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Irreparably Corrupt and Permanently Incorrigible: Georgia's Procedures for Sentencing Children to Die in Prison

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I. INTRODUCTION

Right now, two teenagers live in Georgia prisons, knowing they will be incarcerated for the rest of their lives.[1] Countless adults are serving sentences of life without the possibility of parole (LWOP) for crimes they, too, committed when they were teenagers. It is difficult to find in officially-reported data adults serving sentences they received for crimes they committed while children. This is because, once the two teenagers specifically noted in the Georgia Department of Corrections' Inmate Statistical Profile[2] turn twenty, they will move to the next data bracket for imprisoned people between the ages of twenty and twenty-nine, just as all the adults before them have.[3] There is no readily-attainable public record of how many people in that row and beyond have been in prison since they were teenagers. People like that simply fade into anonymity—unless an appeal from their conviction is significant enough to result in a published opinion by the Georgia Court of Appeals or Georgia Supreme Court.

This is the case for Dakota White and Dantazias Raines. Since being sentenced to serve their lives in prison, both have aged from teenagers into young adults. They no longer occupy the first row of the page four

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[1] GEORGIA DEPARTMENT OF CORRECTIONS, INMATE STATISTICAL PROFILE: ACTIVE LIFE WITHOUT PAROLE at 4 (2020), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_life_wo_parole_2020_10.pdf.

[2] *Id.*

[3] *Id.*

table in the Inmate Statistical Profile but have instead grown into the next bracket for young adults sentenced to LWOP. Unlike most of the other 225 young men on that row, White and Raines have made long-lasting marks on Georgia's juvenile criminal procedure via their appeals to the Georgia Supreme Court. In those cases, in January 2020 and July 2020, the Georgia Supreme Court established rules and published decisions ensuring that White[4] and Raines[5] will stay in prison forever.

Surely White and Raines (and the two anonymous teenagers the Department of Corrections acknowledges in the Inmate Statistical Profile) *deserve* to live and die in prison, though. They must represent the worst of young criminals in Georgia. Of course our criminal justice system is designed to ensure that only "the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility" are sentenced as they were.[6] Well, sort of. This Article examines the procedures that the Supreme Court of the United States and the Supreme Court of Georgia require for the State to permanently imprison individuals based on convictions they received for crimes committed while minors.

Currently, the State must prove a child is "irreparabl[y] corrupt[]" before he can be sentenced to serve his life in prison. [7] At face value, this appears to be a strict standard. It must mean that only the most violent minors, those who cannot be expected to grow beyond their apparent depravity, will never hope for a life outside of prison. This Article analyzes that standard—how it came into existence, how it has been interpreted federally and at the state level, and what the immediate outcomes have been—to determine its true functionality.

Over the years, the United States Supreme Court has interpreted the United States Constitution[8] in ways that significantly limit the State's ability to punish juveniles for criminal actions. First, the Court interpreted the Eighth Amendment[9] to mean defendants could not be sentenced to death for crimes committed under the age of sixteen.[10] Then, the Court expanded that ruling to mean individuals could not be sentenced to death for crimes they committed when they were under the

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[4] *See* White v. State, 307 Ga. 601, 608, 837 S.E.2d 838, 846 (2020) (affirming White's sentence to serve life in prison without the possibility of parol).

[5] Raines v. State, 309 Ga. 258, 273, 845 S.E.2d 613, 624 (2020) (affirming the sentencing judge's denial of Raines's request to be sentenced by a jury).

[6] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

[7] Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

[8] U.S CONST.

[9] U.S. CONST. amend. VIII.

[10] Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

age of eighteen.[11] More recently, the Court ruled that homicide is the only crime for which people under the age of eighteen may be sentenced to life without parole.[12]

A few years later, the Court narrowed that rule even more. Now, when LWOP is on the table, sentencing entities must make specific determinations to decide whether a defendant is eligible to serve life without the possibility of parole for a crime committed while a child.[13] White and Raines, both seventeen when they committed their respective crimes, were sentenced under the most recent iteration of that test.[14]

Most of this Article focuses on more recent rulings on juvenile LWOP sentencing, first tracking federal Supreme Court precedent to the Court's current stance, then reviewing Georgia Supreme Court precedent based on those decisions. The second portion of this Article analyzes *White v. State*[15] and *Raines v. State*,[16] the Georgia Supreme Court's most recent decisions regarding juvenile LWOP. This analysis exposes several procedural gaps through which defendants may fall and thus be more easily sentenced to spend their entire adult lives in prison. Specifically, the Georgia Supreme Court's rulings in *White* and *Raines* indicate a pattern through which sentencing laws designed for children tend to expand beyond their originally intended meaning.

The final third of this Article critiques the appropriateness of the current standards for sentencing children to live in prison and offers feasible alternatives to juvenile LWOP. The Article ultimately concludes that juvenile life without parole must either be abolished entirely, as the Georgia General Assembly could easily do, or must be regulated by the legislature so the procedures to meet the irreparable corruption standard function uniformly and comply with modern understandings of juvenile psychology.

II. OVERVIEW OF UNITED STATES SUPREME COURT RULINGS ON JUVENILE SENTENCING

A. Abolition of Juvenile Death Penalty as Groundwork for Juvenile

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[11] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[12] Graham v. Florida, 560 U.S. 48, 82 (2010).

[13] *Miller*, 567 U.S. at 479–80 (referencing what later became the "irreparable corruption" standard and requiring sentencing entities "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

[14] *White*, 307 Ga. at 608, 837 S.E.2d at 846 (affirming White's sentence); *Raines*, 309 Ga. at 273, 845 S.E.2d at 624 (remanding Raines' case for him to be sentenced by the judge who originally sentenced him to LWOP.).

[15] White v. State, 307 Ga. 601, 837 S.E.2d 838 (2020).

[16] Raines v. State, 309 Ga. 258, 845 S.E.2d 613 (2020).

LWOP Litigation

Before discussing the issue of juveniles serving life without parole, an overview of death sentencing for juvenile is in order. In 1988—not even forty years ago—the Supreme Court determined that executing children under the age of sixteen "would offend civilized standards of decency" and was unconstitutional.[17]

Almost thirty years later, in 2005, the Court decided *Roper v. Simmons*[18] and held that "[t]he Eighth and Fourteenth Amendments[19] forbid imposition of the death penalty on offenders who were under the age of [eighteen] when their crimes were committed."[20] This holding hinged on combined constitutional and psychological theories that reappeared in later juvenile LWOP decisions. First, the Court noted that any logic behind the death penalty relies on a finding of extreme culpability, and even the most criminally-minded teenager is often too immature to develop that level of responsibility.[21] Along the lines of culpability, the Court discussed how children are psychologically underdeveloped, noting that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects . . . transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[22] For these reasons, the Eighth Amendment bars the execution of individuals for crimes committed under the age of eighteen.[23]

Given the psychological deficiencies juveniles have by virtue of being children, the Court determined that permitting the execution of minors constituted "disproportionate punishment" for purposes of the Eighth Amendment and, thus, was unconstitutional.[24] That holding rested on the theory that the Constitution bars punishment for those who cannot be reasonably held accountable for all their actions.[25] The Court also noted that the United States was a significant outlier in international

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[17] *Thompson*, 487 U.S. at 830, 838.

[18] 543 U.S. 551 (2005).

[19] U.S. CONST. amend. XIV.

[20] *Roper*, 543 U.S. at 578.

[21] *Id.* at 572–73.

[22] *Id.* at 573. Though the term "irreparable corruption" later developed into a label necessary to punish a child with LWOP, it was used in this context to denote the level of depravity necessary to justify a death sentence. As is discussed in more detail later in this Article, the Court compared the finding of "irreparable corruption" to a diagnosis of antisocial personality disorder—a diagnosis psychiatrists cannot give patients under eighteen because children have not developed enough to make the permanent diagnosis worth the risk of burdening a future, functional adult. *Id.* at 573–74.

[23] *Id.* at 578.

[24] *Id.* at 575.

[25] *Id.* at 573.

law by permitting the execution of those convicted while minors.[26] In short, the Court introduced a new interpretation of the Constitution that complied with modern understandings of proportionality and juvenile psychology, resulting in the United States refusing to "stand[] alone in a world that has turned its face against the juvenile death penalty."[27]

B. Juvenile LWOP litigation Post-Roper

1. Irreparably Corrupt: The *Miller v. Alabama* Standard

Before 2005, the major issue in juvenile justice was the death penalty. It was only after *Roper* that litigation in federal courts regarding juvenile life without parole began in earnest. From the beginning of juvenile LWOP litigation, courts have relied on death penalty jurisprudence in determining whether a life sentence is appropriate. *Graham v. Florida*[28] was the first major Supreme Court decision regarding juvenile LWOP post-*Roper*. In that 2010 case, the Court held that children cannot be sentenced to life imprisonment for crimes other than homicide.[29] Relying on the same psychology-based logic as in *Roper*, the Court noted that the theory of retribution simply does not apply to child offenders because children cannot develop the "personal culpability" necessary to render life without parole proportional to the offender's responsibility.[30] Furthermore, because LWOP is permanent and the most extreme sentence a juvenile may receive, the Court determined LWOP is for juveniles what the death penalty is for adults: the ultimate punishment that must be approached with extreme caution.[31]

After limiting juvenile LWOP to defendants convicted of homicide, the Court in *Miller v. Alabama*[32] determined that states cannot make life sentences for children mandatory by statute.[33] In reaching that decision, the Court relied on the *Graham* logic that a life sentence for a child is analogous to death sentence for an adult, both in terms of the sentence's permanence and the findings required to satisfy the Constitution before

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[26] *Id.* at 575.

[27] *Id.* at 577. The Court cited multiple international treaties, various countries' statutes, and other countries' disavowing of the juvenile death penalty as evidence that the United States was, essentially, behind-the-times in the cruelest way. *Id.* at 576.

[28] 560 U.S. 48 (2010).

[29] *Id.* at 82.

[30] *Id.* at 71 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987) and *Roper*, 543 U.S. at 571). The Court implied it would not favor minor offenders in the future by assuring the public that "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation . . . ." *Graham*, 560 U.S. at 71.

[31] *Id.* at 78.

[32] 567 U.S. 460 (2012).

[33] *Id.* at 489.

imposing the sentence.[34] Referring back to the concepts of culpability and juvenile psychology that influenced the holdings in *Graham* and *Roper*, the Court stated that sentencers cannot impose "a State's most severe penalties on juvenile offenders . . . as though they were not children."[35] Because death cannot be a mandatory sentence for adults,[36] and because children are unique within the criminal justice system, sentencers must be able to consider the child offender's personality, personal situation, and the circumstances of the crime before rendering a sentence "analogous to capital punishment."[37]

The Court's core reasoning was that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[38] Under a mandatory life without parole scheme, a seventeen-year-old from a functional family would be treated the same as a fourteen-year-old from an abusive background—and both teenagers would be sentenced just like an adult would be in their position.[39] For those reasons, the Court decided that a sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[40] Specifically, the Court referred to its prior decision in *Roper* to argue that sentencers must have the ability to examine evidence and distinguish offenses that reflect "transient immaturity" from those that "reflect[] irreparable corruption."[41]

The Court declined to detail exactly how sentencers should decide which children are irreparably corrupt and which are deeply immature and thoughtless; it left state and lower federal courts to iron out those details. The Court was careful to note that a sentencer may well conclude the defendant is indeed corrupt beyond repair and thus deserving of dying in prison.[42] The juvenile simply cannot be sentenced without an examination of his particular circumstances because, as with the death penalty, mandatory imposition of the most severe punishment constitutionally available "g[ives] no significance to 'the character and record of the individual offender or the circumstances' of the

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[34] *Id.* at 474–75.

[35] *Id.* at 474.

[36] *Id.* at 475 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

[37] *Id.* at 475–77 (quoting *Graham*, 560 U.S. at 89 (Roberts, C.J. concurring)).

[38] *Id.* at 476.

[39] *Id.* at 477.

[40] *Id.* at 489.

[41] *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573).

[42] *Id.* at 479 ("[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . . But . . . we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

offense . . . ."[43] As it had in its prior cases regarding children and the death penalty, the Court rested much of its decision on the determination that children are "constitutionally different from adults for purposes of sentencing."[44]

Four justices dissented from the *Miller* majority opinion.[45] Significantly, Chief Justice Roberts, joined by justices Thomas, Alito, and Scalia, objected on the grounds that mandatory life without parole could not be a "cruel and unusual punishment" for children because it was not "unusual" enough.[46] The Chief Justice warned that by making it more difficult to sentence juveniles to life without parole, minors could have their LWOP sentences overturned.[47] Chief Justice Roberts predicted that over time the trend away from juvenile LWOP would make juvenile life without parole so uncommon that, eventually, "the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits [juvenile LWOP]."[48] Four years later, the Court clarified the scope of *Miller* and applied it more broadly than the opinion originally indicated, paving the way for Chief Justice Roberts's fears to be realized.

2. The Scope of *Miller*

In 2016, in *Montgomery v. Louisiana*,[49] the Court determined that the *Miller* rule applied retroactively, meaning that prisoners whose sentences were finalized before the Court decided *Miller* could attack their sentences through habeas corpus and potentially have their sentences reduced.[50] The Court focused on the *Miller* holding that sentencers must have the option to review a juvenile's history before sentencing him to life in prison and specified that courts must determine whether a child is one of the "rare[]" irreparably corrupt minors for whom life without parole is proportionate to his crime.[51]

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[43] *Id.* at 475 (quoting *Woodson*, 428 U.S. at 304).

[44] *Id.* at 471.

[45] *Id.* at 493. This Article focuses on Chief Justice Roberts' dissent because it highlights the developing nature of extreme sentences for juveniles, but Justices Thomas and Alito wrote additional dissents. Justice Thomas lamented that *Roper* and *Graham* were wrongly decided. *Id.* at 502 (Thomas, J., dissenting). Justice Alito took issue with the Court's treatment of seventeen-year-olds as legal minors and the trend of ruling state laws unconstitutional due to "evolving standards of decency." *Id.* at 510 (Alito, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

[46] *Id.* at 493 (Roberts, C.J., dissenting) (quoting U.S. CONST. amend. VIII).

[47] *Id.* at 501 (Roberts, C.J., dissenting).

[48] *Id.* (Roberts, C.J., dissenting).

[49] 136 S. Ct. 718 (2016).

[50] *Id.* at 736.

[51] *Id.* at 726.

As it had in *Miller*, the Court led readers through the primary theories of punishment and explained why sentencing juveniles to serve their lives in prison does not serve any of those theories particularly well, just as exposing minor defendants to the death penalty served limited functional purposes.[52] Though states are entitled to punish people for purely retributive reasons, "the case for retribution is not as strong with a minor as with an adult" because children usually cannot be as culpable for their crimes as their adult counterparts.[53] Likewise, the deterrence of future crimes barely applies to juvenile offenders because, just as children cannot experience culpability in the same way as adults, they are far less likely to consider the repercussions of their actions.[54] Permanently incapacitating minors via imprisonment is similarly ineffective because children who commit even the most brutal crimes have yet to develop mentally, so they are less likely to be dangerous to society in the future after having the opportunity to mature.[55] Rehabilitation, the final primary theory of punishment, does not apply to LWOP in any case, not just for children, because "life without parole 'forswears altogether the rehabilitative ideal'" in its permanence.[56]

The Court in *Montgomery* did not just repeat its theories in *Miller*; it highlighted that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants'"—the class of juveniles "whose crimes reflect the transient immaturity of youth."[57] The *Miller* decision, then, did not represent merely a prophylactic rule for the future; it rendered unconstitutional all convictions in violation of *Miller*, no matter how long ago the prisoners' direct appeals ended.[58] Again, the Court did not bar life without parole for juvenile offenders across the board; it just required that *Miller*'s constitutional rule be applied retroactively, and acknowledged the limited functionality of sentencing children to serve life without parole.

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[52] *Id.* at 733.

[53] *Id.* (quoting *Miller*, 567 U.S. at 472).

[54] *Id.* (citing *Miller*, 567 U.S. at 472).

[55] *Id.* (quoting *Miller*, 567 U.S. at 472).

[56] *Id.* (quoting *Miller*, 567 U.S. at 473).

[57] *Id.* at 734 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)). This point is particularly interesting because, as the dissenting justices pointed out, the Court in *Miller* clearly stated: "Our decision does not categorically bar a penalty for a class of offenders . . . ." *Id.* at 743 (Scalia, J., dissenting) (quoting *Miller*, 567 U.S. at 483).

[58] *Id.* The Court relied heavily on the retroactivity analysis and test outlined in Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). Under *Teague*, most imprisoned people do not benefit from new rules of criminal procedure established after a sentence is finalized. *Id.* at 306–07. However, individuals in prison may collaterally attack their sentences (usually via habeas proceedings) based on "new substantive and watershed procedural rules." *Montgomery*, 136 U.S. at 728. "*Miller* announced a new substantive rule of constitutional law" that state courts must apply retroactively. *Id.* at 734.

As they had in *Miller*, justices Scalia, Thomas, and Alito objected to the majority ruling.[59] Most of the dissent focused on legal and policy reasons backing prior Supreme Court decisions on retroactively applying new rules in criminal law, but Justice Scalia also alleged that the majority was invested in reducing the number of juveniles serving life sentences rather than ruling strictly based on precedent.[60] Chief Justice Roberts joined in the majority opinion, but Justice Scalia's complaint about the results of the *Montgomery* decision furthered the Chief Justice's earlier theory that the Court was intentionally moving to a future where juvenile LWOP will be barred entirely.

3. *Veal v. State*: A Foundational Georgia Supreme Court Interpretation of *Miller* and *Montgomery*

The Supreme Court's retroactive application of *Miller* in *Montgomery* directly affected post-conviction proceedings in Georgia. In 2016, the Georgia Supreme Court interpreted those United States Supreme Court rulings in a way that was, at first glance, relatively strict and favorable to juvenile defendants. In *Veal v. State* (*Veal I*),[61] the Georgia Supreme Court held that the *Miller* rule meant that, not only must a sentencer consider the factual circumstances surrounding a case when sentencing a child to LWOP, but the sentencer must specifically "determine[] that [the defendant] is *irreparably corrupt*."[62]

However, the court held that the minor defendant's sentence "turns not on" the specific facts of the defendant's circumstances.[63] Rather, the sentence hinges on the "specific determination" regarding the defendant's irreparable corruption.[64] Considering the child's "age and perhaps some of its associated characteristics" combined with the circumstances of the crime itself will not do; the sentencer must determine that the child is irreparably corrupt, impossible to rehabilitate, and thus deserving of LWOP.[65] Because the trial court in *Veal* initially determined the defendant deserved life without parole, but

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[59] *Id.* at 737 (Scalia, J., dissenting). Chief Justice Roberts did not publish an opinion regarding his decision to join the majority, and he did not reiterate his complaints regarding the decision in *Miller*.

[60] *Id.* at 743 (Scalia, J., dissenting) (asserting the majority did "nothing more than express the *reason* why the new, youth-protective *procedure* described by *Miller* is desirable: to deter life sentences for certain juvenile offenders.") (emphasis in original).

[61] 298 Ga. 691, 784 S.E.2d 403 (2016).

[62] *Id.* at 702, 784 S.E.2d at 411 (emphasis in original).

[63] *Id.*

[64] *Id.*

[65] *Id.* at 703, 784 S.E.2d at 412.

did not brand him as irreparably corrupt, the supreme court remanded the case for an irreparable corruption determination.[66]

On remand, the government did not attempt to convince the trial court that Veal was in fact irreparably corrupt. Instead, the prosecutor changed the requested sentence to multiple life sentences with the possibility of parole, to be served consecutively, in addition to several other life sentences with the possibility of parole. Veal's combined sentences totaled "eight consecutive life sentences plus [sixty] years."[67] These life sentences carried the possibility of parole, but per O.C.G.A. § 42-9-39(c),[68] prisoners like Veal must serve sixty years of multiple life sentences before becoming parole-eligible. All this amounted to a requirement that Veal live in prison until he was well into his seventies—several years beyond his statistical life expectancy—without a sentencer ever determining him irreparably corrupt. Just as before, the trial court imposed this new sentence without determining Veal was irredeemable.[69]

On appeal, Veal claimed his multiple consecutive sentences amounted to de facto LWOP without the determination necessary to satisfy the requirements the Georgia Supreme Court outlined in 2016.[70] But his constitutional claim was to no avail. In its second hearing of *Veal v. State* (*Veal II*), [71] the state supreme court ruled that because Veal was not sentenced to LWOP *per se*, the functionality of his sentence was of no constitutional concern.[72] Under the court's reading of *Miller* and *Montgomery*, the two cases "create[ed] a substantive rule" that applies specifically and exclusively to LWOP *per se* because that sentence is based on a single crime.[73] Because the court's understanding of *Miller* and *Montgomery* hinged on the narrow circumstance of courts doling out life without parole based on a single crime, rather than multiple life

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[66] *Id.*

[67] Veal v. State, 303 Ga. 18, 18, 810 S.E.2d 127, 128 (2018) (*Veal II*).

[68] O.C.G.A. § 42-9-39(c) (2020).

[69] *Veal II*, 303 Ga. at 19, 810 S.E.2d at 128.

[70] *Id.*

[71] *Veal v. State*, 303 Ga. 18, 810 S.E.2d 127 (2018).

[72] *Id.* at 20, 810 S.E.2d at 129. ("Because the Supreme Court has not expanded its mandate that the Eighth Amendment's prohibition of cruel and unusual punishment as it applies to juvenile offenders requires a sentencer to consider a juvenile's youth and its attendant characteristics before imposing a sentence other than LWOP, this Court will not do so.").

[73] *Id.* at 19, 810 S.E.2d at 128–29. "[N]either *Miller* nor *Montgomery* addressed the imposition of aggregate life-with-parole sentences for multiple convictions or whether sentences other than LWOP require a specific determination that the sentence is appropriate given the offender's youth and its attendant characteristics . . . ." despite the defendant's argument that the court's interpretation of Supreme Court precedent "elevates form over substance." *Id.*

sentences based on multiple crimes, the latter option fell outside explicit Supreme Court precedent and thus the defendant was not entitled to that precedent's protections.[74]

In the eyes of the Georgia Supreme Court, then, the fact that a child would be forced to live in prison his entire life was not at the core of the United States Supreme Court's reasoning in *Miller*.[75] All that mattered was the technical sentence in relation to one crime, not the real-life fallout of sentencing children to suffer identical consequences for multiple simultaneous crimes[76]—despite the United States Supreme Court's explicit statement that children cannot be sentenced to die in prison "as though they [are] not children."[77]

In *Veal II*, the court determined that whether a child is irreparably corrupt "turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case . . . ."[78] The court reached this surprising conclusion despite the *Miller* Court stating, and the Georgia Supreme Court later understanding, that sentencing entities "must have the discretion to consider 'youth and its attendant characteristics, along with the nature of [the defendant's] crime . . . .'"[79] In short, in *Miller* the United States Supreme Court required that sentencers consider things such as age, maturity, and the circumstances of the crime in determining whether a child is irreparably corrupt.[80] Then, the Georgia Supreme Court interpreted *Miller* to mean that judges must deem a child irreparably corrupt without "turn[ing] . . . on" the child's age; "the qualities that accompany youth"; and the circumstances of the case.[81] This essentially turned *Miller* inside-out, divorcing its primary holding (a requirement of irreparable corruption) from the factors that establish the existence of irreparable corruption and teeing up the State of Georgia for ongoing litigation regarding the procedures required to sentence children to live and die in prison.

III. *WHITE V. STATE*: THE GEORGIA SUPREME COURT DECLINES TO

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[74] *Id.* at 20, 810 S.E.2d at 129.

[75] *Id.* at 19, 810 S.E.2d at 128–29.

[76] *Id.*

[77] *Miller*, 567 U.S. at 474.

[78] White v. State, 307 Ga. 601, 604, 837 S.E.2d 838, 843 (quoting *Veal I*, 298 Ga. at 702, 298 Ga. at 411) (clarifying the holding in *Veal I*).

[79] *Id.* at 604, 837 S.E.2d at 843 (quoting *Miller*, 567 U.S. at 465).

[80] *Miller*, 567 U.S. at 479–80. The Court requires sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" so only those who are irreparably corrupt will be sentenced to LWOP. *Id.*

[81] *Veal I*, 298 Ga. at 702, 784 S.E.2d at 411.

A. Factual and Procedural History

In 2016, the same year the Georgia Supreme Court published its decision in *Veal I*, seventeen-year-old Dakota White and a friend entered a suicide pact. Before dying, however, White and his friend wanted to know what it felt like to kill someone else. To accomplish this part of their plan, the two boys set out to kill White's other friend, Samuel, partially "because he would be an 'easy' victim."[82] White and his friend killed Samuel, but they fell short of the "suicide" part of their plan. In short order, White was arrested and charged with Samuel's murder.[83]

White was charged, tried, and convicted of malice murder. A judge sentenced him to serve his life in prison without the possibility of parole with an additional ten years for the lesser crimes with which he was charged.[84] In determining White was "irreparably corrupt," the sentencing judge noted the circumstances of the crime: the planning White and his co-conspirator put into the crime, the details of the homicide itself, and White's "reckless and impulsive behavior" despite an apparently normal home environment.[85]

White's sentencing judge discredited an expert's conclusion that White was not "irretrievably depraved" because the judge believed the opinion did not rely on credible evidence and was "based on predictions that 'simply cannot be made.'"[86] The judge then sentenced White to life without the possibility of parole based on the premise that White was permanently depraved, a conclusion the judge reached by a preponderance of the evidence.[87]

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[82] *White*, 307 Ga. at 601, 837 S.E.2d at 841 (quoting the record on appeal).

[83] *Id.* at 601–02, 837 S.E.2d at 841.

[84] *Id.* at 602, 837 S.E.2d at 841. White was also convicted of concealing the death of another and tampering with evidence. *Id.*

[85] *Id.* at 605, 837 S.E.2d at 843.

[86] *Id.* Herein lies one of the many issues regarding juvenile LWOP sentencing. One problem with the irreparable corruption standard will always remain true: declaring a child irrevocably corrupt or, in the alternative, *not* irrevocably corrupt requires adults to speculate wildly about a child's certain future. It is true that the conclusion that a child can eventually be rehabilitated broaches on fortunetelling, but so does the conclusion that a child cannot be rehabilitated—that is, that a child is irrevocably corrupt and beyond help, even decades in the future. So, while an expert's determining White to be redeemable was speculative, the judge found the opposite to be permanently true and sentenced White to life without the possibility of parole. *Id.* The sentencing judge (and the reviewing court, for that matter) failed to at least acknowledge the absurdity of dismissing the expert's recommendation on the basis that the defendant could not prove he would not commit crimes in the future while accepting the State's premise that the defendant certainly would commit those future crimes.

[87] *Id.* at 604, 837 S.E.2d at 843.

B. The Supreme Court Holds Sentencers Need Only Decide a Child is More Likely Than not Irreparably Corrupt

On appeal, White's counsel argued that the State should have to prove defendants irreparably corrupt beyond a reasonable doubt, not by a preponderance of the evidence, for the judge to make the determination and sentence White to life without parole.[88] In January 2020, the Georgia Supreme Court reviewed the trial court's findings for clear error and holdings de novo.[89] In *White v. State*, the court upheld the determination that White was irreparably corrupt under a preponderance standard and did not require that conclusion to be proven beyond a reasonable doubt.[90] Instead of requiring proof beyond a reasonable doubt to sentence a juvenile to life in prison, the court noted that the preponderance standard in the sentencing process "generally satisfies due process."[91] While that is true, one must then ask whether sentencing a child to die in prison, which the Georgia Supreme Court acknowledges should be "*exceptionally rare*"[92] and only happen to "the worst-of-the-worst,"[93] falls in the "general[]" category of situations where the preponderance standard is appropriate.[94]

The Georgia Supreme Court continued in this vein, highlighting the fact that the irreparable corruption requirement is an outlier in juvenile LWOP sentencing, not the trend-setter.[95] As a result, the court held there

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[88] *Id.* White's counsel also argued that White's arrest was unconstitutional under the Fourth Amendment and that, based on that constitutional infirmity, statements White made while in police custody were improperly admitted at trial. *Id.* at 603, 837 S.E.2d at 842. Even though the supreme court "ha[d][] doubts" regarding the constitutionality of the arrest itself, it ruled that White's statements were admissible because the police did have probable cause for the arrest (despite lacking a warrant). *Id.* This holding is unsurprising since the exclusionary rule generally does not apply in situations where the arresting officers had probable cause and pertinent information against the defendant provided by other residents in his household. *Id.* However, it is yet another example of a general procedural rule designed primarily for adult defendants that does not account for juveniles being less capable of asserting their rights and remaining silent while in police custody after an illegal arrest.

[89] *Id.* at 602, 837 S.E.2d at 842.

[90] *Id.* at 606, 837 S.E.2d at 844.

[91] *Id.* at 605–06, 837 S.E.2d at 844 (quoting United States v. Watts, 519 U.S. 148, 156 (1997)).

[92] *Id.* at 604, 837 S.E.2d at 843 (quoting *Veal I*, 298 Ga. at 702, 784 S.E.2d at 411) (emphasis in *Veal I*).

[93] *Veal I*, 298 Ga. at 703, 784 S.E.2d at 412.

[94] *White*, 307 Ga. at 606, 837 S.E.2d at 844 (quoting *Watts*, 519 U.S. at 156).

[95] *See id.* at 605–06, 837 S.E.2d at 844 (Arguing that, though the irreparable corruption test presents a particular issue for sentencers to determine, the irreparable corruption determination may comply with the preponderance standard because the Supreme Court has not explicitly made juvenile LWOP an exception to general rules outside the corruption determination).

was no reason to treat juvenile LWOP any more delicately than any other sentencing scheme.[96] Thus, though sentencers must at least "have the opportunity *to consider* mitigating circumstance before imposing the harshest possible penalty for juveniles,"[97] there was no cause for the court to read the unique requirements and repercussions of and for juvenile LWOP in a way that "deviat[es] from the ordinary rule that proof by a preponderance of the evidence is sufficient."[98]

The court noted that the Due Process Clause[99] does not "prohibit" a given state criminal practice unless the practice "offends some principle of justice . . . ranked as fundamental."[100] Though true, this construction is the narrowest possible interpretation of the issue and combines the exceptional sentence of juvenile life without parole, and what is supposed to be the exceptional circumstances of a crime that make LWOP possible, with run-of-the-mill sentencing schemes for adults. Put another way, though life without parole for minors should be "*exceptionally rare*" and applied only to the worst juvenile offenders, those unique offenders are not entitled to any procedural protections beyond what the Supreme Court has made explicit to ensure the rarity of the sentence.[101] Rather, the Georgia Supreme Court decided that, with the exception of the irreparable corruption determination, juveniles being sentenced to the harshest punishment possible are subject to procedures designed for adults.

So, what makes a child irreparably corrupt and eligible to live in prison for the rest of his life? Simply put, whatever convinces the sentencing entity the child is more likely than not irredeemable.[102] And what must the State prove under what was designed to be a strict requirement? "[S]imply . . . that the evidence show[s] that something is more likely true than not."[103]

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[96] *Id.* at 606, 837 S.E.2d at 844.

[97] *Id.* (quoting *Miller*, 567 U.S. at 489) (emphasis in *White*).

[98] *Id.*

[99] U.S. CONST. amend. XIV, § 1.

[100] *White*, 307 Ga. at 605, 837 S.E.2d at 843 (quoting Medina v. California, 505 U.S. 437, 445 (1992)).

[101] *Id.* at 604, 837 S.E.2d at 843 (quoting *Veal I*, 298 Ga. at 702).

[102] *Id.* at 606–07, 837 S.E.2d at 844–45. The supreme court asserted that the trial court laid out detailed evidence to "support[] the trial court's determination that White [was] irreparably corrupt" but did not feel the need to discuss that evidence itself, despite White's claim that it was insufficient to meet the preponderance of the evidence standard. *Id.* at 607, 837 S.E.2d at 845. The trial court considered White's testimony at his co-conspirator's trial, but it stated its decision regarding White's character would be the same even without that testimony. *Id.* at 608, 837 S.E.2d at 845.

[103] *Id.* at 607, 837 S.E.2d at 845.

IV. NO JURY REQUIRED: JUDGES, NOT ONLY JURIES, MAY SENTENCE CHILDREN TO LWOP

In 2011, Dantazias Raines and his friend intended to commit an armed robbery. Their plan went awry, and Raines fatally shot their robbery victim.[104] In 2013, a jury convicted Raines of malice murder, and he was sentenced to serve life without the possibility of parole. After a round of direct appeals, Raines's case was remanded with the instruction that he be resentenced in compliance with *Montgomery* and *Veal I*. On remand, the trial judge prepared to determine whether Raines was irreparably corrupt and sentence him to serve life without parole. Raines objected and requested to be sentenced by a jury. The judge denied his motion but certified his request for an interlocutory appeal for the supreme court to decide the issue.[105] In 2020, the supreme court held in *Raines v. State* that judges, not necessarily juries, may sentence juvenile defendants like Raines to life without parole.[106]

Ultimately, the court held that defendants convicted of murders they committed while minors are not entitled to a jury sentencing them to LWOP because the "irreparably corrupt" determination is not an additional finding of fact that increases an authorized sentence.[107] This holding is particularly interesting given the court's discussion that, when a state requires a finding of an "aggravating circumstance" to sentence a defendant to death, a jury must find that factor.[108] That is, when the law requires a factual finding for adults to receive the ultimate, life-ending sentence of death, a jury, not a sentencing judge, must make a factual finding that an aggravating factor existed in the commission of the murder.[109] The Georgia Supreme Court decided that because an irreparable corruption determination is required by the Constitution, not by Georgia statute, juveniles sentenced to this maximum available punishment are not entitled to the same procedure as adults who receive the maximum punishment available—despite the court's reliance on law regulating the death penalty, the United States Supreme Court's direct comparisons between the death penalty for adults and life without parole for juveniles, and the historic relationship between juvenile death penalty and juvenile LWOP.[110]

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[104] Raines v. State, 304 Ga. 582, 582–53, 820 S.E.2d 679, 682–83 (2018). The court also handled various evidentiary concerns and ruled in favor of the State on almost all of them, none of which rendered Raines ineligible for LWOP. *Id.* at 582, 820 S.E.2d at 682.

[105] Raines v. State, 309 Ga. 258, 258–59, 845 S.E.2d 613, 615 (2020).

[106] *Id.* at 273, 845 S.E.2d at 624.

[107] *Id.* at 264, 845 S.E.2d at 618–19.

[108] *Id.* at 6, 845 S.E.2d at 617 (citing Ring v. Arizona, 536 U.S. 584, 609 (2002)).

[109] *Id.* (citing *Ring*, 536 U.S. at 609).

[110] *Id.* at 265–66, 845 S.E.2d at 619–20.

The court reached two major conclusions through its analysis: (1) unlike the death penalty for adults, life without parole is not an enhanced sentence for juveniles because life with the possibility of parole is not always the statutory maximum sentence available for minors; and (2) the *Veal II* irreparable corruption test is not a "fact" to be determined by a jury. It is just a conclusion to be reached.[111]

A. Procedural Safeguards for Enhanced Sentences and Statutory Maximums do Not Protect Juveniles Sentenced to Life Without Parole

For its conclusion that irreparable corruption is not a finding of fact reserved for a jury, the supreme court relied on the general principle that "no additional facts are required to be found by the jury for the imposition of life without parole."[112] But the case the court relied on for that conclusion, *Lewis v. State*,[113] dealt only with adults sentenced to life without the possibility of parole.[114] For an adult, there is no factfinding necessary for an LWOP sentencing, but there is also no requirement that a sentencer determine the defendant be irreparably corrupt. That is, under a statute that also allows judges to sentence adult defendants to death, adult defendants are not entitled to additional findings of fact to be sentenced to LWOP. It is difficult to see how that relates to the juvenile-specific irreparable corruption determination. That requirement is mentioned nowhere in *Lewis* or in the sentencing statute. In this conclusion, perhaps more clearly than anywhere else, the supreme court analyzed the specific requirements for sentencing children through a lens created for adult defendants, again ignoring the benefits to which juveniles are entitled when being sentenced to LWOP.

Moreover, the court determined that because irreparable corruption is a finding required by the Constitution, not a statute, jurisprudence regulating maximum sentencing simply does not apply to juvenile LWOP.[115] The court noted that Supreme Court Sixth Amendment[116] cases were based on state statutes that "authorized a maximum sentence and also specifically required a judge to make an additional factfinding—apart from the jury's verdict—to authorize imposition of that maximum sentence."[117] But Georgia's murder sentencing statute, O.C.G.A.

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[111] *Id.* at 267–68, 845 S.E.2d at 621.

[112] *Id.* at 11, 845 S.E.2d at 619 (quoting Lewis v. State, 301 Ga. 759, 767, 804 S.E.2d 82, 89 (2017)).

[113] Lewis v. State, 301 Ga. 759, 804 S.E.2d 82 (2017).

[114] *See id.* at 766–67, 804 S.E.2d at 89 (discussing LWOP for the adult defendant with no reference to the special treatment to which minors are entitled).

[115] *Raines*, 309 Ga. at 265, 845 S.E.2d at 619.

[116] U.S. CONST. amend. VI.

[117] *Raines*, 309 Ga. at 265, 845 S.E.2d at 619.

§ 16-5-1,[118] does not require a finding of irreparable corruption or permanent incorrigibility. In fact, the statute, which refers to and authorizes the death penalty, does not mention juveniles at all.[119] It is the Constitution that bars the State of Georgia from executing minors and requires "that a specific determination of irreparable corruption be made before imposing" LWOP on a juvenile.[120] The Eighth Amendment, not the Sixth Amendment, requires juveniles be determined irreparably corrupt before they may be sentenced to life without parole. Thus, the state supreme court held that Eighth Amendment cases defining how juveniles may be sentenced to LWOP have no bearing on who the Sixth Amendment authorizes to do the sentencing.[121]

Along the same lines, the court determined that juvenile life without parole is not an "enhanced" sentence simply because *Miller* and *Montgomery* did not say that it was.[122] In supporting the conclusion that juvenile LWOP is not an enhanced sentence for Eighth Amendment purposes, the court primarily relied on *Cabana v. Bullock*,[123] which determined that the Constitution does not require a jury to decide as a matter of fact that "the defendant himself killed, intended to kill, or attempted to kill" the victim to be eligible for the death penalty and that a judge is competent to make that determination if permitted by state statute.[124] Though *Cabana* is still the law, it has been overruled in part (on other grounds), and the court in *Raines* relied primarily on other state courts' interpretations of the case rather than Supreme Court or circuits of appeals' commentary.[125] For those reasons, the court held that juvenile

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[118] O.C.G.A. § 16-5-1 (2020).

[119] *See* O.C.G.A. § 16-5-1(e)(1) ("A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or imprisonment for life.").

[120] *Raines*, 309 Ga. at 265, 845 S.E.2d at 619.

[121] *Id.* at 13, 845 S.E.2d at 620 ("[T]he Supreme Court's Eighth Amendment precedents . . . do not speak to what punishment a state statute authorizes for a given offense or whether the 'facts reflected in the jury verdict alone' would authorize a given punishment under the state statute . . . .") (quoting *Ring*, 536 U.S. at 602).

[122] *Id.* at 266, 845 S.E.2d at 620 Raines argued that juvenile LWOP was an enhanced sentence "because the Supreme Court's Eighth Amendment precedent has so greatly restricted the availability of that sentence for juveniles . . . . But neither *Miller* nor *Montgomery*'s Eighth Amendment analysis of juvenile LWOP characterized [it] as a sentence that increases or aggravates the penalty a juvenile faces . . . ." *Id.*

[123] 474 U.S. 376 (1986).

[124] *Raines*, 309 Ga. at 267, 845 S.E.2d at 620 (citing *Cabana*, 474 U.S. at 385–86).

[125] *See id.* at 267, 845 S.E.2d at 620–21 (citing People v. Blackwell, 3 Cal. App. 5th 166, 194 (2016) for the assertion that the Supreme Court has yet to "explicitly" overrule *Cabana*'s Eighth Amendment holding and People v. Skinner, 917 N.W.2d 292, 309 n.17 (Mich. 2018) for a holding similar to the *Raines* conclusion.).

LWOP is not an enhanced sentence and that minor defendants are not entitled to be sentenced by a jury on that count.[126]

B. Judges May Impose the Extraordinary Sentence of Juvenile LWOP via Ordinary Procedures

Finally, Raines argued that the irreparable corruption determination was a "'fact' that 'expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict'" and thus must be found by a jury pursuant to *Veal II*.[127] However, the Georgia Supreme Court noted that, in *Miller*, the U.S. Supreme Court used the inclusive phrase "judge or jury" rather than exclusively referring to a jury.[128] Furthermore, in *White*, the state supreme court noted that the irreparable corruption determination was never defined as a factual finding reserved for juries.[129] Rather, the irreparable corruption conclusion is a "specific determination" outside the realm of factfinding *per se*.[130]

The court analyzed the issue further in terms of *Apprendi v. New Jersey*, [131] a United States Supreme Court case that determined judges cannot sentence criminal defendants in excess of the maximum penalty the defendant would have received if he were punished according to the facts presented to his jury. [132] Though "a jury must find the aggravating circumstance that makes the defendant death eligible," a defendant is not entitled to be sentenced by the jury.[133] Rather, once the jury has found facts that permit a defendant to be sentenced to death, a judge can use those facts to "weigh" culpability and determine whether execution is appropriate.[134] Using this standard, the Georgia Supreme Court decided in *Raines* that irreparable corruption is not designated to a jury because *Apprendi*'s guidelines only apply to "*legislative* attempt[s] to remove from the . . . jury the determination of facts that warrant

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[126] *Id.* at 267–28, 845 S.E.2d at 621.

[127] *Id.* at 268, 845 S.E.2d at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

[128] *Id.* at 269, 845 S.E.2d at 622 (quoting *Miller*, 567 U.S. at 489).

[129] *Id.* at 268, 845 S.E.2d at 621.

[130] *Id.*

[131] 530 U.S. 466 (2000).

[132] *Id.* at 483–84 ("[P]ractice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt."). That is, a sentencing judge may not review facts in addition to those presented to the jury in order to make an additional determination regarding culpability and then sentence the defendant based on that additional finding. *Id.*

[133] McKinney v. Arizona, 140 S. Ct. 702, 707 (2020).

[134] *Id.*

punishment for a specific statutory offense."[135] Informed by subsequent Supreme Court rulings, the court decided to apply *Apprendi* only to "statutorily prescribed factfindings," not constitutionally required findings such as irreparable corruption.[136] For this reason, the court held the corruption determination is appropriately made by judges even if it were a finding of fact for purposes of the Sixth Amendment.[137]

The Georgia Supreme Court's decisions regarding juvenile LWOP unnecessarily narrow United States Supreme Court and Georgia Supreme Court precedent and abandon the policies behind the limits on juvenile life without parole. In addition to multiplying the inconsistencies in juvenile LWOP sentencing, the supreme court's jurisprudence leaves the door open for time-consuming, expensive litigation regarding the boundaries of the irreparable corruption standard.

V. THE UNCERTAIN FUTURE OF JUVENILE LIFE WITHOUT PAROLE

A. The Irreparably Corrupt Standard is Unsustainable

First, the current standard for sentencing juveniles to LWOP makes little sense. Determining a minor is irreparably corrupt quite literally requires a sentencer to predict the child's future—that the child cannot and will not ever improve himself. Judges and juries clearly should not engage in attempts at fortune-telling; such predictions are absurd at face value. As the sentencing court noted when sentencing Dakota White to life with the possibility of parole, attempts at predicting the moral development of a child are "based on predictions that 'simply cannot be made.'"[138] Not only does the irreparable corruption standard require the judge or jury to predict the future, but it requires them to accurately predict the moral development of someone who by definition lacks a fully developed brain.[139] That lack of development is precisely why children are entitled to the sentencer's additional decision regarding irreparable corruption.

The irreparable corruption standard requires sentencers to foretell the emotional and psychological development of a child—a determination far beyond the specialties of judges and juries. A finding of irreparable corruption is akin to a diagnosis of antisocial personality disorder, which is a mental health diagnosis considered long-term and characterized by

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[135] *Raines*, 309 Ga. at 262, 845 S.E.2d at 623 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)) (emphasis in *Raines*).

[136] *Id.* at 271, 845 S.E.2d at 623.

[137] *Id.* at 271–72, 845 S.E.2d at 623–24.

[138] *White*, 307 Ga. at 605, 837 S.E.2d at 843.

[139] Rachel Tompa, *This is your brain on adolescence*, BERKELEY NEWS (Oct. 16, 2008), https://www.berkeley.edu/news/media/releases/2008/10/16_neurolaw.shtml.

violent, deceitful, irresponsible behavior.[140] But even psychiatrists do not diagnose children with such a stigmatized, permanent condition.[141] This is not because psychiatrists cannot name and define symptoms of the personality disorder in children but because the diagnosis requires an evaluation of long-term behavior, and those patterns of behavior cannot reliably be tracked over the course of fewer than eighteen years.[142] Even a trained mental health professional cannot say how a seventeen-year-old will interact with the world when he is twenty-seven, much less seventy-seven. If psychiatrists cannot predict the development from a child, including an older teenager, how can a judge?

Second, the irreparable corruption standard almost certainly cannot be applied uniformly among different juvenile defendants. There are no guidelines for what judges must assess to determine permanent corruption; both supreme courts have just listed suggestions.[143] It stands to reason that what represents irreparable corruption to one judge (or jury) indicates the "transient immaturity" of youth to another.[144] Trial courts are highly competent and entrusted with wide discretion in many instances, but the imposition of a vague standard that requires judges to act as a juvenile's psychiatrist should not be one of those instances.

Finally, though most judges would surely make the painstaking fact-finding necessary to evaluate a juvenile's history, as the sentencing judge in *White* did, it is likely not every judge will be so circumspect.[145] Though judges must have the *discretion* to consider the juvenile's history

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[140] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 659 (5th ed. 2013). Antisocial personality disorder is an appropriate diagnosis for individuals over the age of eighteen who have, since at least the age of fifteen, engaged in lawbreaking, deceitful, impulsive, aggressive behavior. *Id.* A hallmark of the diagnosis is a lack of remorse for having hurt others. *Id.*

[141] *Id.* ("For this diagnosis to be given, the individual must be at least [eighteen] years.").

[142] *Id.* at 647–48.

[143] "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics," but there is no definition of what qualify as "attendant characteristics." *Montgomery*, 136 S. Ct. at 734. The Court in *Montgomery* cited *Miller*'s discussion of children's physical and psychological vulnerabilities and immaturity as reasons why LWOP is inappropriate without additional determinations, but the Court did not require sentencers to actually examine a child's homelife or specify anything that could indicate "irretrievable depravity." *Id.* at 733 (citing *Miller*, 567 U.S. at 471). Similarly, the Georgia Supreme Court in *Veal I* acknowledged that the trial court's general consideration of the defendant's "age and perhaps some of its associated characteristics, along with the overall brutality of the crimes for which he was convicted" did not qualify as the "distinct determination" of irreparable corruption *Miller* requires. *Veal I*, 298 Ga. at 703, 784 S.E.2d at 412. The court did not indicate that the trial court need to any more than examine those exact same features to potentially reach the conclusion that, based on that evidence alone, Veal was irreparably corrupt. *Id.*

[144] *Miller*, 567 U.S. at 479 (quoting *Roper*, 543 U.S. at 573).

[145] *White*, 307 Ga. at 605, 837 S.E.2d at 843.

and "any other relevant circumstances," neither the United States Supreme Court nor the Georgia Supreme Court have given straightforward guidance for what those considerations really look like. *White*'s sentencing judge clearly met the standard, but what is the minimum a judge could do to satisfy the consideration requirement? If a judge makes a comparatively cursory analysis of a child's age and the circumstances of the crime and sentences the defendant to life without parole based on that analysis, surely an appeal will follow. Then, the Georgia Supreme Court will be tasked with interpreting its and the United States Supreme Court's juvenile LWOP jurisprudence yet again. Bound by its interpretations of *Miller* and *Montgomery*, the court will have to nitpick the facts of the case to decide on a secondary test to determine whether the irreparable corruption standard has been satisfied. Courts are not overly fond of sussing out facts like these, and compounding the complications of the irreparable corruption standard would not be ideal for either the State or any defendant.

This particular issue is not merely hypothetical. Both the United States and Georgia supreme courts have recently been tasked with determining what, exactly, qualifies as proof of irreparable corruption and what specific procedural protections defendants are entitled to via *Montgomery*'s retroactive application of *Miller*. In *Love v. State*,[146] the Georgia Supreme Court reached the unsurprising conclusion that a history of violent behavior coupled with a lack of remorse qualifies as sufficient proof of irreparable corruption for a child to be sentenced to LWOP.[147] The United States Supreme Court is currently deciding whether an official determination of irreparable corruption is required or whether a sentencer has the discretion to conclude a minor is, essentially, bad enough to be LWOP-eligible with or without an official irreparable corruption determination.[148]

B. Alternatives to the Irreparable Corruption Standard

Since the irreparable corruption standard is untenable, there must be other sentencing options for children who commit homicide. There are

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[146] 2020 Ga. LEXIS 660.

[147] *Id.* at 14–15. Equally unsurprisingly, the court declined to declare juvenile LWOP out of step with "evolving standards of decency" and thus violative of the Eighth Amendment or any other law. *Id.* at 18–19.

[148] In *Jones v. Mississippi*, the State of Mississippi recently argued that a sentencer may impose LWOP after considering youth and its attendant characteristics whether or not the sentencer makes an explicit finding of irreparable corruption. Brief for Respondent, Jones v. Mississippi, No. 18-1259 (U.S. August 14, 2020), 2020 U.S. S. CT. Brief LEXIS 6555, at *3–4. Jones, the juvenile imprisoned for life without that technical finding, argued the explicit determination is required. Brief for Petitioner, Jones v. Mississippi, No. 18-1259 (U.S. June 5, 2020), 2020 U.S. S. CT. Briefs LEXIS 4800, at *2.

two primary solutions: (1) banning life without parole for children or (2) creating a viable standard under which juveniles may be sentenced to LWOP.

1. Acknowledging the Writing on the Wall: Ending LWOP for Georgia's Children

The easiest—and cheapest—solution to these issues would be for the Georgia General Assembly to rewrite the life without parole section of the Georgia Code and take juvenile LWOP off the table. That would save judges, juries, lawyers, defendants, and academics quite a few headaches caused by untangling the current standards. It would relieve the State of the cost of providing room, board, and medical care for people from the age of seventeen to seventy, eighty, or even ninety.[149] This solution would render obsolete the policy and statutory interpretation schisms the supreme court introduced in *Veal II* and *Raines*. Without the power to imprison children for life, there would be no need to quibble over what rights children have in LWOP sentencing procedures.

a. Abolishing juvenile LWOP would empower Georgia lawmakers and conform with the rest of the Georgia Code

Statutorily banning juvenile life without parole would empower Georgia to reach its own conclusions as to what alternatives to life without parole are most appropriate before the United States Supreme Court eventually, inevitably, removes juvenile LWOP from the states' ability to sentence. Though the Court is currently in a state of political flux, and several justices are certainly not pro-criminal justice reform,[150] it is reasonable to suppose that the Court will eventually outlaw a penalty that the rest of the world has already abolished.[151]

Indeed, the Supreme Court banning LWOP is precisely what Chief Justice Roberts warned the American people of in his *Miller* dissent.[152] No matter the outcome of the case currently before the Court, the apparent trajectory of the Court remains the same: harsh sentences for

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[149] THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW, 4 (Feb. 2020) https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

[150] Justices Thomas, Alito, and Roberts all dissented from the *Miller* majority's conclusions that children should be protected from the harshest sentences available. *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting).

[151] JUVENILE LAW CENTER, JUVENILE LIFE WITHOUT PAROLE (JLWOP), 2020, https://jlc.org/issues/juvenile-life-without-parole.

[152] *Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting).

juveniles are increasingly unpopular at home[153] and abroad.[154] It is only a matter of time before the Court decides the United States will no longer "stand[] alone in a world that has turned its face" on a punishment directly comparable to the death sentence.[155]

Georgia sentencing for juveniles, especially when the stakes are high, should be consistent with the rest of Constitutional law and the Official Code of Georgia, where children are treated differently than adults throughout. If the General Assembly wants to beat the Supreme Court to the punch and decide on its own what to do with juveniles convicted of homicide, it could easily bring juvenile sentencing in line with the way the Georgia Code already treats juveniles.

Georgia law already acknowledges that juveniles cannot realistically be held responsible for their decisions in the same way adults are. It is illegal to sell firearms to individuals under the age of twenty-one.[156] The Georgia Code strictly regulates when and with whom teenagers may drive vehicles, and teenagers are completely barred from obtaining some licenses until they are at least seventeen and satisfy multiple other qualifications.[157] Anyone who wishes to buy a lottery ticket must be over eighteen. 158 Georgians cannot get married under the age of eighteen without parental consent.[159] It is illegal for even an adult to buy alcohol for a minor.[160] Children under eighteen cannot so much as buy fireworks for the Fourth of July.[161] These laws are all designed to protect the public from teenagers or teenagers from themselves. If we know children (even ones who are almost adults) are not responsible enough to buy lottery tickets, cannot be trusted to drive safely, and are too immature to buy fireworks, we cannot honestly believe those very same children have the

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[153] This Article chronicles the Supreme Court's progression regarding juvenile justice, from *Roper* through *Montgomery*. Despite shifts in the Court's makeup, it is sensible to suppose that, over time, the Court will continue to lean in the same direction. It is important to remember, however, that the Court is not impervious to public opinion—and public increasingly favors reform, not strict punishment, for juvenile offenders. *See* PEW RESEARCH CENTER, *Public Attitudes on the Juvenile Justice System in Georgia*, 1, 2, 4 (Feb. 3, 2013), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2013/03/05/public-attitudes-on-the-juvenile-justice-system-in-georgia (Georgia voters showed significant interest in and support for placing juveniles on parole rather than prison for various crimes and shortening incarceration periods).

[154] *See* JUVENILE LAW CENTER, *supra* note 151.

[155] *Roper* 543, U.S. at 557.

[156] O.C.G.A. § 16-11-129(b)(2)(A) (2020).

[157] O.C.G.A. § 40-5-24(a)(1)(A), (B) (2020).

[158] O.C.G.A. § 50-27-26 (2020).

[159] O.C.G.A. § 19-3-2(a)(2), (b) (2020).

[160] O.C.G.A. § 3-3-23(a)(1) (2020).

[161] O.C.G.A.§ 25-10-2(b)(1) (2020).

capacity to assess decisions, even criminal ones, just as their adult counterparts.

Beyond the irreparable corruption standard itself, the legislature could redefine who is eligible for life without parole. This could at least limit the number of times sentencers must invest time and energy into deciding whether a child is irreparably evil. Right now, anyone who commits homicide is eligible for LWOP under Georgia law, but the legislature could modify the Georgia Code so minors without criminal histories are ineligible for LWOP. This would fit nicely within the rest of the Georgia Code, as the legislature has already provided that some first offenders are entitled to special sentencing structures.[162] The standard first offender statute already on the books would not apply to minors eligible for LWOP because it does not apply to felonies, 163 but the legislature could make an exception (or an additional part of the Code) for juveniles whose homicide conviction is their first offense.

b. Banning juvenile life without parole reflects public consensus on juvenile sentencing

Eliminating juvenile life without parole is well within the common thinking on juvenile sentencing. Many polls regarding juvenile justice reform focus on perpetrators of non-violent crimes or misdemeanors, but not all the available data has such a focus. Americans—registered Democrats, Republicans, and Independents—widely believe that the criminal justice system should treat children differently than adults.[164] Those same voters overwhelmingly believe that juvenile justice should be focused on rehabilitative efforts, not exclusively punishment.[165] Less than a quarter of Americans believe that the justice system should imprison children to protect the public (as opposed to incarceration serving as rehabilitation), and even fewer believe in a system that punishes children for the sake of punishment alone.[166] Though criminal justice reforms are often met with tough-on-crime defenses, public feedback remains the same: Americans, like the rest of the world, would rather see systems help children rather than hurt them.[167]

Reflecting these voter preferences, many states have revised their statutes to conform with this progress in public opinion. As of 2020, twenty-three states and the District of Columbia have banned juvenile

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[162] O.C.G.A. § 40-8-60(a) (2020).

[163] *Id.*

[164] PEW RESEARCH CENTER, *Public Opinion on Juvenile Justice in America* (Nov. 2014), 2, https://www.pewtrusts.org/-/media/assets/2015/08/pspp_juvenile_poll_web.pdf.

[165] *Id.*

[166] *Id.*

[167] *Id.*

LWOP entirely.[168] Another six states technically permit the judges or juries to sentence minors to life without parole but have no children serving such sentences.[169] That leaves Georgia, with two teenagers serving LWOP sentences and an unknown number of adults finishing life sentences for crimes committed when they were children, with more prisoners in such a position than nearly half of the other states combined.

The many states that have banned juvenile LWOP reflect a broader international standard: every other nation in the world has abolished juvenile life without parole.[170] Not only has every other country on Earth banned juvenile LWOP, but sentencing juveniles to life in prison actually violates international human rights conventions.[171] Unsurprisingly, the United States did not ratify the Convention on the Rights of the Child,[172] the declaration that protects other nations' children from LWOP.[173] Only three other nations failed to ratify the Rights of the Child convention, and of those three the United States stands alone in not even stating an intention to become a signatory.[174] With America's international reputation dissolving into near non-existence over time, our lonely stance on juvenile life without parole only confirms the international perception of the United States' status as a harsh, backwater wasteland. 175

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[168] The Campaign for the Fair Sentencing of Youth, *States That Ban Life Without Parole for Children*, (Feb. 24, 2020), https://fairsentencingofyouth.org/media-resources/states-that-ban-life/. These are not all states known for being particularly progressive and include Alaska, Arkansas, Kansas, Kentucky, and Texas. *Id.*

[169] *Id.*

[170] JUVENILE LAW CENTER, *supra* note 151.

[171] *See* UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, CONVENTION ON THE RIGHTS OF THE CHILD (Sept. 2, 1990), Article 37(a) ("No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.").

[172] UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, CONVENTION ON THE RIGHTS OF THE CHILD (Sept. 2, 1990).

[173] Human Rights Watch, *25th Anniversary of the Convention on the Rights of the Child* (Nov 17, 2014), https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child#.

[174] *Id.*

[175] PEW RESEARCH CENTER, *U.S. Image Plummets Internationally as Most Say Country Has Handled Coronavirus Badly*, 3, 8 (Sep. 15, 2020), https://www.pewresearch.org/global/2020/09/15/us-image-plummets-internationally-as-most-say-country-has-handled-coronavirus-badly/ (specifically noting the world's view of the United States' response to the Covid-19 pandemic and lack of faith in the U.S.'s handling of racial justice issues).

2. Creating an Alternative, Functional Standard for Sentencing Minors to LWOP

If Georgia insists on sentencing juveniles to serve life without the possibility of parole, it must do so within the parameters the Supreme Court has already set. The legislature cannot invent a standard lower than the irreparable corruption requirement. It can, however, more accurately define what irreparable corruption means in the State of Georgia and use precedent from both the United States Supreme Court and Georgia Supreme Court as guides.

So, what could the legislature require courts to consider when sentencing minors to serve life without parole? First, the statute permitting juveniles to be sentenced to life without parole could be amended to fit the requirements the Supreme Court has already set. The legislature could require sentencers to review all the circumstances of a crime—both mitigating and prejudicial to the defendant. An examination of the minor's home and educational environments could quickly illuminate whether a child's behavior indicates antisocial leanings or whether it is more directly tied to the child's personal experiences.

Under *Miller*, judges currently "must have the discretion to consider 'youth and its attendant characteristics, along with the nature of his crime.'"[176] Under *Veal I*, judges must use that discretion to end up with a decision that the minor is or is not irreparably corrupt.[177] But the *Miller* Court's mandate to consider "youth and its attendant characteristics" is vague, and neither of the supreme courts have defined what "attendant characteristics" of youth are really relevant.[178] This may be out of deference to lower courts' ability to decide what is and is not relevant, but if the Georgia legislature establishes a uniform application of a standard, it would be useful to begin by defining at least some of the circumstances that must or can be assessed into before sentencing.

The legislature could require courts to examine factors such as: the defendant's and victim's relative ages and relationship; the mental and emotional development of the defendant; whether the defendant was particularly prone to experience peer pressure and if that affected his decision-making regarding the crime; whether he acted alone or in concert with others; whether he had witnessed or participated in violent acts before (criminal or not); and any indication of remorse or lack thereof.

Focusing on the crime itself, the legislature could require courts to look at the level of planning the murder took. In addition to the time and effort (or lack thereof) the defendant spent planning the crime, sentencers

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[176] *Id.*, 307 Ga. at 604, 837 S.E.2d at 843 (quoting *Miller*, 567 U.S. at 465).

[177] 298 Ga. at 702, 784 S.E.2d at 411.

[178] *Miller*, 567 U.S. at 465.

should also consider the pain the defendant (1) planned to inflict on the victim and (2) actually did inflict. These factors could be useful for a psychiatric assessment of the defendant, but the sentencing entity should consider them outside of that context as well.

Regarding the child's personality, the legislature could require courts to commission a third-party psychiatric analysis. The analysis could determine whether the child exhibits antisocial behavior that indicates an unwillingness or inability to be reformed. There is no need for an actual diagnosis, but an evaluation with written conclusions could go far in determining whether the child is distressed and angry, otherwise mentally unwell, or actively hostile to attempts at helping him reenter society. Much of this analysis could and should focus on the child's ability to empathize with others or experience remorse rather than speculating about his likelihood to experience those emotions.

The legislature could, of course, include the great legal catch-all: sentencing entities can and should include anything else they deem relevant. After all these determinations and evaluations, the judge could still very well sentence the juvenile to serve life in prison. But at least the defense counsel, the prosecutor, the judge, and most importantly the defendant, would know the steps involved in the process no matter who or where the sentencer is.

None of these issues need be determinative of the issue, and this is still far from a perfect standard. It would not render entirely uniform results for similar crimes committed under similar circumstances, but it would come closer than the existing test. This proposed test simply affords juveniles a tailored sentencing scheme that accommodates their constitutional and human rights.

Assessing the required factors would also give the justice system and sentencers a little more security in the permanence of a sentence. Minors convicted under this suggested standard would (and should) still appeal their convictions on every possible issue, but if a sentencing judge has followed the required procedures, the court would have a better chance of its determination being upheld than if the court were stuck deciding for itself what does and does not count as necessary evidence.

These proposed considerations do not, however, solve the moral problem with sentencing children for life based on the worst thing they have ever done. Really, adults who have spent years, decades, in prison should not be bound by psychiatric or judicial evaluations of their character when they were teenagers. But if the State of Georgia will imprison children for their whole adult lives, the government should be clearer about what to expect in the sentencing process and must ensure that such extreme sentences are actually protecting society, not infinitely punishing a single action simply because the government can.

Entitling children to more procedural precautions than adults is complicated and time-consuming, but that is often the cost of administering true justice. It makes little sense for the considerations outlined in *Miller* to be limited to the defendant's receiving a LWOP sentence and not applied to the procedural aspects of handing down that sentence (such as judge versus jury, preponderance versus beyond reasonable doubt, or de facto LWOP). If children are entitled to specific consideration in being sentenced to LWOP (and they are), those children should be entitled to tailored procedural guidelines as well. This higher standard for the justice system is more difficult to administer, but it is the adults' job to ensure that a child is not punished beyond his capacity to understand. [179]

VI. CONCLUSION

Juvenile life without parole poses many functional and ethical problems to consider, but no discussion should overlook the absurdity of the issue itself. The United States is the only country in the world that allows children to be sentenced to life without the possibility of parole.[180] This means that the State of Georgia, with "only" two people who are still children serving sentences without the possibility of parole, still has 100% more children in such a position than all of the other *continents* combined. At the end of the day, the procedures required for the State to punish children more severely than is permitted in any other place on the globe can never be strict enough. Procedure cannot rationalize allowing judges or juries to diagnose personality defects in people so young psychiatrists cannot make such diagnoses—or punishing seventy-year-old men for the sins they committed when they were seventeen.

For now, juvenile homicide defendants have at least some procedural elements on their side. As a rule, and especially regarding children, what procedures exist should be used in as uniform and sensible ways possible. That makes it harder for all the adults involved in the convicting process, but that is a burden we should gladly bear to protect Georgia's children

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[179] In sum, the procedures regarding sentencing children to life in prison should reflect the stringency of the irreparable corruption standard. One may argue that, by decreasing the number of children sentenced to LWOP over time, the irreparable corruption standard has accomplished its purpose and that Georgia's children need no more protection from the State. But that answers the wrong question. When it comes to juveniles' sentencing rights under the constitution, the proper question is not "What must we do to decrease the number of children in our LWOP system?" but "What procedural safeguards is each child convicted of homicide entitled to?" And if each child is entitled to a determination of irreparable corruption, each child is logically entitled to surrounding procedures that serve the policy purposes of the irreparable corruption standard.

[180] JUVENILE LAW CENTER, *supra* note 151.

from our own preoccupation with punishment. It only makes sense to treat juveniles facing sentences to life without parole as they would be treated under many other provisions of the Georgia Code—differently than their adult counterparts, accounting for children's inherent inability to plan for the future as effectively as adults.

In the absence of United States Supreme Court precedent, Georgia Supreme Court law, or a statute protecting Georgia's juveniles from the complex, unpredictable standards of constitutional law, the current position of juvenile life without the possibility of parole may appear bleak. However, it bears remembering that children are more protected from extreme punishments now than ever before in the history of the United States. Until 2005, the United States Constitution permitted the execution of individuals for crimes committed when they were teenagers. Shortly after protecting juveniles from the death penalty, the Supreme Court limited how and when the government can sentence children to live and die in prison. No matter what steps the Court takes regarding juvenile LWOP, in this term or the next, it appears unlikely that the case establishing particular sentencing protections for children, *Roper*, will be overturned or limited beyond recognition. For now, Dr. Martin Luthor King Jr.'s oft-quoted notion remains apt: "[T]he arc of the moral universe is long, but it bends toward justice."[181]

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[181] Dr. Martin Luthor King Jr., Remaining Awake Through a Great Revolution (March 31, 1968).