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Danielle Petretta
Elisabeth Haub School of Law at Pace University

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Juveniles Make Bad Decisions, But Are Not Adults & Law Continues to Account For This Difference: The Supreme Court's Decision to Apply Miller v. Alabama Retroactively Will Have a Significant Impact on Many Decades of Reform and Current Debate Around Juvenile Sentencing

Danielle Petretta,* Comment

Introduction

In January 2016, the Supreme Court made a monumental decision, reflecting the notion that juveniles are **not** adults. For years, courts have been grappling with the notion that juveniles are not adults. The Supreme Court has finally published an opinion that will have extreme implications on the juvenile justice system.

Imagine this scenario: A 12-year-old high school student grows up in a low-income neighborhood in tough economic conditions. She has a tumultuous relationship with her parents. She has friends at school, and like most young girls, she has self-esteem issues. She finally gets a boyfriend. Her 13-year-old boyfriend decides that he wants to do something fun. Because she would do anything to make him happy, she decides to go along with him to his neighbor's house. Her boyfriend wants to steal money from him, and he needs her to be a distraction.

While inside, the girl speaks briefly with the neighbor and the boyfriend asks to use the bathroom so that he can look for the money. After the neighbor hears a suspicious noise coming from his bedroom, he stops speaking to the girl and finds the boyfriend stealing. The boyfriend panics and grabs a baseball bat that he sees in the corner of the room and hits him on the head. The neighbor ultimately dies from the blow.

Do you know what could have resulted if this happened before the case of *Miller v. Alabama* in 2012? This 12-year-old

girl, who could not even get a flu shot without a parent's permission, could have been tried in an **adult court** and sentenced to life without parole. Furthermore, up until January 2016, she would be spending her entire life behind bars and would never have the chance of an early release.

Part I of this Note will discuss the birth of the juvenile justice system. Part II of this Note will briefly introduce the recent oral argument heard before the Supreme Court regarding whether the Supreme Court will apply *Miller v. Alabama* retroactively or non-retroactively. Part III will discuss the history of the juvenile justice system and show the progression of Supreme Court decisions regarding juveniles in the penal system. Part IV will discuss how neuroscience throughout the years has incessantly proven that juveniles are inherently different than adults. Part V will discuss and analyze the *Miller* decision and its effects, and Part VI will discuss the many implications that the recent Supreme Court decision to apply *Miller* retroactively has on the entire future of the juvenile justice system.

I. Background

Until the end of the 18th century, juveniles were sent to both jails and penitentiaries.[1] However, at the time, a separate system for juveniles did not exist, so juveniles were sent to serve their sentences in worn-out, overcrowded institutions with adult criminals.[2] Children were treated as adults and a child as young as seven (known then as the age of reason), could be sentenced as an adult and even receive a death sentence.[3]

* Danielle Petretta, J.D. '17, Elisabeth Haub School of Law at Pace University. I wish to thank Professor Leslie Y. Garfield Tenzer, who encouraged me to delve into this area of law, and Professor Michael Mushlin, who continues to be a mentor and source of encouragement throughout my law school career.

1. *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., http://www.cjcj.org/education1/juvenile-justice-history.html (last visited Mar. 5, 2017) [hereinafter *Juvenile Justice History*].

2. *Id.*

3. SHAY BILCHIK, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 1999 NAT'L REPORT SERIES: JUVENILE

Eventually, reformers began to take center stage as catalysts for changing the way juveniles were treated.[4] In 1825, the work of reformers Thomas Eddy and John Griscom led to the creation of the New York House of Refuge, which housed over 1,000 youths.[5] These Houses of Refuge were essentially the foundation for what later developed into the juvenile justice system.[6] By the 1840s, around twenty-five houses were constructed in urban areas in major cities throughout the country.[7] The houses were "large fortress-like congregate style institution[s]," which on average housed around 200 juveniles.[8] These establishments were created with the hope of rehabilitating, rather than punishing, juveniles in a system of adult criminals.[9]

As a result of the Juvenile Court Act of 1899, the first juvenile court was formed in Cook County, Illinois.[10] The doctrine of *parens patriae,* or "state as parent" governed the way in which juvenile courts were to conduct proceedings on behalf of juveniles.[11] The idea was that the state had "the inherent power and responsibility to provide protection for children [because they lack full legal capacity]."[12] The main focus turned to the welfare of the child,[13] and the proceedings were more informal, with each judge having vast discretion over each particular case.[14]

The 1960s brought more reform to the rapidly-developing juvenile system; the courts became more formal, especially in situations where the court could either waive the juvenile to

JUSTICE BULLETIN 2 (1999), https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

4. *See Juvenile Justice History*, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. ABA DIV. FOR PUB. EDUC., *Part 1: The History of Juvenile Justice*, *in* DIALOGUE ON YOUTH AND JUSTICE 4, 4-5 (2007), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

10. *See* BILCHIK, *supra* note 3, at 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See Juvenile Justice History*, *supra* note 1.

adult court or give him or her a longer sentence.[15] The courts also afforded juveniles more due process protections, such as the right to counsel.[16] In *Kent v. United States*, the Supreme Court held that a juvenile was entitled to a hearing and the records of the juvenile court's waiver decision.[17] *In re Gault* further expanded a juvenile delinquent's rights to include: the right to notice of the charges,[18] right to counsel,[19] the Fifth Amendment right against self-incrimination,[20] and the right to cross-examine witnesses.[21]

Beginning in the 1980s, the public perception was that the juvenile crime rate was increasing and the juvenile system was not stringent enough on juveniles, which led to the institution of mandatory sentences and automatic transfers to adult court.[22] In 1986, mandatory minimum sentencing laws, which disregarded mitigating factors, became part of the reform movement.[23] The 1990s were even tougher on juveniles,[24] largely in part because of the superpredator concept that developed.[25] Princeton Professor John Dilulio coined the term "superpredator," to refer to the increase of juveniles who completely disregarded human life and had no remorse in committing violent acts, which quickly sparked media craze.[26] This myth continued to spiral as James Wilson and John Dilulio predicted that by the end of 2000, one million more juveniles, ages fourteen to seventeen, will exist than in 1995.[27]

Did these superpredators ever exist? No. In fact, the notion of a large group of juveniles never came to fruition, and

15. *Id.*
16. *Id.*
17. Kent v. United States, 383 U.S. 541, 557 (1966).
18. *In re* Gault, 387 U.S. 1, 33 (1967).
19. *Id.* at 40-41.
20. *Id.* at 55.
21. *Id.* at 57.
22. *See Juvenile Justice History*, *supra* note 1.
23. Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 252-53 (2009).
24. *See Juvenile Justice History*, *supra* note 1.
25. JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 3, 4 (2d ed. 2009).
26. *Id.*
27. *Id.*

several researchers have invalidated the myth and found major flaws in Wilson's and Dilulio's predictions.[28] In fact, adults were responsible for two-thirds of the increase in murders and three-fourths of the increase in violent crimes committed throughout the late 1980s and early 1990s.[29] Nonetheless, the 1990s were "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime."[30] Juveniles were treated more like criminals with easier transfer provisions, more sentencing options, and more open access to records and court proceedings.[31] Juveniles were confined much more, and many institutions became overcrowded.[32]

II. Current Debate in the Supreme Court: *Montgomery v. Alabama* Revisited

On October 13, 2015, the Supreme Court heard oral arguments on a 70-year-old case, *Montgomery v. Louisiana*, in which the Supreme Court "ultimately determine[d] whether some 2,100 people serving life terms for committing murder when they were juveniles have any chance of ever getting out of prison."[33] These oral arguments resulted from the Supreme Court decision in 2012, *Miller v. Alabama*, which ruled that mandatory life without parole for juveniles under the age of eighteen at the time of the offense constitutes cruel and unusual punishment, because such a scheme does not allow consideration of the ability to change or decrease culpability.[34] However, "*Miller* did not provide nuanced answers to how [these factors] matter," nor did the Supreme Court address whether or not the ruling would apply retroactively.[35] The two

28. *Id.* at 6.
29. *Id.* at 10.
30. *See* BILCHIK, *supra* note 3, at 5.
31. *Id.*
32. *See Juvenile Justice History*, *supra* note 1.
33. Nina Totenberg, *Will Supreme Court Allow Juvenile Life Sentence Ruling to Be Retroactive?*, NPR (Oct. 13, 2015, 5:14 AM), http://www.npr.org/2015/10/13/448182651/will-supreme-court-allow-juvenile-life-sentence-ruling-to-be-retroactive.
34. Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012).
35. Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief In Court and Before the Parole Board*,

most recent issues before the Supreme Court are whether *Miller* will apply retroactively to cases on collateral review, and whether the Supreme Court has jurisdiction to determine whether Louisiana correctly decided to apply *Miller* retroactively.[36]

III. History of the Juvenile Justice System

A. *Monumental Supreme Court Decisions Paving the Road for True Juvenile Justice*

The Eighth Amendment has been a vital component in the Supreme Court's decisions regarding juvenile detention. The prohibition of cruel and unusual punishment has woven its way into the Court's rationale in the majority of cases regarding juvenile sentencing. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[37] In *Trop v. Dulles*, the Supreme Court stated that they "had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising."[38] Furthermore, the Court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[39]

1. *Thompson v. Oklahoma*

In 1988, The Supreme Court in *Thompson v. Oklahoma* ruled that imposing the death penalty on a minor, under the age of sixteen, violated the Eighth and Fourteenth Amendments.[40] This case dealt with a 15-year-old boy, acting

31 LAW & INEQ. 369, 369-70 (2013).

36. *Montgomery v. Louisiana*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/montgomery-v-louisiana/ (last visited Mar. 6, 2017).

37. U.S. CONST. amend. VIII.

38. Trop v. Dulles, 356 U.S. 86, 100 (1958).

39. *Id.* at 101.

40. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

in concert with others, who participated in his brother-in-law's murder.[41] The victim was shot twice, cut in several areas, and his body was chained to concrete and left at the bottom of a river.[42]

The Court held that to determine whether a minor should receive the death penalty, a court must look to the "legislative enactments" and "jury determinations" to consider why "these indicators of contemporary standards of decency" may lead to a conclusion that "such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[43]

As support for the general proposition that there are inherent differences when dealing with the rights of children, the Court looked to Oklahoma statutes.[44] The Court looked at the fact that "a minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes."[45] Additionally, the Court noted that because juveniles are inexperienced, less educated, and less intelligent, they are less likely to appreciate the consequences of their actions and are more apt to submitting to peer pressure.[46] Ultimately the Court looked at the two main purposes of the death penalty – retribution and deterrence – in deciding "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children . . ."[47] imposing the death penalty would be an "unconstitutional punishment."[48]

2. *Stanford v. Kentucky*

One year after *Thompson* was decided, the Supreme Court ruled that the death penalty could be constitutionally imposed on a juvenile who commits murder at either sixteen or

41. *Id.* at 819.
42. *Id.*
43. *Id.* at 822-23.
44. *Id.* at 823-24.
45. *Thompson*, 487 U.S. at 823.
46. *Id.* at 835.
47. *Id.* at 836-37.
48. *Id.* at 838.

seventeen years old.[49] In *Stanford v. Kentucky*, the Court held that the death penalty for a juvenile offender, who is at least sixteen years old, does not constitute cruel and unusual punishment under the Eighth Amendment.[50] Two consolidated cases were joined before the Court: the first case involved a 17-year-old boy and an accomplice who raped, sodomized, and killed a 20-year-old gas station attendant, and the second case involved a 16-year-old boy who stabbed a 26-year-old convenience store owner.[51]

Petitioners' argument that the death penalty runs contrary to the "evolving standards of decency that mark the progress of a maturing society" failed because they did not show the standards of decency of "modern American society as a whole"[52] and because they did not fulfill their burden in showing a national consensus that disfavors such a penalty.[53] While the Court in *Thompson* noted the importance of statutes when recognizing the difference in how the law treats juveniles differently, the Court in *Stanford* boldly veered away from that argument. The Court stated that it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards."[54] The Court, here, also surprisingly rejected ideas coming from socio-scientific data regarding juvenile culpability: "The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."[55]

49. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).
50. *Id.*
51. *Id.* at 365-66.
52. *Id.* at 369 (citation omitted).
53. *Id.* at 373.
54. *Id.* at 374.
55. *Kentucky*, 492 U.S. at 378.

3. *Roper v. Simmons*

A few years following *Stanford*, the Supreme Court began to make major changes in the way juveniles were sentenced and viewed in the system. *Roper v. Simmons* established that imposing the death penalty for juveniles under the age of eighteen is unconstitutional.[56] The Court relied on the reasoning in *Atkins v. Virginia*, which ruled the death penalty for the mentally disabled to be violative of the Eighth Amendment.[57] The Supreme Court in *Roper* used the Atkins' Court factors, "objective indicia of [national] consensus" and the "Court's own determination in the exercise of its independent judgment," to reach the conclusion that the death penalty is too inappropriate of a punishment for juveniles.[58]

The Court concluded that juveniles are less culpable than adults due to the "objective indicia of national consensus . . . the rejection of the juvenile death penalty in the majority of States; the infrequency of its use . . . and the consistency in the trend toward abolition of the practice . . . ."[59] Additionally, the Court noted that although the crimes committed by juveniles cannot and should be not overlooked, capital punishment is only meant for heinous crimes committed with extreme culpability.[60] The Court's reasoning was that if juveniles are more susceptible to irresponsible behavior, are more vulnerable and lack control in their surroundings, and are struggling to find their identities, they "cannot with reliability be classified among the worst offenders" deserving of capital punishment.[61] The Court also recognized that the most brutal crimes could potentially override mitigating factors, such as vulnerability, youth, and immaturity.[62] However, a state cannot take a juvenile's life, because society has deemed eighteen to be the age of maturity, and that is "the age at which the line for death

56. Roper v. Simmons, 543 U.S. 551, 578-79 (2005).
57. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
58. *Roper*, 543 U.S. at 552.
59. *Id.*
60. *Id.* at 553.
61. *Id.*
62. *Id.* at 573.

eligibility ought to rest."[63]

After *Stanford*, *Roper v. Simmons* revitalizes the notion that juveniles *are* different and under the law, must be treated differently. However, *Roper* is "enlightening because the Court recognizes that identity is an appropriately critical factor separating adults from juveniles for the purposes of punishment. Yet [it] is flawed in terms of the Court's shallow effort to provide support for its reasoning . . . . "[64]

4. *Graham v. Florida*

In 2010, the Supreme Court made yet another monumental stride in reforming juvenile justice. *Graham v. Florida* established that life without parole for juveniles who committed non-homicidal offenses violated the Eighth Amendment's cruel and unusual punishment clause.[65] The Court held that if a state does impose a life sentence, it does not need to guarantee the juvenile's eventual release, but must afford the minor a *meaningful opportunity* for release before the end of his sentence.[66] In this case, 16-year-old Terrance Graham was charged and convicted of attempted robbery and later arrested for violating probation by committing a home invasion robbery with others, holding the victim at gunpoint.[67] The trial court gave Graham the maximum sentences for each charge; he received life imprisonment for armed burglary and fifteen years for attempted armed robbery.[68] Additionally, a life sentence did not offer a defendant any opportunity for release unless "granted executive clemency."[69]

The Court began with a discussion of the Eighth Amendment and the *Trop* test for determining whether the punishment is cruel and unusual: look to "the evolving standards of decency that mark the progress of a maturing

63. *Roper*, 543 U.S. at 554.

64. Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 395 (2006).

65. Graham v. Florida, 560 U.S. 48, 82 (2010).

66. *Id.*

67. *Id.* at 53-54.

68. *Id.* at 57.

69. *Id.*

society."[70] The Court noted that while "the concept of proportionality is central to the Eighth Amendment,"[71] this case involved a challenge to a sentence of a term-of-years which "applies to an entire class of offenders" who have committed different crimes; therefore, comparing the severity of the punishment and the seriousness of the crime would not aid in its analysis.[72]

Instead, the analysis should begin with the "objective indicia of [a] national consensus."[73] Disagreeing with the argument that there is no national consensus on this issue, the Court stated that legislation is not the sole measure of consensus, but that sentencing practices factor into this inquiry.[74] Although there is no express ban on juvenile life without parole, actual sentencing practices demonstrate a consensus against its use, and recent studies at the time revealed that throughout the nation, only 109 juvenile offenders nationwide were serving such a sentence for non-homicide offenses.[75]

Noting that a consensus is insufficient to show that a punishment is cruel and unusual, the Court followed the *Roper* reasoning by noting that a juvenile's culpability, along with the severity of the crime, must be considered.[76] Additionally, the Court added that, given the fundamental difference between juveniles and adults,[77] and therefore, a lessened or diminished culpability, a juvenile's age and the nature of the crime must be considered, because life without parole is "especially harsh for juvenile[s]," and deprives them of all liberties with no hope of restoration.[78]

70. *Graham*, 560 U.S. at 58 (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

71. *Graham*, 560 U.S. at 59.

72. *Id.* at 61.

73. *Id.* at 62.

74. *Id.*

75. *Id.* at 62-63.

76. *Graham*, 560 U.S at 69 ("It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.").

77. *Id.* at 68-69.

78. *Id.* at 69-70 ("Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than

The Supreme Court in *Graham* not only aided in the development of how juveniles were perceived, but it significantly advanced the argument. Building upon the rationale in *Roper*, *Stamford*, and *Thompson*, the Court began to place juveniles into a distinct category for purposes of non-homicidal offenses, truly underscoring the purpose of the institution of a juvenile justice system. While temporarily separating a juvenile from society may be necessary, this does not mean that the juvenile will present a risk to society for life.[79] Furthermore, life imprisonment without parole is not justified by any goals of incarceration – deterrence, retribution, incapacitation, or rehabilitation.[80]

Though *Graham* provided that life without parole was cruel and unusual for non-homicide offenses, the state was not required to release the offenders during their natural lives; rather, this decision only prevented the states from making such a determination from the outset.[81]

IV. Neuroscience And Social Science Tells Us That Juveniles Are Different & Require Different Treatment

It is vital to remember that "[i]mmature judgment, impulsivity, and limited self-control bear directly on evaluations of criminal responsibility, and developmental and neuroscientific research inform those assessments."[82] The Supreme Court in *Graham* was monumental in cataloging the differences between juveniles and adults in the justice system. The *Graham* ruling was majorly influential in supporting and expanding upon the notion that juveniles are inherently

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.").

79. *Id.* at 73 ("A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.").

80. *Id.* at 71.

81. *Graham*, 560 U.S. at 75.

82. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 277 (2013).

different than adults and therefore have a lesser culpability.[83]

Though cognitive development studies do not reveal much support for the assertion that a juvenile at the age of sixteen "should be viewed as much different than adults," the juvenile justice system was not based solely upon the notion of juveniles' cognitive capacities, but also upon the notion that their judgment was less mature.[84]

The human brain matures in an individual's early twenties.[85] This developmental feature manifests itself through the differences that social scientists observe between juveniles and adults.[86] With regard to juveniles' judgment, their ability to perceive risk decreases in mid-adolescent years and begins to increase in adulthood.[87] Additionally, feelings of "[e]xcitement and stress cause youths to make riskier decisions than adults do."[88] It is no surprise that youths have a lower perception of risk and behavior than do adults of a fully developed brain; this difference is precisely because the brain "governs countless actions, involuntary and voluntary, physical, mental and emotional."[89]

Scientists now utilize Magnetic Resonance Imaging (MRI), as opposed to x-rays using radiation, to analyze three-dimensional images of the child's brain and track its developments over a span of years.[90] The findings are telling. Studies reveal that a teenager's brain intensely overproduces gray matter, which is responsible for thinking, and then discards it rapidly—a period known as pruning.[91] After pruning, development of white matter in the brain—known as

83. *Graham*, 560 U.S. at 69-70.

84. Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QLR 403, 410-11 (1999).

85. Feld, *supra* note 82, at 286.

86. *Id.*

87. *Id.* at 285.

88. *Id.* at 281.

89. ABA JUVENILE JUSTICE CTR., CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY
ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 1 (2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf [hereinafter ABA JUVENILE JUSTICE CTR.].

90. *Id.*

91. *Id.* at 1-2.

myelination—begins, and that white matter creates more precise and efficient operation of the brain.[92]

These changes occur through an individual's early twenties, and frontal lobe changes occur the most during adolescence; the frontal lobe is the last part to develop, "which means that even as they become fully capable in other areas, adolescents cannot reason as well as adults . . . ."[93] While the prefrontal lobe lags behind, activity in the limbic system, responsible for control over reflexive or instinctual behavior, increases.[94] Furthermore, science shows that adolescents rely more on the limbic system than the prefrontal cortex.[95]

Researcher Jay Giedd states the portion of an adolescent's brain that is responsible for organizing, planning, and strategizing is not fully developed, so it is unfair to expect a partially-developed brain to act like a fully-developed adult brain with adult levels of decision-making or organizational skill.[96] It is worth mentioning that there are also major hormonal and emotional changes that occur in an adolescent's brain; for example, adolescent boys experience ten times the amount of testosterone, which is associated with higher levels of aggression.[97] Thus, since "adolescents are less psychosocially mature than adults, they are likely to be deficient in their decision-making capacity, even if their cognitive processes are mature."[98]

In criminal law, there is an underlying assumption "that offenders must be able to make rational autonomous choices in order to be held criminally responsible," and if sciences show that relevant developmental factors are impeding on a juvenile's exercise of free will, then they should be less blameworthy for their crimes.[99] All of the data gathered and

92. *Id.* at 2.

93. *Id.*

94. Feld, *supra* note 82, at 288-289.

95. *Id.* at 289.

96. *See* ABA JUVENILE JUSTICE CTR., *supra* note 89, at 2.

97. *Id.*

98. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003) (citations omitted).

99. MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL

studied from social and neuroscience over the last few decades lends credence to the notion that juveniles are different, and the Court has gradually begun to integrate these findings into solid precedents for juveniles moving forward.

V. One Step Closer to Victory: *Miller v. Alabama*

In 2012, the Supreme Court in *Miller v. Alabama* had occasion to further expand upon *Graham* ruling. The Supreme Court held that life sentences without the possibility of parole for children under the age of eighteen who have committed a homicide, irrespective of any mitigating circumstances, is cruel and unusual punishment in violation of the Eighth Amendment.[100] In this case, two 14-year-olds were convicted of murder and sentenced to life without parole, without an alternative sentence, because state law ordered such a sentence without consideration of the youth, attendant circumstances, or the nature of the crime.[101]

The Supreme Court relied on both *Roper* and *Graham* to lend support to the conclusion that mandatory life without parole violates the Eighth Amendment.[102] Not only did the cases rely on science and social science, but they also established that a juvenile's "transient rashness, proclivity for risk, and inability to assess consequences" lessened culpability and supported the notion that with continued neurological development, those tendencies will change.[103] Consequently, such a severe penalty on a juvenile offender cannot be imposed as though the juvenile was an adult, as it is in complete contravention of the Eighth Amendment principles, eliminating any proportionality with the punishment.[104]

The Court emphasizes the problem with such mandatory life without parole sentences, and that is the uniform

FOR A JUVENILE JUSTICE SYSTEM 43 (Temple Univ. Press 2006).

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

101. *Id.* at 2460 (noting that such a scheme "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties.").

102. *Id.* at 2464-65.

103. *Id.* at 2465.

104. *Id.* at 2466.

treatment of every juvenile:[105]

> [E]very juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.[106]

Thus, the Supreme Court noted that the mandatory sentencing structure eliminates consideration of attendant circumstances, such as age, and its accompanying features—family environment and circumstances of the homicidal offense—which may have accounted for a much lesser sentence.[107] Furthermore, the Court stressed that in imposing a sentence, the state must take into account how children are categorically different from adults and how those differences urge against imposing upon them mandatory life sentences behind bars.[108]

Justice Kagan, writing for the majority in *Miller v. Alabama*, stated that the Supreme Court has held, on many prior occasions, "that a sentencing rule permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children."[109] Justice Kagan additionally emphasized that life without parole is constitutional for non-homicidal offenses for adults, but not for children, so if "'death is different,' children are different too."[110]

105. *Miller*, 132 S. Ct. at 2467.
106. *Id*. at 2467-68.
107. *Id.* at 2468.
108. *Id.* at 2469.
109. *Id.* at 2470.
110. *Miller*, 132 S. Ct. at 2470 (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)).

A. *What happens after* Miller*? Questions of Retroactivity*

Miller v. Alabama seemed to make major headway in juveniles' plight to be treated differently from adults in the justice system, but it also left a major area open for debate and another hurdle to be conquered for those juveniles languishing behind bars. The major decision was: Should it be applied retroactively? Given the fact that many were going to be "potentially affected by the Miller holding, lawyers began speculating as to its retroactivity even before the 'ink was dry' on the decision."[111]

For most of the twentieth century, the Court did not distinguish between cases on direct and collateral review with regard to retroactivity concerning new constitutional rules.[112] Cases on direct review refer to cases on direct appeal, whereas cases on collateral review refer to cases of post-conviction challenges after exhaustion of all direct appeals.[113] However, the Supreme Court in *Teague v. Lane* decided that new constitutional rules of criminal procedure apply to cases on direct review but not "to those cases which have become final before the new rules are announced," or to cases on collateral review.[114]

The Teague doctrine will only apply to cases on collateral review unless the rule falls under one of two exceptions: 1) to new substantive rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" and 2) to "'watershed' procedural rules that implicate the fundamental fairness and the accuracy of the conviction."[115] The *Miller* decision left the state and federal courts to grapple with the meaning and exceptions of the retroactivity doctrine provided for by *Teague* and to determine how *Miller* would apply to juveniles whose cases are now final.

111. Levick & Shwartz, *supra* note 35, at 375.

112. Brianna H. Boone, Note, *Treating Adults Like Children: Re-Sentencing Adult Juvenile Lifers After* Miller v. Alabama, 99 MINN. L. REV. 1159, 1166 (2015).

113. *Id.*

114. Teague v. Lane, 489 U.S. 288, 310 (1989).

115. Boone, *supra* note 112, at 1166-67 (citation omitted).

VI. The 2016 Supreme Court decision in *Montgomery v. Louisiana*: *Miller* applies retroactively

On January 25, 2016, the Supreme Court handed down a six-to-three ruling, holding that the Court not only had jurisdiction to review a state supreme court's refusal to apply *Miller v. Alabama* retroactively, but also made the monumental and long-awaited decision on an uncertain ruling – *Miller* applies retroactively in cases on state collateral review.[116] In *Montgomery v. Louisiana*, 17-year-old Petitioner killed a sheriff in 1963, and he received a mandatory life sentence without parole.[117] The trial court denied his collateral appeal after *Miller* because the court determined that *Miller* did not apply retroactively in cases on state collateral review.[118]

Collateral review is a post-conviction appeal that is left up to the discretion of the court.[119] The Supreme Court, a few short months ago, finally addressed the question of whether states "required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules."[120] The Court noted that if the outcome of the case depends on the new substantive rule, then in cases on state collateral review, the court must apply the rule retroactively.[121] The Court further stated that a court cannot have the power to allow a conviction or sentence, in violation of a new substantive rule, to stand whether or not there is a final conviction or sentence before the rule is announced.[122]

Thus, the Court held that, because *Miller* ruled that life without parole for juvenile offenders (except for extreme cases)

116. SCOTUSBLOG, *supra* note 36.

117. Montgomery v. Louisiana, 136 S. Ct. 718, 725-26 (2016).

118. *Id.* at 727.

119. *What Are the Different Kinds of Appeals? What Is an Appeal of Right, or a Discretionary Appeal? What Is the Difference Between "Direct" and "Collateral" Appeals?*, ROTTENSTEIN L. GRP. LLP, http://www.rotlaw.com/legal-library/what-are-the-different-kinds-of-appeals-what-is-an-appeal-of-right-or-a-discretionary-appeal-whats-the-difference-between-direct-and-collateral-appeals (last visited Mar. 10, 2017).

120. *Montgomery*, 136 S. Ct. at 729.

121. *Id.* at 729.

122. *Id.*

is excessive, this qualifies as a new substantive rule because a majority of juvenile offenders would remain carrying out a punishment that is no longer allowed to be handed down on their class.[123] The Supreme Court decided that "[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids."[124] Further, the Court notes that, although *Miller* held that life without parole could be a proportionate sentence in cases where the child's crimes "reflect irreparable corruption," it "does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right."[125]

Finally, the Supreme Court addressed the very nature of children that the string of juvenile cases before this Court had concluded; that is, that children are different and they possess many different characteristics that essentially make them inherently less culpable.[126] Also noted was the fact that children go through a period of "transient immaturity," and to reflect this reality, many juvenile offenders now imprisoned should be eligible for parole so that they are not forced to "serve a disproportionate sentence in violation of the Eighth Amendment."[127]

VII. Implications Moving Forward

You may ask, what happens now? With this long-awaited Supreme Court decision now published, over 2,000 eager juveniles serving life without parole are squirming in their cells at the chance to be eligible for parole.[128] This ruling is a double-edged sword. Yes, this is a good thing, because our legal system does not allow for juveniles to face unconstitutional punishments in violation of the Eighth Amendment. However, the problem now is that each state

123. *Id.* at 734.
124. *Id.* at 731.
125. *Montgomery*, 136 S. Ct. at 734.
126. *Id.* at 736.
127. *Id.*
128. Jesse Wegman, *Supreme Court Revisits Life Sentences for Juveniles*, N.Y. TIMES (Dec. 13, 2014, 9:24 AM), http://takingnote.blogs.nytimes.com/2014/12/13/supreme-court-revisits-life-sentences-for-juveniles/.

must deal with each case individually and carefully, and this will be a difficult process. States will now have to develop a game plan to determine exactly how to deal with these juveniles.

The following is an excerpt from *Montgomery v. Louisiana*, and it shows just how much is now left for state courts to deal with:

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change.[129]

This now gives the States authority to decide whether to come up with new sentences or, alternatively, grant parole subject to future conditions of the juvenile's behavior.[130] Now, juveniles have the opportunity to explain that, at the time they were sentenced, they were not unable to be rehabilitated, and to prove that they can offer instances of good behavior since incarceration.[131]

There is another very obvious problem glaring back at the states. The problem is how courts are going to deal with the evidence presented by the juveniles as to their ability for rehabilitation at the time they were sentenced. Furthermore, how will the courts deal with the evidence of good behavior? Surely, not all that is presented by every juvenile can be simply put on an equal playing field. Each case is different from the next, so these differences raise difficult questions of application that the states must grapple with and deal with fast.

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

130. *Id.*

131. Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBLOG (Jan. 25, 2016, 12:26 PM), http://www.scotusblog.com/2016/01/opinion-analysis-further-limit-on-life-sentences-for-youthful-criminals/.

The states will now also have to create some systematic approach as to how they will begin to handle a small floodgate of juveniles attempting to free themselves of the legal system. Finding a system that will determine which cases will be heard first and creating lists of major factors needed to be met for the eligibility criteria. On the one hand, there needs to be some generally-established set of procedures that the states can follow across the spectrum of cases to process each effectively. On the other hand, the states must come up with ways that will not just lump cases into a general set of factors and guidelines. The states need to account for the fact that every case must also be reviewed individually with regard to the factors that are pertinent to each particular case.

B. *The Decision in Effect: A Chance to Start Over*

Just months after this monumental Supreme Court ruling, news clips and snippets are beginning to pop up daily. Decade-old cases are now being revisited, and those juveniles, now adults, may just have a chance at a second life.

On April 8, 2016, Alex Wong received the news that he would be eligible for parole in five years.[132] Alex Wong has been serving a life sentence since 1989; he was sentenced to life in prison at the young age of sixteen after killing two people at a restaurant for a Chinese gang, the Green Dragons.[133] Mr. Wong is now 43-years-old, and he became choked up with emotion as he stood before Judge Dearie pleading for a second chance: "What I tried to find on the street I had all along in my family. I would like for the second half of my life to help the people that helped me."[134]

On Saturday, April 30, 2016, after serving forty-one years on a life sentence (eight of those years spent in solitary confinement), Gary Tyler was released from a notorious

132. John Marzulli, *Gang Member Sentenced to Life in Prison as a Teen Will Get Second Chance at Life Outside Prison*, N.Y. DAILY NEWS (Apr. 8, 2016, 5:48 PM), http://www.nydailynews.com/new-york/nyc-crime/teen-gang-member-sentenced-life-chance-article-1.2593811.

133. *Id.*

134. *Id.*

Louisiana prison.[135] He, too, was 16-years-old when he was sentenced to death in 1974 for the killing of a 13-year-old white student; Gary Tyler was passing through a group of rowdy white students on a bus filled with black students, and the police later captured a gun.[136] Even though the Fifth Circuit Court of Appeals recognized that his trial was unfair, Gary Tyler still did not receive a new trial.[137] Instead, Tyler's death sentence was later commuted to a life sentence after Louisiana's mandatory death penalty was determined unconstitutional.[138] Gary Tyler has since been completely freed from this now unconstitutional sentence, and the shackles on his life are finally let loose.

In this recent trend of avoiding such harsh sentences for juvenile offenders, states will need to, and are, making difficult decisions regarding the evaluation of a juvenile offender coming before a parole board for a chance at early release. Iowa is one such state making headway on such an uncertain area; on May 27, 2016, the Iowa Supreme Court ruled in a split decision that "sentencing juveniles to life in prison without parole is unconstitutional because it amounts to cruel and unusual punishment."[139] This ruling followed the decision in 2012 involving Isaiah Sweet, who was the first juvenile to be sentenced to life without parole in Iowa after *Miller v. Alabama*; he was 17-years-old at the time he murdered his grandparents with an assault rifle.[140] Individual circumstances were considered at the time of his sentencing, and a psychologist testified that Mr. Sweet's likelihood of rehabilitation would be clearer at the age of thirty.[141]

The Iowa Supreme Court noted that, since determining

135. Ram Eachambadi, *Lousiana* [sic] *Prisoner Freed After Serving 41 Years Unconstitutional Sentence*, JURIST (Apr. 30, 2016, 5:54 PM), http://www.jurist.org/paperchase/2016/04/lousiana-prisoner-freed-after-serving-41-year-unconstitutional-sentence.php.

136. *Id.*

137. *Id.*

138. *Id.*

139. Dave Philipps, *Iowa Court Rejects Life Without Parole for Juveniles*, N.Y. TIMES (May 27, 2016), http://www.nytimes.com/2016/05/28/us/life-sentences-juveniles-iowa-isaiah-sweet.html?_r=0.

140. *Id.*

141. *Id.*

whether the juvenile is "irretrievably corrupt" is near impossible when, in the given case, not even trained professionals attempt to make this determination, "future parole boards would be better suited to make the determination."[142] While the Iowa Court has ruled that future parole boards are better suited to make the determination of whether a juvenile is "irretrievably corrupt," how exactly will that determination be made? How is a juvenile to be determined as "irretrievably corrupt?"

While some adults are now preparing to enter the world after decades growing up behind prison bars, some are still fighting for a chance at life. On Friday, September 23, 2016, a judge in Kent County, Michigan, resentenced David Samel, 52-years-old and behind bars for thirty-five years, to 34½ to 60 years in prison, which made him immediately eligible for parole.[143] All that is left for David Samel is to wait for a state parole board's determination as to whether or not he will be released from the place that he has been confined to since he was just 17-years-old.[144] While things are looking brighter for David Samel, if the state board parole denies his release, in theory, he could be forced to serve the remainder of the new sentence: sixty years. If this is his fate, Samel will be 77-years-old at the time of his release.

VI. Conclusion

There is a lot of uncertainty, but one thing is not uncertain: juvenile life without parole is no longer constitutional; over 2,000 juvenile offenders are languishing in jail serving a punishment that is no longer constitutionally valid.[145] States must now act swiftly. States must first devise a method by which they will begin hearing these cases. Will they be heard at random? Will they be heard on a "first come, first serve" basis? Will it be those juveniles who have served

142. *Id.*

143. John Tunison, *Imprisoned for 34 Years, Juvenile Lifer Gets Shot at Parole*, MLIVE (Sept. 24, 2016, 10:24 AM), http://www.mlive.com/news/grand-rapids/index.ssf/2016/09/imprisoned_for_34_years_juveni.html.

144. *Id.*

145. Wegman, *supra* note 128.

the longest on their sentence? There must then be a list of important and thoroughly analyzed factors for the courts to consider and deem necessary in order to consider parole and the potential release of these once juvenile offenders.

Decisions as to each particular case need to be carefully examined and made in order to ensure that there is proper justice in each case. However, there is a glaring problem staring back at the courts after this Supreme Court decision. A juvenile can still receive long consecutive sentences, potentially living up to half of his or her life in prison, which begs the question: Isn't this just as cruel and unusual, and therefore unconstitutional, as a life sentence, for the very same reasons?

Furthermore, are there proper procedures in place to handle these former juvenile lifers' reentry into society? What is needed to acclimate the oldest juvenile lifer in the state of Philadelphia, Joseph Ligon? Ligon is now a 78-year-old man who has been incarcerated since 1956.[146] What does he need in order to get acclimated into a society that is not behind bars, a society he no longer has any firm ties to? Pennsylvania Corrections Secretary John Wetzel notes some immense difficulties with getting ready for the release of these juvenile lifers; according to Samantha Melamed of *The Philadelphia Inquirer*, the change is a "transition from a world where time moved slowly to one where the pace is frenzied, and from a place with no choices to one where the simplest transaction - buying toothpaste, ordering off a menu - involves a dozen decisions."[147]

146. Samantha Melamed, *After Decades Behind Bars, Juvenile Lifers are Released - but to What?*, PHILLY.COM (July 11, 2016, 3:01 AM), http://www.philly.com/philly/news/20160711_After_decades_behind_bars__juvenile_lifers_are_released_-_but_to_what_.html.

147. *Id.*