showing that recidivism rates are lower for youth processed in the juvenile as opposed to the adult system.<sup>152</sup>

A key reason for the increasing harshness of the system came from the myth of the “superpredator.”<sup>153</sup> In 1995, John J.

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criminal adult standard (as opposed to the lower civil standard) of “beyond a reasonable doubt,” *In re Winship*, 397 U.S. 358, 364 (1970), and application of double jeopardy principles, *Breed v. Jones*, 421 U.S. 519, 528 (1975), but not the right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528, 529 (1971); see also *Feld*, *supra* note 137, at 480–81 (explaining the court’s rationale in *Winship*, *Breed*, and *McKeiver* in extending additional protections to juvenile proceedings).

147. See Klein, *supra* note 126, at 377, 381–82; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 717–18 (1991).

148. PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 8 (Sept. 2011).

149. Only 8 states had automatic transfer laws. See *id.*

150. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 10 (2008); Brief of Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240, at \*16.

151. GRIFFIN ET AL., *supra* note 148, at 9.

152. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 1, 3 (2016) <http://www.campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf>.

153. Brief of Jeffrey Fagan et al., *supra* note 150, at \*7–8.

Dilulio, Jr. published a magazine article claiming that a massive influx of youth crime was on the horizon, which he attributed to “hardened, remorseless juveniles” whom he termed “superpredators.”<sup>154</sup> Dilulio explained that these individuals

are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. *So for as long as their youthful energies hold out, they will do what comes “naturally”: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.*<sup>155</sup>

Dilulio personally warned former President Clinton about superpredators at a White House dinner,<sup>156</sup> and it quickly gained acceptance among the public and policymakers.<sup>157</sup> The superpredator admonition resulted in sweeping legislative changes nationwide for juveniles, including lowering ages of prosecution (e.g., to age thirteen in New York); imposing mandatory minimum terms of incarceration; making it easier to prosecute juveniles in adult court; imposing mandatory transfer statutes;

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154. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995), <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>.

155. *Id.* (emphasis added).

156. *Id.*

157. See Brief of Jeffrey Fagan et al., *supra* note 150, at \*14-15.

and expanding the range of punishments available to juveniles.<sup>158</sup> Ultimately, the superpredator epidemic proved to be false.<sup>159</sup> The scientific evidence on childhood development did not support Dilulio's contentions.<sup>160</sup> It was also unsubstantiated by empirical data on crime and arrest rates, which demonstrated that juvenile crime and arrest rates actually *decreased* in the mid to late 1990s.<sup>161</sup> Even Professor Dilulio later renounced the superpredator belief and conceded it never came to fruition.<sup>162</sup> Nonetheless, laws passed in response to the superpredator fear remain unchanged.<sup>163</sup>

C. *Children are Constitutionally Different: The Trifecta of Roper, Graham, and Miller*

Three key Supreme Court cases decided in the past fifteen years have recognized children as constitutionally different from adults for sentencing purposes.<sup>164</sup>

1. *Roper v. Simmons*

The first, *Roper v. Simmons*, held that imposing the death penalty on offenders under the age of eighteen when they committed their crimes violated the Eighth Amendment.<sup>165</sup> At the age of seventeen, Christopher Simmons, along with a fif-

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158. See *id.* at \*15-18.

159. *Id.* at \*18; see also Frankline E. Zemring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727, 727-28 (1998) (analyzing arrest rates from 1980-1996 and concluding "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s").

160. Brief of Jeffrey Fagan et al., *supra* note 150, at \*19-21.

161. *Id.* at \*21-24.

162. *Id.* at \*18-19.

163. Steve Drizin, *The 'Superpredator' Scare Revisited*, HUFFINGTON POST (Apr. 9, 2014, 1:17 PM), [http://www.huffingtonpost.com/steve-drizin/the-superpredator-scare\\_b\\_5113793.html](http://www.huffingtonpost.com/steve-drizin/the-superpredator-scare_b_5113793.html) (last updated June 9, 2014); Editorial Board, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), [https://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html?\\_r=0](https://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html?_r=0).

164. See *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Graham v. Florida*, 560 U.S. 48, 91-92 (2011); *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

165. 543 U.S. at 551.

teen-year-old friend, broke into a woman's home.<sup>166</sup> The two duct-taped her eyes, mouth, and hands, drove her to a state park, tied her hands and feet together, and threw her from a bridge into the river below, drowning her.<sup>167</sup> The trial judge sentenced Simmons to death.<sup>168</sup> The Supreme Court, however, later overturned Simmons' sentence and banned the death penalty for all juvenile offenders, holding that juveniles differ from adults in three fundamental ways.<sup>169</sup> First, juveniles have an increased "susceptibility to immature and irresponsible behavior."<sup>170</sup> Second, they are more vulnerable and have significantly less control over their environment, making them more susceptible to negative influences and peer pressure.<sup>171</sup> Third, juveniles are still shaping their identities, making their personalities changeable.<sup>172</sup> Taken together, the Court explained that these fundamental differences illustrate that juveniles are *not* among the worst offenders, and that even the most heinous crime committed may not necessarily be evidence of "irretrievably depraved character."<sup>173</sup>

## 2. *Graham v. Florida*

The second case, *Graham v. Florida*, held that mandatory sentences of LWOP for juveniles convicted of non-homicide offenses violated the Eighth Amendment.<sup>174</sup> Terrance Graham, six months into his probation, committed a home invasion robbery along with two twenty-year-old men.<sup>175</sup> The three forcibly entered the victim's home and held the victim and his friend at gunpoint while they searched the house for money.<sup>176</sup>

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166. *Id.* at 556-57.

167. *Id.*

168. *Id.* at 551.

169. *See id.* at 569.

170. *Id.* at 570.

171. *See id.*

172. *Id.*

173. *Id.*

174. 560 U.S. 48, 82 (2011).

175. *See id.* at 54.

176. *See id.*

Later that night, Graham crashed his father's car into a telephone pole while fleeing from police; three handguns were found in his car.<sup>177</sup> The trial court found Graham guilty of violating his probation, and—though Graham could have received a minimum sentence of five years—the trial court sentenced him to life imprisonment.<sup>178</sup>

The Supreme Court reversed Graham's sentence and barred LWOP sentences for juveniles for non-homicide offenses.<sup>179</sup> Notably, instead of relying on precedents that addressed whether term-of-years sentences violated the Eighth Amendment, the Court in *Graham* relied on a different line of precedents (i.e., those espoused in *Roper*, *Atkins*, and *Kennedy*), which until that point only addressed categorical bans in relation to the death penalty.<sup>180</sup> In comparing a sentence of LWOP to the death penalty for juveniles, the Court highlighted that both "alter[] the offender's life by a forfeiture that is irrevocable" and "deprive[] [the individual] of the most basic liberties without giving hope of restoration."<sup>181</sup> Additionally, the Court emphasized the particular severity of a life sentence for juveniles as compared to adults because juveniles would spend a greater percentage of their lives behind bars than adults serving the same sentence.<sup>182</sup> Lastly, the Court explained how each penological justification for imposing a sentence of life without parole (i.e., retribution, deterrence, incapacitation, and rehabilitation) fails in light of the aforementioned characteristics of juveniles that render them different from adults (i.e., decreased culpability, lack of maturity, underdeveloped sense of responsibility, and capacity for change).<sup>183</sup>

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177. *See id.* at 54–55.

178. *Id.* at 57. In Florida, life imprisonment provided no opportunity for release (short of executive clemency) because the state abolished its parole system. *Id.*

179. *See id.* at 82.

180. *See id.* at 59–62.

181. *Id.* at 69–70.

182. *See id.* at 70–71.

183. *See id.* at 71–74.

### 3. Miller v. Alabama

The third case, *Miller v. Alabama*, built upon the holdings of *Roper* and *Graham* by barring mandatory LWOP sentences for those under the age of eighteen when they committed their crime—*regardless of the crime*—under the Eighth Amendment.<sup>184</sup> *Miller* involved the cases of two fourteen-year-old defendants: Kuntrell Jackson and Evan Miller.<sup>185</sup> Jackson and two other boys decided to rob a video store; on the way, Jackson found out one of the boys had a sawed-off shotgun in his sleeve.<sup>186</sup> Jackson remained outside of the store when the other boys entered, but the store clerk was shot and killed during the robbery.<sup>187</sup> Consequently, Jackson was charged with capital felony murder and aggravated robbery and sentenced to mandatory LWOP.<sup>188</sup>

Miller and his friend, Smith, followed a neighbor, Cole Cannon, back to his trailer after Cannon bought drugs from Miller's mother.<sup>189</sup> All three played drinking games and smoked marijuana together.<sup>190</sup> After Cannon fell asleep, Miller stole \$300 from his wallet.<sup>191</sup> Cannon woke up while Miller was trying to put the wallet back in his pocket and grabbed Miller by the throat; Smith then hit Cannon with a baseball bat to get him to let go of Miller.<sup>192</sup> Next, Miller grabbed the bat and repeatedly hit Cannon.<sup>193</sup> The two boys left the trailer, but later came back and started two fires to destroy the evidence of their crime.<sup>194</sup> Cannon later died from smoke inhalation and the injuries he suffered.<sup>195</sup> Miller was convicted of murder in

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184. 567 U.S. 460, 489 (2012).

185. *See id.* at 465–67.

186. *Id.* at 465.

187. *Id.* at 466.

188. *See id.*

189. *Id.* at 468.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

the course of arson and also mandatorily sentenced to LWOP.<sup>196</sup>

The Court overturned both boys' sentences, holding mandatory LWOP sentences for juveniles to be unconstitutional.<sup>197</sup> Writing for the majority, Justice Kagan pointed out that none of the vulnerabilities or susceptibilities of youth discussed in *Graham* were case-specific.<sup>198</sup> Rather, *Graham's* central takeaway was that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."<sup>199</sup> Moreover, the Court used *Graham's* analogy of LWOP to the death penalty to draw on a second line of reasoning established in *Woodson v. North Carolina*, which held that before the death penalty is implemented, the Eighth Amendment requires an individualized consideration of the characteristics of the offender and the circumstances of the offense.<sup>200</sup> Consequently, mandatory sentencing schemes that fail to consider a defendant's age and its implications—(1) "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) home and family life; (3) a defendant's role in the offense; (4) youthful characteristics that might have prevented a defendant from being charged with a lesser offense; and (5) potential for rehabilitation—when sentencing a juvenile to "life (and death) in prison" violate the Eighth Amendment.<sup>201</sup> Remarkably, the Court went even further, stating a LWOP sentence for a juvenile should be "uncommon," given the difficulties in distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient maturity, and the rare juvenile offender whose crime reflects irreparable corruption."<sup>202</sup>

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196. *See id.* at 468–69.

197. *Id.* at 489.

198. *Id.* at 473.

199. *Id.* (emphasis added); *see also supra* notes 179–183 and accompanying text (explaining the Court's reasoning in *Graham*).

200. *Miller*, 567 U.S. at 470 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)).

201. *Id.* at 473–78. These five factors have become known as the "Miller factors." *See supra* note 17 and accompanying text.

202. *Miller*, 567 U.S. at 479–80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

#### D. Retroactivity of Miller

Although principles of stare decisis and the Supremacy Clause require lower courts to follow *Miller's* holding for offenders who have yet to be sentenced,<sup>203</sup> *Miller* did not make clear whether the decision applied retroactively for offenders whose sentences were already final at the time of the holding. It did not take long for courts to become split over the issue.<sup>204</sup>

The *Teague* framework determines whether a new constitutional rule applies retroactively.<sup>205</sup> Generally, new rules of criminal procedure are not given retroactive effect, but new substantive rules are.<sup>206</sup> New substantive rules include two categories: (1) "rules forbidding criminal punishment of certain primary conduct," and (2) "rules prohibiting a certain category of punishment for a certain class of defendants because of their status or offense."<sup>207</sup> Additionally, "watershed rules of criminal procedure," which "implicat[e] the fundamental fairness and accuracy of the criminal proceeding," are also given retroactive effect.<sup>208</sup>

Those who believed *Miller* was retroactive argued that it prohibited a particular punishment for a particular group of defendants—namely, mandatory LWOP for juvenile offend-

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203. See U.S. CONST. art. VI, cl. 2.

204. Compare *Martin v. Symmes*, 782 F.3d 939, 943 (8th Cir. 2015) (holding that the decision in *Miller* was not retroactively applicable for those whose sentences were already final at the time of the decision), *vacated sub nom.* *Martin v. Smith*, 136 S. Ct. 1365 (2016) (mem.), *Johnson v. Ponton*, 780 F.3d 219, 221 (4th Cir. 2015) (holding that the decision in *Miller* was not retroactive for cases on collateral review), *vacated sub nom.* *Johnson v. Manis*, 136 S. Ct. 2443 (2016) (mem.), and *Chambers v. State*, 831 N.W.2d 311, 330 (Minn. 2013) (holding that the decision in *Miller* was not a "watershed rule for retroactivity" and is therefore not retroactive for cases on review), *overruled by* *Jackson v. State*, 883 N.W.2d 272, 280 (Minn. 2016), *with* *Diatchenko v. Dist. Att'y for Suffolk District*, 1 N.E.3d 270, 278 (Mass. 2013) (finding that the *Miller* decision allowed for juvenile LWOP cases to be retroactively reviewed), and *Aikens v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014) (holding that the *Miller* decision was a substantive law and can be applied retroactively for cases on review).

205. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016); see also *Teague v. Lane*, 489 U.S. 288, 307–12 (1989) (plurality opinion).

206. *Montgomery*, 136 S. Ct. at 728.

207. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

208. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). Procedural rules are those that "regulate[] only the manner of determining the defendant's culpability." *Id.* at 732 (quoting *Schriro*, 542 U.S. at 353).



ers – and therefore fell under the substantive rule exception to *Teague*'s general framework of non-retroactivity.<sup>209</sup> While some courts agreed with this argument,<sup>210</sup> others rejected it, finding instead that *Miller*'s own language did not bar any particular punishment, but rather affected the “manner of determining” whether a certain punishment should be given, thus making *Miller* a procedural, rather than a substantive, rule.<sup>211</sup> Others argued that *Miller* announced a new procedural rule and one that constituted “watershed status” – thereby making it an exception under the *Teague* retroactivity bar.<sup>212</sup> Again, courts were split over whether they accepted this argument.<sup>213</sup>

Ultimately, four years after the *Miller* decision, the Supreme Court decided in *Montgomery v. Louisiana* that *Miller* implemented a new substantive rule under the second category (i.e., prohibiting a particular punishment for a particular group of defendants) – LWOP was unconstitutional for juveniles whose crimes resulted from the temporary immaturity of youth.<sup>214</sup> Therefore, *Miller*'s rule *was* retroactive.<sup>215</sup> The Court did not

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209. See, e.g., Brief for Appellant and Appendices at 22–24, *Commonwealth v. Cunningham*, 81 A.3d. 1, 8–9 (Pa. 2013) (No. 38 EAP 2012).

210. See, e.g., *Aiken v. Byars*, 765 S.E.2d 572, 575–76 (S.C. 2014).

211. See *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013) (quoting *Schriro*, 542 U.S. at 353); see also *Martin v. Symmes*, 782 F.3d 939, 942 (8th Cir. 2015) (“*Miller* announced a procedural rule, not a substantive rule. The Court eliminated *mandatory* life sentences without parole for juvenile homicide defendants; it did not eliminate those sentences . . .”), *vacated sub nom.* *Martin v. Smith*, 136 S. Ct. 1365 (2016) (mem.); *Cunningham*, 81 A.3d. at 9–10 (“[I]t is procedural and not substantive for purposes of *Teague*.”).

212. See *People v. Williams*, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012).

213. Compare *id.* (holding *Miller* is a watershed rule of criminal procedure), with *Cunningham*, 81 A.3d. at 10 (“[I]t seems possible that some Justices of the United States Supreme Court may find the rule to be of the watershed variety. We doubt, however, that a majority of the Justices would broaden the exception beyond the exceedingly narrow (or, essentially, class-of-one) parameters reflected in the line of decisions referenced by the Commonwealth.”) (citations omitted), and *People v. Carp*, 828 N.W.2d 685, 711–12 (Mich. Ct. App. 2012) (explaining what constitutes a watershed exception and holding that *Miller* does not meet the requirements).

214. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

215. See *id.* Previous cases that used the *Teague* framework only dealt with federal habeas proceedings. See *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008); *Teague v. Lane*, 489 U.S. 288, 298 (1989). Consequently, the Court in *Montgomery*, before deciding whether *Miller* created a new substantive rule, had to decide whether states had to give retroactive effect to new substantive and watershed procedural rules in their own proceedings. *Montgomery*, 136 S. Ct. at 728–29. The Court held that they did. *Id.* at 729.

deny that *Miller* established a new procedural rule; however, it explained the procedural rule was necessary so juveniles could prove they did not belong to the *category* of offenders who may no longer receive a particular punishment.<sup>216</sup> The Court reasoned that

*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole *collapse* in light of "the distinctive attributes of youth." *Even if* a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence *still* violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity."<sup>217</sup>

The Court explained that because LWOP was to be imposed in the rarest of circumstances—only for those juveniles whose crimes reflected "permanent incorrigibility"<sup>218</sup>—a majority of juveniles previously sentenced to LWOP now "face[] a punishment the law cannot impose upon [them]."<sup>219</sup> The Court held states have two options to correct these injustices: resentence juvenile offenders currently serving LWOP with a hearing that takes "youth and its attendant characteristics" into account<sup>220</sup> or simply allow those individuals to become eligible for parole.<sup>221</sup>

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216. *See Montgomery*, 136 S. Ct. at 734–35.

217. *Id.* at 734 (quoting *Roper v. Alabama*, 543 U.S. 551, 573 (2005) (emphasis added) (citations omitted)).

218. *Id.*

219. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2014)).

220. *Id.* at 735 (quoting *Miller v. Alabama*, 567 U.S. 460, 465 (2012)).

221. *See id.* at 736.

E. *Implications of Miller and Montgomery for Pennsylvania JLWOP Offenders*

Nationally, 1500 to 2000 offenders are impacted by the *Montgomery* decision, although a majority of these individuals reside in only five states: Pennsylvania, Michigan, Louisiana, Illinois, and Missouri.<sup>222</sup> Pennsylvania has by far the most JLWOPs of any state, however, with over 500 individuals needing to be resentenced according to *Miller's* principles, and it now faces the challenge of resentencing all of these offenders.<sup>223</sup> A sentence of LWOP for a juvenile is still allowed in the state.<sup>224</sup> In fact, Pennsylvania has already resentenced one juvenile, Qu'eed Batts, to LWOP post *Miller*,<sup>225</sup> though his case is currently under review by the state supreme court.<sup>226</sup>

Ensuring that those juveniles who receive a sentence of LWOP in Pennsylvania are truly those who are irreparably corrupt is of the utmost importance, because incarcerating until death those youth capable of rehabilitation violates the Eighth Amendment.<sup>227</sup> Additionally, doing so goes against the spirit of *Roper*, *Graham*, *Miller*, and *Montgomery*: minus the rare exception, youth are capable of making positive changes and should be afforded the opportunity for release in order to do so.<sup>228</sup> Should these youths not get a fair resentencing in order to gain a meaningful opportunity for release, it would call into

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222. See Brief of for the State of Michigan and 15 other States as *Amici Curiae* in Support of Respondent at 12-13, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280).

223. See Hayden Mitman, *Supreme Court's Ruling on Juveniles' Life Sentences Could Impact Hundreds of Pa. Cases*, PHILLY VOICE (Jan. 25, 2016), <http://www.phillyvoice.com/philly-juvenile-justice-expert-details-scoutus-decision-life-sentences/>. Prior to *Montgomery*, the Superior Court of Pennsylvania held that *Miller* was not retroactive. See Brief for Appellant at 22-24, *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013) (No. 38 EAP 2012), 2012 WL 8681976, at \*7.

224. See 18 PA. CONS. STAT. § 1102.1 (2017).

225. See *Commonwealth v. Batts*, 125 A.3d 33 (Pa. Super. Ct. 2015).

226. See Order Granting Petition for Allowance of Appeal from the Order of the Superior Court, *Batts*, 125 A.3d 33 (No. 941 MAL 2015); Riley Yates, *State's High Court Agrees to Hear Appeal of Qu'eed Batts*, MORNING CALL (Apr. 21, 2016, 9:06 PM), <http://www.mcall.com/news/local/police/mc-pennsylvania-juvenile-life-without-parole-queed-batts-20160421-story.html>.

227. See *Montgomery*, 136 S. Ct at 726.

228. See Sloan, *supra* note 52, at 244.

question the integrity of the legal system and the purpose of the Supreme Court's decision in *Montgomery*. Incarcerating youths until death also goes against the very reason the juvenile justice system was created in the first place—as a rehabilitative alternative to the punitive adult system.<sup>229</sup> Moreover, it is not only the youths themselves who are negatively impacted if they are not given a fair resentencing; friends and family members who are continually denied the opportunity to be with their loved ones suffer as well.

*F. What a Sentencing Should Look Like for Individuals Convicted Post Miller*

States have varied in their responses to the *Miller* decision, with some abolishing LWOP altogether, others lessening term-of-years sentences for juveniles, and others revising their laws to impose very lengthy term-of-years sentences.<sup>230</sup> For those states that have retained LWOP, a sentencing must include consideration of the *Miller* factors.<sup>231</sup> The *Miller* decision does not, however, explicitly state how this should be done. Consequently, questions remain as to what a *Miller* sentencing should look like,<sup>232</sup> particularly because legislatures have varied in the amount of guidance they have given to sentencing courts on these issues.<sup>233</sup> For example, some legislatures have simply instructed courts to consider “*Miller* factors,” with little additional guidance, while others have explicitly enumerated their own comprehensive lists of factors to be considered.<sup>234</sup>

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229. See *supra* Section II.B.1.

230. See Scott et al., *supra* note 17, at 693; see also Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1816–18 (2016) (surveying “the spectrum of responses to the question of what sentences are permissible post-*Miller*”).

231. See *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *supra* notes 17, 201 and accompanying text.

232. See Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 PSYCHOL. PUB. POL'Y & L. 235, 236 (2016).

233. See Scott et al., *supra* note 17, at 689–90.

234. See *id.* Pennsylvania requires courts consider the following age-related factors before imposition of LWOP for a juvenile:

(i) Age.

In terms of what evidence can or should be used to support each of the five factors identified in *Miller*, legal and psychological experts suggest a variety of potential sources: laboratory tasks; observation of the youth; self-report or interview measures with the youth; measures of academic achievement; collateral interviews with peers, family members, or teachers; and historical record reviews from various contexts (e.g., school or treatment settings).<sup>235</sup> Many of these methods, however, suffer fundamental flaws. For example, the validity of measures in forensic, ethnic, or minority populations may be unknown.<sup>236</sup> Additionally, predictive validity for relevant measures may only be established for short time periods (e.g., three to four years), and most juveniles will be incarcerated for much longer periods of time.<sup>237</sup> Personal motives may also affect the information provided.<sup>238</sup> For instance, peers, family members, or teachers who are interviewed may have personal biases (either in favor of or against the individual) that affect

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(ii) Mental capacity.

(iii) Maturity.

(iv) The degree of criminal sophistication exhibited by the defendant.

(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.

(vi) Probation or institutional reports.

(vii) Other relevant factors.

18 PA. CONS. STAT. § 1102.1(d)(7) (2017); see also *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013) (quoting *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. Super. Ct. 2012)) (remanding a sentencing in accordance with the *Miller* factors to include, at a minimum, “a juvenile’s age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation”). On the other hand, Michigan merely requires a judge to “carefully take [the *Miller* factors] into account when going about the exceedingly difficult task of determining whether a juvenile is irreparably corrupt . . . .” *People v. Hyatt*, 891 N.W.2d 549, 552 (Mich. Ct. App. 2016).

235. Grisso & Kavanaugh, *supra* note 232, at 241–44.

236. *Id.* at 241. Validity is the extent to which a measure actually measures what it is supposed to. MARK ELLIOT ET AL., *A DICTIONARY OF SOCIAL SCIENCE RESEARCH METHODS* (2016) (ebook).

237. Grisso & Kavanaugh, *supra* note 232, at 244.

238. *Id.* at 242.

the type of information they remember and deliver during a collateral interview.<sup>239</sup> Additionally, the same developmental factors that affect a youth's decision to commit a crime – which are therefore relevant at sentencing – may also affect a youth's or peer's ability to provide quality information.<sup>240</sup> Lastly, these sources of information may not necessarily address the specific conceptual demands of each *Miller* factor.<sup>241</sup> For example, the first *Miller* factor refers to youths' "immaturity, impetuosity, and failure to appreciate risks and consequences."<sup>242</sup> While there are a number of psychological measures that can assess relevant capacities (e.g., intellectual functioning, ability to delay gratification, developmental maturity), no measure has been specifically designed for or perfectly captures all of what the *Miller* factor encapsulates.<sup>243</sup>

Accordingly, issues arise regarding what evidence can or should be used to support a finding of "irreparable corruption," as there is "no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character."<sup>244</sup> The closest psychological construct may be a diagnosis of psychopathy; however, there is a lack of evidence that a measure of psychopathy in adolescence can reliably predict psychopathic traits in adults.<sup>245</sup> Moreover, the validity of such measures with racial and ethnic minorities is not well established, and, most importantly, psychopathic traits do not necessarily indicate a lack of potential for rehabilitation.<sup>246</sup> Overall, significant questions remain concerning appropriate

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239. See Kirk Heilbrun et al., *Using Third-Party Information in Forensic Mental Health Assessment: A Critical Review*, 51 CT. REV. 16, 21 (2015).

240. Grisso & Kavanaugh, *supra* note 232, at 243.

241. *Id.* at 241–42.

242. *Miller v. Alabama*, 567 U.S. 460, 477 (2012).

243. See Grisso & Kavanaugh, *supra* note 232, at 241–42.

244. *Id.* at 239 (quoting Brief for the American Psychological Association et al., as Amici Curiae in support of Petitioners at 25, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239, at \*21); see also Scott et al., *supra* note 17, at 701 ("[Forensic Mental Health] experts sometimes will not be able to state with confidence whether a juvenile is likely to reform.").

245. Grisso & Kavanaugh, *supra* note 232, at 240.

246. *Id.*

methodologies for determining “irreparable corruption” after *Miller*.

G. *Issues Specific to a Miller Resentencing*

The issues that exist with a *Miller* sentencing are compounded for a resentencing under *Miller*. For one, courts cannot assess the juvenile at the time he or she committed the crime,<sup>247</sup> and assessment of the adult offender’s current capabilities will provide little insight into his intellectual, emotional, and cognitive functioning as a juvenile.<sup>248</sup> Consequently, experts must rely on records and interviews with relevant parties—such as legal professionals, relatives, and friends—to determine which, if any, age-related *Miller* factors were present at the time of sentencing.<sup>249</sup> These sources of information, however, will have their own shortcomings. Individuals who may need to be interviewed, such as friends, family members, or teachers, may have since passed away or their memories may not be as reliable as they would have been at the time of initial sentencing (which may have been decades ago).<sup>250</sup>

Second, there may be a lack of relevant data available, particularly given that many of the individuals who need resentencing have spent over three decades in prison, and so records from the time of their initial sentencing may not have been digitized or well preserved.<sup>251</sup> Third, resources (e.g., personnel, time, money) may be insufficient to search for and find all relevant documents.<sup>252</sup> Fourth, experts are at the mercy of the expertise, clinical or otherwise, of the individuals who produced those records and the techniques and assessments available at that time, calling into question the information’s

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247. *Id.* at 246.

248. Scott et al., *supra* note 17, at 702.

249. Grisso & Kavanaugh, *supra* note 232, at 246.

250. *See id.*

251. *See id.*; Telephone Interview with Lauren Fine, Co-Director, Youth Sentencing & Reentry Project (Nov. 30, 2016).

252. Grisso & Kavanaugh, *supra* note 232, at 246.

reliability.<sup>253</sup> For example, measures which assess particular age-related characteristics and are recommended for use with a *Miller* sentencing may not have been developed at the time an individual was sentenced; therefore, this information would not be available to use at resentencing.<sup>254</sup>

Additionally, the interpretation of the data is subject to hindsight and other confirmation biases.<sup>255</sup> Confirmation bias is defined as “the psychological tendency to seek out and interpret evidence in ways that *support* existing beliefs, perceptions, and expectations and to *avoid or reject evidence that does not.*”<sup>256</sup> For instance, police may exhibit confirmation bias when they interrogate an individual who is, in fact, innocent but whom they believe is guilty (e.g., based on an erroneous hunch); while questioning the individual, the interrogator may seek and encourage statements that inculpate the suspect, while ignoring or discouraging statements that prove his innocence (e.g., denials, providing an alibi).<sup>257</sup> The statements elicited further entrench the investigator’s belief that the suspect is guilty, despite his factual innocence.<sup>258</sup> Confirmation bias is a pervasive problem throughout the criminal justice system because it affects all actors (e.g., police, prosecutors, defense attorneys, judges, jurors), whether they are doing it deliberate-

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253. See *id.*; Scott et al., *supra* note 17, at 702.

254. For example, the Consideration of Future Consequences Scale – which assesses how well one considers short- versus long-term consequences and could potentially be used under *Miller*’s decisional factor – was not developed until 1994. See Grisso & Kavanaugh, *supra* note 232, at 241; see also Alan Strathman et al., *The Consideration of Future Consequences: Weighing Immediate and Distant Outcomes of Behavior*, 66 J. PERSONALITY & SOC. PSYCHOL. 742, 742 (1994). Similarly, the Resistance to Peer Influence scale, which could also be used to assess the decisional factor, was not developed until 2007. See Grisso & Kavanaugh, *supra* note 232, at 241; see also Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1531 (2007).

255. See Grisso & Kavanaugh, *supra* note 232, at 246.

256. Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 23 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (emphasis added) (citing THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 30–37 (1991)).

257. *Id.* at 24.

258. *Id.*



ly or inadvertently, and it is the primary reason for wrongful convictions.<sup>259</sup> Confirmation bias may affect *Miller* resentencings in that a prosecutor, defense attorney, or judge may have his or her own opinion as to whether the offender facing resentencing is one of those “incorrigible” youth incapable of change. Subsequently, they may, knowingly or unknowingly, give more weight to the evidence that tends to support that assumption and disregard evidence that would disprove it.

Another issue with *Miller* resentencings is that sentencing courts may also consider evidence of the offender’s behavior while incarcerated, information which otherwise would not have been available at the initial sentencing.<sup>260</sup> Courts are required to consider evidence of good conduct if it is presented at sentencing.<sup>261</sup> For example, defense attorneys may present evidence regarding completion of bachelor’s or master’s degrees, vocational training, and substance use or mental health treatment; participation in faith-based or other spiritual activities; lack of disciplinary problems or sanctions in prison; and participation in any rehabilitative programming. While this evidence may greatly benefit those facing resentencing, it is also potentially detrimental. For one, individuals who thought they had no chance of release may have chosen not to participate in such programming. Secondly, individuals may have been barred from participating in certain programming by the Department of Corrections itself.<sup>262</sup> Additionally, individuals who thought they had no hope for release may not have done their best to avoid amassing disciplinary records while incarcerated for fear it would adversely impact their chances of ob-

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259. *Id.* at 23, 25.

260. See Scott et al., *supra* note 17, at 702. *But see* *Montgomery v. Louisiana*, 136 S. Ct. 718, 744 (2016) (Scalia, J., dissenting) (emphasis added) (“[B]ear in mind, the inquiry is whether the inmate was seen to be incorrigible when he was sentenced – *not* whether he has proven corrigible and so can safely be paroled today.”).

261. See, e.g., *Commonwealth v. Losch*, 535 A.2d. 115, 123 (Pa. Super. Ct. 1987).

262. See Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and before the Parole Board*, 31 LAW & INEQ. 369, 393, 397-400 (2013); Telephone Interview with Lauren Fine, *supra* note 251.

taining release on parole.<sup>263</sup> Consequently, evidence of a defendant's behavior while in prison may be tainted by the defendant's belief that he would never be released.<sup>264</sup>

### III. A PROPOSED SOLUTION

To address the significant issues associated with resentencing a juvenile given a mandatory sentence of LWOP that comports with the principles espoused in *Miller* and gives a the individual a fair chance at proving he is not one of those "incorrigible" youth who deserves a sentence of LWOP, these individuals should, after serving the current mandatory minimum penalty for their particular crime,<sup>265</sup> automatically become eligible for parole. Given (1) the difficulties of retrospective analysis of the relevant age-related characteristics, particularly for defendants who were sentenced decades ago,<sup>266</sup> (2) the denial of participation to juvenile lifers in a variety of useful programs to demonstrate one's rehabilitative potential,<sup>267</sup> and (3) the bleak outlook many juvenile lifers may have had thinking they would never be released, which likely led to increased disciplinary infractions, these individuals must be given the benefit of the doubt and presented with a "meaningful opportunity . . . [for] release."<sup>268</sup> While the initial concern of many will be the risk of harm to the public that release of these individuals may present, it is important to note that the Parole Board must give primary consideration to this

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263. See Levick & Schwartz, *supra* note 262, at 395.

264. See *id.* at 395-96.

265. See 18 PA. CONS. STAT. § 1102.1(a) (2017) (listing the mandatory minimum sentences based on an offender's age and crime).

266. See *supra* Section II.G. Interpretations of *Miller* thus far have already resulted in resentencing of LWOP, despite the fact that the Court said it should be used rarely. If courts cannot get it right with defendants who were only recently convicted, there's little hope for defendants who were convicted decades ago. See *Commonwealth v. Batts*, 125 A.3d 33, 52 (Pa. Super. Ct. 2015) (Fitzgerald, J., concurring and dissenting).

267. See *supra* note 262 and accompanying text.

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

factor when making their determination.<sup>269</sup> Additionally, given the nature of parole decisions, it is still going to be difficult for these individuals to be released into the community; as mentioned previously, in December 2016 Pennsylvania granted parole to only slightly more than half of individuals who applied.<sup>270</sup>

Others may be concerned about the lack of general deterrent effects that may result if these individuals are granted parole eligibility after having served the current minimum recommended terms. However, there is little evidence suggesting that lengthy prison sentences provide general deterrent benefits large enough to justify their societal and economic costs.<sup>271</sup> Currently, the United States spends \$80 billion per year to house its overwhelming prison population (which is 22% of the world's prison population despite the United States having only 5% of the world's population).<sup>272</sup> Funds saved from incarcerating fewer individuals for lengthy periods of time could then be funneled into crime reduction efforts that have more evidentiary support to deter criminals, such as increasing the visibility of police officers to heighten the probability of apprehension.<sup>273</sup>

Releasing these individuals after they have served their mandatory minimum sentences would also comport with the principles upon which the juvenile justice system was established: to rehabilitate and protect—not to incarcerate and punish—juveniles for the wrongs they committed.<sup>274</sup> Doing so

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269. See 42 PA. CONS. STAT. § 2154.5(a)(1).

270. MONTHLY STATISTICS REPORT, *supra* note 90, at 7.

271. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (“[T]here is substantial evidence that increasing the visibility of the police by hiring more officers and allocating existing officers in ways that materially heighten the perceived risk of apprehension can deter crimes.”).

272. See Eric. H. Holder, Jr., *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/eric-holder-mandatory-minimum-sentences-full-of-errors.html>.

273. See Nagin, *supra* note 271.

274. See *Lanes v. State*, 767 S.W.2d. 789, 791 (1989); see also *In re Gault*, 387 U.S. 1, 15–16 (1967) (“The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were

would also align with the goal of Pennsylvania's juvenile justice system: "to enable children to become responsible and productive members of the community," in a family environment where possible, using the "least restrictive intervention" and incarcerating "for the minimum amount of time."<sup>275</sup> Given that many of the statutes imposing LWOP were passed as a result of the superpredator scare and were never revised once the myth was proven false,<sup>276</sup> it is fair to give individuals wrongly sentenced to such harsh punishments the opportunity for release.

Implementation of these procedures would require slight deviation from Pennsylvania's standard parole procedures. For one, current parole procedures require that an inmate satisfy four criteria before officially becoming eligible for parole: (1) maintenance of a good conduct record, (2) an adequate reentry plan, (3) establishment of conditions and requirements for parole, and (4) "no reasonable indication" of a risk to public safety.<sup>277</sup> The same concerns relating to good behavior in prison that would affect a resentencing under *Miller* would apply here as well;<sup>278</sup> consequently, this first criterion should be waived for juvenile lifers in the interest of fairness. Moreover, it is not explicitly clear from the statutory language how, and to what extent, an offender's age and related attributes at the time he committed the offense should play a role in the Parole Board's decision. Although some criteria could be thought to include these characteristics,<sup>279</sup> it is not clear that age is to be seen as a mitigating factor as opposed to an aggravating fac-

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to be 'clinical' rather than punitive.").

275. 42 PA. CONS. STAT. § 6301(b) (2017).

276. See *supra* notes 152-62 and accompanying text.

277. See 61 PA. CONS. STAT. § 6137(g)(4).

278. See Levick & Schwartz, *supra* note 262, at 395; *supra* Section II.G.

279. For example, "nature and circumstances of the offense," "general character and background of the inmate," "notes of testimony of the sentencing hearing, if any, together with such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available," and "his physical, mental and behavioral condition and history" are all listed as factors the court must take into consideration as part of a parole hearing. 61 PA. CONS. STAT. § 6135(a)(1)-(7).

tor. Consequently, the Parole Board should be instructed to treat age and all of its relevant attributes in the same way a sentencing court is mandated to do under *Miller* to ensure that juvenile lifers, free from a sentence of life without parole, are not instead subject to de facto life without parole.<sup>280</sup>

#### CONCLUSION

When the Supreme Court ruled in *Montgomery v. Louisiana* that *Miller's* holding barring mandatory LWOP for juvenile defendants applied retroactively, approximately 2000 defendants became eligible for a resentencing consistent with the *Miller* factors. Almost all of these defendants were incarcerated in only five states, with the largest number being held in Pennsylvania. In addition to the significant issues associated with a sentencing under *Miller*—including the lack of clear consensus on what makes a youth “incorrigible”—resentencing under *Miller* poses its own substantial concerns. There likely will be a shortage of relevant information available to guide a constitutional resentencing in line with *Miller* for individuals who committed their crimes decades ago, and attempting to conduct a sentencing in line with *Miller's* principles without this information would likely put defendants at an extreme disadvantage. Consequently, a defendant given a mandatory sentence as a juvenile to life without parole should, after serving the current mandatory minimum penalty for his particular crime, automatically become eligible for parole due to the difficulties of administering a resentencing consistent with the *Miller* principles based on a retrospective analysis. These individuals, however, will not necessarily be granted release simply because they are eligible for parole. They will still have to demonstrate to the Parole Board that they have reformed and can be safe, law-abiding members of society. Because *Miller* restricted LWOP to the rarest instances, however, granting these individuals parole eligibility is consistent with the general

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280. See Sloan, *supra* note 52, at 253.

takeaway of *Miller's* predecessors: youth are capable of great change and rehabilitation.