NOTE

"Permanently Incorrigible" Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole

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ABSTRACT

Juvenile life without parole ("JLWOP") is the most severe criminal penalty for juveniles tolerated by the Eighth Amendment's prohibition against cruel and unusual punishment and is imposed only on those juvenile defendants convicted of homicide crimes. In Miller v. Alabama*, the Supreme Court struck down mandatory JLWOP sentences as unconstitutional. However, a juvenile defendant can still receive a discretionary JLWOP sentence if (1) she is convicted of a homicide offense, and (2) her crime reflects "permanent incorrigibility" as opposed to "transient immaturity." The sentencer determines whether a defendant is permanently incorrigible after consideration of certain mitigating factors. The Court in* Montgomery v. Louisiana *clarified that* Miller *did not impose a formal factfinding requirement on trial courts and that the sentencing court retained discretion to determine what procedures it used to make this determination. With no formal process required, some lower courts have foregone any meaningful factfinding before meting out JLWOP sentences.*

Juvenile sentencing is often analyzed within the Eighth Amendment's "cruel and unusual punishment" framework. However, JLWOP also impli-

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cates the Sixth Amendment's jury requirement because it functions as an enhanced sentence. An enhanced sentence requires additional factual findings that elevate the penalty beyond the statutory maximum authorized by the jury verdict alone. Under the Sixth Amendment, all facts that elevate a penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Therefore, "whether a defendant is permanently incorrigible" is a factual question that should be submitted to the jury and proved beyond a reasonable doubt.

Because JLWOP functions as an enhanced sentence, the Sixth Amendment imposes a formal factfinding requirement on the sentencer even if Miller *does not impose this requirement. To serve the Court's intention in* Miller *and the Sixth Amendment's mandates for enhanced sentences, trial courts should place a presumption against the imposition of JLWOP that requires the state to prove to a jury, beyond a reasonable doubt, that the defendant's crime reflects permanent incorrigibility.*

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Introduction

Qu'eed Batts was fourteen years old when he was sentenced to die in prison.[1] Batts was born to teenage parents and grew up in the foster care system, bouncing between more than ten foster homes and even a homeless shelter during his childhood.[2] As a child, Batts was exposed to physical and sexual violence.[3] He had fragmented relationships with his mother, who neglected and abused him, and his father, who was in and out of jail.[4] While in middle school, Batts met a teenage member of the Bloods gang, who told Batts that the gang took care of each other like a family.[5] Batts found this "enticing."[6] Soon after the gang initiated him, Batts's academic performance declined and his relationship with his mother deteriorated.[7] After staying out late one night, his mother hit him, and Batts left the next morning and never returned home or to school.[8] A few days later, a senior gang member gave Batts a gun, and instructed him to "put work in" and kill two teenagers.[9] Batts did as he was told, killing one victim and injuring another.[10] According to his police statement and testimony at trial, Batts said that immediately after the shooting, he "regretted what he had done and was scared," but "was afraid that if he did not comply" with the member's demands, he would have been killed.[11]

The trial court rejected both expert testimony that Batts could be rehabilitated by age twenty-one and Batts's duress defense.[12] A jury convicted him of first-degree murder, which carried a then–mandatory sentence of life without the possibility of parole.[13] Batts appealed.[14] In the wake of *Miller v. Alabama*,[15] the United States Supreme Court decision striking down mandatory juvenile life without parole

1 *See* Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 415 (Pa. 2017).

2 *See id.* at 416.

3 *See id.*

4 *See id.* Batts eventually ended up back in his mother's custody. *See id*.

5 *Id.* at 417.

6 *Id.*

7 *See id.*

8 *See id.*

9 *Id.*

10 *See id.*

11 *Id.*

12 *Id.* at 418.

13 *Id.* at 418–19.

14 Batts had previously brought an appeal to the Superior Court challenging the constitutionality of his sentence in light of the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which struck down the juvenile death penalty. *Batts II*, 163 A.3d at 419. The Superior Court affirmed his sentence, holding that *Roper* was inapplicable. *Id.*

15 567 U.S. 460 (2012).

("JLWOP") sentences,[16] the Pennsylvania Supreme Court remanded Batts's case to the superior court for a new sentencing hearing.[17] At his resentencing, the judge heard conflicting expert testimony about Batts's young age, traumatic childhood, neglectful family environment, below-average IQ, and potential for rehabilitation, but found that the aggravating factors outweighed the mitigating factors.[18] The judge reinstituted a JLWOP sentence and told the then-14-year-old, "[Y]ou committed a calculated, callous[,] and cold-blooded murder. You made yourself the judge, jury[,] and executioner of [the victim]. . . ."[19]

Qu'eed Batts is now 28 years old.[20] He has been sentenced twice[21] since he was first convicted in 2007.[22] He is still awaiting a third resentencing.[23] His case illustrates some of the challenges lower courts encounter in administering the JLWOP standard set forth by the Court in *Miller*. Batts's situation also demonstrates the toll exacted by the appeals and resentencing process on defendants, victims and their families, and the court system. The Court in *Miller* held that JLWOP was an unconstitutionally excessive punishment except for those "rare" juvenile defendants whose homicide crimes reflect not "transient immaturity," but rather "irreparable corruption."[24] This standard has proven to be highly unworkable in practice.[25] The resulting confu-

16 *See id.* at 489. This Note discusses *Miller* at length. *See infra* Section I.A.

17 Commonwealth v. Batts (*Batts I*), 66 A.3d 286, 295, 299 (Pa. 2013) (rejecting the defense's argument that the Pennsylvania constitution required a categorical ban of JLWOP).

18 *See Batts II*, 163 A.3d at 422–26 (citing Notes of Testimony, Resentencing Hearing at 66–67, Commonwealth v. Batts, No. C-48-CR-1215-2006 (C.P. Northampton Co. May 1, 2014) [hereinafter N.T. Resentencing Hrg.]).

19 *Id.* (citing N.T. Resentencing Hrg., *supra* note 18, at 66).

20 *See id.* at 416 ("Batts was born . . . on April 18, 1991.").

21 Batts was first sentenced on October 22, 2007 to a then–mandatory JLWOP sentence. *Id.* at 419. Following the Court's decisions in *Roper* and *Miller*, and other changes the Pennsylvania legislature made to a relevant sentencing statute, a number of appeals were filed. *See id.* at 418–27. Ultimately, the sentencing court reinstituted Batts's JLWOP sentence and a divided panel of the Pennsylvania Superior Court affirmed. *Id.* at 426.

22 *See* Riley Yates, *'I Don't Know Why I Did It, Honestly,' 14-year-old Easton Killer Says*, MORNING CALL (Jan. 23, 2018, 7:35 PM), https://www.mcall.com/news/breaking/mc-nws-easton-juvenile-murderer-queed-batts-resentencing-20180123-story.html [https://perma.cc/HXF7-NBLT] ("Twice, Batts has been condemned to life in prison without parole . . . .").

23 *See After 2016 Ruling, Battles over Juvenile Life Sentence Cases Persist*, LEHIGHVALLEYLIVE.COM (Jan. 21, 2019), https://www.lehighvalleylive.com/news/2019/01/after-2016-ruling-battles-over-juvenile-life-sentence-cases-persist.html [https://perma.cc/5XKY-TFFR].

24 Miller v. Alabama, 567 U.S. 460, 479–80. While the author has serious doubts that any child can be factually deemed "permanently incorrigible," this Note accepts this premise as true because this is the standard set forth by the Supreme Court. *See id.* at 473.

25 *See infra* Part II.

sion and inconsistency among trial courts heightens the risk of erroneous and arbitrary deprivation of liberty for all eligible juvenile defendants.[26] This Note seeks to clarify *Miller*'s "permanently incorrigible" standard by analyzing the Eighth and Sixth Amendment implications that it triggers.

Part I describes the Court's shift in juvenile sentencing beginning in the early 2000's and leading up to the substantive rule announced in *Miller*. Part I also examines the scientific basis for the Court's conclusion that youth should be treated differently from adults in sentencing. Part II analyzes why the *Miller* standard, as it currently exists, is not an adequate protection against the erroneous imposition of JLWOP under the Eighth Amendment. Part III provides a brief overview of the Court's Sixth Amendment jurisprudence regarding the right to a jury. Part III also argues that JLWOP is the functional equivalent of an enhanced sentence, and thus triggers certain procedural requirements under the Sixth Amendment. Part IV proposes a solution to the problems identified in Parts II and III. This solution imposes these Sixth Amendment procedures and also draws on the Pennsylvania Supreme Court's sentencing approach in *Commonwealth v. Batts* ("*Batts II*").[27] Specifically, this solution would adopt a presumption against the administration of JLWOP and place the burden of rebutting the presumption on the state. The state may overcome this presumption only if the sentencing court formally submits to the jury the question of whether the defendant is permanently incorrigible, and the jury finds that the state has affirmatively proved this beyond a reasonable doubt.

I. A Brief History of Juvenile Sentencing: The Eighth Amendment and Juvenile Life Without Parole

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[28] One might think that what is "cruel" or "unusual" for adults surely differs for children. However, less than fifteen years ago, juvenile defendants were subject to the same punishments as adult defendants, which meant that certain juveniles were eligible to receive the death penalty.[29] When the Supreme Court in *Roper v.*

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26 *See infra* Part II.

27 163 A.3d 410 (2017).

28 U.S. Const. amend. VIII.

29 *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (finding the death penalty a "disproportionate punishment" for all juveniles and overruling *Stanford v. Kentucky*, 492 U.S. 361, 361 (1989), which upheld the death penalty as constitutional for teenagers aged sixteen and seventeen).

Simmons[30] finally struck down the juvenile death penalty as violative of the Eighth Amendment, it noted, grimly, "[o]ur determination . . . finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[31] *Roper* signaled the start of a change in juvenile sentencing for the Court. Seven years later, in *Miller v. Alabama*,[32] the Court struck down mandatory JLWOP and held, definitively, "children are constitutionally different from adults for purposes of sentencing," rooting this finding in adolescent neuroscience research.[33] This Part explores why, as a matter of law and science, juveniles are entitled to a lower Eighth Amendment punishment threshold than adults.

A. Cruel and Unusual Punishment for Juveniles: The Miller *Trilogy*

Recognizing that juveniles are fundamentally different from adults is significant in the criminal justice system because it dictates the procedures used to adjudicate guilt,[34] as well as the available punishments.[35] With the creation of juvenile court in 1899, most juvenile defendants were removed from the adult criminal justice and corrections systems.[36] At first, "juvenile court emphasized treatment, supervision, and control rather than punishment," and lacked the formal procedures of the adult criminal justice system that were intended to act as safeguards against the prosecution and the court itself.[37] This changed in 1967 when the Supreme Court held that judicial paternalism and "discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure," and found that juveniles were entitled to, at minimum, the same procedural safeguards as adults.[38]

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30 543 U.S. 551 (2005).

31 *Id.*

32 567 U.S. 460 (2012).

33 *Id.* at 471.

34 *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 74–90 (1997) (providing an overview of the mechanics of and procedures used in the juvenile justice system).

35 While the harshest possible punishment for juveniles is JLWOP, *see Miller*, 567 U.S. at 479, for adults it is the death penalty, *see Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (J. Brennan, dissenting).

36 *See* Feld, *supra* note 34, at 71.

37 *See id.*

38 *In re Gault*, 387 U.S. 1, 18, 29–31 (1967). The Court further remarked, "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

Nearly forty years later, the Court again showed interest in juvenile justice and decided a series of cases—the *Miller* trilogy—that vastly changed the sentencing landscape for juvenile defendants by establishing that juveniles are constitutionally different from adults.[39] In 2005, the Supreme Court held in *Roper v. Simmons*[40] that imposition of the death penalty on juvenile defendants violated the Eighth Amendment's prohibition of cruel and unusual punishment.[41] In 2010, the Court held in *Graham v. Florida*[42] that imposition of JLWOP for juveniles convicted of nonhomicide crimes violated the Eighth Amendment.[43] Finally, in 2012, the Court in *Miller v. Alabama*[44] found that mandatory imposition of JLWOP for homicide offenders violated the Eighth Amendment.[45] The Court in *Miller* reasoned that the sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[46] The Court further reasoned that the imposition of mandatory JLWOP "preclude[d] consideration of [a juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[47] Post-*Miller*, only after this consideration of youth and its mitigating attendant qualities could a defendant be sentenced to JLWOP.[48] Thus, discretionary JLWOP currently serves as the harshest possible penalty for juvenile defendants.[49]

The Court qualified that JLWOP should be an "uncommon" sentence and reserved only for "the rare juvenile offender whose crime reflects irreparable corruption."[50] The Court failed to define what it meant by "irreparable corruption."[51] A few years later, the Court in *Montgomery v. Louisiana*[52] clarified that *Miller* had retroactive effect

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39 *See Miller*, 567 U.S. at 471.

40 543 U.S. 551 (2005).

41 *Id.* at 578.

42 560 U.S. 48 (2010).

43 *Id.* at 79.

44 567 U.S. 460 (2012).

45 *Id.* at 489. The decision to delineate nonhomicide and homicide offenses for penal purposes, the Court stated, was based on considerations of "both moral culpability and consequential harm." *Id.* at 473.

46 *Id.* at 489.

47 *Id.* at 477.

48 *See id.* at 489.

49 *See id.* (explaining that the discretion available to a judge when determining whether a juvenile should be transferred from juvenile to adult court is insufficient under the Eighth Amendment as a "substitute for discretion at post-trial sentencing in adult court").

50 *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2012)).

51 *See id.*

52 136 S. Ct. 718 (2016).

because it set forth the substantive constitutional rule that mandatory JLWOP violated the Eighth Amendment and that JLWOP is a discretionary sentence reserved only for juvenile offenders who are "permanently incorrigible."[53] This meant that all juveniles who had received mandatory JLWOP sentences pre-*Miller* were entitled to resentencing.[54] Again, the Court neglected to provide a definition for "permanently incorrigible," but in *Montgomery* appeared to treat the vague terms "irreparable corruption" and "permanent incorrigibility" as interchangeable.[55]

In *Montgomery*, the state argued that *Miller* could not "have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility."[56] The Court responded that, although *Miller* did not impose a formal factfinding requirement on trial courts *as a matter of procedure*, it provided a substantive "guarantee"—that only juvenile defendants whose crimes reflected permanent incorrigibility could receive JLWOP.[57] The Court justified its decision to not impose a formal factfinding requirement as an attempt 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."[58] Thus, the Court's decision to not impose a procedural requirement reflected its desire to respect the states' institutional independence, not any unwillingness to create a substantive right for juvenile defendants convicted of homicide offenses.

Although the *Miller* trilogy pushed juvenile justice toward the progressive end of the sentencing spectrum, certain juvenile defendants convicted of homicide crimes may still receive a JLWOP sentence, if sought by the prosecution and administered at the sentencer's

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53 *Id.* at 734, 736.

54 *Id.* at 736.

55 *See id.* at 734 (referring to "permanent incorrigibility" and "irreparable corruption" in the same paragraph and in the same context: that life without parole is reserved only for juveniles whose crimes reflect either "permanent incorrigibility" or "irreparable corruption"). This Note refers primarily to the "permanently incorrigible" standard.

56 *Id.* at 735.

57 *Id.*

58 *Id.* As a result, many states that permit JLWOP do not "require a finding of irreparable corruption by the sentencer." 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, 175 (2017).

discretion.[59] However, JLWOP remains unconstitutionally excessive for all juveniles except those who are "permanent[ly] incorrigibl[e]," that is, "irreparabl[y] corrupt[]."[60]

B. The Neuroscience Behind the Court's Shift

That "children are constitutionally different from adults for purposes of sentencing"[61]—an idea first established in *Roper*[62] and *Graham*,[63] and advocated by Justice Elena Kagan in her *Miller* opinion[64]—marks a change brought about by shifting societal attitudes and developments in scientific research of the adolescent brain.[65] The Court in *Miller* enumerates three main reasons for this conclusion, based on "common sense" and "science and social science."[66] First, children are immature and have an "underdeveloped sense of responsibility."[67] Second, children are more susceptible to "'negative influences and outside pressures,' including from their family and peers."[68] And third, "a child's character is not as 'well formed' as an adult's,"[69] that is, since a child's personality will change with age, her actions are "less likely to be evidence of irretrievabl[e] deprav[ity]."[70] At any rate, the Court makes clear in *Roper*, *Graham*, and *Miller* that youth and its attendant circumstances are highly relevant in determining whether JLWOP is an appropriate sentence for a juvenile defendant.[71]

Scientific and social scientific research on the adolescent brain soundly supports the Court's finding that children should be treated differently from adults under the Constitution. MRI technology has

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

60 *Montgomery*, 136 S. Ct. at 734, 736.

61 *Miller*, 567 U.S. at 471. For the purposes of this Note, "children," "youth," and "juveniles" refer to any person under the age of eighteen, the federal age of maturity in the United States, despite the fact that one scholar noted that "[a]dolescence comprises a developmental continuum; young people do not graduate from irresponsible childhood one day to responsible adulthood the next, except as a matter of law." Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 202 (1998).

62 *See* Roper v. Simmons, 543 U.S. 551, 569 (2012) (noting the general differences between juveniles and adults).

63 *See* Graham v. Florida, 560 U.S. 48, 68 (2010) (referring to the "fundamental differences between juvenile and adult minds").

64 *See Miller*, 567 U.S. at 471.

65 *See id.*

66 *Id.*

67 *Id.* (quoting *Roper*, 543 U.S. at 569).

68 *Id.* (quoting *Roper*, 543 U.S. at 569).

69 *Id.* (quoting *Roper*, 543 U.S. at 570).

70 *Id.* (quoting *Roper*, 543 U.S. at 570).

71 *See id.* at 473.

given way to brain mapping studies that demonstrate the differences in the development of the prefrontal cortex in youth as compared with adults.[72] The prefrontal cortex is responsible for a range of cognitive functions, including "self-control, rational decision making, problem solving, organization, and planning,"[73] and "regulating aggression, long-range planning, mental flexibility, abstract thinking . . . [and] moral judgment."[74] The prefrontal cortex continues to develop into a person's early twenties, which makes youth less able than adults to make rational decisions based on an appreciation of the potential consequences of their actions.[75]

Another important area examined in brain mapping studies is the amygdala.[76] The amygdala functions to analyze emotion and is central in detecting danger and generating the fear response—"fight or flight."[77] When recognizing and interpreting others' facial expressions, research has found that while adults rely primarily on the frontal lobe, which is involved in "planning, goal-directed behavior, judgment, [and] insight," youth rely more heavily on the amygdala, which is the emotional center or the "gut response region" of the brain.[78] This neurological difference in perception of emotion and danger makes youth more likely than adults to act impulsively in certain situations, especially when those situations are emotionally charged or dangerous.[79]

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72 *See, e.g.*, Elizabeth C. Kingston, *Validating* Montgomery*'s Recharacterization of* Miller*: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23, 26–27 (2016) (citing AM. BAR ASS'N, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 1 (Jan. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf [https://perma.cc/PH4X-JJSG]). The two processes relevant to prefrontal cortex development are the synaptic connections formed through dendrite production (which develops the learning process) and myelination (which allows the brain to communicate quickly and effectively). *See id.*

73 BARRY CORBIN, UNLEASHING THE POTENTIAL OF THE TEENAGE BRAIN: TEN POWERFUL IDEAS 24 (2007).

74 Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, 165 SCI. NEWS 299, 299 (2004).

75 *See* Kingston, *supra* note 72, at 28.

76 *See* Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 924 (2009).

77 *See id.* at 924 (citing Joseph LeDoux, *The Amygdala*, 17 CURRENT BIOLOGY R868, R870 (2007)).

78 *See id.* at 925 (quoting Interview by Sarah Spinks with Deborah Yurgelun-Todd, Director, Neuropsychology and Cognitive Neuroimaging of McLean Hosp., in Belmont, Mass. (television broadcast Jan. 31, 2002), available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html [https://perma.cc/2P6M-9CLT] (finding that youth had more trouble identifying the emotion of fear than adults)).

79 *See id.* at 918.

While citing neuroscience to explain the differences between adolescent and adult brain development is useful in creating policy, it is difficult to apply these differences in individualized instances, such as at sentencing hearings.[80] Considering *Miller* and *Montgomery*'s conclusion that children are constitutionally different from adults, how can a court best determine the ways in which individual juvenile defendants differ from each other such that it can separate out the permanently incorrigible from the non–permanently incorrigible defendants?[81]

II. The *Miller* Standard Is Inadequate Under the Eighth Amendment at Limiting JLWOP to Only Permanently Incorrigible Juvenile Defendants

Although *Miller* can be narrowly read as striking down mandatory JLWOP sentences, its holding should be read more broadly as setting forth certain sentencing requirements for juvenile defendants convicted of homicide offenses who are exposed to discretionary JLWOP sentences.[82] The Supreme Court held that while a sentencer is not foreclosed from imposing JLWOP on "permanently incorrigible" juvenile defendants, it must take into account "children's diminished culpability and heightened capacity for change" before meting out that sentence.[83] Unfortunately, the Supreme Court did not make clear *how* the sentencer should go about making the "permanent incorrigibility" determination or *who* the sentencer should be.[84] *Miller* and its progeny offer little guidance to lower courts, and trial judges have struggled during sentencing to identify and weigh mitigating factors to determine whether a defendant's crime reflected "transient immaturity" or "permanent incorrigibility."[85] This lack of

80 Francis X. Shen, *Legislating Neuroscience: The Case of Juvenile Justice*, 46 Loy. L.A. L. Rev. 985, 995 (2013) (noting that "current science tells us reliably about group average differences in brain development in age, but cannot reliably tell us about the *individual* cognitive ability of a particular juvenile in the criminal justice system" (emphasis added)).

81 *See id.* at 1015 ("It does not strain common sense to think that at least a few of the sixteen-year-olds in the country who commit a violent, premeditated crime are rotten to the core, and for whatever reasons have little chance for reform. Could neuroscience ever help us identify these individuals (and feel comfortable with the reliability of that identification)? Maybe not.").

82 *See* Sarah F. Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. Rev. 553, 567–68 (2015).

83 Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

84 *See generally id.*

85 *See, e.g.*, Tatum v. Arizona, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (citing Montgomery v. Louisiana, 136 S. Ct. 718 (2016)).

guidance is problematic because it increases the risk of similarly situated defendants receiving different sentences and non–"permanently incorrigible" juveniles erroneously receiving JLWOP sentences.[86]

The inadequacies of the JLWOP standard articulated in *Miller* stem from a lack of substantive and procedural clarity.[87] The *Miller* standard's lack of substantive clarity largely stems from the Court's failure to provide definitions for "permanent incorrigibility" or "irreparable corruption." The lack of procedural clarity, including confusion over exactly who should make the determination of "permanent incorrigibility," raises concerns under the Sixth Amendment, and is discussed in Part III.[88] This Part explains the *Miller* standard's substantive deficiencies under the Eighth Amendment.

The *Miller* standard purports to draw a line between juvenile defendants whose crimes reflect "transient immaturity" and juvenile defendants whose crimes reflect "irreparable corruption."[89] However,

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Justice Sonia Sotomayor noted that in the consolidated cases below, while the trial judges had identified age as a mitigating factor, and in some cases, had identified other factors such as "emotional[ ] and physical[ ] immatur[ity][,]" efforts at self-rehabilitation, and a troubled childhood and family environment, the judges had insufficiently weighed these factors in the *Miller*/*Montgomery* evaluation. *Tatum*, 137 S. Ct. at 12–13. In the named case, the sentencing judge "merely noted age as a mitigating circumstance without further discussion." *Id.* at 13. All of these efforts fell short of the "very meaningful task" of sentencing juvenile defendants in accordance with the "permanently incorrigible" standard. *Id.*; *see also, e.g.*, State v. Seats, 865 N.W.2d 545, 557–58 (Iowa 2015) (vacating the district court's imposition of JLWOP after finding that the court improperly used the defendant's family and home environment, lack of maturity, and vulnerability to peer pressure as aggravating instead of mitigating factors).

86 *See* Hoesterey, *supra* note 58, at 183. The Court in *Graham* noted that while "categorical rules tend to be imperfect," a categorical rule against JLWOP for nonhomicide juvenile defendants reduced the risk of erroneous imposition of JLWOP onto an undeserving juvenile defendant. Graham v. Florida, 560 U.S. 48, 68, 75–79 (2010). The Court's argument in favor of a categorical rule is equally applicable to those juvenile defendants facing a charge of homicide.

87 Though discussion of this issue is beyond the scope of this Note, a third category—lack of rarity—also contributes to the inadequacy of the *Miller* standard. Prosecutors in states with no statutory prohibition on JLWOP have continued to seek JLWOP sentences at a rate that does not necessarily reflect the Court's belief that it should be a "rare" sentence. *See, e.g.*, Editorial, *Justice at Last for the Youngest Inmates?*, N.Y. Times (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/opinion/life-sentence-youth-parole.html [https://perma.cc/H897-GJ9D] (reporting that, as of 2017, prosecutors in Michigan sought resentences of JLWOP in more than half of the state's cases, and prosecutors in Louisiana sought resentences of JLWOP in over thirty percent of cases); *see also* Ben Finholt et al., *Juvenile Life Without Parole in North Carolina*, Duke L. Sch. Pub. L. & Legal Theory Series No. 2019-16, at 20 (2019) (noting that "once a county has used a juvenile LWOP sentence, that county has a higher probability of using a juvenile LWOP sentence again in the future," a correlation that implies "some form of institutional inertia").

88 *See infra* Part III.

89 *Montgomery*, 136 S. Ct. at 734.

the Court did a poor job of explaining why this standard is appropriate for determining which juveniles should receive JLWOP.[90]

Throughout the *Miller* opinion, the Court muses that youth "diminish[es] the penological justifications"[91] for JLWOP because juveniles are less blameworthy and have a higher capacity for change, and that youth is "inconsistent" with incorrigibility.[92] Declaring that youth is inconsistent with incorrigibility, the Court in the same breath announced a standard under which the sentencer must take youth into account when determining whether a juvenile defendant is permanently incorrigible.[93] The irreconcilability of the *Miller* Court's statements on youth and its standard only serves to further confuse application of the *Miller* standard.

The Court's subsequent opinion in *Montgomery* provides a more robust version of the *Miller* standard: that JLWOP is barred for all juvenile defendants except for "the rarest of juvenile offenders" who have committed homicide, whose crimes reflect "permanent incorrigibility" or "irreparable corruption,"[94] and for whom "rehabilitation is impossible."[95] However, the Court failed to define or further explain these terms in either *Miller* or *Montgomery*.[96]

In an attempt to aid the "permanent incorrigibility" determination, the Court in *Miller* set forth what appears to be an illustrative but nonexhaustive list of mitigating factors that the sentencer should consider in determining whether a defendant meets the JLWOP standard, including: (1) the juvenile's "age and its hallmark features," (2) the juvenile's "family and home environment," (3) the "circumstances" and "extent of [the juvenile's] participation" in the homicide offense, (4) the influence of "familial and peer pressure[]" on the juvenile, (5) any "incompetencies associated with youth," such as the inability to deal with law enforcement and the prosecution or to assist

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90 *See* Hoesterey, *supra* note 58, at 182.

91 Miller v. Alabama, 567 U.S 460, 472 (2012).

92 *See id.* at 472–73 (quoting Graham v. Florida, 560 U.S. 48, 72–73 (2010)).

93 *See id.* at 479–80.

94 *Montgomery*, 136 S. Ct. at 734. It does not help that the standard employs vague ("corruption") and archaic ("incorrigibility") language. Dictionary definitions of "incorrigibility" ("[s]erious or persistent misbehavior by a child, making reformation by parental control impossible or unlikely") and "corruption" ("[d]epravity, perversion, or taint; an impairment of integrity, virtue, or moral principle") are unilluminating. *Incorrigibility*, *Corruption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

95 *Montgomery*, 136 S. Ct. at 733.

96 *See* Hoesterey, *supra* note 58, at 182 (noting that neither opinion "defines what evidence would support a finding of irreparable corruption nor . . . provide[s] guidelines for identifying the exceptionally rare juvenile who is eligible for life without parole").

her own attorney, and (6) the juvenile's potential for rehabilitation.[97] However, all of the factors are vague, and certain factors could be framed in practice as either mitigating or aggravating.[98]

Furthermore, the Court does not give any guidance as to whether certain factors should be weighted more heavily than others, or how the factors relate to each other in the analysis.[99] The Court merely advises the sentencer to "consider mitigating circumstances" and to "take into account how children are different, and how those differences counsel against" a JLWOP sentence.[100]

Lower courts struggle with distinguishing between juveniles who are "permanently incorrigible" and juveniles who are not.[101] Although judges in individual sentencing hearings seem more than capable of *identifying* the presence or absence of the mitigating factors listed in *Miller*, a number of lower courts' sentencing processes lack any indicia of a meaningful balancing process beyond this initial identification.[102]

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97 *Miller*, 567 U.S. at 477–78.

98 For example, would an unstable or neglectful home environment qualify as an aggravating factor—because it cuts against the juvenile's opportunity for rehabilitation in a supportive environment—or as a mitigating factor, because it could indicate lack of a meaningful opportunity to develop a sound moral compass? The Court simply instructs "that a sentencer have the ability to consider the 'mitigating qualities of youth.'" *Miller*, 567 U.S. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). In *Johnson*, the Court reiterates that it is constitutionally permissible for a juror to view "evidence of youth as aggravating, as opposed to mitigating," so long as the sentencer has the opportunity to consider all potentially mitigating evidence, including youth. *Johnson*, 509 U.S. at 368; *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1982) (holding that the Eighth Amendment requires that the sentencer not be precluded from considering as a mitigating factor any evidence the defendant proffers as justification that she deserves a sentence less than the death penalty).

99 For example, growing up without parental figures or in an abusive environment *can* (but does not always) bear on a defendant's susceptibility to peer pressure, and *can* (but does not always) bear on a defendant's affiliation with certain types of people that *can* (but does not always) bear on the circumstances of the defendant's crime. Although beyond the scope of this Note, more research is needed on how the factors articulated in *Miller* bear on one another and eventually lead to a determination of whether or not an individual defendant is permanently incorrigible.

100 *Miller*, 567 U.S. at 480, 489.

101 *See, e.g.*, Adams v. Alabama, 136 S. Ct. 1796, 1800–01 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (criticizing the sentencing orders reviewed as "terse" and noting that the factfinders did not put "great weight on considerations that [the Court] ha[s] described as particularly important in evaluating the culpability of juveniles, such as intellectual disability, an abusive upbringing, and evidence of impulsivity and immaturity" (internal quotations omitted)).

102 *See, e.g.*, State v. Valencia, 386 P.3d 392, 397 (Ariz. 2016) (Bolick, J., concurring) (referring to the resentencing process as a "largely unguided effort"); Conley v. State, 972 N.E.2d 864, 875 (Ind. 2012) (quoting the trial court and finding the sentencing judge properly gave "some" weight to the defendant's mitigating factors, and did not abuse his discretion in imposing JLWOP after finding that the sole aggravating factor outweighed all mitigating factors); State v. Malvo,

The *Miller* factors do not exist in a vacuum separate from one another, and the evaluation is not effective if a judge merely runs through the list of factors as they apply to the defendant and ultimately determines that they "affirmatively considered all the relevant factors at play"[103] or "took full account"[104] of the defendant's youth. Given the substantive nature of the *Miller* rule and the high liberty interest dependent on the outcome of this evaluation, whether a juvenile defendant receives JLWOP should not hinge on a sentencing process that is wildly inconsistent from court to court.[105]

III. The *Miller* Standard Has the Unintended Consequence of Triggering Procedural Problems Under the Sixth Amendment

In addition to the lack of substantive clarity, the *Miller* standard also raises procedural concerns. Although courts typically analyze criminal punishment under the Eighth Amendment's proscription of "cruel and unusual punishment[],"[106] issues related to sentencing may also implicate the Sixth Amendment's jury requirement.[107] In theory, the Sixth Amendment should apply evenly to adult and juvenile defendants, though this is currently not the case in practice: the harshest available sentence—the constitutional maximum or Eighth Amendment "punishment ceiling"[108]—for children and adults is JLWOP[109] and the death penalty,[110] respectively. However, for an adult facing the death penalty, the Sixth Amendment requires that every fact contributing to her potential death penalty sentence be submitted to a

No. 102675-C, 2017 WL 3579711, at *13 (Md. Cir. Ct. June 15, 2017) ("Judge Ryan affirmatively considered all the relevant factors at play and the plain import of his words at the time of sentencing was that Defendant is 'irreparably corrupted.'"). *But see* State v. Walker, No. F07-4947, 2015 WL 7184661, at *6 (Fla. Cir. Ct. Nov. 13, 2015) (finding the mitigating factors persuasive and declining to impose JLWOP).

103 *Malvo*, No. 102675-C, 2017 WL 3579711, at *13.

104 Evans-García v. United States, 744 F.3d 235, 241 (1st Cir. 2014) (quoting United States v. Carrión-Cruz, 92 F.3d 5, 6 (1st Cir. 1996)) (upholding the district court's decision to impose JLWOP as a valid exercise of discretion).

105 *See* Hoesterey, *supra* note 58, at 152 (noting that "many state sentencing schemes remain noncompliant with the increased sentencing requirements prescribed by *Montgomery*").

106 U.S. Const. amend. VIII.

107 U.S. Const. amend. VI.

108 *See* Russell, *supra* note 82, at 558.

109 *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) (referring to JLWOP as the "harshest prison sentence").

110 *See generally* Gregg v. Georgia, 428 U.S. 153 (1976) (permitting the death penalty as an available punishment).

jury and found beyond a reasonable doubt.[111] There is no such requirement for juveniles who are exposed to JLWOP.[112] This Part provides an overview of the Supreme Court's Sixth Amendment jurisprudence regarding the right to a jury and analyzes why the Sixth Amendment—separate from *Miller*—necessitates more formal factfinding procedures for juveniles facing JLWOP, just as it currently does for adults facing the death penalty.

A. The Sixth Amendment Jury Right: Apprendi *and its Progeny*

The Court has held that the Fourteenth Amendment right to due process[113] and the Sixth Amendment right to a jury trial,[114] taken together, "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[115] In deciding the following cases, the Court extended this jury right to the Eighth Amendment punishment ceiling for adults by holding that all facts that make a defendant eligible to receive the death penalty "must be submitted to a jury, and proved beyond a reasonable doubt."[116]

In *Apprendi v. New Jersey*,[117] the Court considered the conviction of a man charged under two separate statutes for firing a gun into the home of an African-American family living in a predominantly white neighborhood.[118] The first statute imposed a sentence of imprisonment between five and ten years for second-degree possession of a firearm for an unlawful purpose.[119] A separate statute provided for an "extended term of imprisonment" of ten to twenty years, conditioned on the trial judge's finding that the defendant's conduct also constituted a hate crime.[120] The trial court characterized this additional find-

111 *See* Ring v. Arizona, 536 U.S. 584, 600 (2002).

112 *See, e.g.*, Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 422–26 (Pa. 2017) (judge, not jury, sentencing Batts to JLWOP).

113 U.S. CONST. amend. XIV, § 1, cl. 3.

114 U.S. CONST. amend. VI.

115 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

116 *Id.* at 490.

117 530 U.S. 466 (2000).

118 *Id.* at 469.

119 *Id.* at 468 (citing N.J. Stat. Ann. §§ 2C:39–4(a), 2C:43–6(a)(2) (West 1995)).

120 *Id.* at 468–69 (citing N.J. Stat. Ann. §§ 2C:44–3(e), 2C:43–7(a)(3) (West Supp. 1999–2000)) (a hate crime required a finding by a preponderance of the evidence that the defendant committed the offense "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity"). The hate crime in *Apprendi* was acting with the purpose to intimidate because of the victims' race. *Id.* at 469–71.

ing as a "sentencing factor,"[121] or "a fact that [i]s not found by a jury but that could affect the sentence imposed by the judge."[122] The trial court concluded that because this finding was a sentencing factor and not an "element" of the offense, a judicial finding was permissible because defendants have no Sixth Amendment right to have sentencing factors decided by a jury.[123]

The Supreme Court rejected this view, holding that a sentencing factor that enhanced the statutory sentence, or "expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict" for a crime was functionally equivalent to an element of that crime.[124] Here, the hate crime statute's extended term of imprisonment was an enhanced sentence because its imposition was conditioned on a finding by the trial judge that was separate from the jury's verdict.[125] The Court held that such enhanced sentences trigger the Sixth Amendment, and therefore, a jury must find the factual determination that authorizes the imposition of any enhanced sentence beyond a reasonable doubt.[126]

The Supreme Court extended this enhanced sentence framework to the death penalty in *Ring v. Arizona*.[127] In *Ring*, the defendant was convicted of first-degree murder and faced a maximum penalty of death with a possible lesser sentence of life imprisonment.[128] However, the statute only allowed imposition of the death penalty if the trial judge, after conducting a sentencing hearing to consider aggravating and mitigating factors, made a finding that there was at least one aggravating factor and no "sufficiently substantial" mitigating factors.[129] Here, the judge found two aggravating factors and one mitigat-

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121 *See id.* at 471–72.

122 *Id.* at 485 (citing McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).

123 *See id.* at 471; *see also McMillan*, 477 U.S. at 93.

124 *Apprendi*, 530 U.S. at 494; *see also id.* at 494 n.19 ("This is not to suggest that the term 'sentencing factor' is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.").

125 *See Apprendi*, 530 U.S. at 494 ("Indeed, the effect of New Jersey's sentencing 'enhancement' here is unquestionably to turn a second-degree offense into a first-degree offense, under the State's own criminal code.").

126 *See id.* at 488, 490, 494.

127 536 U.S. 584, 589 (2002).

128 *Id.* at 592 (citing Ariz. Rev. Stat. Ann. § 13–1105(C) (West 2001)).

129 *Id.* at 592–93 (citing Ariz. Rev. Stat. Ann. § 13–703(C), (F) (West Supp. 2001)).

ing factor, and sentenced the defendant to death.[130] On appeal, the state asserted that the judge sentenced the defendant within the "range of punishment authorized by the jury verdict," but the Court rejected this argument.[131] The Court reasoned that, in effect, the required statutory finding of aggravating and mitigating factors exposed the defendant "to a greater punishment than that authorized by the jury's guilty verdict."[132] Thus, in *Ring*, the statutory maximum authorized by the jury verdict alone was life imprisonment, not the death penalty.[133] The Court clarified in a later opinion that the statutory maximum refers not to "the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[134] Therefore, because the aggravating factors operate as the "functional equivalent of an element of a greater offense," the Sixth Amendment mandates that a jury find these factors beyond a reasonable doubt.[135] In short, the rule established by *Apprendi* and *Ring* bars a sentencing judge, "sitting alone"[136] and without submitting the determination to the jury, from making a judicial finding that exposes a defendant to an enhanced sentence above the statutory maximum.[137]

B. JLWOP Is an Enhanced Sentence Under the Sixth Amendment

Analyzing the *Miller* standard within a Sixth Amendment framework reveals that JLWOP functions as an enhanced sentence because it is unlocked by a factual finding of "permanent incorrigibility" and provides for a term of imprisonment beyond the statutory maximum

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130 *Id.* at 594–95.

131 *Id.* at 603–04.

132 *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

133 *Id.* at 597.

134 Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.").

135 *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court restated this holding in *Blakely v. Washington*, claiming, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." 542 U.S. at 304 (citation omitted). In a related vein, the Court in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), addressed not raising the punishment ceiling, but rather raising the "sentencing floor," Russell, *supra* note 82, at 574. The Court in *Alleyne* held, "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." 570 U.S. at 114–15.

136 *Ring*, 536 U.S. at 588.

137 *Id.* at 589.

for a homicide offense by a juvenile (life with the possibility of parole or a term-of-years sentence). Because JLWOP functions as an enhanced sentence, it is subject to the Sixth Amendment requirement that a jury, not a judge, determine its requisite finding of "permanent incorrigibility" beyond a reasonable doubt.[138]

JLWOP functions as an enhanced sentence because it imposes a punishment beyond the statutory maximum authorized by a guilty jury verdict alone.[139] *Miller* held that JLWOP is only constitutionally permissible for a juvenile defendant (1) who has been convicted of a homicide offense and (2) whose crime reflects "permanent incorrigibility."[140] *Miller* struck down mandatory JLWOP, but left discretionary JLWOP intact.[141] Therefore, whenever a juvenile is convicted of a homicide offense there will always be a sentencing option available that is less severe than JLWOP.[142] This less severe option is the statutory maximum, likely, life with parole or a term-of-years sentence.[143] Therefore, "permanent incorrigibility" functions as "an element of a greater offense"[144] because it exposes juvenile homicide offenders to JLWOP when they would otherwise be exposed to a less severe statutory maximum.

Some scholars have argued in favor of treating an "Eighth Amendment punishment ceiling [a]s equivalent to a statutory or guideline ceiling for Sixth Amendment purposes."[145] That is, when the Court deems a sentence to be the most severe penalty allowable under the Eighth Amendment, it triggers the Sixth Amendment requirement

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138 *See Apprendi*, 530 U.S. at 490; *see supra* note 102 and accompanying text.

139 *See Apprendi*, 530 U.S. at 490; *see supra* note 102 and accompanying text.

140 *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

141 *Id.*

142 *See id.* at 480.

143 *See supra* text accompanying notes 108–10.

144 *Apprendi*, 530 U.S. at 494 n.19.

145 Russell, *supra* note 82, at 558. However, few scholars and courts have considered the intersection of the Sixth Amendment jury trial right and the Eighth Amendment juvenile punishment ceiling. *Id.* at 555 n.10. Some state courts that have considered the issue have found no Sixth Amendment problem. *See, e.g.*, Wilkerson v. State, CR-17-0082, 2018 WL 6010590, at *13–14 (Ala. Crim. App. Nov. 16, 2018) (finding no Sixth Amendment issue, and finding that *Miller* and *Montgomery* did not require imposing a presumption against JLWOP or the burden of proof on the state to prove permanent incorrigibility); People v. Skinner, 917 N.W.2d 292, 305–06 (Mich. 2018) (finding no Sixth Amendment issue); Beckman v. State, 230 So.3d 77, 97 (Fla. Dist. Ct. App. 2017) (finding no Sixth Amendment issue); Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 415 (Pa. 2017) (mentioning only an Eighth Amendment issue); People v. Blackwell, 207 Cal. Rptr. 3d 444, 449 (Cal. Ct. App. 2016) (finding no Sixth Amendment issue); *see also* State v. Houston, 353 P.3d 55, 68 (Utah 2015) (finding that *Apprendi* did not apply). However, this problem is relatively new and will likely continue to develop in the lower courts.

that a jury find certain facts beyond a reasonable doubt before a defendant can be exposed to that sentence.[146] For juvenile defendants convicted of homicide, the Eighth Amendment punishment ceiling, or the "harshest possible penalty,"[147] is JLWOP. After *Miller*, not all juvenile defendants convicted of homicide are automatically eligible for JLWOP; only those who are "permanently incorrigible" are eligible.[148] Therefore, if JLWOP functions as both an Eighth Amendment punishment ceiling and a Sixth Amendment statutory ceiling, "permanent incorrigibility" serves as a "functional equivalent of an element of a greater offense."[149] A jury should be required to make this finding beyond a reasonable doubt before an individual juvenile defendant can be sentenced to JLWOP.[150] At minimum, JLWOP can also be characterized as an "'extended term' of imprisonment," analogous to the term-of-years penalty deemed an enhanced sentence by the Court in *Apprendi*.[151] The Court in *Graham* acknowledged the particular severity of JLWOP sentences, noting, "[l]ife without parole is an especially harsh punishment for a juvenile. . . . [A] juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[152]

Furthermore, the Supreme Court, by consistently analogizing JLWOP to the death penalty, has strengthened the argument that JLWOP should be treated as an enhanced sentence.[153] In *Graham*, five years after the Court struck down the juvenile death penalty,[154] the Court noted that the death penalty shares characteristics with JLWOP "that are shared by no other sentences."[155] The Court continued:

> 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, ex-

146 *See Apprendi*, 530 U.S. at 490.

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

148 *See id.* at 479–80.

149 *Apprendi*, 530 U.S. at 494 n.19.

150 *See id.* at 490; Ring v. Arizona, 536 U.S. 584, 609 (2002).

151 *Apprendi*, 530 U.S. at 468 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). In *Apprendi*, the extended term authorized by the statute was a sentence "between 10 and 20 years," as opposed to a sentence between five and 10 years. *Id.* at 468–69 (quoting N.J. Stat. Ann. §§ 2C:43-6(a)(2), 7(a)(3) (West 1995)).

152 560 U.S. 48, 70 (2010).

153 The death penalty was the enhanced sentence at issue in *Ring*. *See* 536 U.S. at 592.

154 *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).

155 *Graham*, 560 U.S. at 69.

> cept perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.[156]

In *Miller*, the Court cited positively *Graham*'s death penalty and JLWOP analogy, and it affirmed that the "confluence" of the Court's death penalty precedent[157] led to the conclusion that JLWOP was disproportionately severe[158] for juveniles who are not convicted of homicide offenses and are not "permanently incorrigible."[159] Indeed, the Court's description of JLWOP as an "uncommon"[160] sentence that is appropriate only in "exceptional circumstances,"[161] and imposable only on certain "rare juvenile offender[s]"[162] for whom "rehabilitation is impossible"[163] seems to echo the Court's similarly caveated description of the death penalty in *Gregg v. Georgia*[164] as "an extreme sanction, suitable to the most extreme of crimes."[165]

Considering the intersection of *Apprendi*-Sixth Amendment doctrine and *Miller*-Eighth Amendment doctrine, JLWOP should be treated as an enhanced sentence that triggers certain procedural requirements under the Sixth Amendment. Specifically, whether a juvenile can receive JLWOP turns on whether she is "permanently incorrigible."[166] This question should be determined by a jury, not a judge, and any affirmative finding should be made beyond a reasonable doubt.

IV. Limiting the Imposition of JLWOP: A Solution Under the Sixth and Eighth Amendments

The solution proposed in this Part seeks to work around the *Miller* standard's main issue: lack of a formal factfinding requirement.[167] The conclusion that the Sixth Amendment requires a jury finding of "permanent incorrigibility" *before* JLWOP may be imposed by the sentencing court partially cures this deficiency. Imposing a presumption against JLWOP and placing the burden of proof of establish-

156 *Id.* at 69–70.

157 Miller v. Alabama, 567 U.S. 460, 470 (2012).

158 The proportionality doctrine stems from the idea that "the culpability of a class of offenders and the severity of a penalty" should match one another. *Id.*

159 *Id.* at 479–80.

160 *Id.* at 479.

161 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

162 *Miller*, 567 U.S. at 479.

163 *Montgomery*, 136 S. Ct. at 733.

164 Gregg v. Georgia, 428 U.S. 153 (1976).

165 *Id.* at 187.

166 *See Miller*, 567 U.S. at 479–80.

167 Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

ing "permanent incorrigibility" on the state, procedural tools that were used by the Pennsylvania Supreme Court in *Batts II*,[168] can also help cure this deficiency. This solution would better effectuate the Court's assertion in *Miller* that JLWOP should be an "uncommon" sentence reserved only for "rare" juvenile defendants for three reasons.[169] First, a presumption against JLWOP puts the burden of proof on the state to convince the jury beyond a reasonable doubt that the defendant is "permanently incorrigible."[170] Second, although the Court in *Miller* refers to the "sentencer" repeatedly throughout its opinion, it does not expressly specify whether the sentencer, that is, the authority responsible for determining "permanent incorrigibility," should be the judge or the jury.[171] Lower courts disagree on who the sentencer is.[172] This Note proposes that we look to the Sixth Amendment for a definitive answer to this question: that a jury should make a finding of fact to impose this sentence.[173] Third, uniformly imposing a formal factfinding requirement logically extends *Miller* because it forces a meaningful, searching consideration of mitigating factors in determining whether an individual defendant is "permanently incorrigible" and, thus, eligible to receive JLWOP.

A. A Presumption Against JLWOP: Returning to Batts II

When Qu'eed Batts's case arrived in front of the Pennsylvania Supreme Court for the second time,[174] the court was tasked with deciding how to sentence juvenile defendants facing discretionary JLWOP post-*Miller*.[175] Ultimately, the court in *Batts II* adopted several procedural safeguards, including a presumption against JLWOP and a burden on the state to prove eligibility for JLWOP beyond a reasonable doubt.[176] A presumption arises "if a fact constitutes 'a con-

168 Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 452 (Pa. 2017).

169 *Miller*, 567 U.S. at 479.

170 *See Batts II*, 163 A.3d at 452.

171 *See, e.g.*, 567 U.S. at 474 ("But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations."); *id.* at 477 ("So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."); *id.* at 480 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

172 *See* Russell, *supra* note 82, at 553.

173 *See* U.S. CONST. amend. VI.

174 Batts had already endured three sentencings. *See supra* INTRODUCTION.

175 *See Batts II*, 163 A.3d at 427–28.

176 *See id.* at 451–56.

clusion firmly based upon the generally known results of wide human experience,'"[177] and is "mandatory and requires the factfinder to find the existence of an 'elemental' or 'ultimate' fact based on proof of a 'basic' or 'evidentiary' fact."[178] In deciding whether a presumption against JLWOP applied, the court determined that proof of the basic fact—that Batts was a juvenile when he committed the crime—necessarily proved the ultimate fact—that Batts was capable of rehabilitation, and therefore, his crime was a result of transient immaturity.[179] The court reasoned that there was "no doubt" under Supreme Court precedent that the ultimate fact was connected to the basic fact, and it held that the discretion expressly granted by *Montgomery* allowed it to create the presumption against JLWOP.[180]

This presumption against JLWOP would apply in all future cases and could only be rebutted if the state proved "that the juvenile [was] removed from this generally recognized class of potentially rehabilitable offenders."[181] The court held that the prosecution had the burden of proof, squarely rejecting the state's argument that the burden of disproving "permanent incorrigibility" lay with the defendant.[182] That argument, the court determined, was "belied by the central premise of *Roper*, *Graham*, *Miller*[,] and *Montgomery*––that as a matter of law, juveniles are categorically less culpable than adults."[183] The court concluded that proof beyond a reasonable doubt, "a crimi-

177 *Id.* at 451 (quoting Watkins v. Prudential Ins. Co. of Am., 173 A. 644, 648 (Pa. 1934)).

178 *Id.* (first citing Commonwealth v. Childs, 142 A.3d 823, 830 (Pa. 2016), then citing City of Pittsburgh v. W.C.A.B., 67 A.3d 1194, 1204 (Pa. 2013)).

179 *See Batts II*, 163 A.3d at 451.

180 *Id.* at 452. The court cited to language in *Miller* and *Montgomery* stating that JLWOP should only be imposed in "exceptional circumstances" on "the rarest of juvenile offenders." *Id.* (citing Montgomery v. Louisiana, 136 S. Ct. 718, 735–36 (2016)). The court noted that appellate courts in other states had also recognized the same presumption, including those in Missouri, Utah, Connecticut, and Iowa (though the latter three states now have a categorical ban on JLWOP). *See Batts II*, 163 A.3d at 458–59.

181 *Batts II*, 163 A.3d at 452.

182 *See id.* Some states have similarly imposed a presumption against JLWOP and/or placed the burden on the state to prove "permanent incorrigibility." *See, e.g.*, State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) (imposing a presumption against JLWOP); State v. Hart, 404 S.W.3d 232, 242 (Mo. 2013) (en banc) (placing the burden on the state and requiring proof beyond a reasonable doubt); Davis v. State, 415 P.3d 666, 681–82 (Wyo. 2018) (imposing a presumption against JLWOP, placing the burden on the state, and requiring proof beyond a reasonable doubt). Other states have placed the burden on the juvenile. *See, e.g.*, State v. Valencia, 386 P.3d 392, 396 (Ariz. 2016) (placing the burden on the juvenile to establish she is not permanently incorrigible by a preponderance of the evidence); *see also* State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) (finding that *Miller* "does not require that the State assume the burden of [proof]").

183 *Batts II*, 163 A.3d at 452.

nal standard [that] carries the highest evidentiary burden," was the appropriate standard of proof necessary to satisfy due process.[184] The court also pointed to what it felt was "definitive" language in *Montgomery*, which stated that JLWOP is an unconstitutionally disproportionate sentence for a juvenile defendant unless that defendant "exhibits such irretrievable depravity that rehabilitation is *impossible*."[185] *Batts II* illustrates that a presumption against JLWOP is both a realistic procedural solution and justifiable as a sound interpretation of the Supreme Court's language in *Miller* and *Montgomery*.[186]

B. Proposed Solution: Putting It All Together

Courts should follow the Pennsylvania Supreme Court's lead in *Batts II* and recognize a presumption against JLWOP. The language in *Miller* and *Montgomery* signals the Supreme Court's intent that JLWOP be an "uncommon"[187] sentence, to be imposed only in "exceptional circumstances,"[188] upon "rare"[189] juvenile defendants who show that rehabilitation is "impossible."[190] The adolescent brain is not as developed as the adult brain, which means that children have less moral culpability for their bad acts and have a higher capacity for positive change in their character and judgment.[191] This suggests that the ultimate fact—that the defendant is capable of rehabilitation and the crime was a result of transient immaturity—rests upon proof of the basic fact—that the defendant is a child. A presumption against JLWOP would not only raise the procedural bar for its imposition, but would also, hopefully, deter prosecutors from seeking JLWOP unless they believed that the defendant was genuinely "permanently incorrigible" and deserving of the sentence. Ultimately, a presumption would lower JLWOP's rate of imposition, giving greater practical effect to the Court's assertion in *Miller* that it should be an "uncommon" sentence.[192]

In a departure from the Pennsylvania Supreme Court,[193] this Note proposes that this presumption may only be rebutted by a formal

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184 *Id.* at 453–54.

185 *Batts II*, 163 A.3d at 455 (quoting *Montgomery*, 136 S. Ct. at 733).

186 *See generally Batts II*, 163 A.3d 410.

187 Miller v. Alabama, 567 U.S. 460, 479 (2012).

188 *Montgomery*, 136 S. Ct. at 736.

189 *Miller*, 567 U.S. at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)).

190 *Montgomery*, 136 S. Ct. at 733.

191 *See supra* Section I.B.

192 *Miller*, 567 U.S. at 479.

193 The court rejected Batts's argument that he had a Sixth Amendment right to a jury

finding by a jury that the defendant is permanently incorrigible. This factfinding requirement does not stem from *Miller* or *Montgomery*, but from the Supreme Court's Sixth Amendment jurisprudence, which requires that a jury find any fact that exposes the defendant to an enhanced sentence beyond a reasonable doubt.[194] Because JLWOP functions as an enhanced sentence, a jury accordingly must find beyond a reasonable doubt that the defendant is permanently incorrigible.[195]

In determining the substantive question of "permanent incorrigibility," the jury should first consider the mitigating factors suggested by the Court in *Miller*, as well as any other characteristics unique to the individual defendant.[196] Although the *Miller* factors are a good starting point, more psychological research is needed about the probative value of these factors in accurately determining the "permanent incorrigibility" of a defendant.[197] One particular concern of the author is a jury characterizing a child's "family and home environment"[198] as having too strong of a bearing on her "possibility of rehabilitation,"[199] especially if she has experienced neglect or abuse. Just because a child lacks an objectively conventional or stable family unit does not mean she necessarily has a lower capacity for rehabilitation. Future research should focus on any unintended disproportionate effects that these factors may have, especially on those children who come from certain socioeconomic, racial, or ethnic backgrounds; for example, juveniles of color already face higher rates of incarceration than white juveniles,[200] and courts should take all measures possible to prevent implementing practices that exacerbate this disparity. Although all of

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determination under *Apprendi* and its progeny. Commonwealth v. Batts *(Batts II)*, 163 A.3d 410, 456–57 (Pa. 2017). The court left the sentencing determination within the discretion of the sentencing judge. *Id.* at 457.

194 *See supra* Section III.A.

195 *See supra* Section III.B.

196 Again, those factors are (1) the juvenile's "age and [] hallmark features," (2) the juvenile's "family and home environment," (3) the "circumstances" and "extent of [the juvenile's] participation" in the homicide offense, (4) the influence of "familial and peer pressure[]" on the juvenile, (5) any "incompetencies associated with youth," such as the inability to deal with law enforcement and the prosecution or to assist his own attorney, and (6) the juvenile's potential for rehabilitation. *Miller*, 567 U.S. at 477–78.

197 *See supra* notes 98–99 and accompanying text.

198 *Miller*, 567 U.S. at 477.

199 *Id.* at 478.

200 For example, black juveniles represent only 14% of the U.S. population, yet they comprise 43% of boys and 34% of girls in juvenile facilities. *See* Wendy Sawyer, *Youth Confinement: The Whole Pie*, Prison Pol'y Initiative (Feb. 27, 2018), https://www.prisonpolicy.org/reports/youth2018.html [https://perma.cc/2968-85DY].

these concerns are beyond the scope of this Note, they emphasize the need for further research in the area of juvenile sentencing. Even considering the shortcomings in understanding how the substantive *Miller* factors play out, the procedural solution that this Note poses is not only a step in the right direction, but is also a logical and much-needed extension of the *Miller* standard.

C. *Imposing a Formal Factfinding Requirement: Why Uniformity Aligns with* Miller

The Court in *Montgomery* conceded that a formal finding of permanent incorrigibility is "not required" by *Miller*.[201] Many lower courts cite this holding, seemingly, as justification for perfunctory consideration of the mitigating factors offered by the defendant.[202] That is, because *Miller* and *Montgomery* impose no formal factfinding obligation on the sentencing court to find that the defendant is permanently incorrigible, a court may defend its imposition of a JLWOP sentence by simply stating that the aggravating factors or overall heinousness of the crime outweigh any mitigating factors.[203] However, the Court in *Montgomery* also explained, "[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole."[204] The premise that *Miller* does not require a finding of permanent incorrigibility before imposition of JLWOP seems irreconcilable with *Miller*'s ultimate holding that JLWOP is unconstitutional for those defendants who are *not* permanently incorrigible. Examining *Miller* through a Sixth Amendment framework resolves this conflict.

Because the Court in *Montgomery* refrained from imposing a procedural factfinding requirement on state courts out of respect for the independence of the states in fashioning their criminal justice systems,[205] one could critique this proposal by arguing that it violates the constitutional principle of federalism. However, the confusion resulting from the *Miller* standard counsels in favor of a uniform procedural

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201 Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

202 *See, e.g.*, People v. Skinner, 917 N.W.2d 292, 308, 310 n.18 (Mich. 2018) (finding first that *Miller* "did not hold that a finding of 'irreparable corruption' must be made before a life-without-parole sentence can be imposed on a juvenile," then asserting that "[w]hether a juvenile is irreparably corrupt is not a factual finding; instead, it is a moral judgment that is made after considering and weighing the *Miller* factors" (quoting *Miller*, 567 U.S. at 479–80)); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) ("[*Miller*] does not require the sentencing court . . . to make an explicit finding that the offense reflects irreparable corruption on the part of the juvenile.").

203 *See Montgomery*, 136 S. Ct. at 734–35; *id.* at 744 (Scalia, J., dissenting).

204 *Id.* at 744.

205 *See id.* at 735.

approach over rigid adherence to states retaining control over procedural specifics. First, lack of clarity may result in similarly situated defendants receiving different sentences[206] or non–permanently incorrigible defendants erroneously receiving JLWOP.[207] Administration of criminal justice should strive for more, not less, consistency. Second, absence of a formal factfinding requirement lowers the procedural bar and, theoretically, makes it easier for prosecutors to seek and obtain JLWOP as a sentence.[208] This is troubling given the *Miller* Court's assertion that JLWOP should be an "uncommon" sentence reserved only for "rare" juvenile defendants who commit the most heinous crimes.[209] Finally, given that a life sentence is not quantifiable like a term-of-years sentence, JLWOP is arguably a harsher sentence for juveniles simply because the remaining lifespan of a child is most likely longer than that of an adult; this means that a juvenile defendant will serve more years and more of her life in prison than an adult defendant.[210] The Supreme Court in *Graham* acknowledged the gravity and consequences of a JLWOP sentence. The Court stated:

> Terrance Graham's [life without parole] sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a . . . crime that he committed while he was a child in the eyes of the law.[211]

Permanent deprivation of liberty, especially when effected from a young age, has profound physical, emotional, and psychological conse-

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206 *See* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (referring to the principle that similarly situated criminal defendants should be treated the same).

207 *See* Graham v. Florida, 560 U.S. 48, 77–79 (2010) (noting that case-by-case JLWOP sentencing increases the risk of erroneous imposition and misidentification of permanently incorrigible defendants); *see also* Hoesterey, *supra* note 58, at 185–86 n.264 (noting the same).

208 Again, examining actual rarity of JLWOP is beyond the scope of this Note. *See supra* note 87.

209 Miller v. Alabama, 567 U.S. 460, 479 (2012).

210 The Court itself articulated this argument in *Graham*, noting,

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

560 U.S. at 70.

211 *Id.* at 79.

quences on a child and should not be imposed lightly or arbitrarily.[212] It is cruel and unusual to impose JLWOP on juvenile defendants without regard for the Court's intent in *Miller*. It is cruel and unusual to impose JLWOP without consistent procedures that include a searching and meaningful consideration of the facts particular to the individual defendant. And it is cruel and unusual to impose JLWOP before a jury finds "permanent incorrigibility" beyond a reasonable doubt. This Note's proposed solution seeks to remedy that cruelty.

CONCLUSION

Qu'eed Batts committed a terrible crime that resulted in the death of another teenager. His youth does not excuse that fact. Batts has been incarcerated for fourteen years, which means that he has spent half his life behind bars.[213] Despite multiple judges finding him "permanently incorrigible," since being incarcerated, Batts has expressed remorse for his crime and shown objective signs of rehabilitation.[214] This supports the premise that children are different from adults, both in their lack of neurological development that contributes to underappreciation of wrongful actions, and in their capacity to recognize and learn from these wrongful actions.[215] Sentencing juveniles to life in prison without the possibility of parole causes more harm than just constraining their opportunities for rehabilitation; it communicates, "unequivocally[,] that their lives are worthless, they are beyond repair or redemption, and any effort they may make to improve themselves is essentially futile."[216]

The Court held that juveniles could be sentenced to die in prison if they were determined to be permanently incorrigible.[217] In giving effect to this substantive rule, courts are also bound by the mandates of the Sixth Amendment, which requires formal factfinding by a jury beyond a reasonable doubt.[218] A solution that sits at the intersection of both the Eighth and Sixth Amendments not only increases clarity in

212 *See* HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 53–54 (2005).

213 *See supra* notes 1, 20–23 and accompanying text.

214 *See* Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 424 (Pa. 2017) ("Batts has remained employed while in prison and participates in various sports, fitness, and personal enrichment programs (including GED, leadership development, long-term offenders, violence prevention, resume creation and job application courses) offered to him [through the prison].").

215 *See supra* Section I.B.

216 HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 212, at 82.

217 *See* Graham v. Florida, 560 U.S. 48, 70 (2010).

218 *See supra* Section III.A.

lower court administration of the *Miller* standard, but also ensures that juvenile defendants receive their constitutionally guaranteed procedural safeguards. The Court struck down mandatory JLWOP as an unconstitutionally cruel and unusual punishment for juveniles, but discretionary JLWOP lives on.[219] It is a sentencing court's duty to ensure that non–"permanently incorrigible" juveniles do not get swept up in the sentence, doomed to live and die in prison.

219 Miller v. Alabama, 567 U.S. 460, 460 (2012).