ENSURING PROPORTIONAL JUVENILE PUNISHMENT: WHY STATES SHOULD LIMIT JLWOP TO NARROWED FIRST-DEGREE MURDER

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I. INTRODUCTION

In 2004, fifteen-year-old Brett Jones killed his grandfather during an argument about Brett's girlfriend.[1] Brett had moved in with his grandparents in Mississippi two months earlier, "to escape his mother['s] . . . violent household" and, unknown to his grandparents, his girlfriend came to stay with him.[2] After Brett's grandfather discovered this, he ordered her to leave, and an argument and violent altercation ensued.[3] It ended with Brett stabbing his grandfather with a kitchen knife.[4] Brett was convicted of murder and sentenced to life without parole.[5] On appeal, the Mississippi Supreme Court opined that as long as a court "considers a set of youth-related factors," a sentence of juvenile life without parole may be imposed without violating the Eighth Amendment's prohibition on excessive sanctions.[6] But most children, even those who commit grievous crimes, are capable of rehabilitation and redemption.[7]

Sentencing a juvenile to life without the possibility of parole, referred to as JLWOP, is the harshest sentence available to an individual under the age of eighteen in the United States today.[8] In recent years,

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1 Brief for Petitioner at 3, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 4.

6 *Id.*; *see* U.S. CONST. amend. VIII; Jones v. State, 122 So. 3d 698, 700–02 (Miss. 2013).

7 *See* Brief for Petitioner at 34, *Jones*, 141 S. Ct. 1307 (No. 18-1259) (citing Montgomery v. Louisiana, 577 U.S. 190, 212 (2016)); Part IV, *infra*.

8 *See* Miller v. Alabama, 567 U.S. 460, 479 (2012).

the Supreme Court has meaningfully advanced the idea that children, as compared to adults, are inherently and constitutionally less culpable in criminal sentencing.[9] Yet in the 2021 case *Jones v. Mississippi*, the Court articulated that a factual finding of permanent incorrigibility is not necessary before imposing JLWOP on a juvenile offender.[10] The Court elaborated that this holding does not disturb its prior JLWOP precedent, which limits the application of the sentence, and that states are not precluded from imposing additional sentencing limits—like requiring a finding of incorrigibility.[11]

But before questioning an individual's incorrigibility, or an inability to be rehabilitated,[12] a threshold question should first consider the nature of the individual's crime. This Comment contends that some offenses should not reach the question of whether JLWOP is available. This is partly because JLWOP application has varied among states, with some states affording less procedural protection for juveniles than others, rendering disproportionate punishments.[13]

This Comment argues that states should (1) adopt a categorical ban on JLWOP sentences for charges less than first-degree murder and (2) narrowly construe such first-degree murder charges. Adopting this argument would serve several functions, including aiding states with a backlog of resentencing hearings, offering more uniform sentences for similarly situated defendants, creating consistency between the law and juvenile brain science, and remaining consistent with Supreme Court precedent holding that JLWOP should be an uncommon sentence reserved for the rarest of juvenile offenders. Part II of this Comment discusses the Supreme Court case *Miller v. Alabama*[14] and its impact on JLWOP sentences in the United States. Part III explores state responses

[9] *See id.* at 465; Graham v. Florida, 560 U.S. 48, 71–72, 74 (2010); Roper v. Simmons, 543 U.S. 551, 571 (2005).

[10] 141 S. Ct. 1307, 1311 (2021).

[11] *Id.* at 1321–23.

[12] *See* Casey Matsumoto, *"Permanently Incorrigible" Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole*, 88 GEO. WASH. L. REV. 239, 251 (2020) ("JLWOP is barred for all juvenile defendants except for 'the rarest of juvenile offenders' who have committed homicide, whose crimes reflect 'permanent incorrigibility' or 'irreparable corruption,' and for whom 'rehabilitation is impossible.'") (quoting Montgomery v. Louisiana, 577 U.S. 190, 208 (2016)); *see also Corruption*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Incorrigibility*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, The Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 161–72 (2017).

[14] 567 U.S. 460 (2012).

to *Miller* and *Montgomery v. Louisiana*[15] as well as national and state trends in imposing JLWOP, with specific case studies on Michigan and Pennsylvania. Part IV recommends that JLWOP sentences be limited to first-degree murder charges, taking Eighth Amendment concerns and adolescent brain science into account. Finally, Part V shows why states should construe first-degree murder charges narrowly when considering Part IV's recommendation that JLWOP sentences be limited to first-degree murder charges.

II. JLWOP IN THE UNITED STATES AND THE *MILLER V. ALABAMA* PRECEDENT

JLWOP is a sentence of life in prison, without the possibility of parole, imposed on children under the age of eighteen when they committed their crime.[16] Before 2012, these children thought they would spend the rest of their lives in prison, never having the chance to demonstrate that they had been rehabilitated for a crime they committed as a youth. By contrast, other punishments, like a term-of-years sentence, is a limited and established period scheduled to be served before juveniles are eligible for parole.[17]

In *Miller v. Alabama*, the Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[18] There, two fourteen-year-old defendants were convicted of murder and sentenced to life imprisonment without the possibility of parole under mandatory sentencing schemes.[19] The states' mandatory sentencing schemes prohibited a judge or jury from considering the juveniles' youth and attendant characteristics as mitigating factors or considering whether a lesser sentence, like life in prison *with* the possibility of parole, was appropriate.[20] The Court saw fit to categorically ban mandatory JLWOP sentences, relying heavily on the reasoning of cases like *Roper v. Simmons*[21] and *Graham v. Florida*.[22] *Roper*, which categorically barred capital punishment for children under the age of eighteen at the time of their offense,[23] established that

15 577 U.S. 190 (2016).

16 *Juvenile Life Without Parole*, RESTORE JUST., https://restorejustice.org/issues-solutions/juvenile-life-without-parole/ (last visited Jan. 4, 2021).

17 *See* Hoesterey, *supra* note 13, at 195.

18 567 U.S. at 465.

19 *Id.*

20 *Id.*

21 543 U.S. 551 (2005).

22 560 U.S. 48 (2010).

23 *Roper*, 543 U.S. at 568.

juveniles are constitutionally different from adults for sentencing.[24] *Graham* similarly viewed the characteristics of youth as weakening the rationale for punishment and rendered JLWOP sentences inappropriately disproportionate for children who were not charged with homicide.[25]

Because the Eighth Amendment guarantees that individuals will not be subject to excessive sanctions and will receive proportional punishments for their offenses,[26] the *Miller* Court looked to children's diminished capacity and greater prospects for reform and concluded in both cases that juveniles are "less deserving of the most severe punishments."[27] The Court reasoned that mandatory sentencing schemes, which prevent a sentencer from taking into account a juvenile's "lessened culpability" and greater "capacity for change," were unconstitutional.[28] Further, the Court highlighted some key differences between adults and juveniles: a lack of maturity and an underdeveloped sense of responsibility; vulnerability to negative influences and outside pressures; and psychological and brain science developmental deficits, including a proclivity for risk, transient rashness, and inability to assess consequences.[29]

The Court could have banned JLWOP altogether in *Miller*, which would have been supported by *Roper* and *Graham* as well as recent findings regarding juvenile brain development that diminishes penological justifications for juveniles.[30] It declined to do so, however, and instead created five mitigating factors for a sentencer to consider when determining whether to impose a sentence of JLWOP.[31] These, dubbed the *Miller* factors, include: (1) the age of the juvenile at the time of the crime and immaturity; (2) circumstances of the homicide, including the role the juvenile had in the offense and any influence of peer pressure; (3) environmental vulnerabilities at the time of the crime, like an unstable family home environment; (4) evidence or potential for the juvenile's rehabilitation; and (5) information around the original court case, like challenges dealing with police or lack of participation in court because of the defendant's youth.[32] Though the Court left the procedural imposition of JLWOP sentences to the

[24] *Miller*, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569).
[25] *Graham*, 560 U.S. at 68, 82.
[26] U.S. CONST. amend. VIII; *see Miller*, 567 U.S. at 469.
[27] *Miller*, 567 U.S. at 471 (citing *Graham*, 560 U.S. at 68).
[28] *Id.* at 465 (citing *Graham*, 560 U.S. at 48, 68, 74, 130).
[29] *Id.* at 471–72.
[30] *Id.*
[31] *See id.* at 477.
[32] *Id.* at 477–78.

discretion of the states, after considering these factors, the Court elaborated:

> [W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[33]

Some states have interpreted this, as well as the Court's emphasis on requiring the sentencer to take into account how "children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison,"[34] as creating a presumption against JLWOP.[35] Presumption or not, the Court outlined that JLWOP should be a rare sentence because juveniles have a great capacity for change, and considering youth as a mitigating factor may make a JLWOP sentence disproportionate to all but incorrigible offenders.[36]

A narrow reading of *Miller*'s holding led a minority of states to conclude that the Court only struck down JLWOP under mandatory sentencing schemes. Thus, states adopting the narrow reading of *Miller* concluded that they could constitutionally impose discretionary JLWOP sentences at the same rate as they were prior to the decision, so long as sentencers considered the five *Miller* factors.[37] These states did so regardless of the Court's language that the sentence should be "uncommon."[38] Similarly, they refused to apply *Miller* retroactively to individuals who were under the age of eighteen and charged with JLWOP under a mandatory sentencing scheme prior to *Miller*—until the Court reiterated that states were obligated to do so.[39]

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[33] *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).

[34] *Miller*, 567 U.S. at 480.

[35] Hoesterey, *supra* note 13, at 164–67 ("Relying on language in *Miller* . . . state supreme courts in Connecticut, Iowa, Utah, Missouri, and Indiana all held there must be a presumption against imposing a life sentence without the opportunity for parole.").

[36] *Miller*, 567 U.S. at 479.

[37] *See* Alexandra Fahringer, *Disturbing the Finality of a Sentence: How States with High Rates of Juvenile Life Without Parole ("JLWOP") Responded to* Montgomery v. Louisiana, 70 RUTGERS U. L. REV. 1271, 1278–79 (2018); Hoesterey, *supra* note 13, at 162–67; *see also* JUV. SENT'G PROJECT AT QUINNIPIAC UNIV. SCH. OF L. & THE VITAL PROJECTS FUND, JUVENILE LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES: NOVEMBER 2017 SNAPSHOT 3, 6, 8, 11–15 (Nov. 20, 2017) [hereinafter JUV. SENT'G PROJECT].

[38] *Miller*, 567 U.S. at 479.

[39] Montgomery v. Louisiana, 577 U.S. 190, 208 (2016); *see also* Hoesterey, *supra* note 13, at 151–52.

In *Montgomery v. Louisiana*—a case where Louisiana denied the petitioner's order to correct his mandatory sentence of life without parole for a crime he committed as a juvenile—the Court clarified that *Miller*'s ban on mandatory JLWOP sentences applies retroactively to convictions that had become final before *Miller* was decided.[40] It held that the petitioner was entitled to resentencing because *Miller* provided a substantive "guarantee" that only juvenile defendants whose crimes reflected permanent incorrigibility may constitutionally receive JLWOP.[41] States have begun to conduct resentencing hearings, but because procedural requirements have been left up to the states, discrepancy remains as to what findings *Miller* requires for a sentencer to impose a JLWOP sentence.[42]

III. TRENDS IN STATES IMPOSING JLWOP

Following the Court's decisions in *Miller* and *Montgomery*, states have the procedural discretion to implement requirements and restrictions on JLWOP sentencing.[43] Generally, since the *Miller* decision in 2012, states' responses have fallen into three categories: Category 1, states that have prohibited JLWOP; Category 2, states that have not banned JLWOP but either have no juveniles currently serving the sentence or have drastically reduced the number of sentences; and Category 3, states that have increased or continued use of the sentence. Section A discusses these three categories post-*Miller* and *Montgomery*, explaining how JLWOP is trending to be less favorable. Section B first provides specific case studies on Michigan and Pennsylvania, states that account for a large percentage of JLWOP sentences nationwide, and ends by showing why Pennsylvania's procedural safeguards are more efficient and fairer than those in Michigan.

A. *National Trends*

Leaving individual states the discretion to procedurally implement requirements and restrictions on JLWOP sentencing has led to state disparities in both recommending new JLWOP sentences and resentencing JLWOP recipients post-*Montgomery*.[44] Since the *Miller*

40 *Montgomery*, 577 U.S. at 208.

41 *Id.* at 208–13.

42 *See* Hoesterey, *supra* note 13, at 161–72.

43 *See Montgomery*, 577 U.S. at 206.

44 Hoesterey, *supra* note 13, 161–72. Resentencing in JLWOP refers to cases post-*Montgomery* that now have the opportunity to be heard again before a judge for a new sentence. Prosecutors may recommend continuing the life sentence, a lesser sentence, or release, but in any event, prosecutors must abide by the criteria set forth in *Miller*.

decision, thirty-four states and the District of Columbia have joined Category 1 or Category 2 by either banning or reducing the imposition of JLWOP sentences.[45] An average of three states per year have abolished JLWOP since 2013, showing that the country is moving towards broader rejection of the harsh sentence.[46] So far, there are twenty-five states in Category 1, which encompasses states that have passed legislation to abandon JLWOP, and nine states that currently have no juveniles serving such a sentence, which fall into Category 2.[47] Even globally, 181 countries have recognized the injustices of JLWOP and prohibited the sentence for juveniles.[48]

While twenty-five states—in Category 2 and 3—have not banned JLWOP, currently, five states account for about 70 percent of all JLWOP sentences: Pennsylvania, California, Michigan, Florida, and Louisiana.[49] This is, in part, because these states imposed strict mandatory sentencing schemes before *Miller*—for example, mandating a sentence of JLWOP to all offenders charged with first-degree murder—and, in part, due to an unwillingness of these states to apply *Miller* retroactively before *Montgomery*.[50] Since *Montgomery*, an estimated 2,100 formerly-convicted juveniles serving mandatory JLWOP sentences have become eligible for a sentencing review, but some states have been more expedient in their resentencing procedures than others.[51]

Most states that have reduced their number of JLWOP sentences have applied *Miller* broadly, in some cases necessitating a finding by the judge or jury of incorrigibility before sentencing a juvenile to die in

45 *See* Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole; *States that Ban Life Without Parole for Children*, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Feb. 24, 2020), https://fairsentencingofyouth.org/media-resources/states-that-ban-life/; JUV. SENT'G PROJECT, *supra* note 37; *Significant Case Law from Courts Nationwide*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/significant-case-law/ (last visited Nov. 8, 2021).

46 Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 554 (2017).

47 Rovner, *supra* note 45; *Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop/ (last visited Oct. 13, 2021).

48 *Juvenile Life Without Parole*, supra note 16.

49 *State by State Data*, SENT'G PROJECT (2020) https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=0 (last visited Nov. 15, 2021) (Juvenile lifers by state as of 2020: Pennsylvania (294), California (224), Michigan (191), Florida (178), and Louisiana (150)).

50 Fahringer, *supra* note 37, at 1272; Rovner, *supra* note 45; JUV. SENT'G PROJECT, *supra* note 37.

51 Rovner, *supra* note 45; Maura Ewing & Samantha Melamed, *A Prison Lifer Comes Home*, ATLANTIC (Sept. 15, 2019), https://www.theatlantic.com/politics/archive/2019/09/juvenile-lifer-comes-home-prison/596845/.

prison.[52] These states have fallen into Category 1 by prohibiting JLWOP, or Category 2 by having no juveniles currently serving the sentence or drastically reducing the number of sentences imposed. Mandating an incorrigibility finding necessarily limits the application of JLWOP sentences and resentences, leading to a smaller pool of children eligible to receive the sentence. Some states have also found a presumption against JLWOP,[53] relying on the Court's language in *Miller* that the sentence should be "uncommon" and that youth "counsel[s] against irrevocably sentencing [juveniles] to a lifetime in prison."[54] All of these states have seen a decline in their JLWOP populations.[55]

A minority of states have fallen into Category 3, either by increasing JLWOP sentences after *Miller* or consistently recommending or re-recommending JLWOP. These states interpreted *Miller* more narrowly, finding the decision only applied to mandatory, not discretionary, JLWOP sentences.[56] Many of these states have declined to recognize that an explicit finding of incorrigibility is needed before imposing JLWOP and have similarly declined to recognize a presumption against JLWOP.[57] Prosecutors in these states have continued to seek JLWOP sentences at a rate that does not reflect the Court's stated belief that it should be a rare sentence.[58] Such states base these assumptions on one phrase in *Montgomery*: that *Miller* did not impose a formal fact-finding requirement of a child's incorrigibility.[59] Critics have countered that, in *Montgomery*, the Court mentioned eight times that only irredeemable youth might be sentenced to JLWOP, whereas the Court only mentioned the formal fact-finding distinction once; therefore, a finding of incorrigibility by a judge or jury should be required.[60]

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52 *See* JUV. SENT'G PROJECT, *supra* note 37; *see also* Davis v. State, 415 P.3d 666 (Wyo. 2018); People v. Holman, 91 N.E.3d 849 (Ill. 2017); Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017); McGee v. State, No. F-2015-393 (Okla. Crim. App. 2016); State v. Montgomery, 194 So. 3d 606 (La. 2016); Landrum v. State, 192 So. 3d 459 (Fla. 2016); Veal v. State, 784 S.E.2d 403 (Ga. 2016); People v. Gutierrez, 324 P. 3d 245 (Cal. 2014).

53 Hoesterey, *supra* note 13, at 164–66.

54 Miller v. Alabama, 567 U.S. 460, 479–480 (2012); Hoesterey, *supra* note 13, at 164–65.

55 *See* JUV. SENT'G PROJECT, *supra* note 37, at 7, 10, 13–14.

56 *See id.* at 6, 10–12, 15–16.

57 Hoesterey, *supra* note 13, at 164–66.

58 *Id.*

59 Montgomery v. Louisiana, 577 U.S. 190, 211 (2016).

60 Hoesterey, *supra* note 13, at 173–74 (describing how an incorrigibility requirement is mentioned eight times in *Montgomery*); *see Montgomery*, 577 U.S. at 209, 211, 224, 225, 226.

Although the Court has recently held a formal finding of permanent incorrigibility is not required before sentencing a child to JLWOP,[61] states are free to impose additional requirements to ensure children whose crimes reflect "unfortunate but transient immaturity" are not sentenced to a lifetime in prison.[62]

B. *Michigan and Pennsylvania's Approaches to JLWOP*

When comparing how states have responded to *Miller*, it is helpful to look at Michigan and Pennsylvania. These states are similar in that they had a high number of JLWOP sentences before *Miller* and still do compared to other states that retain the sentence.[63] Combined with California, these states make up about half of all JLWOP sentences in the United States.[64] Michigan and Pennsylvania differ, however, in their applications of *Miller* and *Montgomery* through legislative response and resentencing guidelines directed at judges and prosecutors, which have shown varying levels of effectiveness.[65] They also differ in what their states statutorily describe as constituting first-degree murder—a mandatory prerequisite to receive a JLWOP sentence in these states.[66] These differences have allowed Pennsylvania to effectively move into Category 2, despite the large number of "juvenile lifers"[67] still

[61] Jones v. Mississippi, 141 S. Ct. 1307, 1310 (2021). The Court agreed with the minority of states that relied on one phrase of *Montgomery*—that a formal fact finding of incorrigibility is not required. *Id.* at 1323. Justice Sotomayor's dissent thoroughly details the phrases in both *Miller* and *Montgomery* which support the contrary. *Id.* at 1328–31 (Sotomayor, J., dissenting). Justice Sotomayor then critiques the Court's "mischaracterization" of the one statement the decision rests on. *Id.* at 1331.

[62] *Id.* at 1315 (majority opinion).

[63] JUV. SENT'G PROJECT, *supra* note 37. Before *Miller*, Pennsylvania had 525 juvenile lifers imprisoned while Michigan had 363. *Id.* at 9, 14. Though today these numbers are gradually decreasing, other states by contrast, like Missouri, had ninety juvenile lifers in 2012 and have zero today. *Id.* at 10. Missouri has not formally banned JLWOP but has passed legislation in 2016 narrowing the range of cases where the sentence may be available. *Id.* In 2012, California had 310 juvenile lifers and altogether banned JLWOP sentences in 2017. *Id.* at 4.

[64] *State by State Data*, *supra* note 49.

[65] JUV. SENT'G PROJECT, *supra* note 37, at 9, 14.

[66] MICH. COMP. LAWS ANN. § 750.316 (West 2014); 18 PA. CONS. STAT. § 1102.1(a)(1)(2) (2012).

[67] Eli Hager, *"Juvenile Lifers" Were Meant to Get a Second Chance. COVID-19 Could Get Them First.*, THE MARSHALL PROJECT (June 3, 2020), https://www.themarshallproject.org/2020/06/03/sentenced-to-life-as-teens-they-fear-getting-coronavirus-before-getting-a-second-chance (using the term "juvenile lifer" to describe individuals who were under the age of eighteen at the time of their crime that are currently serving life in prison without the possibility of parole).

imprisoned, while Michigan has held fast onto Category 3 and appears reluctant to implement change.[68]

1. Michigan

Before the Court decided *Miller* in 2012, 363 people were serving JLWOP sentences in Michigan.[69] This was largely because, at the time, Michigan's statutory scheme mandated a sentence of JLWOP to any individual convicted of first-degree murder, including aiding and abetting a murder and felony murder, without respect to youth as mitigating evidence.[70] Following *Miller*, Michigan's legislature amended its statute to give courts discretion to sentence juveniles convicted of first-degree murder to a term-of-years sentence[71] or JLWOP, instead of mandatory JLWOP.[72] Further, in both sentencing and resentencing, no explicit finding of incorrigibility by the judge or jury is needed.[73] Today, it is estimated that Michigan has around 191 juvenile lifers,[74] most of whom are waiting for judicial review.[75]

Prosecutors have discretion to seek resentencing of JLWOP, leading to a high percentage of resentencing recommendations compared to other states.[76] As of 2019, prosecutors in Michigan were re-seeking life without parole ("LWOP") for nearly two-thirds of

68 *See* Fahringer, supra note 37, at 1272.

69 JUV. SENT'G PROJECT, *supra* note 37.

70 Fahringer, *supra* note 37, at 1285.

71 MICH. COMP. LAWS ANN. § 769.25 (West 2014). This Comment does not address lengthy or aggregate term-of-year sentences, which some states have found to be "de facto" life without parole sentences, triggering the protections of *Miller* under the Federal and State Constitutions.

72 JUV. SENT'G PROJECT, *supra* note 37, at 9.

73 People v. Skinner, 917 N.W.2d 292, 309 (Mich. 2018) (holding that *Miller* did not require trial courts to make an explicit finding regarding a child's incorrigibility, stating it cannot imagine how a trial court would go about determining whether a particular defendant is "rare" or not).

74 *State by State Data*, *supra* note 49. Since there is no centralized database for JLWOP statistics, other sources vary in reporting the number of juvenile lifers currently incarcerated in Michigan. *See* Allie Gross, *More than Half of Michigan Juvenile Lifers Still Wait for Resentencing*, DET. FREE PRESS (Aug. 16, 2019), https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/ (estimating between 350 and 380); Hager, *supra* note 67 (estimating 350). However, for the sake of consistency, this Comment will rely on The Sentencing Project's projections, which utilizes the U.S. Office of Juvenile Justice and Delinquency Prevention's juvenile population data.

75 *See* Gross, *supra* note 74; Hager, *supra* note 67 (discussing fears of juvenile lifers contracting coronavirus before resentencing).

76 Fahringer, *supra* note 37, at 1285; Hager, *supra* note 67 (discussing how a prosecutor in Michigan advocated that victims and the public should "get priority" over juvenile lifers).

juvenile lifers.[77] In Oakland County, defense attorneys sued prosecutors for recommending resentencing of JLWOP for forty-four out of forty-nine juvenile lifers.[78] Prosecutors have publicly defended these decisions, explaining that the juvenile lifers in their jurisdictions fit the description of a "rare juvenile offender whose crime reflects irreparable corruption."[79] Generally, resentencing in Michigan has been slower than other states due to "clunky bureaucracy, disagreements over procedures, and a lack of an official database tracking the process,"[80] as well as prosecutors recommending a high percentage of JLWOP resentencing.[81]

In *People v. Skinner*, the Michigan Supreme Court declined to require that a finding of incorrigibility was needed before sentencing or resentencing a defendant to JLWOP.[82] The court reasoned that as long as the *Miller* factors were considered, a JLWOP sentence was not a disproportionate punishment.[83] The court also pointed out that Michigan restricts JLWOP to individuals convicted of first-degree murder,[84] which necessarily limits the application of the sentence, making it "rare" as the language of *Miller* intended.[85] But Michigan's first-degree murder statute is not as limiting as the court postulates, because its language effectively allows children charged with second-degree or felony murder to receive JLWOP.[86] The statute employs a very broad definition of first-degree murder, including "[m]urder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct . . . robbery, carjacking, breaking and entering of a dwelling, home invasion . . . larceny of any kind, extortion, kidnapping . . . ."[87] Because of this, Michigan has a large number of children (and adults) available to receive life without parole sentences.

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77 Gross, *supra* note 74; The Associated Press, *A State-By-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 30, 2017), https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/.

78 The Associated Press, *supra* note 77.

79 Fahringer, *supra* note 37, at 1300.

80 Gross, *supra* note 74.

81 *Id.*; Hager, *supra* note 67.

82 917 N.W.2d 292, 309 (Mich. 2018).

83 *Id.* at 312.

84 *Id.* at 313.

85 *Id.*

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

87 *Id.* § 750.316(b).

2. Pennsylvania

Before the Court decided *Montgomery* in 2016, Pennsylvania had 517 juvenile lifers—more than any other state.[88] About 300 of these juvenile cases originated in Philadelphia.[89] After the *Montgomery* decision, judges began fast-tracking resentencing hearings of some of the longest-serving inmates, approving new sentences negotiated by the District Attorney's office and public defenders.[90] In 2012, Philadelphia County had almost as many juvenile lifers as the entire state of Michigan and devised a plan to complete all but ten of its resentencing cases by the end of Summer 2019.[91] When carrying out the resentencing plan, not a single juvenile lifer in Philadelphia County had been given a new JLWOP sentence.[92] As of 2020, Pennsylvania has cut its JLWOP prison population down to 294 juvenile lifers,[93] and a recent study found that only 1.14 percent of those released have since been convicted of any new crime.[94]

In Pennsylvania, JLWOP sentences are limited by statute to juveniles convicted of first-degree murder.[95] The statute, which only applies to new JLWOP cases since 2012, abolishes the sentence for "second-degree murder and gives courts discretion to sentence juveniles to either LWOP or a parole eligible sentence for first-degree murder."[96] It also distinguishes between those who were fifteen years of age or older and those who were fifteen years of age or younger at the time of the crime.[97] The statute defines first-degree murder as a criminal homicide "committed by an intentional killing,"[98] and defines second-degree murder as a murder "committed while defendant was engaged as a principal or accomplice in the perpetration of a felony."[99] Third-degree murder encompasses all other kinds of murder.[100]

In addition to the *Miller* factors, the Pennsylvania Supreme Court has imposed extra guidelines for a sentencing court to consider in

88 The Associated Press, *supra* note 77.
89 *Id.*
90 *Id.*
91 Gross, *supra* note 74.
92 *Id.*
93 *State by State Data*, *supra* note 49.
94 Hager, *supra* note 67.
95 18 PA. CONS. STAT. § 1102.1(a) (2012).
96 JUV. SENT'G PROJECT, *supra* note 37 (citing 18 PA. CONS. STAT. § 1102.1(c)).
97 18 PA. CONS. STAT. § 1102.1(a)(1)–(2).
98 *Id.* § 2502(a).
99 *Id.* § 2502(b).
100 *Id.* § 2502(c).

determining whether to sentence a child to JLWOP.[101] In *Commonwealth v. Batts*, the court created a presumption against JLWOP, which may only be overcome if the state proves, based on competent evidence beyond a reasonable doubt, that a juvenile is "entirely unable to change."[102] It also generated seven factors that a court is required to consider and note on the record, some of which overlap with the *Miller* factors, and others unique to Pennsylvania like "the impact of the offense on the community."[103]

3. Comparing Pennsylvania and Michigan

Unlike Michigan, which gives prosecutors, alone, the discretion to seek resentencing for JLWOP,[104] Pennsylvania supports open negotiations in resentencing between prosecutors and defense attorneys.[105] If prosecutors seek JLWOP in Pennsylvania, they must prove beyond a reasonable doubt that the offender is beyond rehabilitation, essentially a finding of incorrigibility.[106] Pennsylvania's Supreme Court also created a heightened standard of a presumption against JLWOP and extra factors to consider in addition to the *Miller* factors.[107] Since these restrictions, Philadelphia's District Attorney's office announced it is not seeking JLWOP for any juvenile sentenced in Philadelphia County, and since this announcement has found only three exceptions.[108] Dissimilarly, Michigan's Supreme Court has neither found a presumption against JLWOP nor required a finding of incorrigibility before imposing JLWOP.[109] This has led to Michigan's prosecutors seeking to resentence around two-thirds of its present juvenile lifer population to JLWOP, instead of a lesser punishment, and continuously recommending the sentence to newly charged children.[110]

Though the Michigan Supreme Court emphasized that the sentence is only reserved for juveniles convicted of first-degree murder, Michigan's first-degree murder statute is very broad and encompasses second-degree and felony murder.[111] This allows prosecutors to charge most offenders, whose crimes resulted in a criminal homicide, with first-

101 *See* Commonwealth v. Batts, 163 A.3d 410, 459–60 (Pa. 2017).
102 *Id.* at 416, 435.
103 *Id.* at 418 n.2.
104 Fahringer, *supra* note 37, at 1286.
105 *Id.* at 1297.
106 *Batts*, 163 A.3d at 416.
107 *Id.* at 418.
108 Fahringer, *supra* note 37, at 1283.
109 People v. Skinner, 917 N.W.2d 292, 312 (Mich. 2018).
110 Gross, *supra* note 74; The Associated Press, *supra* note 77.
111 Fahringer, *supra* note 37, at 1285.

degree murder. In Pennsylvania, JLWOP is restricted to more narrowly defined first-degree murder charges, limiting the availability of the sentence to those children who did not commit an intentional criminal homicide.[112] As a result of these differences, Pennsylvania's JLWOP sentencing system is arguably more efficient and fairer than Michigan's is currently. In Pennsylvania, juveniles may only be sentenced to JLWOP after being convicted of first-degree murder, a finding of incorrigibility, and a defeat of the presumption against JLWOP.[113] Michigan offers no comparable protections.

IV. WHY JLWOP SENTENCES ARE PROBLEMATIC FOR CHARGES LESS THAN FIRST-DEGREE MURDER

States should limit JLWOP sentences to children charged with first-degree murder. This argument is not only supported by current national trends and the Court's desire to limit JLWOP to incorrigible offenders to keep the sentence uncommon, discussed above. It is also supported by juvenile brain development research, discussed below in Section A. Further, JLWOP is disproportionate and thus in tension with the Eighth Amendment when issued for second-degree murder or felony murder charges for juveniles, as explained below in Section B.

A. *Juvenile Brain Science Suggests Most Children Are, By Definition, Not Incorrigible*

Though the Supreme Court recently held that sentencers are not required to make a separate factual finding of permanent incorrigibility before sentencing a juvenile offender to JLWOP,[114] states should take it upon themselves to recognize that, inherently, because of their age, most juveniles are not incorrigible and thus should not be sentenced to JLWOP unless charged with first-degree murder. Children cognitively think differently than adults and psychosocially lack the developed social and emotional capabilities that do not form until they mature into adults.[115] Research has shown that juvenile thinking is oriented in the present and largely overlooks consequences or implications, especially in stressful situations.[116] Other research has shown that juveniles tend to make decisions based on emotions, such as anger or fear, to a much

112 18 PA. CONS. STAT. § 1102.1(a) (2012).

113 Commonwealth v. Batts, 163 A.3d 410, 452 (Pa. 2017); *see also* Fahringer, *supra* note 37, at 1283.

114 Jones v. Mississippi, 141 S. Ct. 1307, 1309 (2021).

115 Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. 4 (2007).

116 *Id.*

greater extent than adults do.[117] This largely has to do with the delayed development of a juvenile's frontal lobe, a part of the brain that regulates aggression, long-range planning, abstract thinking, and perhaps even moral judgment, which does not sufficiently develop until adulthood.[118] The frontal cortex, which controls impulses and risk assessment, is the last part of the brain to develop.[119]

Justice Kagan relied on the constitutional distinction between children and adults to categorically ban mandatory JLWOP in *Miller*.[120] The opinion stated, "transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[121] Taking into account developmental science when determining proportionality under the Eighth Amendment is crucial in cases regarding juveniles and acts as a sound basis for rejecting harsh sentences as excessive.[122]

The *Miller* factors take into account these juvenile brain development considerations by recognizing that youth necessarily diminishes a juvenile offender's culpability and by describing age and potential for rehabilitation as two major mitigating factors.[123] Considering the circumstances of the homicide, including the juvenile's role in the offense and any influence of peer pressure, is also relevant since juveniles' brains are less formed and more likely to be impacted by societal pressures when compared to adults.[124] The environmental vulnerabilities at the time of the crime, like an unstable family home environment, mitigate potential penological justifications by recognizing a juvenile offender's development may have been stunted in the not-so-distant past.[125] Lastly, the information around the original court case, like challenges dealing with the police or lack of participation

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117 *Id.* (citing Thomas Grisso, *What We Know About Youth's Capacities*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267 (Thomas Grisso & Robert G. Shwartz eds., 2000)).

118 *See* Aviva L. Katz et al., *Informed Consent in Decision-Making Pediatric Practice*, 138(2) PEDIATRICS e1, e7 (2016); Streib & Schrempp, *supra* note 115.

119 *Id.*

120 Miller v. Alabama, 567 U.S. 460, 471–75 (2012).

121 *Id.* at 472.

122 *Id.* at 470.

123 *Id.* at 477–78.

124 *See* Katz et al., *supra* note 118; Streib & Schrempp, *supra* note 115.

125 ASHLEY NELLIS, SENT'G PROJECT, THE LIVES OF JUVENILES LIFERS: FINDINGS FROM A NATIONAL SURVEY 2 (2012), https://www.sentencingproject.org/publications/the-lives-of-juvenile-lifers-findings-from-a-national-survey/ (79 percent of juvenile lifers reported witnessing violence in their homes; more than half (54.1 percent) witnessed weekly violence in their neighborhoods).

in court, showcases that juveniles are potentially at a disadvantage in communicating effectively with their attorneys and court personnel when compared to adults.[126]

JLWOP is the harshest sentence a juvenile can currently receive. Considering the Court's accepted findings on brain development and the decision-making capacity of juveniles, it is an inherently disproportionate sentence for all juvenile offenders except for those who are incapable of rehabilitation. A finding of incorrigibility may be a troubling distinction itself that is left up to judges and juries to determine, and some have argued that no juvenile is unable to be rehabilitated due to the nature of their youth.[127] But decreasing the pool of offenders eligible to receive a JLWOP sentence can be an effective next step in diminishing the likelihood of imposing a disproportionate punishment—especially now that the Court has clarified a finding of permanent incorrigibility is not required and has extended discretion to states to impose additional sentencing limits which abide by *Miller* and *Montgomery*.[128]

B. *JLWOP is an Excessive Sanction for Second-Degree and Felony Murder Charges*

The Eighth Amendment guarantees individuals the right to not be subjected to excessive sanctions and the right to proportional punishment for an offense.[129] In *Roper*, the Court reasoned that adults are constitutionally different from children and held that this must be taken into account to impose a proportional punishment consistent with the Eighth Amendment.[130] The Court held that capital punishment is an excessive sanction for those under the age of eighteen at the time of their crime, in part because of juvenile developmental immaturity and the diminished penological justifications that follow such immaturity.[131] It is well settled that juveniles have developmental immaturity in their decision making when compared to adults and that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior[.]"[132]

126 *Miller*, 567 U.S. at 477–78.

127 *See* Hoesterey, *supra* note 13, at 181–83; Matsumoto, *supra* note 12, at 253.

128 Jones v. Mississippi, 141 S. Ct. 1307, 1309–10 (2021).

129 U.S. CONST. amend. VIII; Roper v. Simmons, 543 U.S. 551, 560 (2005).

130 *Roper*, 543 U.S. at 568.

131 *Id.* at 569–70.

132 *Id.* at 570 (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

Allowing second-degree and felony murder charged juvenile offenders to receive JLWOP is in tension with the Eighth Amendment's prohibition on excessive sanctions and is a disproportionate punishment for juveniles. A charge of second-degree murder is generally an intentional killing lacking premeditation.[133] In some states, it also encompasses "depraved heart murder," defined as a killing caused by reckless disregard for human life.[134] Allowing children charged with second-degree murder to receive JLWOP is problematic. When charged with a second-degree offense that lacks premeditation or intent to kill, the child, therefore, did not think through the killing beforehand. Rather, the child acted out of impulse—something that, according to brain research discussed above, may be attributable to the undeveloped brain. Thus, the argument that the juvenile cannot be rehabilitated is very weak.

Felony murder and accomplice liability traditionally attribute the death caused in the commission of a felony to all participants who intended to commit the felony, regardless of whether the participant killed or intended to kill.[135] Depending on the circumstances of the case, the charged offender may not have pulled the trigger but would be guilty by association.[136] Prior to *Miller*, an estimated one-fourth of all JLWOP sentences resulted from felony murder cases or accomplice liability cases.[137] Allowing JLWOP to be available to juveniles who lack premeditation in the commission of a homicide, or who intentionally commit a felony but unintentionally become an accomplice to a murder, is a disproportionate punishment because these juveniles have the unique ability to be rehabilitated by the nature of their youth and juvenile brain science considerations.[138]

Penological justifications do not apply to juveniles charged with felony-murder.[139] Juveniles' culpability for felony murder charges has

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133 40 AM. JUR. 2D *Homicide* § 41 (2008); *Second-Degree Murder*, JUSTIA, https://www.justia.com/criminal/offenses/homicide/second-degree-murder/ (last updated Oct. 2021).

134 *Second-Degree Murder*, JUSTIA, *supra* note 133.

135 Miller v. Alabama, 567 U.S. 460, 491 (2012) (Breyer, J., concurring); *Felony Murder*, JUSTIA, https://www.justia.com/criminal/offenses/homicide/felony-murder/ (last updated Oct. 2021).

136 Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper, Graham *&* J.D.B., 11 CONN. PUB. INT. L.J. 297, 312 (2012).

137 *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUM. RTS. WATCH (Oct. 11, 2005), https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states.

138 *See Miller*, 567 U.S. at 490–91 (Breyer, J., concurring); Katz et al., *supra* note 118; Streib & Schrempp, *supra* note 115.

139 Keller, *supra* note 136, at 316.

been argued to be twice diminished since they are categorically less culpable than adults, and even adults convicted of felony murder who do not kill or intend to kill are less culpable than the actual killers.[140] So, "there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill."[141] The doctrine of felony murder attempts to deter individuals from bringing deadly weapons if they are planning to commit a crime,[142] but juvenile brain science shows that juveniles, when compared to adults, are reckless, immature, and impulsive; so any possible goals of deterrence with regards to felony murder are unlikely to be satisfied.[143]

C. *JLWOP Can Only be a Proportionate Sentence Under the Miller Factors When a Child Commits First-Degree Murder*

First-degree murder charges are a necessary, but not sufficient, condition for JLWOP. In most states, a charge of first-degree murder requires a prosecutor to prove the offender acted with both premeditation and deliberation in the course of the murder.[144] If the prosecutor is seeking JLWOP, the question of incorrigibility should only be made after determining a juvenile acted with both premeditation and deliberation during an intentional murder. Premeditation requires the offender to plan the murder before it was committed, or to think about the act beforehand, while deliberation requires the offender to be collected at the time of the offense, or that the offender developed the conscious intent to kill before committing the murder.[145] Thus, the juvenile who acts with both premeditation and deliberation must have considered the intentional murder ahead of time and decided to proceed with the act. The argument that this juvenile is incorrigible is slightly stronger than it would be for lesser offenses since in planning out a murder, through premeditation and deliberation, the juvenile might be susceptible to the penological justification of deterrence.

But youth is still a mitigating factor under the *Miller* factors, and premeditation and deliberation do not necessarily infer an inability to be rehabilitated. The potential for rehabilitation will have to be

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140 *Miller*, 567 U.S. at 490–91 (Breyer, J., concurring); Keller, *supra* note 136, at 307.

141 *Miller*, 567 U.S. at 492 (Breyer, J., concurring) (citing Graham v. Florida, 560 U.S. 48, 69 (2010)).

142 *Felony Murder*, *supra* note 135.

143 *See Miller*, 567 U.S. at 490–91 (Breyer, J., concurring).

144 40 AM. JUR. 2D *Homicide* § 38 (2008); *First-Degree Murder*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/first_degree_murder (last visited Sept. 30, 2021); *First-Degree Murder*, JUSTIA, https://www.justia.com/criminal/offenses/homicide/first-degree-murder/ (last updated Oct. 2021).

145 *First-Degree Murder*, JUSTIA, *supra* note 144.

determined on a case-by-case basis. Because juveniles are different in their ability to mature and change, anything less than evidence that a murder was perpetrated with premeditation and deliberation should not receive the harshest punishment a juvenile can obtain in the United States. Limiting JLWOP sentences to first-degree murder charges appropriately puts a procedural limit on a judge's and prosecutor's discretion to seek the sentence.

V. STATES SHOULD CONSTRUE FIRST-DEGREE MURDER STATUTES NARROWLY

But problems can arise with the argument that limiting JLWOP to first-degree murder charged individuals is an effective procedural limit. First, some states statutorily define first-degree murder broadly to include felony murder and accomplice murder.[146] Second, premeditation and deliberation may still be too lax of a standard to justify a sentence of JLWOP after taking into account juvenile brain development, which diminishes penological justifications. Thus, first-degree murder charges should be limited even more narrowly to create a heightened standard not in tension with the Eighth Amendment's prohibition on excessive sanctions. When considering JLWOP sentences for first-degree murder charges, first-degree murder should be defined narrowly as a homicide committed with *premeditation and deliberation*—similar to Pennsylvania's narrow first-degree murder statute and dissimilar to Michigan's broad statute.[147] In addition to a finding of premeditation and deliberation, there should be a second finding of deliberate and intentional *cruelty* before a sentence of JLWOP is considered. This will be discussed below in Section A.

Narrowing what constitutes first-degree murder would serve several functions with regards to JLWOP sentencing, discussed below in Sections B, C, D, and E. First, it would help states with backlogged resentencing procedures by limiting the pool of offenders for which prosecutors may seek JLWOP. Second, it would take away discretion from a judge or jury to determine if a child who lacks premeditation and deliberation is (or is not) incorrigible, leading to more uniform sentences for similarly situated defendants. Third, it would be consistent with developing juvenile brain science, evidencing most juveniles have a unique ability to mature and change.[148] And finally, it would be consistent with Supreme Court precedent, as showcased by

146 *See* MICH. COMP. LAWS ANN. § 750.316 (West 2014); *see also* LA. STAT. ANN. § 14:30 (West 2015).

147 *See* discussion *supra* Section III.B.

148 *See* discussion *supra* Section IV.A.

the Court categorically prohibiting capital punishment for certain offenses, and advances the *Miller* Court's notion that JLWOP should be uncommon since it is now the harshest sentence a juvenile can receive in the United States.

A. *Deliberate and Intentional Cruelty Standard*

Before asking whether a juvenile charged with intentional murder is incorrigible or not, a threshold question should consider whether the nature of the crime committed is severe enough for a JLWOP sentence to be recommended. JLWOP should only be available for those charged with first-degree murder who showcased *premeditation and deliberation* and *deliberate and intentional cruelty* in the execution of the offense. This diminishes the risk of excessive sanctions since prosecutors must comply with additional procedural checkpoints before recommending JLWOP. For juveniles charged with first-degree murder who showcased particular, deliberate cruelty in the commission of a heinous murder, the penological justification of deterrence can arguably be satisfied, making JLWOP a proportionate sentence for juveniles in accordance with the Eighth Amendment. This heightened standard could make JLWOP particularly uncommon, but this would be consistent with the Court's opinion in *Miller* that the sentence should be reserved for the "rare juvenile offender whose crime reflects irreparable corruption."[149]

In retaining JLWOP and not categorically banning it, some juveniles may be deterred from committing especially heinous crimes.[150] Specifically, if there is evidence of a juvenile offender extensively thinking about committing a homicide, deterrence may play a role in his decision of whether or not to follow through with it. In other instances, where a juvenile commits a murder quickly without consideration—like for second degree or felony murder, discussed above—deterrence may not play a role in that impulsive decision. Since "juveniles are

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[149] Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)).

[150] *See id.* at 480 ("[W]e do not foreclose a sentencer's ability to make that [incorrigibility] judgment."); Natalie Pifer*, Is Life the Same as Death?: Implications of* Graham v. Florida, Roper v. Simmons, *and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1517 (2010) ("[T]he Court's deterrence analysis, weighted against an offender's 'moral responsibility,' would almost certainly be altered by the increased severity of homicide-related offenses."); THOMAS A. LOUGHRAN ET AL., JUVENILE JUSTICE BULLETIN: STUDYING DETERRENCE AMONG HIGH-RISK ADOLESCENTS 12 (Off. of Juv. Just. and Delinq. Prevention ed., 2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248617.pdf ("Even within a group of serious juvenile offenders, the certainty of punishment can play an important role in deterring future crime.").

particularly susceptible to negative influences, and . . . long-term consequential effects are not fully ingrained in the juvenile mind[,]" this diminishes the effects of deterrence as applied to them.[151] But while juveniles are less susceptible to deterrence when compared to adults, some juveniles may still be susceptible under such unique and limited heinous circumstances, making them dangerous enough to argue they should be incapacitated for life.[152]

The Court in *Miller* presumably concluded that deterrence was an applicable penological justification, in rare cases, by declining to categorically ban discretionary JLWOP.[153] If deterrence was not a valid penological justification, JLWOP sentences would likely be in tension with the Eighth Amendment as a disproportionate punishment. Another penological justification is retribution, or evaluating the blameworthiness of these juveniles, which may also be considered.[154] Juveniles are still blameworthy for their acts, but not as much as adults, and only when their acts can be considered deliberately cruel would they deserve the harshest punishment available to them.[155] This would require a holistic examination of the facts of the case.

Once the nature of a juvenile's crime is considered, and if the prosecution shows extensive premeditation and deliberation *and* deliberate and intentional cruelty in the commission of the homicide, only then would the question become whether there is evidence that the juvenile is incorrigible. A first-degree murder with evidence of premeditation and deliberation does not necessarily presume incorrigibility—particularly in a developing child. Anything less than a distinct finding of deliberate cruelty suggests that immaturity fueled the commission of the crime rather than incorrigibility.

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151 Charles Garabedian, *Juvenile Empiricism: Approaches to Juvenile Sentencing in Light of* Graham *and* Miller, 21 U.C. DAVIS J. JUV. L. & POL'Y 195, 210 (2017); *see also* Katz et al., *supra* note 118; Streib & Schrempp, *supra* note 115, at 4–6.

152 Pifer, *supra* note 150; Moin A. Yahya, *Deterring* Roper*'s Juveniles: Using A Law and Economics Approach to Show That the Logic of* Roper *Implies That Juveniles Require the Death Penalty More than Adults*, 111 PENN. ST. L. REV. 53, 53–54 (2006).

153 *Miller*, 567 U.S. at 480 ("Although we do not foreclose a sentencer's ability to make that [incorrigibility] judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

154 *Graham*, 560 U.S. at 71 ("'The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.' . . . *Roper* found that '[r]etribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer.") (internal citations omitted).

155 *See* Montgomery v. Louisiana, 577 U.S. 190, 208 (2016); *Miller*, 567 U.S. at 472 ("[A]ttributes of youth diminish penological justifications for imposing the harshest sentence on juvenile offenders, even when they commit terrible crimes."); Pifer, *supra* note 150, at 1517.

Some examples of murder that exhibit deliberate cruelty include "murder . . . committed by means of a destructive device, bomb, or explosive . . . [that] the defendant knew . . . would create a great risk of death" or multiple deaths, a murder that manifested "a conscienceless or pitiless crime that [was] unnecessarily torturous to the victim," or the deliberate murder of a child.[156] By contrast, examples of murder that do not exhibit deliberate cruelty include murder committed in the heat of the moment,[157] murder committed because of a lack of intellect leading to an inability to appreciate consequences,[158] or murder committed without planning. Judges may be guided by determining whether the murder was carried out in a manner that indicates a strong and calculated desire to bring about the victim's, or multiple victims', deaths, as well as by considering the defendant's youth, level of maturity, and social factors that affected his decision. Even in circumstances in which a juvenile displays premeditation and deliberation *and* deliberate cruelty, juveniles have such a capacity for change that JLWOP may *still* be unjustified, depending on the facts of the case and the evidence presented.[159] Applying these narrowed definitions and threshold questions before entertaining the possibility of JLWOP diminishes the risk of excessive sanctions by creating procedural checkpoints with which a prosecutor must comply.

B. *Recommendation Positively Impacts Resentencing Procedures*

Considering how a juvenile has perpetrated the narrowed first-degree murder charge will limit the availability of JLWOP and aid some states with their backlogged resentencing procedures. Prosecutors

156 CAL. PENAL CODE §190.2 (West 2019); *see* United States v. Tsarnaev, 968 F.3d 24, 79 (1st Cir. 2020). Taking into account the number of victims, number of injured, extensive premeditation and planning of the bombing, and motivation for the attack, if the Boston Marathon bomber was under the age of eighteen at the time of the bombings, under this standard, he should still be subject to JLWOP. He was nineteen years old and eligible for the death penalty. *See also Columbine Shooting*, HISTORY.COM (Mar. 4, 2021) https://www.history.com/topics/1990s/columbine-high-school-shootings. The Columbine High School Massacre shooters were eighteen and seventeen years old and killed thirteen people.

157 Brief for Petitioner at 3, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259) (Fifteen-year-old Brett "'had a steak knife in his hand from making [the] sandwich' and 'he "threw the knife forward," stabbing his grandfather.'").

158 Commonwealth v. Batts, 163 A.3d 410, 424 (Pa. 2017) ("Batts' 'level of sophistication[,] which was not very high,' also affected his ability to make a sound decision. While seemingly streetwise, Batts' judgment was clouded by the idea of 'being part of a crowd' and gaining acceptance. . . . Batts was of an entirely different mindset because of his age and the 'horrible environment' from whence he came.") (internal citations omitted).

159 Roper v. Simmons, 543 U.S. 551, 573 (2005).

would not have the ability to re-recommend JLWOP for those convicted of less than first-degree murder, which could alleviate some of the delays courts have been experiencing, like in Michigan. Prosecutors would have to evaluate the circumstances and nature of the juvenile lifer's crime, and if it seems unlikely the crime was committed with deliberate and intentional cruelty, they would be less likely to re-recommend JLWOP.

Alleviating backlogs of resentencing is especially relevant in response to calls to decrease prison population density because of COVID-19.[160] Though resentencing procedures should not be rushed, it is important to be cognizant of how fast (or how slow) a state allows resentencing and it is equally important to hold these states accountable for unnecessarily detaining individuals entitled to resentencing. And since mandatory JLWOP sentences have been held unconstitutional, juvenile lifers are entitled to resentencing. But some states have been either unwilling or unable to give these lifers their guaranteed resentencing hearing.[161] States should be proactively alleviating these resentencing delays, not actively contributing to them.

C. *Recommendation Helps Relieve Current Problems with Defining Incorrigibility*

This recommendation, imploring states to narrowly tailor what constitutes first-degree murder, will also take away discretion from a judge or jury to determine if an offender who lacks premeditation and deliberation is incorrigible, leading to more uniform sentences for similarly situated juvenile defendants. Though the Court has specified in both *Miller* and *Montgomery* that a sentence of JLWOP should be reserved for the rarest of individuals,[162] the Court has not defined what evidence would support a finding of incorrigibility or "provide[d] guidelines for identifying the exceptionally rare juvenile who is eligible for life without parole."[163] Without any instruction on how to apply the *Miller* factors, "courts are unable to apply them consistently in any fair way."[164]

Incorrigibility itself is an imprecise and variable determination, "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient

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160 Hager, *supra* note 67.

161 *Id.*

162 Montgomery v. Louisiana, 577 U.S. 190, 208 (2016); Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

163 Hoesterey, *supra* note 13, at 182.

164 *Id.*

immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[165] But employing a deliberate and intentional cruelty standard regarding the nature of a juvenile's crime, explained above, will require prosecutors to provide more evidence as to the nature and circumstances of the crime and the juvenile's mental state and planning of the homicide. This presumably would make it less likely that a juvenile would be considered incorrigible unless there were sufficient facts to prove it. Conversely, those juveniles who did not showcase deliberate and intentional cruelty would not be subject to the finding of incorrigibility; thus, JLWOP would not have been an appropriate sentence in the first place, reaffirming the notion that "incorrigibility is inconsistent with youth."[166]

D. *Recommendation is Consistent with Juvenile Brain Science*

The deliberate and intentional cruelty standard is consistent with juvenile brain science, evidencing that most juveniles have prospects for reform.[167] The recommended standard affords more protection than the current law surrounding JLWOP, making it less likely that juveniles would be considered for the sentence without meeting the heightened procedural safeguards. Though there is an argument to be made that no juvenile is incapable of being rehabilitated,[168] since as time passes and neurological development occurs most deficiencies will be reformed, there may be outliers or the "rare juvenile offender whose crime reflects irreparable corruption."[169] Though juveniles are *less* culpable than adults for sentencing purposes, they may still be culpable; those juveniles who extensively and deliberately plan a homicide may be eventually deterred by knowing JLWOP may await them if they follow through.

E. *Recommendation is Consistent with Precedent*

The Court has categorically prohibited capital punishment for certain classes of offenses in the past, requiring state death penalty statutes to narrow the categories of murders for which capital punishment is available.[170] The Court has also categorically prohibited JLWOP for charges that do not involve a homicide, holding it a

165 Roper v. Simmons, 543 U.S. 551, 573 (2005) (citing Steinberg & Scott, *supra* note 132, at 1014–16).

166 *Miller*, 567 U.S. at 473 (quoting Graham v. Florida, 560 U.S. 48, 72–73 (2010)).

167 *Id.* at 471 (citing *Graham*, 560 U.S. at 68); *see* discussion *supra* Section IV.A.

168 *See* Hoesterey, *supra* note 13, at 181–83.

169 *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).

170 *Roper*, 543 U.S. at 568; Atkins v. Virginia, 536 U.S. 304, 321 (2002).

disproportionate punishment in those cases.[171] Categorically prohibiting the imposition of JLWOP for certain degrees of crimes is consistent with this line of precedent, with the understanding that it is a disproportionate punishment for all but narrowed first-degree murder. This recommendation also reaffirms and is consistent with the general reasoning in *Miller* that JLWOP should be uncommon since it is now the harshest sentence a juvenile can receive in the United States.

On April 22, 2021, the Court held in *Jones v. Mississippi* that the Eighth Amendment does not require a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of JLWOP.[172] The Court asserted this opinion did not disturb *Miller* or *Montgomery*, though Justice Sotomayor provided a powerful dissent challenging the majority's application of stare decisis.[173] Since the Court held that a finding of incorrigibility is not needed despite the Court's precedent of *Miller* and *Montgomery*, this Comment's recommendation may be even *more* important. If a finding of incorrigibility is not needed before sentencing a juvenile to JLWOP, creating a further limit on imposing JLWOP is even more necessary because state disparities in sentencing will continue to go unchecked, and juveniles who likely have the capacity for rehabilitation will not be protected from the then-excessive sentence of JLWOP. Judges and juries in the minority of states that do not require a finding of incorrigibility now have the discretion to simply consider the *Miller* factors, without a presumption against JLWOP and without an explicit understanding of how youth itself diminishes penological justifications to all but the rarest of offenders who commit the rarest of offenses. Implementing a heightened procedural safeguard that sentencers must comply with would mitigate these risks.

VI. CONCLUSION

Imposing a categorical ban on JLWOP for those charged with less than a narrowed definition of first-degree murder will serve several functions. First, it will help states with backed-up resentencing procedures by limiting the pool of JLWOP sentences a prosecutor can

171 *Graham*, 560 U.S. at 74.

172 Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

173 *Id.* at 1328 (Sotomayor, J., dissenting) ("Today, however, the Court reduces *Miller* to a decision requiring 'just a discretionary sentencing procedure where youth [is] considered.' Such an abrupt break from precedent demands 'special justification.' The Court offers none. Instead, the Court attempts to circumvent *stare decisis* principles by claiming that '[t]he Court's decision today carefully follows both *Miller* and *Montgomery*.' The Court is fooling no one. Because I cannot countenance the Court's abandonment of *Miller* and *Montgomery*, I dissent.") (internal citations omitted).

seek. Second, it will take away discretion from a judge or jury to determine if an offender who lacks premeditation and deliberation is (or is not) incorrigible, or unable to be rehabilitated, leading to more uniform sentences for similarly situated defendants. Third, it is consistent with developing juvenile brain science, evidencing most juveniles have a unique ability to mature and change. And finally, it is supported by precedent—as showcased by the Court categorically prohibiting capital punishment for certain offenses—and advances the *Miller* Court's notion that JLWOP should be uncommon since it is now the harshest sentence a juvenile can receive in the United States.

Limiting how first-degree murder should be statutorily defined by requiring a showing of premeditation and deliberation *and* deliberate cruelty in the execution of the crime further protects juveniles and prohibits states from justifying the imposition of JLWOP sentences broadly. Children are different in their ability to mature and change and should not be subjected to the harshest penalty available to them in the United States unless a prosecutor can effectively comply with this heightened standard.