Washington and Lee Law Review

Volume 75 | Issue 4 Article 8

2-19-2019

# Sentence for the Damned: Using Atkins to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole

Zachary Crawford-Pechukas
*Washington and Lee University School of Law*, crawford.z@law.wlu.edu

# Sentence for the Damned: Using *Atkins* to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole

Zachary Crawford-Pechukas*

> The sad truth is that most evil is done by people who never make up their minds to be good or evil.[1]

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* Candidate for J.D., Washington and Lee University School of Law. I would like to thank J.D. King, who guided me through this process, and Jacob Howard, whose work on this issue contributed to this Note. I would like to acknowledge Kia Stewart and George Toca, whose cases inspired my interest in this subject and whose strength and grace continue to inspire me; my mother, my life-long sounding board; and my late father, whose green pen editing was missed in this process though not nearly as much as he is.

1. HANNAH ARENDT, THE LIFE OF THE MIND: THE GROUNDBREAKING INVESTIGATION ON HOW WE THINK 180 (1981).

## *I. Introduction*

In 1924, two teenagers, Nathan Leopold and Richard Loeb, stood trial in Chicago for the "crime of the century."[2] The two boys were accused of randomly selecting, kidnapping, and brutally murdering a neighborhood boy, fourteen-year-old Bobby Franks, as he walked home from school and then leaving his naked body in a culvert.[3] Both boys confessed to the murder and displayed no remorse.[4] Asked their motive, the boys replied that it was "an experiment in sensation."[5]

Facing the death penalty, the boys, represented by famous "attorney for the damned" Clarence Darrow,[6] pleaded guilty to avoid the judgment of a jury.[7] This put the decision as to whether they should live or die in the hands of the judge.[8] Such a sentencing hearing would be otherwise unremarkable except for two important

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2. *See* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 702–04 (2002) (providing a synopsis of the crime).

3. *Id.*

4. *Id.*

5. *Id.* at 702 n.245.

6. For more information on Darrow, see JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED (2011); ANDREW E. KERSTEN, CLARENCE DARROW: AMERICAN ICONOCLAST (2011).

7. Tanenhaus & Drizin, *supra* note 2, at 702.

8. *Id.*

things weighing on the judge's decision: (1) who these boys were and (2) a bevy of psychological testimony put on by the defense to persuade the judge to let the two boys live.[9]

Leopold and Loeb were the sons of Hyde Park millionaires and, though still teenagers, graduates of elite universities.[10] At the time of the murder, Leopold was already a published ornithographer and had qualified to enter Harvard Law School.[11] Loeb was the youngest ever graduate of the University of Michigan.[12] In their defense, Darrow put on psychiatrists and experts on juvenile delinquency to explain the boys' behavior.[13] In his final plea, Darrow invoked the change in attitudes towards juvenile offenders that saw Chicago at the center of a movement to treat—instead of punish—child offenders.[14] Darrow warned that sentencing these teenagers to death would be "turning our faces backward toward the barbarism which once possessed the world" and prophesized, in summation, that

> Someday, if there is any such thing as progress in the world, if there is any spirit of humanity that is working in the hearts of men, someday men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity, and sympathy, and committed an unforgivable act.[15]

Leopold and Loeb were spared and sentenced to life in prison.[16] While in prison, Leopold and Loeb founded and ran the

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9. *See id.* at 703 (noting the degree to which the testimony of these "men of science" attracted international attention to the case and an invitation to Sigmund Freud to psychoanalyze the defendants).

10. *See* Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. AM. HIST. 919, 922 (1993) (profiling the defendants).

11. *Id.*

12. *Id.*

13. Tanenhaus & Drizin, *supra* note 2, at 703.

14. *See* MAUREEN MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB 186–87 (1957) ("You would be dealing a staggering blow to all that has been done in the city of Chicago in the last twenty years for the protection of infancy and childhood and youth."); *see also infra* Part II.B (discussing the juvenile reform movement of the early twentieth century and its origins in Chicago).

15. MCKERNAN, *supra* note 14, at 231.

16. Tanenhaus & Drizin, *supra* note 2, at 704.

Statesville Correspondence School for prisoners.[17] Leopold learned twelve languages, reclassified the prison library, became an x-ray technician, registered inmates for the draft during World War II, volunteered for a medical project to cure malaria, and wrote an autobiography.[18] After thirty-three years, he was paroled, married, worked in a hospital, taught at the University of Puerto Rico, researched leprosy, and upon his death willed his body to science.[19]

Eighty years after the sensationalized case of the "boy-murderers," the United States Supreme Court held in *Roper v. Simmons*[20] that courts could not sentence juveniles to death.[21] Darrow's prophecy came true as a result of developments in brain science, which enabled the Supreme Court to conclude that the developing adolescent brain may result in an individual's diminished personal culpability for crimes he commits.[22] This diminished culpability required the Court to reassess the proportionality of some criminal sanctions when imposed upon children and the intellectually disabled.[23]

Alongside these developments, however, two new phenomena emerged in the latter half of the twentieth century, which called into question whether this moment could truly be called progress. There was both a shift towards longer and more severe punishments in criminal sentencing at large and a concomitant hardening in attitudes towards juvenile justice—from a focus on rehabilitation of youthful offenders to a focus on punishment.[24] Life without parole went from being an unused, or misnamed,[25]

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17. *Id.* Richard Loeb was murdered in prison in 1936, twelve years into his sentence. *Id.*

18. *Id.*

19. *Id.* at 704–05.

20. 543 U.S. 551 (2005).

21. *See id.* at 568 (holding that the imposition of the death penalty on juvenile offenders under eighteen constituted "cruel and unusual punishment" barred by the Eighth Amendment).

22. *See infra* Part II.C (discussing the brain science developments of the late twentieth century).

23. *See infra* Part III.A–B (discussing the development of the Supreme Court's Eighth Amendment jurisprudence into the realm of juvenile culpability).

24. *Infra* Part II.A–B.

25. *See infra* Part II. A (discussing how parole eligibility made life sentences "life" in name only).

punishment to being on the books in every state but Alaska.[26] And, in response to the appearance of a juvenile crime wave, more and more teenagers were being sentenced to die in prison.[27]

With these forces at play, the Supreme Court intervened in *Miller v. Alabama*,[28] holding that the Eighth Amendment's protection of juveniles due to their diminished culpability not only barred states from sentencing juveniles to death but also from sentencing juveniles to life without parole without considering the mitigating circumstances of youth.[29] In doing so, the Court stopped shy of announcing an all-out constitutional protection for juveniles, instead distinguishing between those whose crime "reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[30] Those juvenile offenders meeting this irreparable corruption standard could still be sentenced to the harshest available penalty—life without parole.[31]

But what does irreparable corruption mean? And how are state courts to determine whether an offender, still an adolescent, meets this standard of irreparable corruption? Would Nathan Leopold have been considered irreparably corrupt when assessed at the time, in spite of what we know about his life after he was

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26. *See infra* Part II.A (reviewing the expansion of life without parole as a sentencing option following the moratorium on the death penalty in the early 1970s).

27. *See infra* Part II.B (discussing the superpredator theory and the explosion of juvenile life without parole sentences).

28. 567 U.S. 460 (2012).

29. *See id.* at 479 (forbidding a mandatory sentencing scheme, which by its nature makes the youth of the offender "irrelevant to imposition of that harshest prison sentence").

30. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

31. *See id.* at 480 ("[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases."); see also Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (clarifying that Miller did more than simply require consideration of a juvenile offender's youth, it "rendered life without parole an unconstitutional penalty for a class of defendants," those who were not irreparably corrupt).

paroled?[32] Because of federalism concerns, the Supreme Court has largely left these questions to the states to determine.[33]

This Note suggests that guidance should be drawn from the Supreme Court's death penalty jurisprudence regarding the execution of intellectually disabled offenders. *Atkins v. Virginia*[34] paved the way for the juvenile sentencing cases as the Supreme Court for the first time found that, under the Eighth Amendment, a selected class of offenders—the intellectually disabled—were not eligible for the state's harshest penalty—the death penalty—because of their diminished culpability.[35] *Atkins* similarly left the state courts to figure out how to decide whether an individual offender met this amorphous standard, "intellectually disabled."[36] As state courts grappled with this standard and failed to adequately define "intellectually disabled," the Supreme Court was forced to provide guidance.[37] That guidance, in essence, was to follow the science to determine who was intellectually disabled.[38] State courts should do the same in developing procedures for

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32. Leopold was nineteen and, therefore, he would not have been affected by the rulings in Miller or Montgomery, but, because adolescent brain research now shows that brain development continues into a person's twenties, Leopold can still serve as an example. *See* Tanenhaus & Drizin, supra note 2, at 702 (providing Leopold's age); BARBARA STRAUCH, THE PRIMAL TEEN: WHAT THE NEW DISCOVERIES ABOUT THE TEENAGE BRAIN TELL US ABOUT OUR KIDS 204 (2003) (describing adolescent brain development extending past the teenage years).

33. *See* Montgomery, 136 S. Ct. at 735 (explaining how the Court's concerns for federalism limits the degree to which it will impose procedural requirements on the states in determining how to carry out the sovereign administration of their criminal justice systems).

34. 536 U.S. 304 (2002).

35. *See id.* at 321 (concluding that death is not a suitable punishment for an intellectually disabled offender because it would not serve the deterrent or retributive purposes of the death penalty).

36. *Id.* at 317.

37. *See* Hall v. Florida, 572 U.S. 701, 721 (2014) (rejecting Florida's procedure for determining if an individual is intellectually disabled); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017) (rejecting Texas's procedure).

38. *See Hall*, 572 U.S. at 721 ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals."); *Moore*, 137 S. Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus.") (citations omitted).

determining who is irreparably corrupt, even if the result is a de facto prohibition on sentencing any juvenile offenders to life without parole.

In Part II, this Note will look at the confluence of factors that led the Supreme Court to expand its Eighth Amendment scrutiny to encompass juvenile life without parole sentences.

Part III will look at the development of the irreparable corruption standard by tracing the line of cases from *Roper* to *Montgomery*, in which the Supreme Court articulated how the new scientific understanding of adolescent development affected what penalties states could and could not impose upon juvenile offenders under the Eighth Amendment. Part III will then look to the difficulties that have arisen in trying to interpret the irreparable corruption standard.

Part IV will make the case for why the courts struggling with this standard should look to the *Atkins* cases for guidance. Part V will then address the substantive guidance the Court gave in *Atkins* and how a decade later in *Hall* and *Miller* the Supreme Court was compelled to step in to correct Florida and Texas's misapplication of the *Atkins* standard. Part V then argues that state courts should apply the guidance from these *Atkins* cases—namely that the states needed to hue closer to the clinical guidance in making these determinations—in interpreting the irreparable corruption standard.

Overall, this Note argues that to ensure the state court definitions of irreparable corruption do not become untethered from their clinical foundation, *Montgomery* should be read to require expert testimony that a juvenile offender is irreparably corrupt and among the rare offenders for whom life without parole is constitutionally permissible. Courts should require such testimony to make a determination, even if presently such testimony is not possible to find.

## *II. Background of the Issues Surrounding Criminal Culpability and Juveniles*

Beginning with *Roper v. Simmons*[39] in 2005, the Supreme Court recognized a constitutional difference between adult and juvenile offenders based on juveniles' diminished culpability.[40] *Roper* and the line of cases that followed[41] reflected a Court grappling with how to apply evidence of scientific developments into its jurisprudence.[42] These cases also highlighted a Court grappling with the effects of sentencing schemes designed to keep people in jail for longer and from an earlier age.[43]

### *A. Life Without Parole*

While legal scholars tend to focus on the death penalty as the distinguishing feature of the American criminal justice system,[44] at least one scholar has argued that another punishment—life without parole—presents the most striking distinction.[45] In

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39. 543 U.S. 551 (2005).

40. *See id.* at 571 (prohibiting the death penalty for juvenile offenders due in part to their diminished culpability).

41. *See infra* Part III.B (discussing the progression of juvenile culpability cases leading to the "irreparable corruption" standard).

42. *See Roper*, 543 U.S. at 569 (discussing the scientific studies that suggest juveniles have "a lack of maturity" and an "underdeveloped sense of responsibility"); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70, 75 (2014) (noting the dissenting judges preferred a case-by-case approach to assessing psychological maturity).

43. *See* Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 989 (2014) (suggesting the *Miller* cases reaffirmed the principle, dormant during the extreme sentencing trend of the 1980s and 90s, that the law treat children different because they act different).

44. *See, e.g.*, Moshik Temkin, *The Great Divergence: The Death Penalty in the United States and the Failure of Abolition in Transatlantic Perspective* 1–2 (Harvard Kennedy Sch., Working Paper No. RWP15-037, 2015) (detailing the "striking divide" between the American criminal justice system and that in Europe based on use of the death penalty).

45. *See* Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1106 (2013) (suggesting that the American use of life without parole sentences is the "most striking evidence" of the divide between "European leniency" and "American harshness").

Europe, only four nations even have criminal sanctions approximating life without parole[46] and the sentence is rarely applied.[47] In the United States, both the number of states using life without parole as a criminal sanction and the number of inmates serving life without parole sentences increased dramatically during the latter half of the twentieth century.[48]

In the early part of the twentieth century, very few American jurisdictions imposed life without parole[49] and those that did, did so only as a replacement for the death penalty.[50] Wisconsin, a state that replaced the death penalty with life without parole, issued an official report, which portrayed the "indescribable horror and agony incident to imprisonment for life" and recommended the use of fixed term sentences, which, though long, would "leave some faint glimmer of hope."[51]

For the most part, those handed a "life" sentence were parole-eligible after a relatively short period.[52] During the first half of the twentieth century, federal prisoners sentenced to life would be parole-eligible after fifteen years.[53] In 1976, Congress changed

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46. *See id.* at 1113 (noting that the Netherlands, England and Wales, and France have inmates serving life sentences where the only mechanism for relief is executive clemency).

47. *See id.* (calculating that there are fewer than one hundred inmates serving the equivalent of a life without parole sentence in Europe).

48. *See* Leslie Patrice Wallace, *And I Don't Know Why It is That You Threw Your Life Away: Abolishing Life Without Parole, the Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 39–44 (2010) (detailing and explaining the rise of life without parole).

49. *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 95 (2017) (counting only seven states with life without parole before 1972).

50. *See* Lerner, *supra* note 45, at 1115 (explaining that a century ago, life without parole was imposed primarily as an alternative to the death penalty).

51. *See id.* (citing a report found in WILLIAM TALLACK, PENOLOGICAL AND PREVENTIVE PRINCIPLES 155 (1889)).

52. *Id.*; *see also* ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 3 (2013) (highlighting Louisiana's "10/6 law," in place from 1926 to the 1970s, that allowed life sentenced prisoners to be released after a little over a decade if they demonstrated good behavior).

53. *See* NELLIS, *supra* note 52, at 3 ("In the federal system, for example, as far back as 1913, parole reviews took place after serving 15 years, though remaining incarcerated for the rest of one's life was still possible.").

the laws to allow for parole after serving ten years of a life sentence.[54] This change led Justice William Brennan to call life imprisonment a misnomer in his concurrence in *Furman v. Georgia*,[55] the decision imposing a temporary moratorium on executions.[56]

The *Furman* decision, in fact, spurred the modern uptick in life without parole sentences.[57] States reacted to the nationwide moratorium on death sentences by turning to life without parole sentences to provide deterrence and satisfy community demands for proportionate punishment.[58] The fervor for life without parole as a sentencing option did not diminish when the Court, just four years later, sanctioned new permissible death penalty schemes.[59] Instead, both law-and-order advocates[60] and death penalty abolitionists[61] rallied broad support behind life without parole sentences. For law-and-order advocates, the addition of life without parole sentences supplemented use of the death penalty as a means to "throw away the key" on violent or incorrigible

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54. Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) (repealed 1984).

55. 408 U.S. 238 (1972).

56. *See id.* at 302 n.54 (Brennan, J., concurring) (arguing that because life imprisonment rarely meant life, a mandatory life without parole sentence for crimes committed while incarcerated would serve as a deterrent).

57. *See* GARRETT, *supra* note 49, at 96

> [T]he same backlash that brought the death penalty back to life led to a surge in states adopting [life without parole]. Some states . . . did so in direct response to *Furman*. Others, acting in the 1980s, did so in direct response to new skepticism at the possibility of rehabilitation and to a rise in "tough on crime" attitudes generally.

58. *See id.* at 97 (explaining that states considered life without parole as providing "all the benefits of the death penalty but without the executions").

59. *See id.* at 96 (describing the continued increase of life without parole statutes during the 1980s and beyond).

60. *See id.* (articulating the cause of "tough on crime" individuals to implement life without parole because of the impossibility of rehabilitation).

61. *See* Lerner, *supra* note 45, at 1116 (explaining that abolitionists believed the public would be more likely to support death penalty repeal and juries would be more likely to vote against death sentences if life without parole existed as an option).

offenders.[62] Abolitionists, on the other hand, approved of the option as a means of discouraging death penalty verdicts.[63]

The result was a wide-spread incorporation of life without parole sentencing into criminal sentencing codes.[64] By 1990, thirty-three states and the District of Columbia had adopted life without parole.[65] By 2012, every state except Alaska had adopted life without parole for some crimes, and six states and the federal government had eliminated parole altogether.[66]

With the death penalty moratorium and the rapid advance of life without parole sentences, the Supreme Court toyed with applying Eighth Amendment scrutiny to life without parole.[67] In *Solem v. Helm*,[68] the Court affirmed the reversal of the life without parole sentence of a defendant whose six non-violent offenses over a fifteen year period[69] made him eligible to serve life without parole as a habitual offender.[70]Although the trial court found Helm "beyond rehabilitation,"[71] there was significant evidence that his crimes stemmed from alcoholism.[72] The Court, drawing on the Eighth Amendment analysis usually reserved for death penalty

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62. *See* GARRETT, *supra* note 49, at 98 (questioning whether Texas, the last state to adopt life without parole, saw it as a "powerful supplement" to deal with juveniles and the intellectually disabled, whom the Supreme Court had recently said could not be sentenced to death).

63. *See id.* at 97 (citing public opinion polls and studies of capital juries as suggesting that the availability of life without parole discourages jurors from selecting death).

64. *See id.* at 96 (describing the steady increase of states with life without parole statutes).

65. *Id.*

66. *Id.*

67. *See* Schick v. Reed, 419 U.S. 256, 267–68 (1974) (rejecting a challenge to the constitutionality of a life without parole sentence for a death sentenced prisoner whose sentence was later commuted on the condition he never be granted release).

68. 463 U.S. 277 (1983).

69. *See id.* at 279–81 (recounting Helm's convictions for three third-degree burglaries, one obtaining money under false pretenses, and a DUI before his final offense—uttering a "no account" check for $100).

70. *Id.* at 284; *see also id.* at 281 (reciting the recidivist statute for South Dakota as authorizing a maximum penalty of life without parole for a defendant charged with a felony and who has at least three prior convictions).

71. *Id.* at 282–83.

72. *See id.* at 297 n.22 (rejecting the suggestion that Helm was a professional criminal, rather than an alcoholic who struggled to maintain employment).

cases,[73] found the sentence unconstitutionally disproportionate.[74] Whatever opening this provided to challenge life without parole sentences under the Eighth Amendment was swiftly closed.[75] In *Harmelin v. Michigan*,[76] the Court, reviewing a mandatory life without parole sentence for drug possession, effectively eliminated the distinction between life without parole and other life sentences.[77] There would be no separate category for life without parole sentences.[78] Courts would not be required to make individualized sentencing determinations to ensure the sentence was not disproportionate, as they were with death penalty sentencing.[79] In practice, this cut off Eighth Amendment review of life without parole sentences because states could reserve life without parole for violent crimes and drug offenses,[80] and courts could sentence habitual nonviolent offenders to "virtual life" term of years sentences that stretched well beyond an offender's life expectancy.[81]

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73. *See id.* at 292

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

74. *Id.* at 303; *see also id.* at 297 n.22 ("Incarcerating him for life without the possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way.").

75. *See* Lerner, *supra* note 45, at 1119 ("Yet if *Solem* intimated a possible movement in a European direction, fraught with qualms and equivocations about the harshness of [life without parole], *Harmelin v. Michigan*, decided just eight years later, returned America to its distinctively punitive path.").

76. 501 U.S. 957 (1991).

77. *See id.* at 996 ("It is true that petitioner's [life] sentence is unique in that it is the second most severe known to the law; but life imprisonment *with* possibility of parole is also unique in that it is the third most severe.").

78. *See id.* (reasoning that life without parole still allowed for "retroactive legislative reduction and executive clemency").

79. *See id.* at 995–96 (rejecting the idea of an "individualized mandatory life in prison without parole sentencing doctrine").

80. *See id.* at 1002 (Kennedy, J., concurring) (distinguishing *Helm* based on the severity of the offense, hinting that the Court could still apply scrutiny to life without parole sentences, so long as they were for minor crimes).

81. *See* Lerner, *supra* note 45, at 1119 ("In theory, this intimated a willingness to apply meaningful scrutiny to [life without parole] sentences

The inclusion of life without parole as a sentencing option may have begun as a response to *Furman* and the tough-on-crime movement of the 1980s and 1990s,[82] but its use has not diminished to reflect the decline in crime since that period.[83] Instead, there are now tens of thousands of prisoners for whom death would not have been permissible, but this "other death penalty"[84] has been mandatorily applied.[85]

By the time *Miller v. Alabama*[86] was decided in 2012, one in nine prisoners—nearly 160,000 people—was serving a life sentence.[87] Nearly a third of those prisoners were serving life without parole, and this number was rising more than life sentences with the possibility of parole.[88] Approximately 2,500 of those serving life without parole were juveniles at the time of the offense.[89]

That so many juvenile offenders have been swept up in this expansion of life without parole sentencing is particularly notable

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imposed for minor offenses. In practice, however, this qualification proved easy to satisfy.").

82. *See* GARRETT, *supra* note 49, at 170 (attributing the surge in the number of states with life without parole to a combination of states seeking "whole life" alternatives in response to the moratorium on death sentences in the 1970s and then tough on crime sentencing measures in the following decades).

83. *See* NELLIS, *supra* note 52, at 15 (charting the decline in overall prison populations versus the increase in parole ineligible lifers in Michigan, New York, and New Jersey from 2000 to 2010).

84. *See* GARRETT, *supra* note 49, at 170 (using the terminology of capital punishment in referring to the creation of "life rows," vastly larger than any death row, where prisoners are similarly fated to die on prison grounds); *see also id.* at 172 (quoting Ashley Nellis, the author of a 2017 study on life without parole sentences, as saying, "Life in prison is a death sentence, without the execution"); Mario M. Cuomo, Editorial, *New York State Shouldn't Kill People*, N.Y. TIMES (June 17, 1989), http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldn-t-kill-people.html (last visited Dec. 2, 2018) (defending his veto of bills to reintroduce the death penalty in New York by referring to the alternative, life without parole, as effectively "a sentence of death in incarceration") (on file with the Washington and Lee Law Review).

85. *See* GARRETT, *supra* note 49, at 167–86 (discussing the relationship between this boom in life without parole sentencing and the decline in death sentencing).

86. 567 U.S. 460 (2012).

87. NELLIS, *supra* note 52, at 1.

88. *See id.* (observing a 22.2% increase in life without parole sentences since 2008).

89. *Id.* at 11.

because of the length of time these offenders will spend incarcerated.[90] It is also notable because it cuts against the criminal justice system's general desire to treat children offenders differently.[91] In order for juvenile offenders to face mandatory life without parole sentences, prosecutors had to first make a threshold decision that those children should in fact be tried as adults. As the next section shows, the American criminal justice system's treatment of juvenile offenders evolved in such a manner to bring about the Supreme Court's intervention.

### *B. Harsher Treatment of Juveniles*

The second force leading to the *Miller*/*Montgomery* line of cases was the shift in attitude towards the justice system's treatment of juvenile offenders.[92] During the late-nineteenth and early-twentieth centuries, there was a "revolution" in the states' attitudes towards juvenile offenders: "Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility . . . ."[93] Julian Mack, writing in the *Harvard Law Review*, lamented that the focus on inflicting a punishment proportional to the crime rather than reforming the juvenile offender "criminalized [youths] by the very methods that it used in dealing with them."[94] New reforms, however, reflected "the thought that the child who has begun to go

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90. *See* Graham v. Florida, 560 U.S. 48, 70 (2010) ("[A] juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."); Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016) (noting the petitioner had already served over fifty years for the crime he committed as a seventeen-year-old).

91. This is evidenced most notably by the entirely separate juvenile justice system and the Supreme Court's decision in *Roper v. Simmons* to disallow the death penalty for juveniles. *See* AM. BAR ASS'N, THE HISTORY OF JUVENILE JUSTICE https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf (describing the history and changing attitudes toward the juvenile justice system); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the juvenile death penalty).

92. *See* AM. BAR ASS'N, *supra* note 91 (charting this development of the juvenile justice system).

93. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

94. *See id.* at 106–07 ("[T]he punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not by the needs of the state.").

wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian."[95] In 1899, the first juvenile court—providing juveniles with court proceedings separated from adult offenders—opened in Cook County, Illinois.[96] By 1945 there were juvenile courts in every state.[97]

Alongside this push to separate juvenile and adult justice systems was a move to increase the age of criminal responsibility.[98] Recognizing, presciently, that adolescence extends through age twenty-five, Arthur Towne, the Superintendent of the Brooklyn Society for the Prevention of Cruelty to Children, argued that treating sixteen-year-olds as possessing the reasoning capabilities of adults "flies in the face of present-day psychology and the hard facts."[99] In the 1960s, the Supreme Court legitimized the juvenile system by guaranteeing that due process protections extended to juvenile courts.[100] The first half of the twentieth century, thus, reflected what Clifford Simonsen and Marshall Gordon, referred to as slow movement "away from an age of reform and punishment to an age of rehabilitation and understanding."[101] Even outside of the corrective focus of juvenile courts, there was a renewed focus in preventing juvenile delinquency through intervention, providing at-risk youths with opportunities to upgrade their educations and learn a skill or trade.[102] This prevention focus was reflected in the 1960's in the creation of the Jobs Corp. under the Federal Poverty

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95. *Id.*

96. *See* CLIFFORD E. SIMONSEN & MARSHALL S. GORDON, III, JUVENILE JUSTICE IN AMERICA 27 (2d ed. 1982) (detailing the origins of the juvenile court system).

97. *Id.*

98. *See* Arthur W. Towne, *Shall the Age Jurisdiction of Juvenile Courts be Increased?*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 493, 501 (1920) (advocating for an increased age of criminal responsibility for juvenile offenders).

99. *Id.*

100. *See In re* Gault, 387 U.S. 1, 28 (1967) (recognizing that the basic constitutional rights of a criminal defendant, such as the right to counsel and notice of charges, are extended to juvenile defendants in juvenile court).

101. SIMONSEN & GORDON, *supra* note 96, at 29.

102. *See id.* at 38 (explaining the desire to intervene early with at-risk youths by providing skills and job training).

Program.[103] However, by 1979, Simonsen and Gordon observed attitudes swinging back towards a focus on punishment.[104]

In 1978, in response to the light sentencing of a fifteen-year-old convicted of murder, New York introduced the automatic transfer law, allowing children as young as thirteen to be tried as adults for murder.[105] Between 1990 and 1996, forty states had passed similar laws allowing for juveniles to be prosecuted as adults.[106] An uptick in violent crime in the late 1980s and early 1990s, including a notable increase in juvenile homicides, compounded this change in attitudes.[107] The national homicide rate increased from 7.9 per 100,000 U.S. residents in 1984 to an all-time peak of 9.8 per 100,000 U.S. residents in 1991.[108] Over nearly the same period, the homicide rate for juveniles nearly tripled.[109]

This crime increase led to hysteria over the rise of the "juvenile superpredators"[110]—"kids who have no respect for human life and

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103. *See id.* (noting that though the main goal of these programs was to provide youths opportunities, there was a secondary goal in preventing delinquency).

104. *Id.*

105. *See* Katie Rose Quandt, *Why Does the U.S. Sentence Children to Life in Prison?*, JSTOR DAILY (Jan. 31, 2018), https://daily.jstor.org/u-s-sentence-children-life-prison/ (last visited Dec. 3, 2018) (articulating New York's automatic transfer law) (on file with the Washington and Lee Law Review).

106. *See id.* (highlighting additional laws, such as those to open juvenile records, set mandatory minimum sentences, and replace phrases like "rehabilitation" and "best interests of the child" with "punishment" and "protection of the public").

107. *See* Tanenhaus & Drizin, *supra* note 2, at 642 (explaining how the increase in the juvenile homicide rate led academics, such as John Dilulio, to predict "a coming tidal wave of remorseless and morally impoverished youth," the so-called "juvenile superpredator").

108. ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS., U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 2 (2011).

109. *Id.* at 4.

110. For more information on the origin of the term superpredators and a discussion of the racial undertones, see Kevin Drum, *A Very Brief History of Super-Predators*, MOTHER JONES (Mar. 3, 2016, 5:04 PM), https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators/ (last visited Dec. 2, 2018) (on file with the Washington and Lee Law Review); Clyde Haberman, *When Youth Violence Spurred 'Superpredator Fear'*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-

no sense of the future . . . [who] kill or maim on impulse, without any intelligible motive."[111] Though the superpredator theory would later be disproved as a myth,[112] it created a heated and fearful rhetorical climate that changed the attitude towards juvenile offenders as a whole.[113] This climate spurred legislative efforts to transfer more juveniles into the adult criminal justice system.[114] The new transfer laws differed from past efforts in that they gave prosecutors or the legislature, not judges, the power to decide whether a juvenile should face "adult time for an adult crime."[115] Second, for crimes such as murder, there was no bottom age limit on those who could be transferred and tried as adults.[116] The result was a large number of juveniles under eighteen-years-old—a 1999 study suggested the number could be 200,000 each year—being tried as adults for a variety of crimes.[117]

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superpredator-threat-of-90s.html (last visited Dec. 2, 2018) (on file with the Washington and Lee Law Review).

111. *See* John J. Dilulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995, 12:00AM), https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators (last visited Dec. 10, 2018) ("[A]s long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.") (on file with the Washington and Lee Law Review).

112. *See* YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 5 (2001) (finding "there is no evidence that the young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youth in earlier years"); *see also* Brief of Jeffery Fagan et al. as Amici Curiae in Support of Petitioners at 37, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9647), 2012 WL 174240 (summarizing data showing Dilulio's predictions of continued increases in juvenile crime were wrong and signed by Dilulio himself).

113. *See* Tanenhaus & Drizin, *supra* note 2, at 642–43 (recounting the alarmist rhetoric used to attack the juvenile court system in light of the superpredator crisis).

114. *See* Robert J. Smith & Zoe Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 486 (2017) ("This super-predator rhetoric significantly contributed to sharp increases in life without parole sentences for juveniles, as well as the transfer of cases from juvenile to adult court.").

115. *See* Tanenhaus & Drizin, *supra* note 2, at 665–66 (distinguishing the 1990s revolution in transfer laws from the former system of juvenile transfer which had been reserved for recidivists or those who committed especially heinous crimes).

116. *See id.* at 666, n.99 (citing twenty-three states with provisions placing no bottom limit on the age of transferable juvenile offenders for specific crimes).

117. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 106 (1999) (including

The approach lent itself to an oft-recited appeal for "adult time for adult crimes."[118] David Tanenhaus and Steven Drizin point out that, through the abolition of parole and the institution of mandatory minimum sentencing, by the mid-1990s "youth had ceased to be a mitigating factor in adult court and instead had become a liability."[119] Juvenile transfers convicted of murder, on average, received longer sentences than their adult counterparts.[120]

As states moved to recast their treatment of juvenile offenders back into the terms of punishment and dispositions based more on the offense than the offender, evidence emerged to challenge the notion of "super-predators" and open a space for the possibility of a new reform movement. Juvenile crime decreased between 1994 and 2000,[121] and in 2001 the U.S. Surgeon General debunked the super-predator myth.[122] Between 2002 and 2011 there was a further 31% drop in juvenile arrests.[123]

Empirical studies also showed that the states' legislative changes were not causally responsible for the decline in juvenile homicide rates.[124] In fact, those states with the greatest decrease

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as transfers those transferred under judicial waiver, those statutorily excluded from juvenile court because of the nature of the crime, and those under eighteen tried in states that set the upper age of juvenile court jurisdiction at fifteen or sixteen).

118. *See* Tanenhaus & Drizin, *supra* note 2, at 664 (referencing the use of this mantra in arguing for tougher juvenile transfer laws).

119. *Id.* at 665.

120. *See* SNYDER & SICKMUND, *supra* note 117, at 178 ("On average, the maximum prison sentence imposed on transferred juveniles convicted of murder in 1994 was 23 years 11 months. This was 2 years and 5 months longer than the average maximum prison sentence for adults age 18 or older.").

121. Quandt, *supra* note 105.

122. *See* YOUTH VIOLENCE, *supra* note 112, at 5 ("[T]here is no evidence that the young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youth in earlier years.").

123. ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 71 (2016).

124. *See* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 26 (2011), https://www.juvenile-in-justice.com/wp-content/uploads/2011/10/NoPlaceForKids.pdf ("[F]rom 1997 to 2007, the states that decreased juvenile confinement rates most sharply (40 percent or more) saw a slightly greater decline in juvenile violent crime arrest rates than states that increased their youth confinement rates.").

in juvenile confinement rates between 1997 and 2007 saw a greater decline in juvenile crime rates than the national average.[125] Further, there was no difference in crime rate between those states which authorized life without parole versus life with parole sentences or those that automatically transferred all juveniles over the age of sixteen to adult court versus those that transferred more selectively.[126] It turned out there was little evidence that the prospect of longer sentences had any significant deterrent effect on adolescents.[127] Thus, at the time the Supreme Court started considering these juvenile life without parole cases, the cloud had begun to lift and reveal the misconceptions of the superpredator era, yet the statutory implications of this draconian approach towards juveniles remained in place.

### *C. Brain Science and Scientific Development Impacts on Sentencing*

The third force leading to Supreme Court's juvenile life without parole jurisprudence was the emergence of adolescent brain research. This research supported the theory that for some juveniles delinquency is part of adolescence that most will outgrow without the strong-handed interventions being legislatively prescribed in the 1980s and 90s.[128]

Since at least the nineteenth century, reformers had attempted to apply scientific explanations to juvenile

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125. *See id.* (detailing national averages for juvenile crime and confinement).

126. *See* James Alan Fox, *Abolish Life Without Parole in Mass.*, CORRECTIONS.COM (Nov. 21, 2011), http://www.corrections.com/news/article/29641-abolish-juvenile-life-without-parole-in-mass- (last visited Dec. 2, 2018) (analyzing the 1996 Massachusetts statute that made life without parole mandatory for all juveniles fourteen and older convicted of first-degree murder, and showing no subsequent impact on juvenile homicide rates) (on file with the Washington and Lee Law Review).

127. *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 9, 14 (2011) (showing that for both adolescents and young adults an increase in the risk of arrest has a greater deterrent effect than the threat of longer prison sentences).

128. *See* NELLIS, *supra* note 123, at 78 (crediting this new research-based policy framework with discrediting the earlier theories about juvenile offenders' inclination toward crime).

elinquency.[129] Jane Addams, the founder of Hull House and renowned children's welfare reformer, subscribed to the recapitulation theory,[130] the theory that juvenile delinquency is the result of forces of good and evil battling for possession of a child's soul.[131] Through proper guidance and influence, juveniles could be turned into "angels of virtue."[132] A contemporary of Addams, William Forbush, pushed a theory that troublesome juveniles were stuck in "psychic arrest"—periods of continued tendencies towards crime.[133] If this period of psychic arrest did not pass, the juvenile was "considered locked into a life of crime."[134] These early theories lacked empirical verification, and "sound scientific explanations for delinquent behavior failed to permeate the institutional atmospheres of the day."[135]

During the 1980s and 90s, medical and psychosocial research on the development of the adolescent brain began to emerge, which would become the basis for reassessing juvenile culpability and sentencing.[136] Led by Laurence Steinberg, an internationally renowned expert on adolescence, the Research Network on Adolescent Development and Juvenile Justice focused on adolescents' competence, culpability, and capacity for change.[137]

In terms of competence—the ability to understand the judicial process and meaningfully contribute to one's own defense—

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129. *See* SIMONSEN & GORDON, *supra* note 96, at 25–26 (explaining the emergence of treatments designed to change human behavior with the introduction of social science research).

130. *See id.* at 26 (describing Jane Addams's support of recapitulation theory).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* at 26–27 (chronicling how nonscientific attitudes based on economic, moral, and political forces slowed the advancement of scientific theories on delinquency); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 10–11(1969) ("[S]tudies of delinquency in the early 1900s have been parochial, inadequately descriptive and show little appreciation of underlying political and social conditions.").

136. *See* NELLIS, *supra* note 123, at 79 (noting that the development of adolescent brain research coincided with increasing criticism of the rehabilitation focus of pre-1980s juvenile justice systems).

137. *See id.* ("In particular, researchers examined whether deficits in any or all of these should be considered mitigating factors in criminal liability and, by extension, in sentencing.").

Steinberg recommended a categorical exclusion of juveniles from adult courts.[138] Similar to those with serious mental illness or intellectual disability, Steinberg suggested that juveniles' age should be considered a preexisting impairment because they were more vulnerable to pressures from authority figures, such as police and legal counsel.[139]

In terms of culpability, research revealed that although a teenager's cognitive abilities may be on par with an adult's, their emotional, cognitive, and psychosocial maturity are still developing.[140] This, in turn, is the reason adolescents routinely disregard the long-term consequences of their action and why they are predisposed to take risks and act impulsively.[141]

Finally, the research focused on juvenile offenders' prospects for reform. Steinberg and his colleagues found that an adolescent's prospects for reform are greater than for a mature adult.[142] In rebutting the diagnosis of "juvenile psychopathy," they concluded that antisocial activity in adolescence is not usually indicative of bad character—their bad acts tend to be out of character—and there is no evidence that juveniles who display characteristics of adult psychopaths (i.e. juveniles who are callous, manipulative, and antisocial) actually become adult psychopaths.[143]

These findings were supported by the findings of neuroscientists from Harvard Medical School, the National Institute of Mental Health, and UCLA's School of Medicine, who produced analyses of the prefrontal cortex to demonstrate why

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138. *See id.* at 80 (arguing that typical remedies, such as using medications to establish competency, would be ineffective for juveniles).

139. *Id.*

140. *See id.* (discussing research on the comparative culpability of juveniles and adults).

141. *See id.* ("This rational balancing of pros and cons does not become a regular feature in decision making until adulthood.").

142. *See id.* (opposing the argument that juveniles are more capable of modifying their behavior).

143. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1015 (2003) ("Although the notion that some juvenile offenders are actual or 'fledgling' psychopaths has become increasingly popular in legal and psychological circles, no data exist on the stability or continuity of psychopathy between adolescence and adulthood.").

teenagers sometimes act irrationally.[144] Comparing MRI scans of the prefrontal cortex through time, the researchers detected an important "growth spurt" in the brain that begins in adolescence.[145] The prefrontal cortex, the brain's primary decision-maker, continued developing well into a person's twenties.[146] For juveniles, this meant their brains were still maturing, and they did not yet possess the physiological abilities of adults to control their impulses, exercise judgment, or entirely comprehend the consequences of their actions.[147]

These scientific findings, thus, revealed a fundamental disconnect between what researchers now knew about the characteristic features of adolescents and the assumptions of the criminal justice system about juveniles.[148] While some developmental research was available to the Supreme Court when it first addressed the juvenile death penalty in 1989,[149] these new findings would shake the manner in which the Court assessed juvenile criminal culpability.[150] While the research presented in the 1980s suggested that moral development was a long-term process that juveniles had not yet completed, it had lacked the strength of this neuroscience-backed evidence.[151] When the Court was called upon to readdress juvenile criminal culpability beginning with *Roper*, relevant organizations of psychiatrists,

144. *See* NELLIS, *supra* note 123, at 81 (detailing the research findings of several neuroscientists on juvenile behavior).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* RICHARD J. BONNIE ET AL., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 23–26 (2012) (recollecting the history of research developments as to the heterogeneity of juvenile offending).

149. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (upholding the constitutionality of a death sentence given to a seventeen-year-old offender); *see also* Kevin W. Saunders, *The Role of Science in the Supreme Court's Limitations on Juvenile Punishment*, 46 TEX. TECH. L. REV. 339, 340 (2013) ("The science did not study the physical structure of the relevant regions of the brain, but presented conclusions based on examining the behavior of children and asking them questions involving moral decision-making.").

150. For a comprehensive analysis of the neuroscience developments between *Stanford* and *Roper*, see Saunders, *supra* note 149.

151. *See id.* at 347 (observing that in the juvenile cases from the 1980s, the breakdown amongst the judges reflected those who believed the observational-based science versus those who did not).

psychologists, mental health, and juvenile experts inundated the court with amicus briefs urging the Court to consider this new research-supported understanding.[152] As the discussion of the cases in Part III shows, this new scientific evidence was an essential component of the Supreme Court's juvenile decisions holding that, in essence, "kids are different."[153]

### *III. Creation and Development of the Irreparable Corruption Standard*

These behind-the-scenes forces put the criminal justice system and brain science on a collision course. As the criminal justice system treated more and more juvenile offenders as adults, and correspondingly deemed more offenders incapable of rehabilitation, the scientific developments were showing the opposite—children were not only less culpable than adult offenders, they were also the most capable of rehabilitation.[154] Despite this new evidence, juvenile reform advocates encountered a Supreme Court wary to interfere with the states' control of their criminal justice systems. As the *Harmelin* decision showed,[155] the Court was unwilling to listen to Eighth Amendment challenges to criminal sentences as being excessive or disproportionate, unless the sentence was death.[156] Under the banner of "death is different," the Supreme Court had only been willing to strike down capital

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152. *See, e.g.*, Brief for American Psychological Ass'n & the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447; Brief for American Medical Ass'n et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549.

153. *See* NELLIS, *supra* note 123, at 83 ("This new narrative, rooted in science, was critical to the opinions of the Supreme Court in its four juvenile justice rulings over the past decade, but the view that 'kids are different' has had spillover effects to broader juvenile justice reforms as well.").

154. *See supra* Part II.A–C (discussing the contemporary developments in juvenile brain science and criminal sanctioning).

155. *See supra* Part II.A (reviewing the Supreme Court's aborted efforts to analyze the excessiveness or disproportionality of life without parole sentences in the 1980s).

156. *See infra* Parts III.B, IV (discussing how *Graham* marked a significant expansion of the Supreme Court's Eighth Amendment analysis out of the confines of capital jurisprudence).

verdicts under the Cruel and Unusual Punishment Clause.[157] Now, this confluence of harsher sentencing of juveniles and scientific developments questioning that approach led the Court to consider expanding its Eighth Amendment review to meet this problem. The fix, however, has created further problems for the states, as they are left to determine whether juvenile offenders can be deemed irreparably corrupt.

This Part looks at how the Supreme Court utilized its Eighth Amendment framework to find the juvenile death penalty unconstitutional and then expanded this Eighth Amendment analysis to consider whether sentencing juvenile offenders to die in prison also constituted cruel and unusual punishment.[158] Then, this Part will discuss the Court's decisions in *Miller* and *Montgomery*, and the creation of the irreparably corrupt standard for determining whether juvenile offenders should be sentenced to life without parole.[159] Finally, this Part will turn to the scientific and procedural difficulties that state courts face in trying develop the irreparable corruption standard.[160]

### *A.* The Road to *Miller* and *Montgomery*

The idea that states must reassess the boundaries of punishment is derived from the concept that the Eighth Amendment's Cruel and Unusual Punishment clause is an evolving standard that must meet the norms and morality of the present day.[161] The bulk of modern Eighth Amendment jurisprudence deals with the application of the death penalty.[162]

157. *See* Mary Berkheiser, *Death is Not So Different After All:* Graham v. Florida *and the Court's "Kids are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 2 (2011) (describing the Court's categorical approach to the Eighth Amendment as "formerly the exclusive province of the death penalty").

158. *Infra* Part III.A.

159. *Infra* Part III.B.

160. *Infra* Part III.C.

161. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("[T]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

162. *See* Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1125 (2016) (pointing out that the Supreme Court "rarely invalidated noncapital sentences on Eighth Amendment grounds").

But, as the Supreme Court noted in *Coker v. Georgia*,[163] the Eighth Amendment bars not just "barbaric" punishments, but those that are excessive in relation to the crime.[164]

In assessing whether a punishment categorically runs afoul of the Eighth Amendment, the Supreme Court developed a two-part inquiry.[165] First, the Court asks whether there is a consensus about the acceptableness of the sentence.[166] Then, the Court applies its own judgement to ask whether the sentence is unconstitutionally excessive.[167] A punishment can be unconstitutionally excessive in one of two ways: (1) it does not contribute to an acceptable goal of punishment such as deterrence, retribution, incapacitation, or rehabilitation[168] or (2) it is grossly disproportionate to the crime.[169]

After *Gregg*, the Supreme Court used this Eighth Amendment framework to prohibit the use of the death penalty for certain categories of offenders[170] and for certain offenses.[171] In *Roper v. Simmons*, the Supreme Court utilized its Eighth Amendment

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163. 433 U.S. 584, 592 (1977) (summarizing the takeaway from the plurality and two concurring opinions in *Gregg v. Georgia*, the decision reaffirming the use of the death penalty).

164. *See id.* (providing the precedent that would guide the Court's future Eighth Amendment jurisprudence).

165. *See* Gregg v. Georgia, 428 U.S. 153, 172–73 (1976) (establishing an objective and a subjective component of the Eighth Amendment analysis).

166. *See id.* at 175–76, 181 (analyzing state legislative activity and juries' sentencing decisions as "significant and reliable objective ind[ices] of contemporary values").

167. *See id.* at 182 ("[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court must ask whether it comports with the basic concept of human dignity at the core of the Amendment.").

168. *See id.* (elaborating that such a punishment "is nothing more than the purposeless and needless imposition of pain and suffering").

169. *Id.*

170. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring capital punishment for intellectually disabled offenders); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (barring capital punishment from being inflicted on a prisoner who is insane).

171. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413, 439 (2008) (barring capital punishment for rape of a child or other offenses not resulting in the death of the victim); Coker v. Georgia, 433 U.S. 584, 592 (1977) (barring capital punishment for rape of an adult victim).

framework to strike down capital punishment for juvenile offenders—those under eighteen at the time of the offense.[172]

The Court first looked to state legislative action and "consistency of the direction of change"[173] and the decline in actual use of the penalty[174] to find that a national consensus had emerged against the juvenile death penalty, as thirty states did not impose the death penalty on juveniles.[175] Next, the Court applied its own independent judgment to determine that the juvenile death penalty was both disproportionately severe and imposed on a class of people with an inherently diminished capacity.[176] According to Justice Kennedy's opinion, the death penalty is reserved for a narrow category of crimes[177] and the worst offenders,[178] those "whose extreme culpability makes them the most deserving of execution."[179]

The Court cited three distinctions between juvenile and adult offenders that prevented juveniles from being reliably classified among the worst offenders.[180] First, juveniles are comparatively

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172. *See id.* at 578 (holding that the Eighth Amendment "forbid[s] . . . imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

173. *See id.* at 566 (noting that since its prior decision upholding the death penalty for offenders between the ages of sixteen and eighteen, five states had abolished their juvenile death penalty); *but see id.* at 595–96 (O'Connor, J., dissenting) (challenging the majority's consensus by noting the slow pace—only five states in fifteen years—and the lack of uniformity of the change—two states, Virginia and Missouri, "expressly reaffirmed their support" by enacting statutes setting sixteen as the minimum age).

174. *See id.* at 563 (counting only three states that had actually executed juveniles in the decade prior).

175. *Id.* at 560.

176. *Id.* at 567–75.

177. *See id.* at 568 (noting the Court's previous rejection of imposition of the death penalty for even severe crimes, such as rape of an adult woman and felony murder where the defendant did not attempt to, intend to, or actually kill the victim) (citing Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982)).

178. *See id.* ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded no matter how heinous the crime.").

179. *Id.* at 572.

180. *See id.* at 570–71 (recalling that the Court had relied on these distinct characteristics of those under the age of sixteen to find the Eighth Amendment prohibited the death penalty for that group).

immature and irresponsible.[181] Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures."[182] Third, a juvenile's personality traits are not set, allowing for greater possibility for rehabilitation.[183] Because of these unique characteristics, the Court concluded that juvenile offenders were less culpable for their crimes.[184]

In turn, juvenile offenders' diminished culpability makes the recognized justifications for the death penalty—retribution and deterrence—inadequate.[185] The Court found the retributive purpose, as an expression of the community's moral outrage or attempt to avenge the victim, was ill-served where the juvenile offender's immaturity made him less blameworthy.[186] Likewise, the argument for deterrence fails because juveniles are extremely unlikely to have made a cost-benefit analysis that considered the possibility of execution.[187] Without a valid penological justification, imposition of the juvenile death penalty is automatically disproportionate and, thus, a violation of the Eighth Amendment.[188]

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181. *See id.* at 569 (relaying "what any parent knows" and what "scientific and sociological studies" tend to confirm, children's immaturity and underdeveloped sense of responsibility lead to adolescents being "overrepresented statistically in virtually every category of reckless behavior" (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992))).

182. *See id.* at 569–70 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.").

183. *See id.* ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character . . . for a greater possibility exists that a minor's character deficiencies will be reformed.").

184. *Id.*

185. *See id.* at 571–72 ("We have held there are two distinct social purposes served by thedeath penalty: retribution and deterrence of capital crimes by prospective offenders.").

186. *See id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

187. *See id.* at 572 (reasoning that even if a case could be made for the deterrent effect of the juvenile death penalty, the sentence of life without parole is "itself a severe sanction, in particular for a young person").

188. *Id.* at 571–72, 575.

In reaching its conclusion, the Court rejected the argument that a categorical ban was an overreach because there may be juvenile offenders who commit heinous crimes and possess "sufficient psychological maturity."[189] The Court concluded that allowing jurors to decide on a case-by-case basis whether the juvenile was sufficiently culpable would create an "unacceptable likelihood" that the heinous nature of the crime might overpower any mitigation based on the youth of the offender.[190] The danger was that a jury, presented with a juvenile whose immaturity, vulnerability, and "lack of true depravity" should warrant a sentence less than death, could be so inflamed by the brutality of the crime that they might unjustly sentence him to death.[191] To bolster this argument, the Court pointed out, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[192] The Court declined to encumber jurors with a task that trained psychologists, with the benefits of diagnostic expertise, clinical testing, and observation, would struggle to reliably assess.[193] Life without parole, thus, became the harshest available penalty for a juvenile offender.

In 2010, the Supreme Court in *Graham v. Florida*[194] expanded the Eighth Amendment's reach to strike down the imposition of life without parole sentences to juveniles who committed "nonhomicide" crimes.[195] The Court recognized that life without

189. *See id.* at 572 (dismissing petitioner's argument that the Supreme Court's past insistence on individualized consideration of the mitigating and aggravating factors in a death penalty case made the adoption of a categorical bar both arbitrary and unnecessary).

190. *See id.* at 573 (pointing out that in Simmons's case, the prosecutor even argued that the defendant's youth should be treated as an aggravating factor because his longevity would make him a danger for longer).

191. *See id.* (suggesting that the brutality of a particular crime may blind a jury to any mitigating facts of youth).

192. *See id.* (explaining that psychiatrists are prohibited by the American Psychiatric Association from diagnosing juveniles under eighteen as having antisocial personality disorder, commonly referred to a psychopathy or sociopathy).

193. *Id.*

194. 560 U.S. 48 (2010).

195. *Id.* at 53.

parole is an "especially harsh punishment for a juvenile" because they will, on average, serve more years and a greater percentage of their lives in prison than a non-juvenile lifer.[196] Accordingly, the Court held that the Eighth Amendment required that juveniles convicted of non-homicide offenses must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[197]

As with *Roper*, the Court again rejected the idea that juries should be allowed to determine if a particular offender might have "sufficient psychological maturity" to overcome the Court's concerns.[198] Again, the Court reiterated that the differences between juvenile and adult offenders are too well understood to risk sentencing a juvenile with diminished culpability to life without parole.[199]

Separately, the Court reasoned that even outside of the death penalty context, "[i]t remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'"[200] The Court pointed out that such a penalty served no rehabilitative purpose and as such was inappropriate in light of the juvenile nonhomicide offender's capacity for change.[201]

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196. *See id.* at 70 (noting that a sixteen-year-old and seventy-five-year-old each sentenced to life without parole receive the same punishment in name only).

197. *See id.* at 75 ("The Eighth Amendment does not foreclose the possibility that [offenders] will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.").

198. *See id.* ("Categorical rules tend to be imperfect, but one is necessary here.").

199. *See id.* at 69 (finding a juvenile offender who did not kill or intend to kill has a "twice diminished culpability").

200. *Id.* at 68 (second alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

201. *See id.* at 74 (noting that those serving life without parole are often denied rehabilitative services available to other inmates, further evidencing the disproportionality of the sentence when applied to juveniles, who are "most in need of and receptive to rehabilitation").

### *B.* Miller, Montgomery, *and the Irreparable Corruption Standard*

In 2012, the Supreme Court in *Miller v. Alabama*[202] extended *Graham* to prohibit the imposition of all mandatory life without parole sentences for juvenile offenders.[203] Drawing on the brain science research cited in *Roper* and *Graham*, the Supreme Court reiterated that "children are constitutionally different from adults for purposes of sentencing."[204] Because of their diminished culpability and greater capacity for reform, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[205] The Court used the petitioners' circumstances to illustrate the diminished culpability argument. Kuntrell Jackson's background was so immersed in violence that both "his mother and grandmother had previously shot other individuals."[206] As for Evan Miller, he had been physically abused by his stepfather and neglected by his alcoholic and drug-addicted mother to the point that by age fourteen, he had attempted suicide four times.[207] Mandatory life without parole would, thus, "disregard the possibility of rehabilitation even when circumstances most suggest it."[208]

However, the Court opted to not issue a categorical ban on the imposition of life without parole sentences for juveniles but merely found the Eighth Amendment prohibited sentencing schemes which made such penalties mandatory.[209] The Court reasoned that "[m]andatory life without parole for a juvenile precludes

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202. 567 U.S. 460, 480 (2012). The Supreme Court consolidated *Miller*, a case on direct appeal, with *Jackson v. Hobbs*, in which Kuntrell Jackson, who like Evan Miller was fourteen at the time his offense was committed, challenged ,on post-conviction, his life without parole sentence for felony murder. *Id.* at 466.

203. *See id.* at 479 (holding that the Eighth Amendment forbids mandatory life without parole sentencing schemes for juveniles, because "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment").

204. *See id.* at 471 (reciting from *Graham* the three major differences between juveniles and adults for the purposes of sentencing: immaturity; vulnerability to outside pressures and their environments; and chance for reform).

205. *Id.* at 474.

206. *Id.* at 478.

207. *Id.* at 478–79.

208. *Id.* at 478.

209. *See id.* at 479 (finding such schemes pose "too great a risk of disproportionate punishment").

consideration of chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[210] The Court did opine that such sentences should be rare based on the discussion in *Roper* and *Graham* of juveniles diminished culpability, their capacity for change, and the 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."[211]

In the end, the *Miller* decision carved out a small segment of juveniles for whom a life without parole sentence was still constitutionally permissible: the rare, irreparably corrupt juvenile homicide offender.[212] This has become a de facto sentencing standard that authorizes a sentencer, whether judge or jury, to impose the harsher life without parole sentence only after (1) considering the mitigating effects of youth; and (2) making a finding of irreparable corruption.[213]

This issue resurfaced in *Montgomery v. Louisiana*[214] when the Supreme Court was called upon to settle a split between the states as to whether *Miller* applied retroactively to 2,100 inmates who had already been convicted as juveniles and sentenced under a mandatory sentencing scheme to life without parole.[215] In light of *Miller*, Henry Montgomery, a sixty-nine-year-old inmate, challenged his continued incarceration on a mandatory sentence of life without parole for a crime Montgomery committed in 1963 as a seventeen-year-old.[216]

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210. *Id.* at 477.

211. *Id.*

212. *See* Graham v. Florida, 560 U.S. 48, 74 (2010) (mandating that *nonhomicide* juvenile offenders may *never* receive life without parole sentences); *Miller*, 567 U.S. at 479–80 (providing that the remaining *homicide* juvenile offenders could only receive life without parole in the rare circumstances where the sentencer concludes that the youth is irreparably corrupt).

213. Roper v. Simmons, 543 U.S. 551, 568–69 (2005).

214. 136 S. Ct. 718 (2016).

215. *See Juvenile Life Without Parole: An Overview*, POLICY BRIEF: JUVENILE LIFE WITHOUT PAROLE (The Sentencing Project, New York, N.Y.), updated August 2017, at 2 (summarizing *Montgomery* and its impact).

216. *See Montgomery*, 136 S. Ct. at 726 (providing the factual background of the case).

In order for a newly announced rule to apply retroactively to cases with a final disposition, the new rule must be either a new substantive rule of constitutional law[217] or a new "watershed" procedural rule.[218] The Court's review in *Montgomery*, thus, focused on whether the *Miller* decision, in fact created a new substantive rule, which would "place certain criminal laws and punishments altogether beyond the State's power to impose."[219] The key question was whether *Miller* required sentencing courts to simply consider a juvenile defendant's age before sentencing him or her to life without parole—a procedural modification—or did *Miller*, in fact, dictate that states were constitutionally prohibited from imposing the punishment—a substantive rule to be applied retroactively.[220]

Finding *Miller* announced a substantive rule to be applied retroactively, Justice Kennedy, writing for a narrowly divided Court, relied upon his majority opinions in *Roper* and *Graham*, calling them the "foundation stone for *Miller*'s analysis."[221] Justice Kennedy clarified that *Miller* imposed not only a procedural requirement that the sentencer give individualized consideration to the circumstances of youth, but also placed a substantive limitation upon juvenile life without parole sentences.[222]

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217. *See id.* at 728 (defining a substantive rule as those "forbidding criminal punishment of certain primary conduct" and those "prohibiting a certain category of punishment for a class of defendants because of their status or offense").

218. *See* Teague v. Lane, 489 U.S. 288, 313 (1989) (limiting the scope of such procedural rules to "those new procedures without which the likelihood of an accurate conviction is seriously diminished"); *see also* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (defining watershed rules of criminal procedure as those "implicating the fundamental fairness and accuracy of the criminal proceeding").

219. *See Montgomery*, 136 S. Ct. at 729 (focusing on the substantive rule exception to the bar on retroactivity because the procedural change would not affect the accuracy of any convictions).

220. *See id.* at 730 ("Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate. . . . [T]he same possibility . . . does not exist . . . where the Constitution immunizes the defendant from the sentence imposed.").

221. *See id.* at 732–33 ("*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for the purposes of sentencing.'" (quoting *Miller*, 567 U.S. at 471)).

222. *See Montgomery*, 136 S. Ct. at 734 ("*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the 'distinctive attributes of youth.").

Accordingly, *Miller* prohibited states from imposing the punishment, not on all juveniles, but on all children "whose crime reflects 'unfortunate yet transient immaturity." Because of his lessened culpability as a juvenile offender, the Court found "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption."[223]

The Court gave states the option to avoid resentencing by simply permitting parole hearings for the *Montgomery* prisoners.[224] In doing so, the Court noted that this approach would not burden the states and would maintain the finality of state convictions.[225]However, if a state elected to pursue life without parole sentence on resentencing, the Court reiterated that *Miller* placed a ceiling on punishment for the vast majority of juveniles.[226] Only based on a "properly informed finding that a child is the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible" could a sentencer impose a life without parole sentence.[227] In other words, the question for a sentencer was whether the offender's crimes, committed as a juvenile, "reflect transient immaturity" or "irreparable corruption."[228]

The *Montgomery* decision importantly expanded *Miller* to the 2,100 inmates who were already serving mandatory life without parole sentences at the time *Miller* was announced.[229] But it also represented an interpretative expansion of *Miller* by clarifying that *Miller* was meant as a categorical ban on the imposition of life without parole sentences for a class of defendants, not based on a clear delineator such as age, but on the basis of an amorphous trait: irreparable corruption. In doing so, the Court did not define irreparable corruption, except to provide a synonym—

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223. *Id.* at 736.

224. *Id.* By *Montgomery* prisoners, I refer to those whose convictions that were final prior to the *Miller* decision and for whom *Montgomery* allowed an avenue for relief.

225. *Id.*

226. *Id.*

227. *Id.* at 733.

228. *See id.* at 734 (distinguishing *Miller* from *Roper* and *Graham* because *Miller* actually drew a line between the rare, irreparably corrupt offender and the majority of juveniles).

229. *Id.* at 736.

"incorrigible"[230]—and an equally amorphous antonym—"those whose crime reflects transient immaturity."[231] Nor did the Court provide the states with any meaningful guidance on how they should construct a proceeding, whether on initial sentencing or on the resentencing required by *Montgomery* for those sentenced prior to *Miller*, to determine whether a juvenile offender is irreparably corrupt.[232] Instead, the *Montgomery* decision foisted upon the state courts the responsibility for interpreting and defining a standard, and then setting up a procedure to make individual determinations of whether offenders met the standard.[233] To complicate matters, the irreparable corruption standard being handed over to the states to develop was based on the exact distinction, between transient immaturity and irreparable corruption, that the Court had in the death penalty context determined was too complex for jurors because it was "difficult even for expert psychologists" to distinguish between the two types of offenders.[234]

The confounding standard led Justice Scalia, in dissent, to suggest that the majority was being disingenuous by even putting this standard to the states. "The majority does not seriously expect state and federal collateral-review tribunals to engage in this silliness, probing the evidence of 'incorrigibility' that existed decades ago when defendants were sentenced."[235] Instead, Scalia asserted the Court's true motive was found in its "not-so-subtle invitation" to the states that they may avoid this resentencing process by granting everyone affected parole eligibility: "This whole exercise, this whole distortion of *Miller* is just a devious way

230. *Id.* at 734.

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

232. *Cf.* Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016) (suggesting that the evidence raised by Montgomery of his troubled youth, his achievements in prison, and his efforts to mentor younger prisoners could be used to show rehabilitation).

233. *See id.* at 735 ("We leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.").

234. *See Roper*, 543 U.S. at 573 ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation.").

235. *See Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting) (noting the particular problem of attempting to gauge an offender's irreparableness at the time of the crime when that offender has spent years in prison).

of eliminating life without parole for juvenile offenders."[236] In Scalia's telling, the Court only stops short of saying so explicitly to save face.[237] Because the Court had relied upon the availability and the severity of life without parole in striking down the juvenile death penalty,[238] it could not, a mere decade later, declare that penalty to also be unconstitutionally disproportionate.[239] Instead, Justice Scalia posited the irreparable corruption standard as a Godfather-like offer from the Court to the states: "Avoid all the utterly impossible nonsense we have prescribed by simply permitting juvenile homicide offenders to be considered for parole."[240] This, however, was clearly not an "offer they couldn't refuse," as the response of many state legislatures has been to try to define irreparable corruption, whatever it may mean.[241]

### *C. The Difficult Application of the Irreparable Corruption Standard*

In *Roper*, the Supreme Court specifically relied on the difficulty of distinguishing between children whose crimes reflect their transient immaturity and those whose crimes reflect irreparable corruption as a justification for finding the juvenile death penalty unconstitutional.[242] What made the irreparable corruption distinction an impermissible standard in death penalty cases was that the Court would be asking judges and jurors to make a distinction that "is difficult even for expert psychologists."[243] However, in *Miller* and *Montgomery*, the Court

236. *Montgomery*, 136 S. Ct. at 744.

237. *See id.* ("The Court might have done that expressly . . . but that would have been something of an embarrassment.").

238. *See Roper*, 543 U.S. at 572 (assuaging concerns about any lost deterrent effect of striking down the juvenile death penalty by recognizing that juvenile life without parole is itself a particularly severe penalty).

239. *See Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting) ("How could the majority—in an opinion written by the very author of *Roper*—now say *that* punishment is *also* unconstitutional? . . . [T]he Court refuses . . . today, but merely makes imposition of that severe sanction a practical impossibility.").

240. *Id.*

241. *See infra* Part III.C.2 (tracking the states' responses to the *Montgomery* decision).

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

243. *Id.*

made this scientifically confounding distinction the threshold for applying the harshest penalty available, a penalty banned as unconstitutional for juveniles who did not meet this criteria.[244] Thus, making a reliable factual determination about a juvenile offender's character is constitutionally significant, because without such a finding a life without parole sentence is cruel and unusual punishment.[245]

The Supreme Court has given little guidance since *Montgomery* as to what and how a sentencer should determine whether on a case-by-case basis an offender's crime reflects irreparable corruption.[246] *Montgomery* made clear that the sentencer had to do more than simply consider the mitigating effects of youth, they had to make the factual determination that the offender was irreparably corrupt.[247]

This Part will address both the difficulties that expert psychologists face in determining whether a juvenile is irreparably corrupt from the scientific angle.[248] Then, this Part will provide an overview of the practical difficulties states are having in determining how to apply the irreparable corruption standard.[249]

### *1. Scientific Difficulties*

One of the primary difficulties mentioned in *Roper* is that the American Psychiatric Association (APA) forbids psychiatrists from diagnosing antisocial personality disorders in patients under

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244. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (finding those whose crimes reflected transient immaturity protected from life without parole sentences).

245. *See id.* (interpreting *Miller*'s substantive holding as a requirement that sentencing courts limit life without parole sentences to those offenders whose crimes reflect irreparable corruption).

246. *See infra* Part III.C.2 (discussing the Court's silence on *Montgomery* cases still coming to the Court).

247. *See Montgomery*, 136 S. Ct. at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.").

248. *Infra* Part III.C.1.

249. *Infra* Part III.C.2.

eighteen.[250] In *Miller*, the APA filed an amicus brief, in which they stated that "[t]he positive predictive power of juvenile psychotherapy assessments . . . remains poor."[251]

The difficulty preventing expert psychiatrists from using their clinical training to diagnose a juvenile with a personality disorder is the same that makes the death penalty and mandatory life without parole constitutionally impermissible: children's brains are not yet fully developed. "Adolescence is a period of substantial brain maturation with respect to both structure and function."[252] Furthermore, adolescence involves "plasticity in brain maturation" that is "qualitatively different from that of the adult."[253] The general takeaway, for those who argue for a categorical ban on juvenile life without parole sentences, is that because of the "rapid change in brain processes during adolescence, who [these children] will become as adults is not yet clear."[254] In other words, you cannot determine whether a juvenile offender committed a crime because of "transient immaturity" without seeing if he transitions out of that immaturity.[255] From a psychological perspective, because of

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250. *See Roper*, 543 U.S. at 573 ("As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS 701–06 (4th ed. text rev. 2000))).

251. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239, at *21.

252. Steinberg, *supra* note 42, at 70.

253. *See* Beatriz Luna & Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System*, *in* APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE 91, 110 (Kirk Heilbrun ed., 2016)

> What neuroscience evidence can do is inform how adolescents constitute a special population with respect to culpability and extended sentencing. In regard to culpability, immaturities in the adolescent brain can provide evidence that the defendant may have acted in an impulsive and impassioned manner that might not have occurred had that individual reached full maturity with optimal executive control and dampened motivational reactivity.

254. *Id.* at 109.

255. *See* Robert Semel, *Limitations of Extending Juvenile Psychopathy Research Assessment Tools and Methods to Forensic Settings*, 4 J. PSYCHOL. &

the continued possibility for further brain development, a clinician cannot make a determination regarding whether a juvenile offender is in fact irreparably corrupt.[256] This makes the states' implementation of an irreparable corruption standard nearly impossible, as psychiatric diagnoses—the best evidence—are prohibited by the APA due to their unreliability.

### *2. Procedural Difficulties in the States*

The Supreme Court has denied certiorari in a number of cases seeking guidance on the directives of *Miller* and *Montgomery*.[257] Without any further instruction, some states have taken steps legislatively to convert the sentences of those serving mandatory life without parole sentence into parole-eligible sentences.[258] Other states have left the resentencing process largely up to their courts to figure out.[259]

This considerable confusion has led to splits in the state courts related to three primary issues. The first area of confusion stems from the question of when the *Miller*/*Montgomery* protections are triggered. State courts are split as to whether to apply *Miller*/*Montgomery* to only mandatory sentencing schemes or to

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CLINICAL PSYCHIATRY 1, 1 (2015) (showing that "most individuals identified as psychopaths at age 13 will not receive such a diagnosis at age 24").

256. *Id.*

257. *See* Johnson v. Idaho, 395 P.3d 1246 (Idaho 2017), *cert. denied* 138 S. Ct. 470 (2017) (mem.) (denying without opinion petition for writ of certiorari urging categorical ban on life without parole sentences for juveniles); *see also* Adams v. Alabama, 136 S. Ct. 1796, 1799–1801 (2016) (mem.) (granted, vacated, and remanded) (Sotomayor, J., concurring) (supplying that a life without parole sentence cannot be based simply on the serious or shocking nature of the offense); Tatum v. Arizona, 137 S. Ct. 11, 11–13 (2016) (mem.) (granted, vacated, and remanded) (Sotomayor, J., concurring) (clarifying *Miller*/*Montgomery* as requiring a finding that the "crimes reflect permanent incorrigibility").

258. *See generally* Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, ASSOC. PRESS (July 31, 2017), https://apnews.com/9debc3bdc7034ad2a68e62911fba0d85 (last visited Dec. 2, 2018) (presenting the number of inmates serving life without parole sentences, the number resentenced or released, and the legislative remedies of each state) (on file with the Washington and Lee Law Review).

259. *Id.*; *see also* Kimberly Thomas, *Random If Not Rare: The Eighth Amendment Weaknesses of Post*-Miller *Legislation*, 68 S.C. L. REV. 393, 401–11 (2017) (summarizing state responses to *Miller*).

extend the protections to those who received discretionary life without parole sentences.[260] For example, the Arizona Supreme Court initially denied review on a case that applied *Miller* only to mandatory sentences.[261] But after the Supreme Court vacated and remanded a number of Arizona cases for reconsideration in light of *Montgomery*,[262] the court reversed course.[263] The Virginia Supreme Court similarly had its decision finding *Miller* only applied to mandatory sentences vacated and remanded for reconsideration in light of *Montgomery*.[264] However, that court remained steadfast that *Miller*/*Montgomery* only applied to mandatory life without parole sentences.[265] An ancillary dispute among the courts exists over whether *Miller*/*Montgomery* protections apply to only "life without parole" sentences or more expansively to include de facto life without parole sentences—aggregated sentences that deny the prisoner any meaningful opportunity for release.[266]

A second, and more applicable, disagreement exists over whether *Montgomery* even requires a finding of irreparable corruption.[267] This dispute stems from the language of

260. For an appendix listing the various state court approaches to this question, 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. 149,194 (2017).

261. State v. Purcell, No. CA-CR 13-0614 PRPC, 2015 WL 2453192, at *1 (Ariz. Ct. App. May 21, 2015), *review denied* (Ariz. Jan. 5, 2016), *vacated*, 137 S. Ct. 369 (2016) (mem.).

262. Tatum v. Arizona, 137 S. Ct. 11 (2016) (mem.).

263. *See* State v. Valencia, 386 P.3d 392, 396 (Ariz. 2016) (applying *Montgomery* to juvenile sentenced to life after the abolition of parole, who was not eligible for earned release credits, even where the legislature had later amended the statute to allow for the opportunity for release).

264. Jones v. Virginia, 136 S. Ct. 1358 (2016) (mem.).

265. *See* Jones v. Commonwealth, 795 S.E.2d 705, 713 (Va. 2017) (finding a juvenile's statutorily prescribed life sentence in a state without parole was not mandatory because judges had the discretion to suspend any part of the sentence).

266. For a more comprehensive list of how state courts have decided this issue, see Hoesterey, *supra* note 260, at 195–97, App. D.

267. *Compare* Malvo v. Mathena, 893 F.3d 265, 267 (4th Cir. 2018) (holding a finding of permanent incorrigibility/irreparable corruption is required); Davis v. State, 415 P.3d 666, 695 (Wyo. 2018) (same); People v. Holman, 91 N.E.3d 849, 863 (Ill. 2017) (same); Landrum v. State, 192 So. 3d 459, 468 (Fla. 2016) (same); Veal v. State 784 S.E.2d 403, 410 (Ga. 2016) (same); Luna v. State, 387 P.3d 956, 963 n.11 (Okla. Crim. App. 2016) (same); *with* United States v. Briones, 890 F.3d 811, 819 (9th Cir. 2018) (finding no requirement that courts make an explicit

*Montgomery*, specifically the Court's acknowledgment that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility."[268] Based on this sentence, some courts have construed *Miller*/*Montgomery* as merely requiring consideration of the factors of youth[269] or reaffirming the need for proportionality review of sentences.[270] However, as other courts have rightly pointed out, *Montgomery* also charges sentencing authorities with the duty of "separat[ing] those juveniles who may be sentenced to life without parole from those who may not."[271] Furthermore, recall that the central holding of *Montgomery* was that *Miller* created a substantive rule that the Eighth Amendment prohibited imposition of life without parole sentences on a class of offenders—those juvenile offenders whose crimes did not reflect irreparable corruption.[272] The Court mentions eight times that *only* irreparably corrupt juveniles can receive life without parole sentences.[273] While the split over this question highlights the degree of confusion caused by the *Montgomery* opinion, the case for the existence of the irreparable corruption is on safe ground.

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finding that juvenile offenders are irreparably corrupt); People v. Skinner 917 N.W.2d 292, 308 (Mich. 2018) (same); Chandler v. State, 242 So. 3d 65, 69 (Miss. 2018) (same); Johnson v. State, 395 P.3d 1246, 1258 (Idaho 2017) (same); State v. Valencia, 386 P.3d 392, 396 (Ariz. 2016) (same).

268. Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016). *But see id.*

> That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.

269. *See Chandler*, 242 So. 3d at 69 (reaffirming its pre-*Montgomery* decision that *Miller* only required sentencing authorities to take into account characteristics and circumstances unique to juveniles) (citing Jones v. State, 122 So. 3d 698, 702 (Miss. 2013)).

270. *See Skinner*, N.W.2d at 309–310 ("In this sense, the 'irreparable corruption' standard is analogous to the proportionality standard that applies to all criminal sentences.").

271. *Montgomery*, 136 S. Ct. at 735; *see also id.* at 734 ("*Miller*, then, did more than require a sentence to consider a juvenile offender's youth before imposing life without parole . . . .").

272. *Id.* at 733–34.

273. *See* Hoesterey, *supra* note 260, at 173 n.189 (listing the eight separate sentences in the *Montgomery* opinion in which the Court highlights the importance of a finding of irreparable corruption).

Other courts have found application of the irreparable corruption standard unconstitutional.The Supreme Courts of Iowa, Massachusetts, and Washington all found that because distinguishing between the two cannot be done with accuracy or integrity, the imposition of life without parole sentences on juveniles would violate the states' constitutions.[274] In doing so, theses courts grappled with the same Eighth Amendment jurisprudence and the scientific data on brain science development in adolescence presented to the Supreme Court in *Miller* and *Montgomery* and concluded the irreparably corrupt standard was unworkable.[275]

The Iowa Supreme Court framed its review as determining whether to develop case law around this new irreparable corruption standard by proceeding on a case-by-case basis or taking a categorical approach, banning life without parole sentences under the state constitution.[276] The court reviewed the case law development leading to *Montgomery* and concluded that identifying which juvenile offenders are "irretrievable" at the time of trial would be "too speculative and likely impossible given what we know about the timeline of brain development."[277] If "trained professionals with years of clinical experience would not attempt

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274. *See* State v. Sweet, 879 N.W.2d 811, 838 (Iowa 2016) ("Because of the difficulty of applying the individual *Miller* factors, the likelihood that the multifactor test can be consistently applied by our district courts is doubtful at best."); Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 270, 283–85 (Mass. 2013) ("Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time is irretrievably depraved."); State v. Bassett, 428 P.3d 343, 354 (Wash. 2018) ("[G]iven the difficulty even expert psychologists have in determining whether a person is irreparably corrupt and the extremely high stakes of the decision . . . this type of discretion produces the unacceptable risk that children undeserving of a life without parole sentence will receive one.").

275. *See Sweet*, 879 N.W.2d at 811 (reviewing a psychologist testimony that because of Sweet's adolescence it was not possible to determine if he would develop a "full-blown psychopathic personality disorder as an adult, and even if he did, psychologists could not say whether it would be untreatable"); *Diatchenko*, 1 N.E.3d at 283–84 ("Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character' can never be made with integrity . . . .").

276. *Sweet*, 879 N.W.2d at 835–37.

277. *Id.* at 836–37.

to make such a determination," the court found that "no structural or procedural approach, including provision of a death-penalty-type legal defense, [would] cure this fundamental problem."[278]

The court's rejection was two-fold. First, the court found that the factors suggested by *Miller* for consideration such as the offender's family and home environment, or history of abuse could cut either way in a sentencer's determination.[279] The ambiguous results and the known information about adolescent brain development convinced the court that it could not impose an irreparable corruption standard and hope for accurate or fair application.[280] Second, any attempt to fairly determine who was the irreparably corrupt juvenile offender would require the use of death-penalty-type safeguards, such as expert testimony and extensive resources, and even as such the determinations would be constitutionally inadequate under the state constitution.[281]

On the other side are the states that, upon review, have preserved juvenile life without parole sentences and attempted to craft procedural rules to ensure the constitutionality of the proceedings.[282] Pennsylvania stands as a particularly poignant example of the struggle states have had crafting a procedure for determining which offenders meet the irreparable corruption standard. At the time of *Miller*, Pennsylvania had more juveniles

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278. *Id.* at 837.

279. *See id.* at 838 ("Would the fact that the adolescent offender failed to benefit from a comparatively positive home environment suggest he or she is irreparable . . . or . . . suggest that his or her character and personality have not been irreparably damaged and prospects for rehabilitation are . . . greater?").

280. *See id.* at 838 ("Because of the difficulty of applying the individual *Miller* factors, the likelihood that the multifactor test can be consistently applied by our district courts is doubtful at best.").

281. *See id.* at 837

> In imposing a sanction akin to the death penalty in some respects, the trial court simply will not have adequate information and the risk of error is unacceptably high, even if we require an intensive, highly structured inquiry similar to that required by the ABA guidelines for the defense of death-penalty cases.

282. *See* State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) (placing the burden on the state to make a showing beyond a reasonable doubt that the defendant is irreparably corrupt); Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017) (fashioning rules for Pennsylvania, in lieu of state legislative action).

serving life without parole than any other state[283] and is one of only three states with over one hundred juveniles yet to be resentenced.[284] In *Commonwealth v. Batts*,[285] the Supreme Court of Pennsylvania recognized a presumption against the imposition of life without parole for juvenile offenders and placed the burden on the state to prove beyond a reasonable doubt that the offender was incapable of rehabilitation.[286] The court was asked to review the resentencing of a *Montgomery* prisoner, convicted and sentenced prior to *Miller*. The trial court considered a litany of information, including expert testimony, and found Batts to be irreparably corrupt and resentenced Batts to life without parole.[287] The Supreme Court of Pennsylvania reversed that finding and set up the procedural framework for the other resentencings.[288]

The *Batts* decision is especially intriguing because of its treatment of the Pennsylvania lower court's consideration of expert testimony presented by the Commonwealth.[289] Dr. Michals, a forensic psychiatrist testified that, based on his review of an examination and psychological testing conducted by the defendant's expert, Batts's personality would not change and that his impulsiveness, poor judgment, and "acting out behavior" were "just unfortunately part of who he is," part of his "biological genetic

283. *See* JUVENILE SENTENCING PROJECT AT QUINNIPIAC UNIV. SCH. OF LAW & THE VITAL PROJECTS FUND, JUVENILE LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES, NOVEMBER 2017 SNAPSHOT, https://www.juvenilelwop.org/wp-content/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf (noting that Pennsylvania had approximately 525 juveniles serving life without parole at the time of *Miller* while Michigan and Louisiana had 363 and 290, respectively).

284. *See id.* (noting that Pennsylvania has 325 mandatory resentencings remaining; prosecutors in Michigan and Louisiana have elected to pursue life without parole sentences in resentencing hearings for 229 and 112 inmates, respectively).

285. *See* Commonwealth v. Batts, 163 A.3d 410, 418 (Pa. 2017) (presenting the procedural history).

286. *Id.*

287. *See id.* at 426 (recounting the trial court's finding that the aggravating factors significantly outweighed the mitigating factors).

288. *See id.* at 460 (reversing the trial court).

289. *See id.* at 438–39 (rejecting the psychiatrist's testimony as directly in opposition to the legal conclusions of the Supreme Court and the science backing those conclusions).

makeup."[290] The expert did note that he could not predict the future and that Batts had not received any psychological treatment or counseling in prison, but he believed that people generally do not change as they age.[291] Batts presented his own expert, who testified on the role Batts's horrible environment played in creating his situation, and that he believed with therapy, Batts would be able to change.[292] However, the trial court, in resentencing Batts to life without parole made reference to the defense experts' belief that "any rehabilitation will require years of psychotherapy" as a grounds for finding Batts to be among the irreparably corrupt.[293]

In overturning the lower court's ruling, the Supreme Court of Pennsylvania pointed out that the sentencing court had relied upon Dr. Michals's testimony to decide that Batts was not capable of rehabilitation, but "the testimony and conclusions espoused by Dr. Michals are in direct opposition to the legal conclusion announced by the High Court and the facts (scientific studies) underlying it."[294] In part, the Supreme Court of Pennsylvania reversed the sentencing court's decision because the expert testimony was just plain wrong.[295] However, the Supreme Court rejected Batts's argument that expert testimony be required for a court to make a determination that the defendant is irreparable.[296] The court believed that placing a presumption against the sentence and requiring the prosecution to prove permanent incorrigibility beyond a reasonable doubt would likely necessitate expert

290. *Id.* at 422.

291. *Id.* at 425.

292. *Id.*

293. *Id.*

294. *See id.* at 438 (reminding the lower courts that when the U.S. Supreme Court issues a decision, they are bound not only by the result, "but also by those portions of the opinion necessary to that result").

295. *See id.* at 438–39 ("Dr. Michals' testimony therefore does not constitute competent evidence and cannot provide support for a conclusion that Batts's actions were not the result of transient immaturity or that he is permanently incorrigible.").

296. *See id.* at 455–56 (declining to hold that expert testimony is constitutionally required to rebut the presumption against permanent incorrigibility and leaving it to the sentencing courts to determine the necessity).

testimony and thus a constitutional requirement was unnecessary.[297]

### *IV. The Link between Life Without Parole and Death Penalty Jurisprudence*

Prior to *Graham*, the Supreme Court often opined in the context of Eighth Amendment jurisprudence that "death is different."[298] After *Graham*, at least one commentator has identified a new "kids are different" jurisprudence arising at the intersection of death penalty cases and juvenile life without parole cases.[299] Professor Mary Berkheiser described the Court's use in *Graham* of an analytical approach previously reserved for death penalty cases as "unceremoniously demolish[ing] the Hadrian's Wall that has separated its 'death is different' jurisprudence from non-capital sentencing review from 1972."[300] Professor Berkheiser suggests that "[i]n its place the Court fortified an expansive 'kids are different' jurisprudence."[301]

For the first time in *Graham* the Court applied the legal reasoning that was previously reserved for death penalty cases to a case outside of the capital context.[302] Recognizing that life without parole is "the second most severe penalty permitted by law," the Court said that while death is "unique in its severity and irrevocability . . . life without parole sentences share some characteristics with death sentences that are shared by no other sentences."[303] The Court, thus, linked capital punishment with life

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297. *See also id.* at 460–61 (Wecht, J., concurring) (suggesting that expert testimony should be utilized by the State in almost all resentencings and that, where it is, the defendant should also be entitled to an expert in the interest of equity).

298. *See* Thomas, *supra* note 259, at 397.

299. *See* Berkheiser, *supra* note 157, at 1 (articulating the real impact of *Graham* as the sea change to the Court's use of its Eighth Amendment legal reasoning).

300. *Id.*

301. *Id.*

302. *See generally* Graham v. Florida, 560 U.S. 48 (2010) (addressing Graham's case under an analytical framework previously saved for death penalty jurisprudence).

303. *Id.* at 69.

without parole sentences in their irrevocability: "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration."[304] For juvenile defendants, the Court reasoned, life without parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days."[305] In effect, by reaching into its capital jurisprudence, the Court was opening a Pandora's box—enabling litigants to use the Eighth Amendment to pursue limits on noncapital sentencing.[306]

Before *Graham*, the Court had only ever used the Eighth Amendment to apply a categorical ban on sentences in capital cases, never in sentences of imprisonment.[307] With *Graham*, *Miller*, and *Montgomery*, the Court definitively expanded the limitations on sentencing provided by the Eighth Amendment into the realm of juvenile life without parole sentences.[308] While the Court has yet to push further in applying its Eighth Amendment limitations, it is clear, at least, that the Court wanted state courts to revisit their imposition of life without parole sentences on juvenile offenders. In order to interpret the Eighth Amendment procedural restriction on the state courts in *Montgomery*—the requirement that state courts find a juvenile offender irreparably corrupt before sentencing them to life without parole—it makes sense that we should look for guidance in the only area to which Eighth Amendment analysis had, until *Graham*, been applied—death penalty jurisprudence.

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304. *Id.* at 69–70.

305. *Id.* at 72 (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)).

306. *See* Russell & Denholtz, *supra* note 162, at 1124 (advocating for the use of Eighth Amendment challenges in noncapital sentencing contexts to push for better sentencing procedures for both juvenile and adult offenders).

307. *See id.* at 1125 ("In reviewing the constitutionality of noncapital sentences, the Court considered whether the sentence was 'grossly disproportionate' as applied to the offense and the offender.").

308. *See id.* at 1125–26 (explaining the expansion of the death penalty framework to the juvenile life without parole context).

### *V. Applying the Lessons of Death Penalty Jurisprudence*

As in *Montgomery*, when the Supreme Court in *Atkins v. Virginia*[309] drew an Eighth Amendment line mandating those with intellectual disabilities could not be executed, it left to the states how to implement this requirement.[310] In *Montgomery*, the Court in effect told the states there was a class of offenders—juvenile offenders whose crimes reflect the transient immaturity of youth—who were constitutionally protected from the most severe available punishment—life without parole.[311] In *Atkins*, the Court similarly told the states there was a class of offenders—the intellectually disabled—who were constitutionally protected from the most severe available punishment—death.[312] In both *Atkins* and *Montgomery*, the Court, in an effort to avoid overstepping its federalism bounds, gave state courts and sentencers a clear order that certain offenders were exempt from certain punishments, but gave little substantive guidance as to how the sentencer should determine who fell into the protected categories.[313]

Luckily, for state courts and sentencers baffled as to who is and is not "irreparably corrupt" the Supreme Court was forced in the years following *Atkins* to refine the boundaries of what states can and cannot do to determine which offenders are "intellectually disabled."[314] The guidance in these subsequent decisions can also

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309. 536 U.S. 304 (2002).

310. *Id.* at 317.

311. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (stating a different and more protective standard must apply to juveniles when considering a sentence of life without parole).

312. *See Atkins*, 536 U.S. at 321 (holding that execution of the "mentally retarded" is excessive and violative of the Eighth Amendment).

313. *Compare id.* at 317 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction.") (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986))), *with Montgomery*, 136 S. Ct. at 735

> When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the State's sovereign administration of their criminal justice systems. . . . [W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction.

314. *See* Hall v. Florida, 572 U.S. 701, 707 (2014) (rejecting Florida's scheme for determining intellectually disabled); Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017) (rejecting Texas's scheme for determining intellectually disabled).

provide guidance as to how state courts should determine the meaning of irreparable corruption and what kinds of evidence are persuasive, or perhaps even required, to make such a finding.

### *A. Looking to the* Atkins *Line of Cases for Guidance on Defining an Amorphous Standard*

Daryl Atkins was sentenced to death for committing a robbery-murder with an accomplice.[315] At sentencing, his defense relied upon the testimony of a forensic psychologist who testified that Atkins was "mildly mentally retarded."[316] The Supreme Court granted certiorari to revisit its prior decision in *Penry v. Lynaugh*[317] holding that the Constitution did not bar the execution of intellectually disabled defendants.[318] The Court undertook the familiar Eighth Amendment analysis and found that a national consensus had emerged against executing the intellectually disabled, as evidenced by the number of states that had taken legislative action to prohibit such sentences and the few executions being carried out in those states that maintained the penalty on the books.[319]

The Court then turned to consider whether the penological purposes of the death penalty—retribution and deterrence—were served by executing the intellectually disabled.[320] The Court concluded that intellectually disabled offenders' diminished capacities "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[321] As it would

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315. *Atkins*, 536 U.S. at 307.

316. *Id.* at 308–09. Atkins had an IQ of 59 and a mental age of a child between the age of nine and twelve-years-old. *Id.* While *Atkins* used the term mental retardation, the courts, and popular nomenclature, have since referred to intellectual disability. As used in this Note, the terms are interchangeable.

317. 492 U.S. 302 (1989).

318. *See id.* at 340 (concluding that the Eighth Amendment does not bar the execution of "any mentally retarded person").

319. *See Atkins*, 536 U.S. at 313 (acknowledging the judgment of the legislatures and noting that the Court has no reason to disagree with that judgment).

320. *See* Atkins v. Virginia, 536 U.S. 304, 318–19 (2002) (questioning whether any justification for the death penalty applies to "mentally retarded offenders").

321. *Id.* at 318.

later state with regard to juveniles, the Court found this diminished culpability sufficient to undermine the retribution rationale because an offender with diminished culpability for their crime could not be considered among the worst of the worst for whom the most severe penalty was reserved.[322] The Court pointed out that these same cognitive and behavioral impairments that lessened culpability also made these offenders less able to comprehend the possibility of death as a penalty and adjust their conduct accordingly.[323]

The *Atkins* decision diverged from many of the Court's previous Eighth Amendment reviews in that it bestowed on the states the power and obligation to define the class of defendants exempted from punishment by giving meaning to the term intellectually disabled.[324] Past death penalty exemptions for classes of offenders were based on clear delineations such as age[325] or offense.[326] The only exception until *Atkins* was *Ford v. Wainwright*,[327] in which the Court, finding the Eighth Amendment barred the execution of the mentally insane, explicitly left it up to the states to determine a procedure for deciding whether a

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322. *See id.* at 319 (concluding that the retribution rationale for the death penalty was not fulfilled by executing intellectually disabled offenders).

323. *See id.* at 320 (listing among these impairments: "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses").

324. *See id.* at 317 ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . [Thus] we leave to the States the task of developing appropriate ways to enforce the constitutional restriction . . . ."); *but see* Ford v. Wainwright, 477 U.S. 399, 416–17 (1986) (recognizing an already in-practice ban on executing the mentally insane and preserving the state's rights to continue to determine the procedure for deciding whether a defendant was insane or not).

325. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (barring the death penalty for defendants under age sixteen at the time of the offense).

326. *See* Kennedy v. Louisiana, 554 U.S. 407, 420–21 (2008) (barring the death penalty for child rape); Enmund v. Florida, 458 U.S. 782, 798 (1982) (barring the death penalty for accomplice without intent to kills in felony murder); Coker v. Georgia, 433 U.S. 584, 598 (1977) (barring the death penalty for adult rape).

327. *See generally* Ford v. Wainwright, 477 U.S. 399 (1986) (recognizing an already in-practice ban on executing the mentally insane and preserving the state's rights to continue to determine the procedure for deciding whether a defendant was insane or not).

defendant met a mental insanity standard.[328] Significantly, at the time of the *Ford* decision, no state actually allowed for the execution of the insane, so each state already had a procedure in place for its determination of whether a capital defendant belonged to this constitutionally protected class.[329] The Court in *Ford* was not directing the states to develop wholecloth a new standard to define mental insanity, but rather recognizing that the states existent definitions would suffice.

*Atkins* differed in that the constitutionally protected class it exempted did not have readily discernible members and the Court was telling the states to define intellectually disabled for themselves to determine who could and could not be executed.[330] By not establishing a bright-line rule, the Court delegated this task to the states with only the instruction that their standards would be constitutional so long as they "generally conformed" to the clinical definitions then in existence[331]—one set forth by the American Association on Intellectual and Development Disabilities (AAIDD)[332] and a virtually identical definition provided by the American Psychiatric Association (APA) in its Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).

The clinical definitions looked to three distinct aspects of an individual's deficits to make a determination of intellectual disability. First, the sentencer would look to the defendant's "intellectual functioning deficits," typically by using an IQ test.[333]

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328. *See id.* at 416–17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.").

329. *See id.* at 408 n.2 (reviewing the fifty states' existent approaches to determining who constitutes an insane offender).

330. *See id.* at 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus [regarding ineligibility for the death penalty].").

331. *See* Atkins v. Virginia, 536 U.S. 304, 317 n. 22 (2002) (noting that the statutory definitions of mental retardation already in use by states who had banned the death penalty for intellectually disabled offenders were not identical but generally conform to the clinical definitions).

332. The AAIDD was formerly known, and cited to in *Atkins*, as the American Association on Mental Retardation (AAMR).

333. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-5].

A defendant would meet the intellectual functioning deficit prong by scoring "approximately two standard deviations or more below the population mean" with room for a standard margin of error—an IQ in the range of 65–75.[334] Second, the clinical definition looked to adaptive skill deficits.[335] An impairment in any of three categories of adaptive deficits—conceptual, social, and practical—would be sufficient to meet the adaptive skills prong.[336] Clinicians based these determinations upon "knowledgeable informants . . . [and] educational, developmental, medical, and mental health evaluations."[337] Finally, the third prong required that a defendant's intellectual and adaptive deficits manifested at some point before the age of eighteen.[338]

However, as in *Montgomery*, the Court's delegation to the states to determine the meaning of intellectual disability created confusion and wide variation in the resulting standards.[339] By adopting clinical, rather than legal definitions, two problems arose. First, some states adopted additional requirements making the IQ requirements more restrictive (quantitative restrictions) or providing additional interpretive guidance for the adaptive prong (qualitative restrictions).[340] Second, the clinical diagnoses did not match up well to criminal culpability.[341] The result of both problems was underinclusive definitions of intellectual disability, leaving otherwise constitutionally protected individuals

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334. *Id.*

335. *See id.* (requiring "deficits in adaptive function that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility"); *Atkins*, 536 U.S. at 318 (including communication, self-care, and self-direction in this analysis).

336. Clinton M. Barker, *Substantial Guidance without Substantive Guides: Resolving the Requirements of* Moore v. Texas *and* Hall v. Florida, 70 VAND. L. REV. 1027, 1037 (2017).

337. DSM-5, *supra* note 333, at 33, 37.

338. *See id.* at 41 (setting the age-of-onset cutoff at eighteen to ensure the deficits occurred sometime during the developmental period).

339. *See* John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 693 (2009) ("This troubling array allows a defendant who would be ineligible for execution in one state to be eligible for execution in another.").

340. Barker, *supra* note 336, at 1037–38.

341. *See id.* (noting how the importation of clinical definitions into the legal realm assured continuing disagreement over the definition of intellectually disabled).

susceptible to capital punishment.[342] In other words, those who would meet the "intellectually disabled" criteria in one state would be eligible for execution in another state simply based upon the state's diverging approaches to applying the clinical definition.[343]

States had to make a number of determinations in setting up a procedure for deciding which death row defendants were intellectually disabled or not.[344] Should a judge or jury decide? Who would bear the burden of proof and what standard of proof would be required to show the defendant was intellectually disabled? According to Professor John Blume, these decisions contributed to the likelihood that an offender would be found to meet the definition of intellectually disabled.[345] His research showed that from 2002 to 2014 where the jury was tasked with the determination, only 4% of defendants were found to be intellectually disabled compared to a 43% success rate for *Atkins* claims overall.[346]

The success rates of *Atkins* claims varied significantly by state.[347] For example, Alabama, a state which applied a strict IQ cutoff and assessed adaptive functioning deficits based on what the claimant could do, as opposed to (as the clinical definition required) focusing on the claimants limitations, rejected 88% of *Atkins* claims, whereas North Carolina, which did not apply such a restrictive definition of intellectual disability found 80% of claimants met the definition of intellectually disabled.[348] Overall, Blume found that success rates were lower in states that had

342. *Id.*

343. *See* Blume et al., *supra* note 339, at 693 ("This troubling array allows a defendant who would be ineligible for execution in one state to be eligible for execution in another.").

344. *See* John Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Ba*r, 23 WM. & MARY BILL RTS. J. 393, 410 (2014) (assessing the success rates of claims in jurisdictions adopting different procedures for Atkins hearings).

345. *See id.* (considering various factors and their effects upon *Atkins* claim success rates).

346. *See id.* at 410–11 (noting the added discrepancy that jurors are typically found to show greater leniency, especially in death penalty cases).

347. *Id.*

348. *See id.* at 412 (displaying disparities in successful *Atkins* claims by state).

substantively deviated from the clinical definitions mentioned in *Atkins* as the lodestar for determining intellectual disability.[349]

Texas and Florida were two of the states that deviated the most from *Atkins* advice to follow the clinical definition.[350] As a result, before 2014, Florida had not found any defendant met its definition of intellectually disabled, and Texas, with the largest number of *Atkins* claims at forty-five, had only found eight defendants to be intellectually disabled under that state's rigorous standard.[351] While most states post-*Atkins* adopted the clinical definitions outright, Texas and Florida used the room provided by the Supreme Court's statement that it would leave to the states the creation of procedural rules to "enforce the constitutional restriction" to apply methods that were far more restrictive.[352] By doing so, these states excluded from the constitutionally protected class persons whom no reasonable clinician would exclude from a pool of subjects with intellectual disability.

In Florida, the courts applied a strict cutoff—if a defendant's IQ was above 70, even if it was 71 or within the margin of error, then his claim would be dismissed without even considering his adaptive functioning deficits or age of onset, the second and third prongs of the clinical definition.[353] The clinical definition referred to in *Atkins* recognized room for standard error, but the Florida courts would only go deeper into a defendant's deficits if the IQ score fell at or below 70.[354] The result was that a Florida defendant whose full scale IQ scores, providing a range rather than a snapshot, were between 68 and 86 could be executed, but a

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349. *See id.* at 414 ("Florida and Alabama are in that category, as both of them (prior to *Hall*) adhered to an IQ cutoff. Texas also deviates greatly, having adopted its own idiosyncratic approach to adaptive functioning.").

350. *Id.*

351. *Id.* at 412–14.

352. Blume et al., *supra* note 339, at 691.

353. *See* Cherry v. State, 959 So. 2d 702, 714 (Fla. 2007) (disqualifying a defendant with an IQ score of 72, even though it was within the standard error of measurement for qualifying under the IQ prong of *Atkins*).

354. *Compare* DSM-5, *supra* note 333, at 37 (finding an individual meets the intellectual prong of intellectual disability by scoring "approximately two standard deviations or more below the population mean, including a margin for measurement error," or between 65 and 75), *with Cherry*, 959 So. 2d at 713 (interpreting the statute defining intellectual disability as providing a threshold cutoff at 70).

California defendant with scores of 81 to 96 could not because the California courts adhered to the clinical definition and treated the *Atkins* prongs in totality.[355]

Texas, on the other hand, imposed qualitative restrictions by adding additional interpretative guidance to how sentencers should understand the adaptive functioning prong.[356] Texas added seven factors (the so-called *Briseno* factors) to the three-prong clinical test: (1) whether others thought the defendant was intellectually disabled, (2) whether the defendant formulated and carried through with plans, (3) whether the defendant's conduct showed leadership, (4) whether the defendant's conduct in response to external stimuli was rational, (5) whether the defendant could respond to questions coherently, (6) whether the defendant could hide facts and lie effectively, and (7) whether the crime required forethought or complex execution.[357] By adding these questions, Texas directed the adaptive prong inquiry not to the defendant's adaptive deficits, but to his strengths.[358] So while the clinical definition recognized that a defendant could have certain adaptive strengths, for example he could lie effectively but still have intellectual disability,[359] Texas would reject an *Atkins* claim so long as the defendant showed a strength in that one adaptive field.[360]

Over a decade after *Atkins*, the Supreme Court finally weighed in on this underinclusiveness problem in states' definitions of intellectual disability. In *Hall v. Florida*,[361] the Supreme Court invalidated Florida's use of the threshold IQ score, finding it

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355. *See* Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203, 1231 (2008) ("[A]s the comparison between Florida's and California's use of standardized IQ tests suggests, there are noteworthy inconsistencies in the ways in which state courts are using these tests.").

356. *See Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (describing the additional requirements).

357. *Id.* at 8–9.

358. Stephen Greenspan, *The* Briseno *Factors*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 219 (Edward A. Polloway ed., 2015).

359. DSM-5, *supra* note 333, at 33, 38.

360. Greenspan, *supra* note 358.

361. 572 U.S. 701 (2014).

inconsistent with *Atkins*.[362] The Court emphasized that the clinical definitions were a "fundamental premise of *Atkins*."[363] In affirming its intention that the states abide by the clinical definition, the Court reminded the states that they do not have complete autonomy to define intellectual disability but rather should view *Atkins* as providing "substantial guidance on the definition of intellectual disability."[364] The Court seemed to warn the noncompliant states to adopt the clinical definition without edits, or risk being continually reversed. However, because of the federalism concerns inherent in the Eighth Amendment punishment questions, the Court couched its instructions in terms of "substantial guidance on the definition."[365] The Sixth Circuit has supported this interpretation, claiming that *Hall* instructs the courts that "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue."[366]

The Court gave a similar directive in *Moore v. Texas*,[367] invalidating Texas's use of the *Briseno* factors.[368] "Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors create an unacceptable risk that persons with intellectual disabilities will be executed."[369] Drawing further upon the medical community, the Court chastised Texas's many departures from clinical practice in requiring the defendant to show his adaptive deficits were not related to a

362. *See id.* at 719 ("The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70.").

363. *Id.*

364. *See id.* at 720 ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.").

365. *Id.* at 721; *see also* Van Tran v. Colson, 764 F.3d 594, 612 (6th Cir. 2014) ("In *Hall*, the Court reasoned that the Constitution *requires* the courts and legislatures to follow clinical practices in defining intellectual disability.").

366. *Van Tran*, 764 F.3d at 612.

367. 137 S. Ct. 1039 (2017).

368. *See id.* at 1044 (holding Texas's scheme for determining intellectual disability impermissible restrictive).

369. *Id.*

personality disorder[370] and in focusing on adaptive strengths rather than adaptive deficits.[371] Repeating its refrain from *Hall*, the Court notes that the states have "some flexibility, but not unfettered discretion in enforcing *Atkins*'s holding."[372] However, the Court quickly supplied that the medical community's current standards constrain the states' flexibility here because they reflect the "best available description of how mental disorders are expressed and can be recognized by trained clinicians."[373] With the emphasis upon the medical community and the most current standards as a check upon the state's control in determining the meaning of intellectual disability, the Court further hints at a requirement to bind close to the clinical experts because of a recognition that they know best in this particular field.

### *B. Applying the Lessons of* Atkins

By expanding the modern Eighth Amendment analysis to the juvenile life without parole cases, the Supreme Court has arguably either broken wide open its "death is different" jurisprudence, or perhaps, more conservatively, has linked it together with a "kids are different" approach. Further, the Court's treatment of juvenile offenders is inextricably linked to its treatment of intellectually disabled offenders in *Atkins* because they are both based on the lessened culpability from diminished capacity. Recognizing that link, how does the Court's reentry into the discussion of how to define intellectually disabled offenders in *Hall* and *Moore* help lower courts struggling to define the similarly amorphous irreparable corruption standard?

The Supreme Court in both the *Atkins* and *Montgomery* context is caught in the crossfire between respecting the states' administration of their criminal justice systems and an

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370. *See id.* at 1051 ("As mental health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments.").

371. *See id.* at 1050 ("But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.").

372. *Id.* at 1053.

373. *See id.* (quoting DSM-5, at xli).

increasingly scientifically-based understanding of who the Eighth Amendment protects from society's harshest punishments.

In *Atkins*, the Supreme Court attempted to toe this line by leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction," while explicitly citing the clinical definition in its discussion of why an intellectually disabled offender has diminished personal culpability and is therefore constitutionally protected from execution.[374] However, by not explicitly requiring states to look to the clinical definition, the Supreme Court opened the door to states like Texas and Florida to essentially nullify *Atkins* by warping the clinical definition through the addition of quantitative or qualitative restrictions to the point that the assessment of whether an individual defendant was intellectually disabled no longer bore out the clinical underpinnings.[375] States were, thus, able to ignore what the leading psychiatrists and clinicians had to say in favor of their own restrictive ideas of what intellectual disability looked like.

Most tellingly, Texas, in setting out its restrictive definition, explicitly pitted the clinical definition of intellectual disability against Lennie, a fictional intellectually disabled character in John Steinbeck's *Of Mice and Men*.[376] In adding its seven additional factors to the adaptive functioning prong,[377]—factors that would save the fictional Lennie but none of the men on Texas's death row who met the clinical definition of intellectually disabled—Texas

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374. *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002) (referencing the clinical definitions intellectual and adaptive functioning prongs as they relate to diminished relative culpability).

375. *See* Hall v. Florida, 572 U.S. 701, 707 (2014) (rejecting Florida's hard cut-off IQ); *Moore*, 137 S. Ct. at 1052–53 (rejecting the *Briseno* factors).

376. *See Ex parte* Briseno, 135 S.W. 3d 1, 6 (Tex. Crim. App. 2004)

> Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. . . . But does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty?

377. *See id.* at 8 (setting out additional qualitative factors to be considered in assessing adaptive deficits).

rejected the expertise of professional psychologists in favor of this "Lennie Standard."[378]

This danger of courts dismissing a scientific standard in favor of what they feel to be an appropriate definition threatens to play out in the *Montgomery* context. To avoid the development of a Lennie-like standard, courts should heed the lesson of *Hall* and *Moore* and adhere to the what the science tells us. In *Hall* and *Moore*, this meant an adherence to the clinical definition, but in the *Montgomery* cases we have no "clinical definition" of irreparable corruption. There are factors for the Court to consider,[379] but no clinical definition per se. What the state courts have in lieu of a clinical definition, however, is an acknowledgment by the court that "it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[380]

It is bewildering that the Supreme Court would use as a standard for determining whether a juvenile can be punished to the harshest penalty available to them a distinction which it knew to confound even expert psychologists. Justice Scalia rails against this in his *Montgomery* dissent, accusing the majority of creating a de facto constitutional protection against life without parole for *all* juveniles because no court would be able to interpret the irreparable corruption standard.[381] Applying the lessons of *Atkins*, it seems Scalia was right. Both the protection for intellectually disabled offenders and for juvenile offenders were fashioned out of a conception that these cannot be the worst of the worst because of

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378. *See* Adam Liptak, *Supreme Court to Consider Legal Standard Drawn From 'Of Mice and Men'*, N.Y. TIMES (Aug. 22, 2016), https://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html (last visited Dec. 2, 2018) (reporting that Texas's brief in *Moore* urged the Supreme Court to let judges and juries decide the standard rather than medical professionals) (on file with the Washington and Lee Law Review).

379. *See* Miller v. Alabama, 567 U.S. 460, 475–76 (2012) (setting out the mitigating factors to be considered as "the mitigating qualities of youth").

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

381. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 744 (2016) (Scalia, J., dissenting) ("[T]his whole distortion of *Miller*[] is just a devious way of eliminating life without parole for juvenile offenders.").

their diminished culpability.[382] In both instances, that diminished culpability analysis is drawn from developments in psychology and neuroscience.[383] If we apply the Supreme Court's directive from *Hall* and *Moore* that courts need to adhere to the science, then the science behind juvenile brain development tells us that experts cannot make a determination as to whether a juvenile is irreparably corrupt because their brains are still developing.[384] If the lower courts stick to the science when it comes to juveniles, as *Hall* and *Moore* suggest they should when it comes to the intellectually disabled, then there should be a requirement for expert testimony in *Montgomery* cases. To make a finding that a juvenile offender is irreparably corrupt, the courts should require prosecutors to present an expert who can testify that an individual offender is irreparably corrupt and allow the offenders to present expert testimony to rebut. The courts should require such evidence, even if finding credible experts for the prosecution is near impossible.[385] This may be a confounding Catch-22, but it was one the Court was aware of when it got caught in the crossfire of federalism and reading adolescent brain science into the Eighth Amendment.[386]

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382. *Compare id.* at 726 (clarifying *Miller*'s requirement that sentencers consider a child's diminished culpability and capacity for change), *with Atkins*, 536 U.S. at 318 (explaining how diminished culpability eliminates the retribution rationale for the death penalty).

383. *Compare Montgomery*, 136 S. Ct. at 733 (drawing the connection to *Roper* and *Graham*'s rationale that children are different), *with Atkins,* 536 U.S. at 318 ("[T]here is abundant evidence that [intellectually disabled offenders] often act on impulse . . . and that in group settings they are followers rather than leaders.").

384. *See* Luna & Wright, *supra* note 253, at 109 (finding that because of "rapid change in brain processes during adolescence, who [these children] will become as adults is not yet clear").

385. *See* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239, at *21 ("The predictive power of juvenile psychotherapy assessments . . . remains poor."); *Roper*, 543 U.S. at 573 (citing adolescents developing brains as the rationale which "underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder").

386. *See Roper*, 543 U.S. at 573 ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation . . . .").

## *VI. Conclusion*

The Supreme Court's juvenile life without parole cases were a reaction to the perceptible problem that the United States was sending too many people to prison for the rest of their lives for crimes committed as children. The growing numbers of juvenile lifers flew directly in the face of what developing brain research and psychology were showing: that kids really are different. The Court's concern with the use of the harshest available penalties for those with diminished culpability had the right idea. But, unfortunately, in both *Atkins* and *Montgomery*, the Court's apprehension of overstepping their bounds by interfering with the states' administration of their criminal justice systems resulted in constitutional restrictions that required the states to try and define amorphous standards. Both the intellectual disability standard and the irreparable corruption standard draw from clinical psychology. Yet, by allowing states to define irreparable corruption, as they did intellectual disability, there is a real danger that the standard will be not be based on science. Rather, as the Lennie Standard reveals, they will be based on what the average Texan or Floridian thinks an irreparably corrupt child should be. The lesson of *Atkins* is to avoid this unmooring from the clinical definitions. The state courts should, thus, require expert testimony from the states and allow juvenile offenders the opportunity to present experts of their own when determining irreparable corruption.