"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-
icates 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 relation-
ships 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 teen-
age 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

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 constitutio-
nality 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.
(“JLWOP”) sentences, the Pennsylvania Supreme Court remanded Batts’s case to the superior court for a new sentencing hearing. 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. The judge reinstated 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]. . . .”

Qu’eed Batts is now 28 years old. He has been sentenced twice since he was first convicted in 2007. He is still awaiting a third resentencing. 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 unconstitutional punishment except for those “rare” juvenile defendants whose homicide crimes reflect not “transient immaturity,” but rather “irreparable corruption.” This standard has proven to be highly unworkable in practice. The resulting confu-

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16 See id. at 489. This Note discusses Miller at length. See infra Section I.A.
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 reinstated Batts’s JLWOP sentence and a divided panel of the Pennsylvania Superior Court affirmed. Id. at 426.
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. 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”). 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.” 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. When the Supreme Court in Roper v.

26 See infra Part II.
28 U.S. CONST. amend. VIII.
Simmons\textsuperscript{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.”\textsuperscript{31} Roper signaled the start of a change in juvenile sentencing for the Court. Seven years later, in \textit{Miller v. Alabama},\textsuperscript{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.\textsuperscript{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,\textsuperscript{34} as well as the available punishments.\textsuperscript{35} With the creation of juvenile court in 1899, most juvenile defendants were removed from the adult criminal justice and corrections systems.\textsuperscript{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.\textsuperscript{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.\textsuperscript{38}

\textsuperscript{30} 543 U.S. 551 (2005).
\textsuperscript{31} Id.
\textsuperscript{32} 567 U.S. 460 (2012).
\textsuperscript{33} Id. at 471.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{36} See Feld, supra note 34, at 71.
\textsuperscript{37} See id.
\textsuperscript{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. In 2005, the Supreme Court held in *Roper v. Simmons* that imposition of the death penalty on juvenile defendants violated the Eighth Amendment’s prohibition of cruel and unusual punishment. In 2010, the Court held in *Graham v. Florida* that imposition of JLWOP for juveniles convicted of nonhomicide crimes violated the Eighth Amendment. Finally, in 2012, the Court in *Miller v. Alabama* found that mandatory imposition of JLWOP for homicide offenders violated the Eighth Amendment. The Court in *Miller* reasoned that the sentencer “must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” 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.” Post-*Miller*, only after this consideration of youth and its mitigating attendant qualities could a defendant be sentenced to JLWOP. Thus, discretionary JLWOP currently serves as the harshest possible penalty for juvenile defendants.

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

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39 See *Miller*, 567 U.S. at 471.
41 Id. at 578.
43 Id. at 79.
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.”\textsuperscript{53} This meant that all juveniles who had received mandatory JLWOP sentences pre-\textit{Miller} were entitled to resentencing.\textsuperscript{54} Again, the Court neglected to provide a definition for “permanently incorrigible,” but in \textit{Montgomery} appeared to treat the vague terms “irreparable corruption” and “permanent incorrigibility” as interchangeable.\textsuperscript{55}

In \textit{Montgomery}, the state argued that \textit{Miller} could not “have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because \textit{Miller} did not require trial courts to make a finding of fact regarding a child’s incorrigibility.”\textsuperscript{56} The Court responded that, although \textit{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.\textsuperscript{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.”\textsuperscript{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 \textit{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

\textsuperscript{53} \textit{Id.} at 734, 736.

\textsuperscript{54} \textit{Id.} at 736.

\textsuperscript{55} See \textit{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.

\textsuperscript{56} \textit{Id.} at 735.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.} As a result, many states that permit JLWOP do not “require a finding of irreparable corruption by the sentencer.” Alice Reichman Hoesterey, \textit{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 \textit{Fordham Urb. L.J.} 149, 175 (2017).
discretion.\textsuperscript{59} However, JLWOP remains unconstitutionally excessive for all juveniles except those who are “permanent[ly] incorrigibl[e],” that is, “irreparabl[y] corrupt[.]”\textsuperscript{60}

B. The Neuroscience Behind the Court’s Shift

That “children are constitutionally different from adults for purposes of sentencing”\textsuperscript{61}—an idea first established in \textit{Roper}\textsuperscript{62} and \textit{Graham},\textsuperscript{63} and advocated by Justice Elena Kagan in her \textit{Miller} opinion\textsuperscript{64}—marks a change brought about by shifting societal attitudes and developments in scientific research of the adolescent brain.\textsuperscript{65} The Court in \textit{Miller} enumerates three main reasons for this conclusion, based on “common sense” and “science and social science.”\textsuperscript{66} First, children are immature and have an “underdeveloped sense of responsibility.”\textsuperscript{67} Second, children are more susceptible to “‘negative influences and outside pressures,’ including from their family and peers.”\textsuperscript{68} And third, “a child’s character is not as ‘well formed’ as an adult’s,”\textsuperscript{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].”\textsuperscript{70} At any rate, the Court makes clear in \textit{Roper}, \textit{Graham}, and \textit{Miller} that youth and its attendant circumstances are highly relevant in determining whether JLWOP is an appropriate sentence for a juvenile defendant.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item Montgomery, 136 S. Ct. at 734, 736.
\item 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, \textit{Juvenile and Criminal Justice Systems’ Responses to Youth Violence}, 24 \textit{Crime & Just.} 189, 202 (1998).
\item See Roper v. Simmons, 543 U.S. 551, 569 (2012) (noting the general differences between juveniles and adults).
\item See Miller, 567 U.S. at 471.
\item See id.
\item Id.
\item Id. (quoting \textit{Roper}, 543 U.S. at 569).
\item Id. (quoting \textit{Roper}, 543 U.S. at 569).
\item Id. (quoting \textit{Roper}, 543 U.S. at 570).
\item Id. (quoting \textit{Roper}, 543 U.S. at 570).
\item See id. at 473.
\end{enumerate}
\end{footnotesize}
given way to brain mapping studies that demonstrate the differences in the development of the prefrontal cortex in youth as compared with adults. The prefrontal cortex is responsible for a range of cognitive functions, including “self-control, rational decision making, problem solving, organization, and planning,” and “regulating aggression, long-range planning, mental flexibility, abstract thinking . . . [and] moral judgment.” 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.

Another important area examined in brain mapping studies is the amygdala. The amygdala functions to analyze emotion and is central in detecting danger and generating the fear response—“fight or flight.” 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. 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.

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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.


75 See Kingston, supra note 72, at 28.


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.”).


\(^{84}\) 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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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.
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.\footnote{Miller, 567 U.S. at 477–78.} However, all of the factors are vague, and certain factors could be framed in practice as either mitigating or aggravating.\footnote{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.’” \textit{Miller}, 567 U.S. at 476 (quoting \textit{Johnson v. Texas}, 509 U.S. 350, 367 (1993)). In \textit{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. \textit{Johnson}, 509 U.S. at 368; see also \textit{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).}

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.\footnote{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 \textit{Miller} bear on one another and eventually lead to a determination of whether or not an individual defendant is permanently incorrigible.} 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.\footnote{\textit{Miller}, 567 U.S. at 480, 489.}

Lower courts struggle with distinguishing between juveniles who are “permanently incorrigible” and juveniles who are not.\footnote{See, e.g., \textit{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)).} Although judges in individual sentencing hearings seem more than capable of identifying the presence or absence of the mitigating factors listed in \textit{Miller}, a number of lower courts’ sentencing processes lack any indicia of a meaningful balancing process beyond this initial identification.\footnote{See, e.g., \textit{State v. Valencia}, 386 P.3d 392, 397 (Ariz. 2016) (Bolick, J., concurring) (referring to the resentencing process as a “largely unguided effort”); \textit{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); \textit{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 M I L L E R 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
jury and found beyond a reasonable doubt. There is no such requirement for juveniles who are exposed to JLWOP. 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 and the Sixth Amendment right to a jury trial, 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.’” 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.”

In Apprendi v. New Jersey, 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. The first statute imposed a sentence of imprisonment between five and ten years for second-degree possession of a firearm for an unlawful purpose. 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. The trial court characterized this additional find-

113 U.S. Const. amend. XIV, § 1, cl. 3.
114 U.S. Const. amend. VI.
116 Id. at 490.
117 530 U.S. 466 (2000).
118 Id. at 469.
120 Id. at 468–69 (citing N.J. Stat. Ann. §§ 2C:44–3(c), 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.
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. 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. 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.” Thus, in Ring, the statutory maximum authorized by the jury verdict alone was life imprisonment, not the death penalty. 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.” 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. In short, the rule established by Apprendi and Ring bars a sentencing judge, “sitting alone” 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.

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

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.


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.\footnote{See Apprendi, 530 U.S. at 490.} For juvenile defendants convicted of homicide, the Eighth Amendment punishment ceiling, or the “harshest possible penalty,”\footnote{Miller v. Alabama, 567 U.S. 460, 489 (2012).} is JLWOP. After Miller, not all juvenile defendants convicted of homicide are automatically eligible for JLWOP; only those who are “permanently incorrigible” are eligible.\footnote{See id. at 479–80.} 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.”\footnote{Apprendi, 530 U.S. at 494 n.19.} A jury should be required to make this finding beyond a reasonable doubt before an individual juvenile defendant can be sentenced to JLWOP.\footnote{See id. at 490; Ring v. Arizona, 536 U.S. 584, 609 (2002).} 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.\footnote{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)).} 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.”\footnote{560 U.S. 48, 70 (2010).}

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.\footnote{The death penalty was the enhanced sentence at issue in Ring. See 556 U.S. at 592.} In Graham, five years after the Court struck down the juvenile death penalty,\footnote{See Roper v. Simmons, 543 U.S. 551, 575 (2005).} the Court noted that the death penalty shares characteristics with JLWOP “that are shared by no other sentences.”\footnote{Graham, 560 U.S. at 69.} 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-
cept perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.\footnote{\textit{Id.} at 69–70.}

In \textit{Miller}, the Court cited positively \textit{Graham}'s death penalty and JLWOP analogy, and it affirmed that the “confluence” of the Court’s death penalty precedent\footnote{Miller v. Alabama, 567 U.S. 460, 470 (2012).} led to the conclusion that JLWOP was disproportionately severe\footnote{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. \textit{Id.}} for juveniles who are not convicted of homicide offenses and are not “permanently incorrigible.”\footnote{\textit{Id.} at 479–80.} Indeed, the Court’s description of JLWOP as an “uncommon”\footnote{\textit{Id.} at 479.} sentence that is appropriate only in “exceptional circumstances,”\footnote{Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016).} and imposable only on certain “rare juvenile offender[s]”\footnote{\textit{Miller}, 567 U.S. at 479.} for whom “rehabilitation is impossible”\footnote{Gregg v. Georgia, 428 U.S. 153 (1976).} seems to echo the Court’s similarly caveated description of the death penalty in \textit{Gregg v. Georgia}\footnote{\textit{Id.} at 187.} as “an extreme sanction, suitable to the most extreme of crimes.”\footnote{See \textit{Miller}, 567 U.S. at 479–80.}

Considering the intersection of \textit{Apprendi}-Sixth Amendment doctrine and \textit{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.”\footnote{Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).} This question should be determined by a jury, not a judge, and any affirmative finding should be made beyond a reasonable doubt.

\section*{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 \textit{Miller} standard’s main issue: lack of a formal factfinding requirement.\footnote{\textit{Id.} at 479–80.} 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-
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-


\(^{169}\) *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 foresee 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

\(^{184}\) 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.


\(^{188}\) Montgomery, 136 S. Ct. at 736.


\(^{190}\) 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. Because JLWOP functions as an enhanced sentence, a jury accordingly must find beyond a reasonable doubt that the defendant is permanently incorrigible.

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. 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. One particular concern of the author is a jury characterizing a child’s “family and home environment” as having too strong of a bearing on her “possibility of rehabilitation,” 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, and courts should take all measures possible to prevent implementing practices that exacerbate this disparity. Although all of 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. Many lower courts cite this holding, seemingly, as justification for perfunctory consideration of the mitigating factors offered by the defendant. 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. 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.” 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, 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

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 or non–permanently incorrigible defendants erroneously receiving JLWOP. 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. 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. 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. 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.

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

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.


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.\textsuperscript{212} It is cruel and unusual to impose JLWOP on juvenile defendants without regard for the Court’s intent in \textit{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.\textsuperscript{213} Despite multiple judges finding him “permanently incorrigible,” since being incarcerated, Batts has expressed remorse for his crime and shown objective signs of rehabilitation.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{216}

The Court held that juveniles could be sentenced to die in prison if they were determined to be permanently incorrigible.\textsuperscript{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.\textsuperscript{218} A solution that sits at the intersection of both the Eighth and Sixth Amendments not only increases clarity in


\textsuperscript{213} See supra notes 1, 20–23 and accompanying text.

\textsuperscript{214} See \textit{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].”).

\textsuperscript{215} See supra Section I.B.

\textsuperscript{216} \textit{Human Rights Watch} \& \textit{Amnesty Int’l}, supra note 212, at 82.


\textsuperscript{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.
