

S.B. 9: A Second Chance for Juveniles Serving Life Without Parole in California in Theory—and Why It Won’t Make a Difference in Practice

by EVAN REESE*

Introduction

Historically, juveniles have been treated differently than adults when convicted of a crime.¹ They were seen as less culpable than adults and more capable of reform.² As a result, the juvenile justice system has traditionally focused on rehabilitation, rather than retribution.³ In California and many other states, the focus of the adult system is quite different.⁴ For example, the very first sentence of California’s sentencing statute reads: “The Legislature finds and declares that the purpose of imprisonment for crime is *punishment*.”⁵ Yet California, like many other states after the tough-on-crime wave of the 1980s, allows some juveniles to be tried as adults in a variety of situations.⁶

Given the diametrically opposed goals of incarceration discussed above, whether individuals are tried as juveniles or adults makes a huge difference if convicted of a crime, especially for heinous ones,

* J.D. 2014, University of California, Hastings College of the Law; B.A. 2005, Political Science, University of California, Santa Barbara. I would like to thank Professor Hadar Aviram for her assistance during the development of this Note. I would also like to thank my friends and family—more specifically my son, Nathan, for inspiring my interest in the rights of children.

1. Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL’Y REV. 137, 145 n.21 (1995) (citing *Kent v. United States*, 383 U.S. 541, 554 (1966)).

2. *See id.* at 138.

3. *Id.*

4. *See, e.g.*, CAL. PENAL CODE § 1170(a)(1) (2014).

5. *Id.* (emphasis added).

6. Friedland, *supra* note 1, at 138.

such as first-degree murder.⁷ While in the juvenile justice system there is a focus on rehabilitation and eventual reentry into society; in the adult system, a young person faces little more than a lifetime of punishment and incarceration.⁸ However, recent legislation in California offers a glimmer of hope, and perhaps a second chance, for some juvenile offenders who were sentenced as adults to life without parole (“LWOP”). Senate Bill 9 (“S.B. 9” or “the Bill”) amends the California Penal Code (specifically amending Section 1170 by adding subsection (d)(2)) to allow such juveniles to petition the court for resentencing after serving the first fifteen years of their life sentence.⁹ In theory, if the prisoner is successful, he would serve a reduced sentence—most likely twenty-five years to life.¹⁰ However, in practice, the Bill is unlikely to have any significant practical effect on the hundreds of prisoners it aims to help. While the letter of the law has changed since S.B. 9 was passed, this Note addresses how it will work on a practical level. In addition, S.B. 9 may have been rendered moot by the Supreme Court’s decision in *Miller v. Alabama*.¹¹ Even if the Bill is valid and constitutional, it fails to ensure that no child receives a life sentence without the possibility of parole.¹² In fact, the Bill does nothing to prevent additional LWOP sentences, but simply provides a potential outlet to help juveniles *after* they receive LWOP sentences.¹³

Even after S.B. 9, current California law does not satisfy the holding or more importantly the spirit of the *Miller* decision. In *Miller*, the United States Supreme Court found mandatory LWOP sentences for juveniles unconstitutional because they violate the Eighth Amendment’s ban on “cruel and unusual punishment.”¹⁴ S.B.

7. See, e.g., CAL. PENAL CODE § 190.5(b) (2014).

8. See *id.*

9. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

10. State Senator Leland Yee, Remarks at the *Hastings Race and Poverty Law Journal* and California Correctional Crisis Blog Symposium: California Correctional Crisis: Realignment and Reform Symposium (Mar. 22, 2013) [hereinafter Yee, California Correctional Crisis Symposium]. For a general description of the Symposium, see Hadar Aviram, *California Correctional Crisis: Realignment and Reform, Day 2*, (Mar. 23, 2013, 7:00 AM), http://californiacorrectionscrisis.blogspot.com/2013/03/california-correctional-crisis_23.html.

11. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

12. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

13. *Id.*

14. See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012). See also U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

9 places substantial procedural hurdles before prisoners can seek even a mere possibility of parole because the Bill requires prisoners to petition the original sentencing court for resentencing.¹⁵ Instead, this problem should be addressed in a wholesale manner: All prisoners serving LWOP sentences for crimes committed as juveniles should be resentenced. The application procedure envisioned by S.B. 9 ignores the fact that approximately forty-five percent of the offenders sentenced as juveniles to LWOP are possibly unconstitutionally imprisoned under the rationale of both *Graham v. Florida* and *Miller*—two watershed Supreme Court cases for juvenile justice reform.¹⁶ In *Graham*, the Supreme Court held it unconstitutional for juvenile nonhomicide offenders to receive LWOP.¹⁷ Subsequently in *Miller*, the Court extended this rule even further, holding that even in murder cases, juveniles cannot be given *mandatory* LWOP sentences; judges or juries must have at least a modicum of discretion in sentencing juveniles to LWOP.¹⁸ California courts are split as to whether *Miller* applies retroactively, so it is unclear if S.B. 9 applies to juveniles already in prison.¹⁹

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15. CAL. PENAL CODE § 1170(d)(2)(A). Section 1170(d)(2)(A) provides, “When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the *sentencing court* a petition for recall and resentencing.”

Id. (emphasis added).

16. “*When I Die, They’ll Send Me Home*”: *Youth Sentenced to Life without Parole in California*, 20 HUMAN RIGHTS WATCH, no. 1, at 3 (Jan. 2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf> (As of 2008, an estimated forty-five percent of youth sentenced to life without parole did not directly commit the murder). See also *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). *Miller*, *Graham*, and *Florida* together comprise the three landmark Supreme Court cases that limit juvenile sentencing.

17. See *Graham*, 560 U.S. at 81–82.

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

19. See, e.g., *In re Rainey*, 224 Cal. App. 4th 280, 289–90 (Feb. 28, 2014) (holding that *Miller* is retroactive and prohibits LWOP sentences for juveniles unless the sentencing court specifically considers the “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,” as well as the juvenile’s “family and home environment” and the “circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.”); *People v. Moffett*, 148 Cal. Rptr. 3d 47, 55 (2012), cert. granted, 290 P.3d 1171 (Cal. 2013); *People v. Siackasorn*, 211 Cal. App. 4th 909, 915–16 (2012), cert. granted, 296 P.3d 974 (Cal. 2013). But see *People v. Gutierrez*, 209 Cal. App. 4th 646, 659 (2012), cert. granted, 290 P.3d 1171 (Cal. 2013) (noting section 190.5 “does not require a mandatory LWOP sentence and vests sentencing courts with the

Part I of this Note introduces S.B. 9 by focusing on the substance of the Bill and its legislative history.²⁰ Part II discusses the evolution of juvenile law in the United States, with particular emphasis on four pivotal Supreme Court cases: *In re Gault*, *Graham v. Florida*, *Roper v. Simmons*, and most importantly, *Miller v. Alabama*.²¹ Part III examines California's switch to determinate sentencing and how courts in California are applying *Miller* under that newer framework.²² Part IV evaluates the likelihood of S.B. 9's success and focuses on criticisms of the Bill, both in statutory construction and practical application.²³ Finally, Part V suggests alternative paths that California's penal system should take in the future, specifically regarding juvenile justice.

I. Senate Bill 9

A. Relevant Text of the Bill

The Legislative Counsel's Digest describes how S.B. 9 amended California Penal Code section 1170:

This bill would authorize a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to life without parole to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency, as specified The bill would require the petition to include a statement from the defendant that includes, among other things, his or her remorse and work towards rehabilitation. The bill would establish certain criteria, at least one of which shall be asserted in the petition, to be considered when a court decides whether to conduct a hearing on the petition for recall and resentencing and additional criteria to be considered by the court when deciding whether to grant the petition. The bill would require the court to

discretion to sentence the defendant to a term of 25 years to life with the possibility of parole" so *Miller's* holding does not apply).

20. See S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

21. *Miller*, 132 S. Ct. 2455; *Graham*, 560 U.S. 48; *In re Gault*, 387 U.S. 1, 58 (1967).

22. See *Miller*, 132 S. Ct. 2455.

23. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012). See also CAL. PENAL CODE § 1170(d)(2)(A)–(J).

hold a hearing if the court finds that the statements in the defendant's petition are true, as specified. The bill would apply retroactively, as specified.²⁴

B. Background of S.B. 9

As of June 2011, California had 295 prisoners serving LWOP sentences for murders committed before they were eighteen years old.²⁵ Of the 295 prisoners, 172 are seventeen, 121 are sixteen, and two are fifteen.²⁶ As to ethnicity, "43% are Latino, 31% are Black, 13% are White, 1% are Asian/Pacific Islander, and the remainder are classified as 'other.'"²⁷ Only six of the 295 prisoners are women.²⁸

During S.B. 9's introduction, California State Senator Leland Yee, a Democrat representing San Francisco and the Bill's author, offered various reasons why such a Bill was necessary.²⁹ Previously, there was no real system of review for prisoners serving LWOP sentences for crimes committed as minors.³⁰ Senator Yee noted that using LWOP on juveniles was flawed for several reasons: (1) it ignores the neuroscience and common-sense knowledge regarding adolescent development; (2) it is drastically out of step with international norms; and (3) in practice, LWOP is all-too-commonly applied unjustly.³¹ He pointed out that youth are fundamentally different than adults, and that even juveniles convicted of serious crimes should have the chance to later show that they have "matured and changed."³²

Prominent supporters of the Bill, including the Human Rights Watch ("HRW"), the American and California Psychiatric Associations, and the American Academy of Child and Adolescent Psychiatry, also articulated reasons for supporting the passage of S.B.

24. *Id.*

25. *An Act To Amend Section 1170 of the Penal Code, Relating to Sentencing: Hearing on S.B. 9 Before Assemb. Comm. on Appropriations*, 2011-12 Leg., Reg. Sess. (Cal. 2011) [hereinafter *Assembly Committee on Appropriations Hearing*].

26. *Id.*

27. *Id.*

28. *Id.*

29. *An Act To Amend Section 1170 of the Penal Code, Relating to Sentencing: Hearing on S.B. 9 Before S. Comm. on Pub. Safety*, 2011-12 Leg., Reg. Sess. (Cal. 2011) (statement of Sen. Leland Yee) [hereinafter *Senate Committee on Public Safety Hearing*].

30. *Id.*

31. *Id.*

32. *Id.*

9.³³ HRW stated: “We oppose LWOP for youth in California because they are disproportionate (particularly so given recent scientific research) [sic], racially discriminatory, and a violation of international law? [sic]”³⁴ HRW continued, “in California, LWOP is not reserved for youth who commit the worst crimes or who show signs of being irredeemable criminals. Forty-five percent of California youth sentenced to LWOP for involvement in a murder did not actually kill the victim.”³⁵ Most of the individuals sentenced when they were juveniles were convicted of felony murder or for aiding-and-abetting a murder, “because they acted as lookouts or participated in another felony during which the murder took place.”³⁶ In comparing juvenile offenders and their adult counterparts, HRW noted that in many cases, the juveniles actually received *harsher* sentences than their adult codefendants.³⁷ More specifically, “[i]n nearly 70 percent of cases reported to Human Rights Watch in which the youth acted with others, at least one codefendant was adult [sic]. [The] survey responses revealed that in 56 percent of these cases, the adult received a more lenient sentence than the juvenile.”³⁸

The American and California Psychiatric Associations and the Academy of Child and Adolescent Psychiatry also went on record stating, “adolescents are cognitively and emotionally less mature than adults, less able than adults to consider the consequences of their behavior, and therefore more easily swayed by peers.”³⁹ There have been a number of studies of this population that “consistently demonstrate a high incidence of mental disorders, serious brain injuries, substance abuse, and learning disabilities, which may predispose to aggressive or violent behaviors.”⁴⁰

In the past, the California Senate had unsuccessfully attempted to limit LWOP sentences for juvenile offenders. In 2004, State Senator Sheila Kuehl proposed a similar bill, S.B. 1223, which would have “authorized a court to review the sentence of any person convicted as a minor in the adult criminal court” who was sentenced to prison, after serving ten years of their sentence or upon reaching

33. *Senate Committee on Public Safety Hearing* at Comments, No. 6(a)-(b).

34. *Assembly Committee on Appropriations Hearing* cmt 6(a).

35. *Id.* at cmt. 1.

36. *Id.* at cmt. 6(a).

37. *Id.*

38. *Id.*

39. *Id.* at cmt. 6(b).

40. *Id.* at cmt. 7(b).

the age of twenty-five.⁴¹ Senator Kuehl's proposal never made it to a vote on the Senate Floor, and was instead relegated to the California Appropriation Committee's "Suspense File."⁴² Senator Leland Yee had twice attempted to get his "Second Chance" bill (as he dubbed the bill) passed during his legislative career: S.B. 999 in 2007 and S.B. 399 in 2010.⁴³ S.B. 399 was almost identical to S.B. 9, but failed to garner enough votes on the Assembly Floor in 2010.⁴⁴ Yee's first attempt, S.B. 999, proposed to eliminate LWOP altogether for a defendant under the age of eighteen, a solution this Note strongly advocates.⁴⁵ This version of the bill never made its way out of committee, so there was never a vote by the entire California Senate.⁴⁶

Although it is not entirely clear why S.B. 9 passed this time around while other similar bills failed, there are several possible reasons. The timing of the Bill likely played a key role; perhaps California legislators wanted to preemptively fix any constitutional issues when the Supreme Court decided to grant a writ of certiorari for the *Miller* case in November 2011.⁴⁷ The constitutional issue to be decided in *Miller* was whether mandatory LWOP sentences for juveniles is "cruel and unusual punishment."⁴⁸ Another potential reason could be the national spotlight on California's prison overcrowding, as highlighted by the United States Supreme Court in *Brown v. Plata*.⁴⁹ In the alternative, the Bill's passage may be a direct reaction to the *Graham v. Florida* decision in 2010 (banning LWOP sentences for juvenile nonhomicide offenders) and the *Roper v. Simmons* decision in 2005 (banning the death penalty for juvenile offenders).⁵⁰ Yet another possibility is that this was a more narrowly tailored version of the bill—one that included enough procedural safeguards to satisfy legislators who still wanted to appear "tough-on-

41. *Id.* at 9(c).

42. *Id.*

43. *Id.* at cmt. 9(a)-(b).

44. *Id.* at cmt. 9(a). See S.B. 399, 2009-10 Leg., Reg. Sess. (Cal. 2009).

45. *Id.* at cmt. 9(b).

46. *Id.*

47. See *Miller v. Alabama*, 132 S. Ct. 548 (2011) (granting certiorari).

48. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

49. See *Brown v. Plata*, 131 S. Ct. 1910, 1910 (2011).

50. See *In re Rainey*, 224 Cal. App. 4th 280, 291 (2014) ("The legislative history reflects [S.B. 9], was enacted in response to *Roper* and *Graham*."). See also *An Act to Amend Section 1170 of the Penal Code, Relating to Sentencing: Hearing on S.B. 9 Before Assembly Committee on Appropriations*, 2011-12 Leg., Reg. Sess. (Cal. 2011) [hereinafter *Assembly Committee on Appropriations Hearing*].

crime.” Senator Yee credited the passage of the current version of the Bill to this last factor: he publicly stated that the Bill ultimately passed because it had been so significantly narrowed from its original form and included additional procedural safeguards.⁵¹ Regardless, this current version of S.B. 9 passed within two months of the *Miller* decision and Governor Jerry Brown signed it into law on September 30, 2012.⁵²

II. The Evolution of Juvenile Justice

The juvenile justice system has effectively come full circle in California. In California’s early history, juveniles were simply sentenced in the same manner as adults.⁵³ Then, with the widespread acceptance of developmental psychology and other social science data that demonstrated the stark differences between children and adults, California adopted a dual justice system: one for juveniles focusing on rehabilitation, and another for adults focusing on punishment.⁵⁴ However, under the Supreme Court’s guidance in the late 1960s, the juvenile justice system’s procedural and constitutional protections began to align more with the adult system.⁵⁵ As the two justice systems began to mirror each other procedurally, they also began to become more similar in terms of purpose, as the juvenile system’s focus shifted from rehabilitation to punishment.⁵⁶ Eventually, the “tough-on-crime” attitude prevalent in the 1980s and a series of high-profile crimes involving juveniles resulted in many protections for minors—especially older teens—either being weakened or completely eliminated altogether.⁵⁷ Therefore, although there are still some obvious differences in how the juvenile justice system operates, both the juvenile and the adult criminal justice systems seem to now embrace punishment as their primary goal.⁵⁸

51. Yee, California Correctional Crisis Symposium, *supra* note 10.

52. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

53. Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 3 (1992).

54. Friedland, *supra* note 1, at 140.

55. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 137 (1997) (internal citation omitted).

56. Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 692 (1991) (noting that “punishment [is assuming] a greater role in sentencing juveniles”).

57. Friedland, *supra* note 1, at 140.

58. *Id.*

A. The Impact of Developmental Psychology on Juvenile Justice

Separate courts for juvenile offenders can be traced as far back as 1899 in Cook County, Illinois.⁵⁹ The creation of a distinct court system for juveniles was premised on principles that seem obvious today: namely juveniles' incapacity and immaturity vis-a-vis adults.⁶⁰ As a result of these differences, the Illinois juvenile court sought to focus on rehabilitation and "non-punitive treatment for wayward youths."⁶¹ This style of justice was consistent with the social scientific data of the time.⁶² For example, Sheldon Glueck, author of *Unraveling Juvenile Delinquency*, argued that traditional systems of criminal law were inapplicable to minors because it was "sublimated social vengeance."⁶³ By the mid-twentieth century, all fifty states had adopted this dual system of treating juveniles differently than their adult counterparts.⁶⁴

Starting in the 1960s, however, the separate juvenile court system slowly became more similar to the adult system. In 1967, "the Supreme Court introduced procedural regularity to delinquency proceedings in *In re Gault*."⁶⁵ In that case, the Supreme Court ensured that juvenile offenders received at least the same due process rights as their adult counterparts—providing the right against self-incrimination, a record of court proceedings, and the right to an appeal.⁶⁶ However, what was correctly seen as a victory for juvenile rights at the time ultimately led to an unfortunate and unintended consequence. After *Gault*, "courts and legislatures began to slowly chip away at the foundations of the juvenile justice system."⁶⁷ *Gault* prompted the juvenile system to become more closely aligned with the adult one, at least in terms of procedure and due process rights.⁶⁸ A few years later, in *In re Winship*, the Supreme Court extended the "reasonable doubt" standard to delinquency proceedings, and in

59. *Id.* at 138.

60. *Id.*

61. *Id.* (citing *Kent v. United States*, 383 U.S. 541, 554 (1966)).

62. *Id.* at 139.

63. *Id.* (citing Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 456 (1928)).

64. Edwards, *supra* note 53, at 5 (citing *National Council of Juvenile Court Judges Directory and Manual*, Reno, Nevada, at 1 (1964)).

65. Scott & Grisso, *supra* note 55, at 137 (citation omitted).

66. *In re Gault*, 387 U.S. 1, 58 (1967).

67. Scott & Grisso, *supra* note 55, at 137 (citation omitted).

68. See Friedland, *supra* note 1, at 140–41.

Breed v. Jones, the Court extended the double-jeopardy protection.⁶⁹ While all these changes were victories for the children caught in the juvenile justice system at the time, they shared the same unintended consequence as *Gault*.

Gault and *Winship* brought the juvenile justice system's constitutional protections more in line with the adult system, and highlighted the increasing shift away from rehabilitation and towards punishment.⁷⁰ Therefore, while these extensions of due process rights for juveniles were designed to be beneficial, they had the unfortunate effect of treating juveniles more like adults in terms of punishment. This shift stands in stark contrast to the social scientific data of the past century.⁷¹ Empirical evidence shows that "the immaturity of adolescents with respect to both their ability to make informed and nuanced judgments about their behavior, as well as their moral development," reduces "their culpability and, in turn, their punishment liability."⁷² The trend of treating juveniles more like adults "ignor[es] these indicia of reduced culpability . . . and offend the common law doctrine of incapacity."⁷³

By the 1980s, in response to growing juvenile crime rates and a series of highly publicized cases involving minors, most states and much of the public had abandoned the traditional common law ideal that minors were less culpable than adults.⁷⁴ These cases involved horrific fact patterns that caused state legislatures "to revisit their policy of 'compassionate treatment and rehabilitation' for juvenile offenders, shifting instead to a more punishment-focused approach."⁷⁵ Most jurisdictions began to "utilize the 'waiver' mechanism to move juveniles directly into the adult criminal system."⁷⁶ In addition, courts

69. See *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970).

70. Friedland, *supra* note 1, at 27, 138. See also Feld, *supra* note 56, at 692 (noting that "punishment [is assuming] a greater role in sentencing juveniles").

71. Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57, 60 (2003).

72. *Id.* at 60–61.

73. *Id.*

74. Friedland, *supra* note 1, at 140. See also *Stanford v. Kentucky*, 492 U.S. 361 (1989) (affirming the constitutionality of death sentences for sixteen- and seventeen-year-old minors).

75. Friedland, *supra* note 1, at 138.

76. *Id.*

began finding that the bright-line age limit of eighteen⁷⁷ as a threshold for adulthood was too arbitrary: “Psychologists . . . and all parents can well recognize how arbitrary such a distinction based on age [is] Few of us over [18] can recall gaining any significantly greater measure of wisdom, insight, or skill on the date after our eighteenth birthday that we did not already possess.”⁷⁸

Even though the traditional common law notion is that minors are less culpable than adults, beginning in the 1980s most state legislatures began to blur this distinction, especially in cases with older teenagers and more egregious offenses.⁷⁹ For much of the twentieth century, developmental psychology and the traditional common law notion led California to treat minors differently.⁸⁰ But once the Supreme Court required the juvenile justice system to more closely mirror the adult one in terms of procedure, it became easier for the purposes of the two systems to converge as well.⁸¹

B. Juvenile Offenders and the Eighth Amendment

In the past fifteen years, the Supreme Court has made several major decisions affecting the lives of juvenile offenders: *Roper*, *Graham*, and *Miller*.⁸² Most, if not all, of these landmark decisions attack the sentences of juvenile offenders on Eighth Amendment grounds.⁸³ The Eighth Amendment bans sentences that are “cruel and unusual punishment.”⁸⁴ Eighth Amendment jurisprudence has typically followed one of two different paths to determining whether a particular sentence is unconstitutional as “cruel and unusual punishment.”⁸⁵

77. Thirty-eight states and the District of Columbia set eighteen as the official age of adulthood. *Id.* at 140 n.64. Wyoming is the only state to use a higher age (nineteen). *Id.* Eight states including Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina, and Texas use the age of seventeen. *Id.* Connecticut, New York, and North Carolina use sixteen. *Id.*

78. *Id.* (quoting *United States v. E. K.*, 471 F. Supp. 924, 932 (D. Or. 1979)).

79. Friedland, *supra* note 1, at 27, 138. See also Feld, *supra* note 56, at 692 (noting that “punishment [is assuming] a greater role in sentencing juveniles”).

80. Kupchik et al., *supra* note 71, at 60.

81. Friedland, *supra* note 1, at 27, 138.

82. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

83. See Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1449–50 (2012).

84. U.S. CONST. amend. VIII.

85. *Id.*

The first group of Eighth Amendment cases established categorical rules banning certain sentencing practices as applied to particular groups of offenders, such as juveniles and the mentally disabled.⁸⁶ The second group of cases focused on categorical rules related to specific types of sentences.⁸⁷ In the early Eighth Amendment decisions, the Court focused almost exclusively on death penalty cases.⁸⁸ The Court first looked to see if a national consensus existed regarding the application of the death penalty to the types of offenders or offenses at issue, and then went on to exercise their judicial discretion to determine if the punishment at issue was “cruel and unusual” in each individual case.⁸⁹

Roper v. Simmons is an example of the “particular-group-of-offenders” cases.⁹⁰ *Roper* involved a juvenile defendant convicted of first-degree murder and sentenced to death.⁹¹ The Court held that a seventeen-year-old boy who committed first-degree murder could not be sentenced to death.⁹² The Court looked to “the evolving standards of decency that mark the progress of a maturing society.”⁹³ In addition, it highlighted the immaturity, the vulnerability, and the comparative lack of control amongst juvenile offenders, and held that they could not “with reliability be classified among the worst offenders.”⁹⁴ As a result of *Roper*, the Court created a categorical rule that the death penalty could not be applied to juvenile defendants because it constituted “cruel and unusual” punishment.⁹⁵

In *Graham v. Florida*, the Supreme Court used the similar logic from *Roper* to strike down LWOP sentences for juvenile nonhomicide offenders, thereby dramatically expanding its previous

86. See *Roper*, 543 U.S. at 578 (prohibiting the imposition of the death penalty on juvenile defendants); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting the imposition of the death penalty on mentally handicapped defendants).

87. See *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (prohibiting the imposition of the death penalty on nonhomicide offenders).

88. See, e.g., *Kennedy*, 554 U.S. 407 (2008).

89. *Roper*, 543 U.S. at 564 (“The beginning point [of the Eighth Amendment analysis] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment.”).

90. *Id.* at 578.

91. *Id.*

92. *Id.*

93. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

94. *Id.* at 569.

95. *Id.*

Eighth Amendment jurisprudence.⁹⁶ Terrance Graham, a juvenile offender, had been sentenced to LWOP by a Florida state court judge for two armed robbery offenses.⁹⁷ In *Graham*, the Supreme Court added a new substantive, categorical rule to its Eighth Amendment jurisprudence: All juvenile offenders convicted of a noncapital offense must be given at least a “meaningful” and “realistic” opportunity to eventually earn their release.⁹⁸ At the time, Justice Clarence Thomas ominously noted that the Court had “eviscerate[d]” the previous bright-line distinction between capital and noncapital cases.⁹⁹ “Death is different no longer,” he opined, and went on to predict the grave consequences that would ultimately result for Eighth Amendment jurisprudence.¹⁰⁰ Now that the Court has essentially erased the bright-line rule between capital and noncapital cases, Justice Thomas is likely correct in his prediction. Even in capital cases, juveniles still cannot be reliably classified as the worst type of offender, as noted in *Roper*, because they are still “immature,” “vulnerable,” and have a “comparative lack of control” compared to their adult counterparts.¹⁰¹ If one applies the very same reasoning used in *Graham* and *Roper*, it is “cruel and unusual” punishment to sentence juveniles to LWOP in any circumstance, and it is simply a matter of time before the Court rectifies this inconsistency. Further, by adding this new rule to Eighth Amendment jurisprudence—that juveniles convicted of a noncapital offense must be given a “meaningful” and “realistic” opportunity to earn their release—there is no logical reason why the same cannot be said for juveniles convicted of a capital offense.¹⁰²

In 2012, the Court relied on this same line of cases in *Miller v. Alabama* to determine that *mandatory* LWOP sentences as applied to juveniles violated the Eighth Amendment.¹⁰³ In *Miller*, one of the petitioners, Kuntrell Jackson, was fourteen years old when he was convicted of a murder during the course of an arson, which under Alabama law automatically resulted in a LWOP sentence.¹⁰⁴ The

96. *Graham v. Florida*, 560 U.S. 48, 81–82 (2010).

97. *Id.* at 2020.

98. *Id.* at 2030, 2034.

99. *Id.* at 2046 (Thomas, J., dissenting) (internal quotation marks omitted).

100. *Id.*

101. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005).

102. *Graham*, 560 U.S. at 81–82.

103. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

104. *Id.* at 2462.

Supreme Court held that a juvenile offender convicted of homicide could not be automatically sentenced to LWOP; instead, a “judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest penalty possible for juveniles.”¹⁰⁵ However, the Court did not reach a decision as to the petitioner’s second argument, namely, that LWOP should be categorically unconstitutional for juveniles, especially those fourteen and under, but apparently left this issue unresolved for future cases.¹⁰⁶ The majority stated, “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”¹⁰⁷

Justice Stephen Breyer’s concurrence noted that should the State continue to seek a sentence of LWOP for Kuntrell Jackson, “there will have to be a determination whether Jackson ‘killed or intended to kill’ the robbery victim.”¹⁰⁸ In Justice Breyer’s view, “without such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.”¹⁰⁹ Justice Breyer then cites *Graham*, noting, “when compared to an adult offender, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability.”¹¹⁰ He also went on to note the various reasons for this conclusion, many of which formed the basis for the Court’s decisions in *Roper* and *Graham*.¹¹¹ Some reasons are that “compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.”¹¹² In addition, “psychology and brain science continue to show fundamental differences between juvenile and adult minds’ making

105. *Id.* at 2475.

106. *Id.* at 2469 (“Because [the] holding is sufficient to decide these cases, we do not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least those [fourteen] and younger.”).

107. *Id.*

108. *Id.* at 2475 (Breyer, J., concurring) (citing *Graham v. Florida*, 560 U.S. 48, 69–70 (2010)).

109. *Id.*

110. *Id.*

111. *Id.* at 2480.

112. *Id.* (quoting *Graham*, 560 U.S. 48 at 67–68)

their actions ‘less likely to be evidence of irretrievably depraved character’ than are the actions of adults.”¹¹³ Justice Breyer continues his concurrence by pointing out that many of the offenses that can subject a juvenile to LWOP are insufficient under the *Graham* framework.¹¹⁴ For example, he highlights the felony murder law, which attributes any death caused during the course of a felony to all members committing the felony, whether or not each actor killed (or intended to kill) the victim.¹¹⁵ Typically, this “transferred intent” has been sufficient to satisfy the intent element in many murder cases, including those with juvenile defendants.¹¹⁶ However, Justice Breyer notes that this “artificially constructed type of intent” is insufficient “intent” under the Eighth Amendment.¹¹⁷ Justice Breyer points out that the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was “in the car by the side of the road . . . waiting to help the robbers escape.”¹¹⁸

Justice Breyer’s concurrence in *Miller* is especially relevant in regards to the hundreds of juveniles currently serving LWOP sentences in California. If the Human Rights Watch statistics are correct, almost one half of LWOP prisoners fall into the precise category of offenders Justice Breyer highlighted.¹¹⁹ For instance, a 2007 HRW study suggested that up to forty-five percent of LWOP prisoners sentenced as juveniles are serving their term for crimes such as felony murder or aiding and abetting murder.¹²⁰ As articulated by Justice Breyer in his *Miller* concurrence, *Graham* dictated a clear, bright-line rule: “The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who ‘kill or intend to kill.’”¹²¹ If this assertion is correct, S.B. 9’s procedural remedy is insufficient because many of the prisoners it purports to help are being unconstitutionally imprisoned in the first place.

113. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

114. *Id.* at 2476.

115. *Id.* (citing WAYNE R. LAFAYE, 2 SUBST. CRIM. L. § 14.5(a), (c) (2d ed. 2003)).

116. *Id.* (citing SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 439 (8th ed. 2007); CHARLES TORCIA, 2 WHARTON’S CRIMINAL LAW § 147 (15th ed. 1994)).

117. *Id.*

118. *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 797–98 (1982)).

119. *When I Die, They’ll Send Me Home*, *supra* note 16, at 3.

120. *Id.*

121. *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring) (citing *Graham v. Florida*, 560 U.S. 48, 69–70 (2010)).

III. Sentencing in California

In the late 1970s California switched to determinate sentencing, in which judges typically have at least a modicum of discretion when issuing terms of imprisonment.¹²² California Penal Code section 1170 was intended to sentence criminals to “terms proportionate to the seriousness of the offense with provision for uniformity in sentences of offenders committing the same offense under similar circumstances.”¹²³ The legislature endeavored to achieve this goal by establishing triads of sentences for specific crimes, from which the judge would choose a particular sentence based on any mitigating or aggravating circumstances in a specific case.¹²⁴ The judge, thus, has discretion to ultimately lengthen or shorten the sentence based on mitigating or aggravating factors.¹²⁵ For example, when sentencing an adult convicted of first-degree murder, the judge may choose among three different punishments: twenty-five years to life, LWOP, or the death penalty.¹²⁶ The judge’s decision is based on a host of factors, including the defendant’s prior criminal record, the nature of the crime, the defendant’s character, background, and history.¹²⁷

Given this framework, the *Miller* decision failed to affect most California sentences because they were not technically “mandatory.”¹²⁸ In practice, however, judges have presumptively sentenced juvenile offenders to LWOP if certain aggravating factors, laid out in the California Penal Code, were present.¹²⁹ Still, most courts have held that an LWOP sentence is constitutionally permissible under *Miller* because the judge or jury has at least a modicum of discretion when issuing the sentence.¹³⁰ Even though

122. See *In re Morganti*, 204 Cal. App. 4th 904, 929 n.2 (2012) (Kline, J., concurring in part, dissenting in part) (“On July 1, 1977, the ISL was repealed and the Determinate Sentence Law (DSL) . . . became effective.”) (internal citations omitted).

123. CAL. PENAL CODE § 1170 (2013).

124. *Id.*

125. *Cunningham v. California*, 549 U.S. 270, 304 (2007) (“In exercising its sentencing discretion, a California court can look to any of the 16 specific aggravating circumstances . . . or 15 specific mitigating circumstances.” (citing CAL. RULES OF CT. 4.421, 4.423)).

126. CAL. PENAL CODE § 190 (2013).

127. See, e.g., CAL. PENAL CODE § 190.3 (2013).

128. See *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012).

129. CAL. PENAL CODE §§ 190.5, 1170 (2013).

130. See *People v. Parks-Burns*, No. D059348, 2013 WL 140395, at *1 (Cal. Ct. App. Jan. 11, 2013); *People v. Abella*, No. C066010, 2013 WL 28896, at *1 (Cal. Ct. App. Jan. 3, 2013); *People v. Siackasorn*, 149 Cal. Rptr. 3d 918 (2012), *petition for cert. filed*; cf. *People v. Gutierrez (Gutierrez II)*, 290 P.3d 1171 (Cal. 2013) (granting review of an appellate

these prisoners may not obtain relief under *Miller*, S.B. 9 could, in theory, provide the possibility of a shorter sentence through the procedure outlined in the Bill, but in practice such relief will likely be very rare.¹³¹

People v. Gutierrez, currently pending before the California Supreme Court, illustrates one side of the debate as to whether California's "presumptive" sentences should be considered "mandatory" for purposes of the *Miller* decision.¹³² The *Gutierrez* court held that LWOP sentences for juveniles under California Penal Code Section 190.5 were not mandatory for purposes of the *Miller* test because despite the presumption of an LWOP sentence, the court held there was enough discretion in allowing judges to choose twenty-five years to life instead.¹³³ This Note posits that the juvenile LWOP sentences under the California Penal Code Section 190.5 *should* be considered "mandatory" for the purposes of review under *Miller*; because the presumption is so strong, there is no requirement that the courts necessarily review the constitutionally required "hallmark features" of youth required by *Miller*.¹³⁴ Instead, the presumption is that the judge should sentence these juveniles offenders to LWOP

court decision that an LWOP sentence did not violate the Eighth Amendment. The question on review is whether "the sentence of life without parole imposed on this particular juvenile offender under [California] Penal Code section 190.5, subdivision (b), violate[d] the Eighth Amendment under *Miller v. Alabama*.").

131. *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012); S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

132. *People v. Gutierrez*, 147 Cal. Rptr. 3d 249 (2012), *cert. granted*, 290 P.3d 1171 (Cal. 2013). See also 2014 LEXIS 801 (*People v. Gutierrez* has been consolidated with *People v. Moffett*, 148 Cal. Rptr. 3d 47 (2012), "for all purposes," including for review by the California Supreme Court. The citation for the consolidated case currently under review by the California Supreme Court is 290 P.3d 1171 (Cal. 2013)).

133. *Gutierrez*, 147 Cal. Rptr. 3d at 260 (citing *People v. Ybarra*, 83 Cal. Rptr. 3d 340 (2008) ("Section 190.5, subdivision (b) 'requires a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16-[year-old] or 17-year-old special circumstance murderers. The choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime").

134. CAL. PENAL CODE § 190.5 (While subsection (b) technically allows for a sentence of twenty-five years to life "at the discretion of the court," the presumption is first and foremost that LWOP is the appropriate punishment for these juvenile offenders. After the subsection states that the punishment for any juvenile found guilty of first-degree murder with special circumstances *shall* be life without possibility of parole, only then does it mention that perhaps, "at the discretion of the court, 25 years to life" can be imposed instead. This Note argues that such a strong presumption in favor of a LWOP sentence, requiring specific judicial discretion to grant just the possibility of parole, should be considered "mandatory" for purposes of the *Miller* test, and therefore should be struck down as unconstitutional as currently written.).

first and foremost, so for all intents and purposes the LWOP sentence is mandatory under *Miller*.¹³⁵ The California Supreme Court has granted review to the *Gutierrez* case, targeting this specific question of whether the presumption of LWOP imposed by Penal Code Section 190.5 subsection (b) violates the Eighth Amendment under *Miller*.¹³⁶ Although originally intended to aid juvenile offenders sentenced to LWOP, *Miller*'s condition that the sentence in question be mandatory, combined with the uncertainty of its retroactive applicability, as reflected in a lower court split,¹³⁷ may ultimately render the decision somewhat hollow.¹³⁸

Several California courts have held that *Miller* is both retroactive and applicable to California inmates sentenced to LWOP as juveniles.¹³⁹ The First District Court of Appeal, in *In re Rainey*, noted that *Miller* established a new set of constitutionally mandated issues the fact finder *must* consider before issuing a LWOP sentence to a juvenile.¹⁴⁰ To justify vacating the prisoner's LWOP sentence

135. See CAL. PENAL CODE § 190.5; *Miller*, 132 S. Ct. 2468.

136. *Gutierrez II*, 290 P.3d at 1171.

137. Compare *Craig v. Cain*, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (holding that *Miller* is not retroactive), and *People v. Carp*, 2012 WL 5846553 (Mich. App. Nov. 15, 2012) (holding that *Miller* is not retroactive), and *Geter v. State*, 2012 WL 4448860 (Fla. App. Sept. 27, 2012) (holding that *Miller* is not retroactive), with *State v. Simmons*, 99 So. 3d 28 (La. 2012) (allowing for resentencing on collateral review in light of *Miller*), and *People v. Morfin*, 2012 WL 6028634 (Ill. App. Nov. 30, 2012) (holding that *Miller* is retroactive).

138. See *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012).

139. See *In re Rainey*, 224 Cal. App. 4th 280, 286–89 (2014):

Other courts have vacated the LWOP sentence and remanded for resentencing, reasoning that in applying the judicially recognized presumption that LWOP is the appropriate term for a 16- or 17-year-old defendant, the sentencing court failed to exercise its discretion in the manner required by *Miller*. We therefore conclude *Miller* announced a new substantive rule that applies retroactively to cases on collateral review.

Id. See also *People v. Moffett*, 148 Cal. Rptr. 3d 47, 55, review granted Jan. 3, 2013, S206771; *People v. Siackasorn*, 149 Cal. Rptr. 3d 918, 923, review granted Mar. 20, 2013, S207973.

140. *In re Rainey*, 224 Cal. App. 4th at 289–90:

Miller held the Eighth Amendment prohibits the imposition of an LWOP sentence upon a juvenile offender unless the sentencing court considers the offender's chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences, as well as the offender's family and home environment and the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

imposed as a juvenile, the court noted that “[m]issing from the court’s sentencing discourse is a full consideration of the factors, *now constitutionally mandated under Miller*”¹⁴¹ related to “the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”¹⁴²

Further, the court of appeal held, “*Miller* requires sentencing courts to consider ‘how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’”¹⁴³ The court found that the trial court in *In re Rainey* did not consider the “hallmark features” of youth now mandated under *Miller*, and granted habeas relief.¹⁴⁴ This appellate court did not base its holding on the presumptive versus mandatory distinction argued in *Gutierrez*.¹⁴⁵ Instead, the court interpreted *Miller* as requiring consideration of the “hallmark features” of youth before a juvenile can receive a LWOP sentence.¹⁴⁶ The court also held that *Miller* “announced a new substantive rule that applies retroactively to cases on collateral review.”¹⁴⁷ Ultimately, the California Supreme Court will have to address this issue and decide if *Miller* is in fact retroactive. Practically speaking, if the California Supreme Court decides *Miller* is retroactive, S.B. 9 would serve no function whatsoever because any inmate who received an LWOP sentence as a juvenile could simply bring a habeas petition and be resentenced without traversing S.B. 9’s bureaucratic hurdles.¹⁴⁸

Id.

141. *Id.* (citing *Miller*, 132 S. Ct. at 2465).

142. *Id.*

143. *Id.*

144. *In re Rainey*, 224 Cal. App. 4th at 291–92.

145. *People v. Gutierrez*, 147 Cal. Rptr. 3d 249, 260 (2012), *cert. granted*, 290 P.3d 1171 (Cal. 2013).

146. *In re Rainey*, 224 Cal. App. 4th at 290 (“[T]he *Miller* rule—prohibiting the imposition of an LWOP sentence on a juvenile offender absent a consideration of the juvenile “chronological age and its hallmark features—applies retroactively . . .”).

147. *Id.*

148. *See, e.g., In re Rainey*, 224 Cal. App. 4th at 291 (citing § 1170, sub. (d)(2)(A)(i)) (The court, in granting habeas relief, noted, “[w]e reject the Attorney General’s contention that habeas corpus relief should be denied because Rainey ‘now has the possibility of parole’ under [S.B. 9]. This subdivision, enacted in 2012, provides a ‘recall’ procedure for a juvenile LWOP sentence, after a period of 15 years.”). *See also id.* at 292 (“We cannot square section [S.B. 9]’s petitioning process—at the soonest 15 years after sentencing—with the import of the Supreme Court discussion and analysis in *Miller*. The statute effectively makes *Miller*’s mandate irrelevant to our sentencing courts . . .”).

In addition to explicit life sentences, courts are also questioning de facto life sentences.¹⁴⁹ Although the California Supreme Court ultimately overturned the sentence imposed in *People v. Caballero*, the way the sentence came about illustrates how juvenile offenders can be effectively sentenced to LWOP in a *de facto* manner.¹⁵⁰ In *Caballero*, sixteen-year-old Rodrigo Caballero opened fire on members of a rival street gang, injuring one of the targets in his upper back.¹⁵¹ The jury convicted Caballero of three counts of attempted murder.¹⁵² The jury also found that he had personally and intentionally discharged a firearm, inflicted great bodily harm on one victim, and that he committed these acts for the benefit of a criminal street gang.¹⁵³ As a result, the trial court sentenced him to fifteen years to life for the first attempted murder count, plus a consecutive twenty-five years to life for the firearm enhancement.¹⁵⁴ For the second attempted murder, Caballero was sentenced to another consecutive fifteen years to life, plus twenty years for the firearm enhancement.¹⁵⁵ And for the third attempted murder, Caballero was sentenced to another consecutive fifteen years to life, plus twenty years for the corresponding firearm enhancement.¹⁵⁶ This made Caballero's sentence 110 years to life, and he would not have been eligible for parole until he served the initial 110-year sentence.¹⁵⁷

The Second District Court of Appeal affirmed this decision and sentence in its entirety.¹⁵⁸ The California Supreme Court overturned the sentence, holding that it was unconstitutional under *Graham* and *Miller*.¹⁵⁹ The Court based its decision on *Graham*'s proclamation that the "state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during their expected lifetime."¹⁶⁰ More specifically, the Court held that "sentencing a

149. See, e.g., *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

150. *Id.*

151. *Id.* at 293.

152. *Id.*

153. *Id.* (citing CAL. PENAL CODE §§ 664, 187(a) for attempted murder, §12022.53(c)-(d) for the firearm enhancement, §12022.7 for the intentional bodily harm enhancement, and §186.22(b)(1)(C) for the gang enhancement).

154. *Id.* at 293.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 291.

160. *Id.* at 295 (quoting *Graham v. Florida*, 560 U.S. 48, 81–82 (2010)).

juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment."¹⁶¹

In addition to the scenario in *Caballero*, there are several ways in which a juvenile could be sentenced to a *de facto* LWOP sentence via a combination of various sentencing enhancements, special circumstances, and concurrent sentences. For example, if a juvenile offender commits a crime using a firearm—even if unloaded and inoperable—an additional and consecutive ten years is added to his sentence.¹⁶² If the juvenile commits a “serious” felony as defined by section 1192.7(c) (“for the benefit of, at the direction of, or in association with any street gang”), it adds an additional five years.¹⁶³ If the felony is defined as “violent” under section 667.5(c), it adds an additional ten years to the sentence.¹⁶⁴ Thus, despite California's move towards “determinate” sentencing, there are a host of factors and enhancements that can greatly expand a criminal's sentence—perhaps to the point where all three options in the triad are beyond the juvenile's natural life expectancy. From the plain language of S.B. 9's text, it is unclear if juveniles sentenced to *de facto* life sentences, such as the defendant in *Caballero*,¹⁶⁵ will be able to petition the court for resentencing.

IV. S.B. 9 Will Fail to Achieve Any Meaningful Juvenile Sentencing Reform

A. S.B. 9's Ineffectiveness Based on Its Plain Text and California's Parole System

Examination of S.B. 9's plain text and legislative history yields little guidance as to how S.B. 9 will actually work in practice. Absent statutory guidance, it may be useful to look at how California's Parole Board has traditionally functioned in order to predict the likely success of these S.B. 9 resentencing petitions. There is California case law that demonstrates that the parole system largely determines when

161. *Id.* at 291.

162. CAL. PENAL CODE § 12022.53(c)–(d) (2013).

163. *Id.* at § 186.22(b)(1)(B).

164. *Id.* at § 186.22(b)(1)(C).

165. *See People v. Caballero*, 282 P.3d 291 (Cal. 2012).

prisoners are actually released, which can undermine the efficacy of any statutory sentencing reform.¹⁶⁶

Perhaps one of the most illustrative cases regarding the California parole system is *In re Morganti*.¹⁶⁷ In *Morganti*, Judge Kline, concurring in part and dissenting in part, explains the nature of California's parole system.¹⁶⁸ In that case, Christopher Morganti was sentenced to an indeterminate life sentence for second-degree murder and arson, and was sentenced to twenty-one years to life.¹⁶⁹ After serving approximately twenty years of his sentence, Morganti applied for parole to the Board of Parole Hearings ("BPH"), but was denied multiple times.¹⁷⁰ Ultimately, Morganti filed a writ of habeas corpus with the trial court.¹⁷¹ Morganti claimed that the BPH routinely denied parole near the minimum eligible parole date, and sought discovery and an evidentiary hearing regarding this issue to further develop his due process claim.¹⁷² Although this specific request was denied, the trial court did, after reviewing the BPH's decision under the highly deferential "some evidence" standard, conclude that the BPH was incorrect in its decision to deny parole in his specific instance.¹⁷³

Judge Kline's opinion, concurring in part and dissenting in part, focuses mostly on the initial ruling in regards to Morganti's request for discovery and an evidentiary hearing, but it also touches upon how exactly the BPH administers the parole system, and if in fact justice is being afforded to those with indeterminate sentences.¹⁷⁴ As he points out, more prisoners are now being indeterminately sentenced under our "nominally determinate sentencing system" than were ever sentenced under the previous indeterminate sentencing framework.¹⁷⁵ However, the key difference is that now, the

166. See, e.g., *In re Morganti*, 204 Cal. App. 4th 904, 928 (2012) (Kline, J., concurring in part and dissenting in part).

167. *Id.*

168. *Id.* at 450–51.

169. *Id.* at 434 (majority opinion).

170. *Id.* at 450.

171. *Id.* at 433.

172. *Id.* at 450–51.

173. *Id.*

174. *Id.* at 450–63 (Kline, J., concurring in part, dissenting in part).

175. *Id.* See also *id.* at 462 n.13 ("By 2009, the last year for which reliable statistics are available, the number of indeterminately sentenced prisoners in California has grown to 34,160, about one-fifth of the prison population." (citing ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 3 (2009),

procedural safeguards imposed by a frustrated Supreme Court in *In re Rodriguez* are no longer in effect.¹⁷⁶ The heart of Morganti's claim rests in the language of California Penal Code Section 3041, which states that:

One year prior to the inmate's minimum eligible parole release date, a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and *shall normally set a parole release date . . .* The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public.¹⁷⁷

Morganti presented evidence that from January 1, 2000, to October 31, 2010, the BPH held 5,993 initial parole hearings, denied parole in 5,372 cases (in 599, the inmate stipulated to being unsuitable for parole), and granted parole on only twenty-two occasions.¹⁷⁸ This amounts to approximately 0.37% of the 5,993 hearings.¹⁷⁹ During the same time period, in first-subsequent parole hearings, the BPH granted parole only seventy-five times, or 1.3% of the time.¹⁸⁰ Judge Kline noted that this "inordinate rate at which life prisoners are found unsuitable for parole . . . is hard to square with the fact that recidivism among life prisoners is less than one percent, which is 'miniscule' compared to that of other prisoners."¹⁸¹ These numbers are even harder to square with the statutory presumption that the board "shall normally" grant parole.¹⁸² Judge Kline posits that the only explanation for this huge discrepancy is that the BPH is not giving each prisoner the individualized inquiry that their due process

available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf)).

176. *Id.* at 451.

177. CAL. PENAL CODE § 3041(a) (2013) (emphasis added).

178. *Morganti*, 204 Cal. App. 4th at 930.

179. *Id.*

180. *Id.*

181. *Id.* (citing ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 17 (2011), available at http://blogs.law.stanford.edu/newsfeed/wp-content/uploads/sites/15/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf).

182. CAL. PENAL CODE § 3041(a) (2013).

rights entitle them to, and are simply denying these parole requests as a matter of course.¹⁸³ He notes that it is likely a “thinly veiled policy of ‘transforming most indeterminate sentences with the possibility of parole into sentences of life-without-parole.’”¹⁸⁴

Judge Kline is certainly not the only commentator to criticize California’s parole system. Ashley Nellis and Ryan King point out that the process has become overly politicized.¹⁸⁵ Even when parole is technically available to prisoners sentenced to life, “it does not equate to release and, owing to the reticence of review boards and governors, it has become increasingly difficult for persons serving a life sentence to be released on parole.”¹⁸⁶ Partly because of this reluctance on the part of the BPH, in addition to the War on Drugs and the “tough-on-crime” initiatives of the 1990s, California’s prisons have become hopelessly overcrowded¹⁸⁷—so much so that in 2011 the Supreme Court upheld a court-ordered reduction of California’s prison population.¹⁸⁸

Even in the rare instances where the BPH decides to grant parole, the “Governor can—and frequently does—reverse the decision.”¹⁸⁹ Often, the parole board denies the prisoner’s release, pointing to their original crime, regardless of their degree of rehabilitation or good behavior.¹⁹⁰ Under the provisions of S.B. 9, although the prisoners will be petitioning the sentencing court and/or prosecuting agency instead of the BPH, they too will likely be confronted with highly skeptical decisionmakers who are concerned with the political impact of releasing criminals convicted of, in some instances, heinous crimes.

S.B. 9 lists factors a court should consider when determining whether or not these prisoners should be resentenced. The first factor a court should consider is whether the defendant was convicted

183. *In re Morganti*, 204 Cal. App. 4th at 930–31 (Kline, J., concurring in part, dissenting in part).

184. *In re Morganti*, 202 Cal. App. 4th at 931 (quoting Rachel F. Cotton, *Time to Move On: The California Parole Board’s Fixation with the Original Crime*, 27 YALE L. & POL’Y REV. 239, 239 (2008)).

185. NELLIS & KING, *supra* note 175, at 26–27.

186. *Id.* at 5.

187. J.M. Kirby, Note, Graham, Miller, & *the Right to Hope*, 15 CUNY L. REV. 149, 155 (2011).

188. *Id.* (citing *Brown v. Plata*, 131 S. Ct. 1910, 1910 (2011)).

189. Cotton, *supra* note 184, at 240.

190. *Id.*

pursuant to felony murder or aiding and abetting murder.¹⁹¹ This subdivision is perhaps a realization on the legislature's part that these types of offenses do not comport with the Supreme Court's holding in *Graham*, as Justice Breyer highlighted in his *Miller* concurrence.¹⁹² The second factor to be considered is whether "[t]he defendant [has] any juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to the victims of the prior offense."¹⁹³ The third factor is whether "the defendant committed the offense with at least one adult codefendant."¹⁹⁴ The fourth consideration is whether the "defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation . . . or showing evidence of remorse."¹⁹⁵

S.B. 9 also states, "if any of the information required in subparagraph (B) is missing from the petition . . . the court shall return the petition to the defendant and advise the defendant that the petition cannot be considered without the missing information."¹⁹⁶ Next, if the court, using a preponderance of evidence standard, finds "that the statements in the petition are true, then the court shall hold a hearing to consider whether to recall the sentence . . . previously ordered and resentence the defendant in the same manner as if the defendant had not been previously sentenced."¹⁹⁷ So, even if an offender convicted as a juvenile jumps through all the procedural hurdles, obtains a hearing, and gets to be resentenced, he could end up with the exact same LWOP sentence that he was previously serving.¹⁹⁸

The Bill also specifies that any "victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing."¹⁹⁹ Finally, the Bill lists several additional factors the court may consider once the hearing is in place, when determining whether to recall and resentence:

191. S.B. 9(d)(2)(B)(i), 2011-12 Leg., Reg. Sess. (Cal. 2012).

192. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

193. S.B. 9(d)(2)(B)(ii) 2011-12 Leg., Reg. Sess. (Cal. 2012).

194. *Id.* at (d)(2)(B)(iii).

195. *Id.* at (d)(2)(B)(iv).

196. *Id.* at (d)(2)(C).

197. *Id.* at (b)(2)(E).

198. *Id.*

199. *Id.*

- (iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.
- (v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.
-
- (vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.
- (viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.²⁰⁰

The Bill goes on to state that if this petition is not successful after the first attempt, the prisoner may reapply after twenty years of the sentence has been served, and if he fails again, he may reapply a final time at the twenty-five-year mark.²⁰¹ After these two unsuccessful attempts, the prisoner is presumably stuck with serving the rest of their natural life under the LWOP sentence.²⁰²

Both California's parole system and these potential S.B. 9 resentencing hearings deal with the politically contentious issue of shortening the prison terms of convicted criminals, and both suggest there should be an individualized review of each inmate's case. But given the state's inability or reluctance to grant individualized review during the parole process, it seems highly unlikely that the original sentencing court will feel compelled to do so.

200. *Id.* at (d)(2)(F)(iv)-(viii).

201. *Id.* at (d)(2)(G).

202. *Id.* at (d)(2)(H) ("The *final* petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence"). Also, note by definition LWOP sentences do not leave open to possibility of parole, no matter how model the prisoner's behavior may be decades later.

B. The Bill's Vagueness

One of the primary deficiencies of the Bill is the vagueness of the actual text. While it states that a prisoner who was sentenced to LWOP as a juvenile may begin petitioning the sentencing court after fifteen years, the Bill is vague as to what actually needs to be included in such a petition.²⁰³ While it lists the four main factors listed above: (1) felony murder/aiding-and-abetting murder, (2) prior felony adjudications, (3) the presence of an adult codefendant, and (4) degree of rehabilitation/remorse, no distinction is made between which of these factors are required and which are merely beneficial.²⁰⁴ For example, could a juvenile offender convicted of felony murder—who has a previous felony conviction—still successfully petition the court? Or could a prisoner successfully petition the court for resentencing if no adult codefendant was involved in the original crime? None of these questions are answered through a strict textual analysis of the Bill, nor were they thoroughly fleshed out in the subcommittee notes or legislative history.²⁰⁵ In practice, this could prove to confuse the courts and undermine the effectiveness of the Bill in achieving its primary goal.

C. The “Tough-on-Crime” Crusade and the Lessons of the BPH

Another key concern with the Bill is that, as the Bill's text demonstrates, even after the prisoner completes this convoluted petitioning process, the new sentence is still left in the hands of the original sentencing court.²⁰⁶ It is unclear if courts will feel compelled to lessen these LWOP sentences, since they clearly thought them justified in the first place. Also, as with the parole hearings, it is likely these decisions will be highly emotional, highly politicized affairs, with the families of the victims demanding adherence to the original sentence.²⁰⁷

This new system created to implement S.B. 9 could very likely fall prey to the same deficiencies as the parole system, the ones that Judge Kline highlighted in his *In re Morganti* concurrence/dissent.²⁰⁸

203. *Id.* at (d)(2)(A).

204. *Id.* at (d)(2)(B).

205. *Id.* See also *Assembly Committee on Appropriations Hearing, supra* note 25.

206. CAL. PENAL CODE § 1170(d)(2)(E), amended by § 27, chp. 43, of the Statutes of 2012.

207. *Id.* at (d)(2)(G) (“Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.”).

208. *In re Morganti*, 204 Cal. App. 4th 904, 928–44 (2012) (Kline, J., dissenting in part).

Individualized inquiry into each prisoner's case is not guaranteed, and the inclusion of the rehabilitation/remorse clause provides an easy escape hatch for any judge who feels like delaying the process another five years.²⁰⁹ Therefore, it is possible that prisoners who petition for relief under S.B. 9 will be denied as a matter of course.

D. Conflict with *Graham's* Central Holding

Another major deficiency is that the entire class of prisoners covered by subsection (d)(2)(B)(i) of the Bill are likely unconstitutionally imprisoned under *Graham*.²¹⁰ If these LWOP prisoners were convicted under the felony murder statute, or for aiding and abetting murder, there was likely never an individualized inquiry as to whether these juveniles at issue “killed or intended to kill” the victim.²¹¹ If that is the case, then this entire class of prisoners must be resentenced, not offered some treacherous path towards potential resentencing.²¹² And as the court in *In re Rainey* noted, *Miller* may provide a new, retroactive, substantive rule.²¹³ If *Miller* is retroactive, then S.B. 9 would only apply to a few select prisoners currently in the system, where the factfinder carefully considered and noted on the record that they considered all the factors of youth—or the “hallmarks of youth,” as the Court called them. That would mean S.B. 9 would only apply prospectively to juveniles who commit crimes where the factfinder imposes LWOP, where the punishment was not “mandatory,” and, despite the heightened findings of fact discussed in *Miller*, are still deemed worthy of a LWOP sentence. Simply put, S.B. 9 will apply to only a very tiny fraction of the juveniles currently imprisoned in California, and to an even smaller prospective number of juveniles who commit crimes so heinous where, despite the extra considerations imposed by *Miller*, the trier of fact deems the child worthy of LWOP.

VI. Suggestions for Moving Forward

Given the inadequacies of S.B. 9, there are several ways that California can properly address the issue of immoral and unconstitutional juvenile LWOP sentences. This section suggests

209. S.B. 9(d)(2)(B)(iv), 2011-12 Leg., Reg. Sess. (Cal. 2012).

210. See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (Breyer, J., concurring).

211. *Id.*

212. *Id.*

213. *In re Rainey*, 224 Cal. App. 4th 280, 289-90 (2014).

several solutions, from mild reforms to a categorical ban of LWOP sentences altogether.

A. Adding Structure to the Vagueness of S.B. 9

One suggestion for S.B. 9's implementation involves those juveniles convicted of felony murder or aiding and abetting murder.²¹⁴ When a sentencing court receives petitions that involve this factor, it should follow the standard set forth by Justice Breyer in his *Miller* concurrence.²¹⁵ Thus, the court should determine by a preponderance of evidence if the court below found that the prisoner "killed or intended to kill" the victim.²¹⁶ If not, the sentencing court should grant the prisoner's petition automatically, and commute their sentence to twenty-five years to life.

Another suggestion for implementation is that the statute should be construed as broadly as possible in terms of the factors sufficient for a successful petition. Since the plain text of the Bill does not make it clear how many factors are required, the court should treat each individual factor as a sufficient basis for resentencing and commutation. If any of the listed factors is satisfied, then the court should deem the petitioner's burden satisfied, and the inmate's sentence should be commuted.

B. Juvenile LWOP Sentencing Reform in Other States

California could potentially look to other states' reactions to *Miller* to decide what to do with the portion of the prison population serving LWOP for crimes they committed as minors. If California will not retroactively resentence all juveniles currently serving LWOP, perhaps it can learn from other states and adopt a more modest proposal—as is being debated in Washington State.²¹⁷ Washington is currently grappling with set of proposals that are similar in many regards to S.B. 9.²¹⁸ One bill drafted by the Washington Association of Prosecuting Attorneys, S.B. 5064, would automatically convert the minimum sentence to thirty years to life for homicide offenses, with a presumption in favor of release after thirty

214. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2012).

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

216. *Id.*

217. Editorial, *Give Juvenile 'Lifers' a Path to Early Release from Prison*, SEATTLE TIMES, Mar. 2, 2013, at A14, available at http://seattletimes.com/html/editorials/2020467096_editjuvenilesentencesxml.html.

218. *Id.*

years.²¹⁹ Another bill circulating in the House of Representatives, H.B. 1338, proposed by Representative Mary Helen Roberts, would provide a sentence of twenty to thirty-five years instead.²²⁰ Either way, both bills would apply retroactively to all of Washington's twenty-eight current inmates convicted as juveniles to LWOP sentences.²²¹ S.B. 5064 drafted by the prosecutors expands that number even further, including in that total offenders convicted as juveniles who are serving "functional life sentences."²²² These include the same type of cases, such as *Caballero*, discussed above where the juvenile was sentenced to consecutive sentences or sentencing enhancements that places their first potential parole date beyond the likely end of their natural life.²²³ This would be a compromise between across-the-board sentence commutation, and the convoluted process offered by California's S.B. 9.

C. Adopt a Stringent Rule Banning LWOP for Juveniles

No one should spend the rest of his life in prison because of a crime committed as a juvenile. As discussed above, juveniles have a greater capacity for reform because their brains were not fully developed when the original crime was committed, and they are inherently less blameworthy than their adult counterparts.²²⁴ Children have "diminished culpability, they lack maturity, and have greater vulnerability to peer pressure and risk-taking."²²⁵ Given the lack of penological justifications for LWOP sentences for juveniles, California should refrain from meting out such punishments once and for all. California should ban the practice of sentencing juveniles to LWOP, and should retroactively resentence the hundreds of prisoners currently serving such sentences. If the legislature or the courts refuse to do this of their own accord, at the very least S.B. 9 should be vigorously enforced and utilized, which will require organized advocacy on the part of non-profit groups or attorneys working pro bono to create as many petitions as possible.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

225. *Id.*

Conclusion

S.B. 9 will likely have little practical effect for juveniles convicted of LWOP crimes. Although they may be afforded the façade of a hearing regarding their early release via the recall and resentencing petitions, the barrier presented by California's parole system suggests that S.B. 9 will have little (if any) practical effect on those the legislation is most intended to benefit. Further, as Justice Breyer suggests in his *Miller* concurrence, almost half of California's LWOP offenders are potentially imprisoned unconstitutionally under *Graham* since there was never a determination that they "killed or attempted to kill" the victim in question.²²⁶ S.B. 9's weak procedural remedy does nothing to address this underlying issue. Therefore, to remedy the current injustices, protect future victims, and to fix the unconstitutional overcrowding noted in *Brown v. Plata*,²²⁷ California should outlaw LWOP as a potential punishment for crimes committed as a juvenile, and retroactively resentence all those currently serving such terms.

California should look to its previous struggles with its parole system and determinate sentencing to decide the best manner in which to implement S.B. 9. The parole board has been historically reluctant to grant parole to criminals convicted of a life sentence.²²⁸ Offenders' degree of rehabilitation or remorse seems to matter very little, as the parole board remains fixated solely on the original crime.²²⁹ Moreover, it is unlikely that an original sentencing court will take a different sentencing view when the same case is put before it. Therefore, if California will not retroactively ban all LWOP sentences for juvenile offenders and individually resentence them, at the very least California should adopt the approach being discussed in Washington. By commuting these sentences to a more reasonable length, California could provide juveniles a chance to one day reenter the real world.²³⁰ Also, this would take away the power of the parole board, and ensure that no prisoner is denied the individualized inquiry to which they are entitled.

226. *Id.* at 2475 (Breyer, J., concurring). See also *When I Die, They'll Send Me Home*, *supra* note 16, at 3 (As of 2008, an estimated forty-five percent of youth sentenced to life without parole did not actually commit the murder.).

227. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

228. *In re Morganti*, 204 Cal. App. 4th 904, 936–37 (2012) (Kline, J., concurring in part and dissenting in part). See also WEISBERG, *supra* note 181, at 7; Cotton, *supra* note 184, at 239.

229. See Cotton, *supra* note 184, at 239.

230. See Editorial, *supra* note 217.

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