2017

# Implementing Proportionality

Perry Moriearty
*University of Minnesota Law School*, pmoriear@umn.edu

# Implementing Proportionality

*Perry L. Moriearty*[*]

*Over the last fourteen years, the Supreme Court has issued five decisions that impose substantive constraints on our harshest punishments — forbidding the execution of those with "mental retardation" in* Atkins v. Virginia, *of juveniles in* Roper v. Simmons, *and of those convicted of child sexual assault in* Kennedy v. Louisiana, *and forbidding the sentence of life without parole for juveniles who had not killed in* Graham v. Florida *and for all juveniles when it is imposed mandatorily in* Miller v. Alabama. *Because the offenders in question were categorically less culpable, the proscribed punishment was disproportionately severe, the Court held. In many respects, these decisions reinvigorated the Court's substantive proportionality jurisprudence, which had been virtually dormant for two decades. Yet, three of the five decisions simply have not yielded in practice what they promised in principle. The implementation of* Atkins, Graham *and* Miller *has been so protracted, litigious and encumbered by procedural obstacles that, of the nearly 3,000 inmates nominally impacted by the decisions, only a fraction has been relieved of their sentences. In the meantime, inmates with IQs of 61 have been executed, and others have died waiting to hear whether the Court's decisions apply retroactively.*

*This Article argues that, despite its transformative potential, the Court's contemporary proportionality jurisprudence has been diminished in scope and potency in the course of its implementation — a dynamic that has been called "slippage." In many respects, the "slippage" of these mandates can be attributed to the decisions themselves, which are deregulatory and,*

 Associate Professor, University of Minnesota Law School, and co-director of the Child Advocacy and Juvenile Justice Clinic. I am grateful to Barry Feld, Richard Frase, Mark Kappelhoff, Kevin Reitz, and Michael Tonry for extremely helpful discussion at various phases of this project. I am also deeply indebted to the faculty at the University of Wisconsin for very insightful feedback at the early stages of this Article. Finally, I thank University of Minnesota law students Chris Land, Carolyn Isaac, Christina Squires, Cresston Gackle, Rosie Derrett and Brendan Delaney for their research, critical feedback and deep devotion to the clients who are impacted by the issues raised in this Article.

*in concert with the Court's broader efforts to limit federal court jurisdiction over state criminal justice processes, tie the scope of relief to the political whims and majoritarian preferences of the States. On some issues, the procedural docility of these decisions has proven so problematic that the Court has twice within the last two years had to intervene, striking portions of Florida's capital sentencing scheme in 2014 and, just weeks ago, declaring in* Montgomery v. Louisiana *that* Miller *does in fact apply retroactively. While the Court's reluctance to regulate the implementation of its proportionality mandates may be rationalized as necessary deference to the principles of federalism and finality, these justifications are far less compelling in the Eighth Amendment context. The very establishment of federal habeas, executive clemency, and Supreme Court review suggests that the Framers themselves recognized that there are normative points when interests in federalism and finality simply must yield. By contrast, the risk of offending constitutional norms through slippage may be at their most pronounced since one of the Eighth Amendment's primary purposes is to protect the politically powerless from government overreach. I conclude that, if the Court is serious about implementing in practice the substantive constraints on punishment it has imposed over the last fourteen years, it must accompany its substantive mandates with a minimum threshold of procedural prescription.*

TABLE OF CONTENTS

## INTRODUCTION

Over the past decade and a half, the Supreme Court has issued five decisions imposing substantive constraints on the harshest forms of punishment in this country — forbidding the execution of individuals with "mental retardation" in *Atkins v. Virginia*,[1] those under eighteen in *Roper v. Simmons*,[2] and those convicted of rape of a child in *Kennedy v. Louisiana*.[3] The Court has also banned life sentences without the possibility of parole for juveniles who had not committed homicide in *Graham v. Florida*,[4] and for all juveniles when imposed mandatorily in *Miller v. Alabama*.[5] In each case, a sharply divided Court held that the offender in question, whether by virtue of age, mental status, or the nature of the crime committed, did not deserve the proscribed punishment. The punishment was, in other words, disproportionate under the Eighth Amendment.

To many scholars, these decisions reinvigorated the Court's substantive proportionality jurisprudence, which had been virtually dormant for two decades.[6] Collectively, they amounted to a doctrinal

[1] 536 U.S. 304 (2002).

[2] 543 U.S. 551 (2005).

[3] 554 U.S. 407 (2008).

[4] 560 U.S. 48 (2010).

[5] 132 S. Ct. 2455 (2012).

[6] *See, e.g.*, Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 86 (2010) ("*Graham* contains the ingredients to be of transformative significance to the Supreme Court's Eighth Amendment jurisprudence."); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 722-31, 735 (2008) [hereinafter *Lessons from Substance*] (noting that, because *Atkins* was the first Supreme Court case to find an American criminal practice excessive in the absence of an overwhelming legislative consensus, it had "opened the path not only to other proportionality limitations on the reach of the death penalty, but also to the prospect of judicial abolition of the death penalty itself"); Jordan Steiker, *United States:* Roper v.

and methodological pivot by a Court that had for years taken a decidedly hands-off approach to sentencing review, as laws of unprecedented severity proliferated.[7] Though the Court heavily regulated capital sentencing procedures through the 1980s and 1990s,[8] it avoided the imposition of substantive constraints.[9] With *Atkins*, the Court shifted its stance, expanding the scope of its Eighth Amendment protections and augmenting its methodological approach to proportionality review. In *Roper*, the Court looked to international norms and practices as a barometer of consensus[10] — something it had

Simmons, 4 INT'L J. CONST. L. 163, 165 (2006) [hereinafter *U.S.:* Roper v. Simmons] (noting that *Roper* appears to be part of a larger effort to regulate the American death penalty system and "provides a blueprint not simply for increased judicial regulation of the capital practices but also for judicial abolition of the American death penalty altogether").

[7] *See, e.g.*, Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1052 (2013) (arguing that the Supreme Court's expansion of the Eighth Amendment signaled that it was finally willing to halt "ceding all punishment decisions to the legislature without a modicum of judicial and constitutional checks and balances"). The list of cases in which the Court upheld especially punitive state sanctions is expansive. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (affirming life-with-parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 296-302 (1983) (reversing sentence of life-without-parole for presenting a worthless check for $100, where defendant had six prior felonies).

[8] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating a mandatory death penalty statute on grounds that it foreclosed individualized consideration of the offender and offense); *see also* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (invalidating limits on defense-sponsored testimony regarding the unavailability of parole in cases where the prosecution emphasized the prospective dangerousness of the defendant); Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) (limiting prosecutorial efforts to diminish jurors' sense of responsibility for their verdict based on an inaccurate characterization of the scope of appellate review).

[9] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (rejecting Eighth Amendment challenge to execution of juveniles who were sixteen and seventeen years old at the time of the offense); Penry v. Lynaugh, 492 U.S. 302 (1989) (rejecting Eighth Amendment challenge to execution of persons with mental retardation); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 438 (1995) [hereinafter *Sober Second Thoughts*] (arguing that the Court's excessively procedural focus on death penalty law during the two decades post-*Furman v. Georgia* had wrought the "worst of all possible worlds").

[10] The Court cites to Article 37 of the United Nations Convention on the Rights of the Child, for example, which expressly prohibits juvenile executions and which every country in the world has ratified with the exceptions of the United States and Somalia.

done only in passing in prior decisions[11] — and in *Graham*, it applied to a non-capital sentence for the first time the robust proportionality analysis previously reserved for capital cases.[12] The Court's reasoning in these cases might one day extend to the mentally ill,[13] scholars claimed, and called into question other juvenile processing[14] and sentencing decisions.[15] The general consensus was that this jurisprudence had the potential to transform the regulation of sentencing in the United States.[16]

*See* Roper v. Simmons, 543 U.S. 551, 576, 604 (2005) (citing to Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002)) ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.").

[11] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (plurality opinion) (referencing the abolition of juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

[12] In doing so, the Court all but eviscerated its "death is different" approach to proportionality review, Justice Thomas lamented in dissent. *See* Graham v. Florida, 560 U.S. 48, 103 (2010) (Thomas, J., dissenting) (declaring "'[d]eath is different' no longer"); *see also* Alison Siegler & Barry Sullivan, *"'Death is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 379 (2010) (arguing that the Court's decision "marked a significant break with past practice").

[13] *See, e.g.*, Helen Shin, *Is the Death of the Death Penalty Near?: The Impact of* Atkins *and* Roper *on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 477-78, 480-83 (2007) (discussing how excessive punishments are judged by currently prevailing standards and how defendants with diminished capacity are not likely to be deterred); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 819-20 (2009) (analyzing how the death penalty is a disproportionate punishment for defendants with mental illness because it does not meet the penological goals of retribution and deterrence).

[14] *See generally* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010) (suggesting that lawyers use *Graham* to challenge the constitutionality of adult court transfer statutes).

[15] *See, e.g.*, Jennifer S. Breen & John R. Mills, *Mandating Discretion*: *Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 307-09 (2015).

[16] *See, e.g.*, Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49 (2010) ("It would be hard to overstate the significance of the Supreme Court's decision in *Graham v. Florida*."); Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1788-89 (2016) (arguing that *Miller* was revolutionary in logic and scope); Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 487 (2014) (arguing that "the cases have a far more revolutionary reach than their conventional understanding").

What has received far less attention, however, is whether these decisions have achieved in practice what they promised in principle[17]: whether the Court's promise to exempt from execution the intellectually disabled, juveniles and those convicted of the sexual assault, and to exempt from life without parole juveniles who not committed homicide and all juveniles when it is mandatory, have in fact been implemented by the thirty affected states.[18] The answer is decidedly mixed.

This Article makes three primary claims. First, the Court's modern proportionality jurisprudence has substantially eroded in the course of its implementation — a dynamic that scholars have called constitutional "slippage" in other contexts.[19] While *Kennedy* and *Roper* were implemented without significant opposition,[20] the implementation of *Atkins*, *Miller*, and to a lesser extent *Graham*, has been protracted, litigious, geographically disunited, and, in some cases, evaded altogether. As a result, these decisions have, in a number of jurisdictions, lived up to neither their doctrinal guarantees nor their underlying principles. Four structural and cultural features of the U.S. criminal justice system have contributed: a long-standing cultural resistance in most jurisdictions to incorporating scientific expertise

[17] Many scholars have looked at the impact of some of these decisions in isolation. *See* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 91-104 (2015) (examining the implementation of *Miller*); Cara H. Drinan, Graham *on the Ground*, 87 WASH. U. L. REV. 51, 64-82 (2012) (analyzing the implementation of *Graham*); Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 722-31 (examining the implementation of *Atkins*). But none have considered the implementation of the Court's modern proportionality jurisprudence in the aggregate. This Article fills this gap.

[18] As discussed in Part II, *infra*, both legal scholars and political scientists have defined compliance with judicial mandates as the process through which political authorities carry out the action (or avoid action) called for (or prohibited) in court rulings. *See, e.g.*, Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 L. & SOC. INQUIRY 803, 806 (2013) (citing ALEXEI TROCHEV, JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006 (2008); James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567, 567-93 (1997)).

[19] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (defining "slippage" as the gap "between a constitutional norm and its enforcement"); *see also* Daniel Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 297 (1999) (calling "slippage" the breaks between what law mandates and what actually happens). As set forth below, however, the slippage of the Court's modern proportionality jurisprudence was predictable because the holdings were substantively and procedurally lean.

[20] *See infra* Part II.A.

into policy-making; elected officials' continued attraction to "tough on crime" policies; the procedural complexity and rigidity of state post-conviction processes; and, in many states, the absence of robust systems of parole and release. The net effect has been the states' "procedural evasion of [the Court's] new substantive rights."[21]

As a result, sentencing relief has been elusive. Perhaps the plainest evidence is that until recently, of the nearly 3,000 inmates[22] ostensibly entitled to some form of collateral relief in the aftermath of *Atkins*, *Graham* and *Miller*, only a third had even been deemed eligible, and far fewer have actually obtained meaningful relief.[23] In some instances, the consequences have been deeply disturbing: in 2012, a fifty-four year old Texas inmate with an IQ of 61, who reportedly sucked his thumb and could not always tell the difference between left and right, was executed — a casualty of Texas' highly restrictive and unscientific *Atkins* framework.[24]

In fact, the states' responses to *Atkins* and *Miller* have been so uneven and, in some cases, obstructionist, that a reluctant Court has stepped in three times within the last two years. In 2014 in *Hall v. Florida*, the Court struck a portion of Florida's capital sentencing scheme, declaring that it imposed such extreme burdens on *Atkins* petitioners that it created "an unacceptable risk that persons with intellectual disability will be executed."[25] In January 2016, the Court announced in *Montgomery v. Louisiana* that *Miller* does in fact apply to

[21] Steiker & Steiker, *Lessons from Substance*, *supra* note 6 at 731. This is not to say that these decisions have been entirely unproductive. In the juvenile sentencing arena, *Miller* has prompted the abolition of juvenile life without parole in nine states. *See infra* Part I.B. Among some of the states that retain juvenile life without parole policies, legislatures and courts have diminished their impact through reforms that narrow the application of life without parole.

[22] The *Miller* Court estimated that approximately 2,000 inmates in the United States were serving mandatory life without parole sentences for offenses they committed as juveniles, Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, J., dissenting), the *Graham* Court identified 123 inmates who were sentenced as juveniles to life without parole for offenses other than homicide, Graham v. Florida, 560 U.S. 48, 64, 110, 113 (2010), and a recent study showed that, in the decade after *Atkins* was decided, 371 of the 4819 (7.7%) death row inmates or capital defendants who could have raised *Atkins* claims did so, and, of these, roughly half prevailed. *See* John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 396 (2014) [hereinafter *A Tale of Two*].

[23] *See infra* Part II.A.

[24] Andrew Cohen, *Of Mice and Men: The Execution of Marvin Wilson*, ATLANTIC (Aug. 8, 2012), http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/.

[25] Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).

the approximately 2,100 inmates who had been sentenced to mandatory life without parole as juveniles, but whose cases were final when the decision was issued.[26] And in November, the Court clarified that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[27]

Second, the slippage of the Court's substantive proportionality mandates is, in many respects, a natural and even foreseeable consequence of the decisions themselves, which are narrowly drawn and virtually devoid of procedural prescription. Though both *Graham* and *Miller* are grounded firmly within the Court's proportionality jurisprudence, the decisions whittled away at the sentence of juvenile life without parole, without banning it outright.[28] In doing so, the Court left the States to wrestle with substantive questions about concepts as nebulous as diminished culpability, mitigation, and amenability to rehabilitation, and as technical as retroactivity.

In *Atkins*, the Court expressly left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on executing the mentally retarded.[29] Similarly, in *Miller,* it declared that juvenile offenders must be afforded individualized sentencing and a "meaningful opportunity to obtain release,"[30] without defining either concept, nor indicating how and to whom they should apply. In fact, the *Graham* majority's regulatory reticence was so blatant that Justice

[26] Montgomery v. Louisiana, 136 S. Ct. 718, 732, 736 (2016) (holding *Miller* to be a substantive rule retroactive to cases on collateral review).

[27] Tatum v. Arizona, 137 S. Ct. 11, 11-12 (2016) (Sotomayor, J., concurring) (granting certiorari, vacating judgment, and remanding five cases in which defendants convicted of committing murders while under the age of 18 were sentenced to life without parole because "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility'").

[28] *See, e.g.*, Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 398-99, 412 (2013) ("If life imprisonment for juveniles were itself substantively cruel . . . the Court should have banned it outright instead of simply leaving open a chance at parole or allowing sentencers to impose LWOP on certain killers.").

[29] Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)).

[30] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (quoting Graham v. Florida, 560 U.S. 48, 51 (2010)).

Thomas predicted in dissent that the Court's opinion would "embroil the courts for years."[31]

Adding to the fallout from the Court's narrow and deregulatory approach in these decisions have been its parallel efforts to safeguard the States' autonomy over their criminal and collateral proceedings through a series of decisions that limit habeas corpus and restrict retroactivity. Just a year after the Court decided *Atkins*, it held in *Ewing v. California*[32] that a prison term of twenty-five years to life under California's three-strikes law for shoplifting by a repeat offender was not cruel and unusual. "[O]ur tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding," Justice O'Connor emphasized.[33] Since *Ewing*, the Court has issued numerous decisions restricting the retroactive application of new rules of criminal procedure[34] and rendering federal habeas corpus review of state court convictions almost non-existent.[35] Operating virtually unchecked by the federal courts, and given license to restrict the remedial scope of the Court's new proportionality rules, it is not surprising that states have taken wildly different approaches to implementation, leaving the substantive mandates announced in *Atkins*, *Graham* and *Miller* to "turn upon . . . trivialities,"[36] "vary from place to place and from time to time,"[37] and to create a procedural landscape that resembles a "crazy quilt."[38]

---

[31] *Graham*, 560 U.S. at 123 (Thomas, J., dissenting).

[32] 538 U.S. 11, 28-31 (2003).

[33] *Id.* at 24; *see, e.g.*, *id.* at 28 ("We do not sit as a 'superlegislature' to second-guess [California's] policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'").

[34] *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court held that the Sixth Amendment requires a jury (not a judge) to find aggravating factors necessary for imposition of the death penalty, does not apply retroactively to cases on federal habeas review); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 727-32 (2016) (discussing the numerous procedural thresholds that a federal habeas petition must navigate in order to obtain relief).

[35] *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (explaining that AEDPA "[s]ection 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal") (citing Jackson v. Virginia, 433 U.S. 307, 332 n.5 (1979)).

[36] Whren v. United States, 517 U.S. 806, 815 (1996).

[37] Virginia v. Moore, 553 U.S. 164, 176 (2008) (quoting *Whren,* 517 U.S. at 815).

[38] *See* Kansas v. Marsh, 548 U.S. 163, 185 (2006) ("Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform

Finally, while the Court's deregulatory and narrow approach to substantive decision-making can be rationalized as promoting the principles of federalism and finality,[39] the constitutional slippage it sows is far less tolerable in the Eighth Amendment context. Society's interests in finality and federalism are simply weaker when it comes to the implementation of proportionality guarantees.[40] There is also a normative point at which society's interest in federalism must yield. Both the Court[41] and the Framers recognized as much. As Doug Berman has written, while the Framers sought to preserve state sovereignty over matters of criminal process,[42] they were also unequivocal in their intent to give criminal defendants in the colonial era various means of challenging government action. They did so by preventing the legislative branch from suspending habeas review, empowering the executive to grant clemency, and authorizing the Supreme Court to hear appeals.[43]

By contrast, the risk of offending constitutional norms through slippage and disunity may be most pronounced with Eighth Amendment proportionality rules. It is generally accepted that one of the Eighth Amendment's primary roles is to protect the politically powerless from government overreach.[44] Yet, when the Court links the

'law of the land' into a crazy quilt.").

[39] The Court itself said as much in cases like *Williams v. Taylor*, where it characterized limits on federal habeas corpus relief as necessary to vindicate society's interests in "comity, finality, and federalism." 529 U.S. 420, 436 (2000).

[40] *See* Perry Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 981 (2015) (arguing that finality interests are less compelling with sentences than they are with convictions).

[41] *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 338 (1921) ("The Constitution was intended — its very purpose was — to prevent experimentation with the fundamental rights of the individual.").

[42] *See* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 154 (2014) (observing that "criminal adjudications in the Founding Era lacked many of the legal formalities and procedural particulars now familiar to modern lawyers: criminal trials, which were frequent and speedy, involved a 'common-sense, public moral judgment' in which laymen were central players" (citation omitted)); *see also* United States v. Lopez, 514 U.S. 549, 564 (1995) ("[I]n areas such as criminal law enforcement or education . . . States historically have been sovereign.").

[43] Berman, *supra* note 42, at 155 (noting that "Article I, Section 9 instructs Congress that the 'Privilege of the Writ of Habeas Corpus shall not be suspended,' Article II, Section 2 provides that the President 'shall have Power to grant Reprieves and Pardons for Offences against the United States,' and Article III, Section 2 provides that the Supreme Court 'shall have appellate Jurisdiction'").

[44] *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 907 (2011) (noting that the historical focus

scope and potency of its Eighth Amendment protections to the political whims and majoritarian preferences of individual jurisdictions, as it has done in these cases, these constitutional protections are often fundamentally compromised. Indeed, the same social forces that hinder meaningful participation in the political process and perpetuate prejudice have the potential to affect decisionmaking by state political bodies and individual actors.

There is also the more basic concern that issuing substantive mandates with no assurance of their enforcement undermines the Court's own legitimacy. It is, in the words of Carol Steiker, akin to speaking in "two voices to two different audiences . . . [t]hose 'in the know' realize that the substantive right runs only as far as its effective enforcement . . . [while] [t]he less sophisticated general public, however, is likely to accept at face value that the United States no longer [imposes the punishments in question.]"[45] In our current climate, in which the vast majority of those who stand to benefit from these substantive rights are people of color,[46] such duplicity is especially problematic.

While my purpose is less to offer a list of prescriptions than it is to document and provide a normative assessment of the slippage of the Court's contemporary proportionality jurisprudence, if the Court is serious about implementing in practice the substantive constraints on punishment that it has imposed through its modern proportionality jurisprudence, it must be willing to incorporate a minimum threshold of procedural prescription. Recently, a handful of commentators have explored the use of what they call the Court's prophylactic "anti-

was not on punishments that were "'cruel and rare" but on those that are "cruel and new," which suggests "the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis").

[45] Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 734.

[46] ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 14 (2016) (reporting that "racial disparities vary broadly across the states, as high as 12.2:1, but even in Hawaii — the state with the lowest black/white disparity — African Americans are imprisoned more than two times the rate of whites."); LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (2014), http://www.prisonpolicy.org/reports/rates.html (calculating the racial makeup on the U.S. prison population as 40 percent black, despite the fact that blacks make up thirteen percent of the total U.S. population); *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Aug. 10, 2016) ("African Americans are incarcerated at nearly six times the rate of whites.").

evasion doctrines," procedural devices that seek "to optimize constitutional enforcement by curbing circumvention of constitutional principles."[47] The Court's clarification in *Hall v. Florida* that *Atkins* requires the incorporation of professional views about threshold IQ scores and adaptive functioning, and *Montgomery*'s presumption against juvenile life without parole sentences[48] suggests that the Court is willing to employ such devices. They also indicate that the Court is willing to entertain new constitutional challenges to overly rigid practices and methodologies when it comes to the implementation of the harshest punishments.

This Article proceeds in three parts. Part I gives a brief overview of the Supreme Court's efforts over the last decade and a half to impose substantive constraints on the death penalty and the sentence of life without parole in cases where the offender in question, whether by virtue of age, mental status, or the nature of the crime committed, is not sufficiently culpable.[49] Part II then turns to the implementation of these decisions by the States, arguing that three of the five decisions issued by the Court simply have not produced in practice what they promised in principle.[50] This constitutional "slippage" can be attributed both to the structural features of state criminal justice processes and also to substantive and procedural deficiencies in the decisions themselves. Finally, Part III makes the case that the erosion of substantive doctrine is far less tolerable in the Eighth Amendment context and advocates that, when proportionality rules are at stake, a minimum threshold of procedural prophylaxes is warranted.[51]

## I. REGULATING PROPORTIONALITY

With its decisions over the last fourteen years in *Atkins v. Virginia*, *Roper v. Simmons*, *Kennedy v. Louisiana*, *Graham v. Florida* and *Miller v. Alabama*, the Supreme Court imposed substantive constraints on the

[47] Brandon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 4 UTAH L. REV. 1773, 1776 (2013); *see also* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008) (arguing that courts should protect constitutional guarantees by using doctrines designed to raise the cost to government decisionmakers who enact unconstitutional policies).

[48] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").

[49] *See infra* Part I.

[50] *See infra* Part II.

[51] *See infra* Part III.

harshest forms of punishment administered in this country. In doing so, the Court reinvigorated its substantive proportionality jurisprudence in many critical respects.

### *A. Twentieth Century Formalism*

It is generally accepted that the Eighth Amendment's ban on cruel and unusual punishment contains a proportionality requirement.[52] Over the course of the twentieth century, the Supreme Court repeatedly held that the ban "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense,'"[53] interpreting the requirement to include "not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime and the committed."[54] Despite this basic premise, however, the Court's approach to regulation over the last century was disjointed, shifting from substantive intervention to procedural surplus and back again. And until recently, the Court also maintained a rigid barrier between capital and non-capital sentencing review, reserving its truly rigorous analysis for capital sentences alone.

---

[52] *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1064 (2004) (tracing the concept of proportionality to the Magna Carta and arguing that it is inaccurate to base the rejection of proportionality review on history); Stinneford, *supra* note 44, at 926-27 (arguing that the English Bill of Rights, Anglo-American tradition, and the text of the "Cruel and Unusual Punishments" clause itself all support a proportionality requirement).

Yet, some of the most prominent Supreme Court Justices and legal scholars have argued that the Punishments Clause was intended to forbid only barbaric methods of punishment, not disproportionate punishments. Within the Court's own jurisprudence, this criticism began with Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 397 (1910) (White, J., dissenting). More than eighty years later, Justice Scalia would draw upon Justice White's dissent in *Harmelin v. Michigan*, 501 U.S. 957, 966-85, 991-93 (1991), as well as a prominent law review article by Professor Anthony Granucci, to argue that the Court's textual basis for proportionality review was unsupported. *See* Anthony D. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969).

[53] Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting *Weems*, 217 U.S. at 367).

[54] Coker v. Georgia, 433 U.S. 584, 592, 598 (1977) (observing that "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life").

1. Procedural Surplus

The Court first imposed a substantive constraint on punishment in 1910 in *Weems v. United States*,[55] when it rejected a legislatively authorized sentence of fifteen years of hard labor and permanent loss of civil liberties for minor offenses by a governmental employee. A half century later, the Court relied on *Weems* when it articulated for the first time in *Trop v. Dulles* that the meaning of "cruel and unusual" punishments was not static, but evolved over time, consistent with "the evolving standards of decency that mark the progress of a maturing society."[56] The "evolving standards of decency test" subsequently became the Court's threshold inquiry when it reviewed challenges to punishment,[57] and has traditionally involved consideration of relevant state legislation and practices, and the views of entities with relevant expertise.[58] The Court follows this analysis with the application of its "independent judgment," assessing, in essence, whether it agrees with the national consensus.[59] Here, the Court weighs the culpability of the offender or offense against the severity of the punishment and then considers whether the particular sentencing practice can be justified by any of the standard theories of punishment.[60]

[55] *Weems*, 217 U.S. at 380-81.

[56] Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).

[57] *Id.* The test has been heavily criticized. *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) ("The preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right."); Stinneford, *supra* note 44, at 905 (criticizing the test's limited protection for criminal offenders because it "rarely yields an unambiguous showing of societal consensus against a given punishment, for virtually all punishments reviewed by the Supreme Court enjoy significant public support"); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 868, 872 (2009) (noting that, if society were to pivot toward a "a large-scale movement toward executing juveniles or the insane," the Court would have to deem such punishments proportional).

[58] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564-65 (2005) (calculating a "national consensus" against juvenile death penalty by considering which states allow and prohibit such sentences); Atkins v. Virginia, 536 U.S. 304, 312, 317 (2002) (discussing the reliance on state legislation as the "clearest and most reliable objective evidence of contemporary values").

[59] *See, e.g.*, *Roper*, 543 U.S. at 564 (defining the evolving standards of decency inquiry as beginning with a "review of objective indicia of consensus," followed by an "exercise of [the Court's] own independent judgment"); *Atkins*, 536 U.S. at 321 (concluding that the Court's independent evaluation of the propriety of executing the mentally handicapped "reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter").

[60] *E.g.*, *Atkins*, 536 U.S. at 318-19 (concluding that the diminished culpability of

In the half century after *Weems* was decided, the Court invoked its substantive proportionality analysis just once, holding in 1962 in *Robinson v. California* that a ninety-day sentence of incarceration for the offense of addiction to narcotics was excessive.[61] While the assault on capital punishment in the 1960s and 1970s included additional substantive and procedural challenges to punishment, the Court responded with rules that were almost exclusively procedural. Between 1970 and 2000, the Court issued dozens of rulings placing procedural constraints on the imposition of the death penalty, limiting the discriminatory selection of capital jurors,[62] invalidating capital sentencing schemes which foreclosed the consideration of mitigating evidence,[63] prohibiting judges from excluding such evidence from capital sentencing decisions,[64] limiting prosecutorial efforts to mischaracterize the scope of appellate review,[65] and invalidating limits on testimony regarding the availability of parole,[66] for example. But the Court rejected several substantive challenges to capital punishment as a practice,[67] issuing just three substantive decisions over the course of three decades — prohibiting the death penalty for the rape of an adult in 1977 in *Coker v. Georgia,*[68] prohibiting the death penalty for those who were not major participants in the offense in 1982 in *Enmund v. Florida,*[69] and prohibiting the death penalty for those declared clinically "insane" in 1986 in *Ford v. Wainwright*.[70]

mentally handicapped offenders prevents justifiable exercise of the death penalty).

[61] Robinson v. California, 370 U.S. 660, 676-77 (1962) (finding that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

[62] Witherspoon v. Illinois, 391 U.S. 510, 520-23 (1968).

[63] Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976).

[64] Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982); *see* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

[65] Caldwell v. Mississippi, 472 U.S. 320, 323 (1985).

[66] *See* Simmons v. South Carolina, 512 U.S. 154, 161-62 (1994).

[67] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (rejecting an Eighth Amendment challenge to execution of juveniles who were sixteen and seventeen years old at the time of the offense); Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (rejecting an Eighth Amendment challenge to execution of persons with mental retardation); McCleskey v. Kemp, 481 U.S. 279, 317-19 (1987) (rejecting Eighth and Fourteenth Amendment claims that the death penalty was imposed in an impermissibly arbitrary manner). *See generally* Steiker & Steiker, *Sober Second Thoughts*, *supra* note 9, at 402-03 (arguing that the Court's excessively procedural focus on death penalty law during the two decades post-*Furman v. Georgia* had "wrought the worst of all possible worlds").

[68] 433 U.S. 584, 598-99 (1977).

[69] 458 U.S. 782, 797, 806 (1982) (holding that the Eighth Amendment does not permit the death penalty for individuals who did not themselves kill, attempt to kill,

2. "Death Is Different"

Through much of the twentieth century, the Court also took a much different approach to non-capital cases, refusing to apply the robust proportionality analysis that it utilized in the capital context and instead applying a "narrow" proportionality inquiry that asked only whether the sentence was "grossly disproportionate" to the offense.[71] This standard was rarely met — as long as the state had a "reasonable basis for believing" that the sentence in question served some penological goal, the Court upheld the punishment.[72]

In 1980 in *Rummel v. Estelle*, the Court was for the first time explicit about its "death is different" approach to proportionality review, observing that outside the death penalty context, "successful challenges to the proportionality of particular sentences have been exceedingly rare."[73] In *Rummel*, the Court upheld the imposition of a life sentence under Texas' recidivist statute for a defendant who was convicted of three non-violent felonies over a period of fifteen years,[74] and two years later, in *Hutto v. Davis*, affirmed two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana.[75] Yet, in 1983, in *Solem v. Helm*, the Court unexpectedly reversed as disproportionate a life without parole sentence for a repeat non-violent offender who had passed bad checks,[76] and made the surprising claim that proportionality review does in fact apply to term-of-years sentences.[77] Nonetheless, the Court refused to overrule *Rummel*.[78]

In 1991, the Court reversed course yet again in *Harmelin v. Michigan*, when it upheld a life without parole sentence for a first-time drug offender.[79] In rejecting the defendant's argument that a sentence of life without parole could not be imposed without a consideration of

or intend to kill).

[70] 477 U.S. 399, 409-10 (1986).

[71] *See* Harmelin v. Michigan, 501 U.S. 957, 995, 998-1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.").

[72] Ewing v. California, 538 U.S. 11, 28-30 (2003) (plurality opinion).

[73] Rummel v. Estelle, 445 U.S. 263, 272 (1980).

[74] *Id.* at 263.

[75] Hutto v. Davis, 454 U.S. 370, 370-72 (1982) (per curiam).

[76] Solem v. Helm, 463 U.S. 277, 278 (1983).

[77] *Id.* at 278-79.

[78] *Id.* at 304 (Burger, J., dissenting).

[79] Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991).

mitigating factors, the Court made clear that it would not require individualized sentencing in non-capital cases. Writing for the majority, Justice Scalia also argued that *Solem v. Helm* was wrongly decided because the Eighth Amendment does not contain a proportionality guarantee.[80] In his concurrence, however, Justice Kennedy disagreed, affirming that the Court's Eighth Amendment jurisprudence recognizes a "narrow" proportionality requirement in non-capital cases which "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[81]

All the while, sentences of unprecedented severity proliferated. During the 1980s and the 1990s, every state and the federal government enacted laws that enhanced prosecutorial authority, reduced judicial discretion, created mandatory minimum sentences and made punishment more severe.[82] More than half the states also adopted truth-in-sentencing laws, which prevented release from prison before an inmate had served at least eighty-five percent of his sentence, and three strikes laws, which required minimum terms of twenty-five years to life for third-time felons.[83] The impact of these measures was unmistakable. Between 1970 and 2003, the U.S. prison population increased from 200,000 to 1.4 million.[84]

### *B. Twenty-First Century Functionalism*

It was against this backdrop of substantive restraint, procedural surplus, and the reservation of truly rigorous proportionality review for capital cases alone that the Court in 2002 issued the first of five decisions that have, by almost any measure, transformed its modern proportionality jurisprudence. These decisions have several common characteristics. First and most critically, they were the Court's first

---

[80] *Id.* at 965.

[81] *Id.* at 997-1001 (Kennedy, J., concurring). Justice Kennedy explained:

> All of these principles — the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors — inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

*Id.* at 1001.

[82] MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025, at 3, 16, 202-05 (2015).

[83] *Id.* at 224-25.

[84] BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 3 (2006).

efforts in two decades to impose substantive constraints on punishment. Second, they were all categorical decisions — the sentences in question were disproportionately severe, the Court held, because the offenders as a category, by virtue of their status or offenses, were insufficiently culpable. The Court's decisions in *Graham* and *Miller* also represented the first time the Court had ever placed a categorical restriction on life sentences. Finally, while the Court employed its standard two-step Eighth Amendment inquiry in each case, it deviated from its traditional "evolving standards" analysis in important ways.

1. Substantive Limits

The Court's decisions in *Atkins, Roper, Kennedy*, and, to a lesser extent, *Graham* and *Miller*, were unequivocally substantive. In *Atkins*, the Supreme Court overruled its thirteen-year-old decision in *Penry v. Lynaugh*,[85] and declared that the death penalty was unconstitutional for those who are "mentally retarded."[86] In doing so, the Court issued a categorical exemption from the death penalty for defendants who meet the clinical criteria for intellectual disability.[87] "[T]he Constitution places a substantive restriction on the State's power to take the life of [an intellectually disabled] offender," the Court held.[88]

Three years later, a sharply divided Court issued a comparable categorical ban in *Roper*,[89] prohibiting the execution of juvenile offenders. In doing so, the Court overruled its 1989 decision in *Stanford v. Kentucky* and, for the first time, applied proportionality principles to juveniles as a class.[90] Drawing upon the same categorical analysis that it employed in *Atkins*, the Court identified three fundamental features of youth that make juveniles constitutionally different from adults for purposes of capital sentencing: immaturity and limited self-control; increased susceptibility to peer pressure and inability to escape criminogenic environments; and the transient

[85] 492 U.S. 302 (1989).

[86] Atkins v. Virginia, 536 U.S. 304, 318-19 (2002).

[87] *Id.* at 317 n.22 ("The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions . . . .").

[88] *Id.* at 321.

[89] *See* Roper v. Simmons, 543 U.S. 551, 551-54 (2005) (5–4 decision) (holding that the Eighth and Fourteenth Amendments prohibited the execution of a juvenile offender who had committed a capital crime).

[90] *Id.* at 552.

nature of adolescent personality development.[91] It would rely on these distinguishing features in both *Graham* and *Miller*.

In *Kennedy*, the Court invoked its rationales in *Coker*[92] and *Enmund*,[93] prohibiting the death penalty for the crime of sexual assault on a child where the crime did not result, and was not intended to result, in the victim's death.[94] Again, the Court based its categorical exemption on the defendant's diminished culpability, not as a function of the defendant's class or status, but rather his offense.[95]

In *Graham,* the Court returned to *Roper*, holding that the same reduced culpability that precluded the State from imposing the death penalty on juveniles also precluded the State from sentencing juveniles who had not killed to the next harshest punishment — life without parole.[96] Central to *Graham*'s holding was the Court's determination that juveniles are categorically less culpable than adults, doubly so when they had not killed, and as a result, are categorically less deserving of the sentence of life without parole, a punishment which the Court expressly noted, in *Graham*, was akin to death for juveniles.[97] The Court did not, of course, ban juvenile life without parole outright, something it could have, and perhaps should have,

[91] *See id.* at 567-71 (discussing these three distinctive features of adolescence). Justice Kennedy's decision to rely on a "categorical" rather than an "as-applied" approach was met with considerable opposition. *Id.* at 602-03 (O'Connor, J., dissenting). In her dissent, Justice O'Connor decried the Court's use of a "categorical age-based rule" rather than an "individualized sentencing" methodology, *id.* (O'Connor, J., dissenting), while Justice Scalia argued that the majority's "startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with 'mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system,'" *id.* at 620 (Scalia, J., dissenting) (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987)).

[92] Coker v. Georgia, 433 U.S. 584 (1977) (holding that capital punishment for a crime of rape of an adult woman was grossly disproportionate and excessive punishment prohibited by the Eighth Amendment).

[93] Enmund v. Florida, 458 U.S. 782 (1982) (holding that the Eighth Amendment does not permit the imposition of the death penalty for those who aid and abet a felony during the course of which a murder is committed).

[94] Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

[95] *See id.* at 420-21.

[96] *See* Graham v. Florida, 560 U.S. 48, 74-75 (2010).

[97] *See id.* at 69, 74, 79 ("A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.").

done if it believed that such a punishment was itself substantively cruel.[98]

Just two years later, the Court granted certiorari in the cases of *Miller v. Alabama* and *Jackson v. Hobbs*. Like *Graham*, *Miller* and *Jackson* were framed as categorical challenges to non-capital sentences, this time to the imposition of juvenile life without parole for the offense of homicide.[99] *Miller* brought together "two strands" of Eighth Amendment precedent.[100] Writing for the majority, Justice Kagan began with the Court's "categorical" ban cases.[101] *Atkins*, *Kennedy*, *Roper* and *Graham* were controlling, Justice Kagan explained, because each case banned a category of punishment because either the class of defendants was insufficiently culpable, or the class of conduct was insufficiently severe.[102]

The second strand of cases included those "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[103] While *Roper*, *Graham* and *Atkins* focused principally on the vulnerability of the class of defendants in question, these other cases focused on the severity of the punishment, grafting an individualization requirement into capital sentencing because it is uniquely harsh.[104] Because mandatory life without parole sentences for juveniles "preclude a sentencer from taking account of an offender's age and the wealth of

98 *See* Bierschbach & Bibas, *supra* note 28, at 416.

99 Petition for Writ of Certiorari at 7, Jackson v. Arkansas, 132 S. Ct. 2455 (2012) (No. 10-9647), 2011 WL 5322575, at 7 ("*Graham* confirmed [*Jackson*'s] basic submission that juveniles sentenced to life imprisonment without parole could maintain categorical challenges to their sentences under the Eighth and Fourteenth Amendments."); Petition for Writ of Certiorari at 8-10, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646), 2011 WL 5322568, at 8 ("[Miller] continued to raise his categorical challenge to the constitutionality of sentencing a fourteen-year-old child to life imprisonment without parole . . . .").

100 *Miller*, 132 S. Ct. at 2463.

101 *Id.*

102 *Id.* at 2463-65.

103 *Id.* at 2463-64.

104 *See* Woodson v. North Carolina, 428 U.S. 280, 293, 304 (1976) (citing consensus of jurisdictions rejecting mandatory death sentences as "unduly harsh and unworkably rigid"); *see also* Eddings v. Oklahoma, 455 U.S. 104, 116-117 (1982) (holding "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances"); Roberts v. Louisiana, 428 U.S. 325, 332 (1976) (noting "unacceptable severity of the common-law rule of automatic death sentences").

characteristics and circumstances attendant to it," they "pose[] too great a risk of disproportionate punishment," Justice Kagan warned.[105]

2. Different No Longer

One of the most significant aspects of the Court's decision in *Graham* was Justice Kennedy's acknowledgement that it was nearly impossible to establish a constitutional violation under the Court's "narrow," non-capital review, and his application of the Court's "categorical" prohibition cases to a non-capital sentence.[106] The *Graham* Court also explicitly dispensed with its traditional stance of penal agnosticism in non-capital cases. Just seven years earlier, in the companion cases of *Ewing v. California* and *Lockyer v. Andrade*, the Court affirmed that, as long as the state has a reasonable basis for believing that the sentence in question serves some penological goal, the Court would not find it grossly disproportionate.[107] The Court abruptly reversed course in *Graham*, however, holding that the sentence of life without parole for juveniles convicted of non-homicide offenses, like the death penalty in *Atkins* and *Roper*, was disproportionate because it did not advance any legitimate goals of punishment. Juveniles who did not kill had "twice diminished moral culpability," Justice Kennedy noted, and none of the rationales for punishment could justify imposing upon them a sentence of life without parole.[108] The significance of the Court's methodological approach was immediately evident to scholars, advocates and jurists.[109] *Graham* had all but eviscerated the Court's "death is

[105] *Miller*, 132 S. Ct. at 2467, 2469.

[106] *See* Graham v. Florida, 560 U.S. 48, 60-62 (2010) ("[A] threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach.").

[107] Ewing v. California, 538 U.S. 11, 28-30 (2003); Lockyer v. Andrade, 538 U.S. 63, 76-77 (2003).

[108] *Graham*, 560 U.S. at 59-70.

[109] *See, e.g.*, Richard S. Frase, Graham's *Good News — and Not*, 23 FED. SENT'G REP. 54, (2010) (suggesting that Kennedy's approach in *Graham* offered a more unified approach to proportionality review than the Court's earlier "two-track distinction between death and prison sentences"); Smith & Cohen, *supra* note 6 (describing the *Graham* Court's departure from prior Eighth Amendment jurisprudence and its implications); Steiker & Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79 (2010) (discussing the implications of the *Graham* decision for capital and noncapital Eighth Amendment challenges).

different" approach to proportionality review,[110] something that became abundantly clear in *Miller*.

In the aftermath of *Graham*, questions abounded about whether the Court was prepared to take the next logical step and ban juvenile life without parole outright.[111] Though the *Miller* Court declined to do so, Justice Kagan picked up where *Graham* left off methodologically, again applying the Courts robust "categorical" approach to a non-capital sentence.

3. Methodological Expansion

While in each of the five cases the Court employed its standard two-step analysis, it also deviated from its standard inquiry. In *Atkins*, the Court acknowledged that just eighteen of the thirty-eight states that retained the death penalty prohibited the execution of those with an intellectual disability, but emphasized that the bans had been recent.[112] "It is not so much the number of these States that is significant, but the consistency of the direction of change," the Court noted.[113] The Court then noted that several professional organizations, religious communities and other nations also condemned the practice, which added to the growing consensus that the punishment was cruel and unusual.[114]

The Court relied on international consensus even more heavily in *Roper*.[115] Though Justice Kennedy maintained that something akin to a "national consensus" against the death penalty for juveniles was emerging in the United States,[116] he emphasized that such consensus had already emerged in other countries,[117] citing to article 37 of the United Nations Convention on the Rights of the Child, which

[110] *See Graham*, 560 U.S. at 103 (Thomas, J., dissenting). Justice Thomas complained that the majority's reliance on its capital proportionality analysis "impose[s] a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances." *Id.* at 105.

[111] *See, e.g.*, Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 263-64 (2013) (discussing "how *Graham* altered the Court's non-death penalty proportionality framework . . . of young non-homicide offenders").

[112] Atkins v. Virginia, 536 U.S. 304, 342-44 (2002) (Scalia, J., dissenting).

[113] *Id.* at 315 (majority opinion).

[114] *Id.* at 316 n.21.

[115] *See* Roper v. Simmons, 543 U.S. 551, 575-78 (2005).

[116] *Id.* at 564-67.

[117] *Id.* at 576-77.

expressly prohibits juvenile executions and which every country in the world has ratified, except the United States and Somalia.[118] The Court had referenced this type of evidence only in passing in prior decisions.[119]

In *Graham*, Justice Kennedy based his conclusion that there was "objective indicia of [a] national consensus" against sentencing juvenile non-homicide offenders to life without parole not on the legality of the sentence, which thirty-seven states and the federal government allowed, but on "actual sentencing practices."[120] The sentence was rarely imposed, the Court noted.[121] Finally, in *Miller*, Justice Kagan acknowledged the Court's traditional objective indicia analysis, but then brushed quickly past, turning almost immediately to the Court's independent judgment.[122]

The Court's independent judgment analysis in these cases also broke with precedent. In every case but *Kennedy*, the Court invoked both psychological and neurological evidence to bolster its diminished culpability analysis. In *Atkins*, the Court observed that the very nature of intellectual disability — including a reduced ability to understand, reason, communicate, control impulses, and learn from mistakes — categorically reduced the criminal culpability of such defendants and undermined the death penalty's penological purposes.[123] In *Roper*, *Graham* and *Miller*, the Court cited to amicus briefs filed by the American Medical Association and the American Psychiatric Association, which argued that the developmental differences between juveniles and adults rendered juveniles inherently less culpable and therefore less deserving of the ultimate punishment.[124]

---

[118] *Id.* at 576.

[119] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (plurality opinion) (referencing the abolition of juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

[120] Graham v. Florida, 560 U.S. 48, 62-63 (2010).

[121] *Id.* at 64-67, 72.

[122] *See* Miller v. Alabama, 132 S. Ct. 2455, 2470-72 (2012).

[123] Atkins v. Virginia, 536 U.S. 304, 317-18 nn.23–24 (2002).

[124] *See* Roper v. Simmons, 543 U.S. 551, 569-71 (2005) (discussing the numerous developmental differences between juveniles and adults raised by Simmons and his *amici* and concluding that these "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders"); Brief for American Medical Ass'n et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) ("This Court has concluded that . . . adolescents who are under age 16 . . . exhibit characteristics . . . that categorically disqualify them from the death penalty. Offenders at age 16 and 17 exhibit those characteristics as well."); Brief for American Psychological Ass'n & Missouri Psychological Ass'n as Amici Curiae Supporting

A number of scholars have described these cases as the contemporary revitalization of the Court's substantive proportionality jurisprudence, which had been virtually dormant since its 1986 decision in *Ford v. Wainright*.[125] It was not that the Court had undertaken an unprecedented power grab, many scholars maintained, it was that the Court's "expansion of the Eighth Amendment . . . [had] simply restore[d] an absent Court to its proper role of policing legislative overreaching."[126] Collectively, the five decisions reinforced the constitutional principle of proportional punishment, and in the case of *Graham* and *Miller*, the social reintegration of offenders and individualized, discretionary sentencing.[127] The Court's reasoning might one day provide a basis to challenge the sentences of certain categories of adult offenders,[128] including the mentally ill,[129] and other juvenile processing[130] and sentencing decisions.[131]

Respondent, *Roper*, 543 U.S. 551 (No. 03-633) ("The unformed nature of adolescent character makes execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. Developmentally immature decision-making, paralleled by immature neurological development, diminishes an adolescent's blameworthiness."); *see also Miller*, 132 S. Ct. at 2464 n.5 (citing to a brief by the American Psychological Association); *Graham*, 560 U.S. at 68 (citing to briefs filed by the American Medical Association and the American Psychological Association).

125 *See, e.g.*, Smith & Cohen, *supra* note 6, at 86 ("*Graham* contains the ingredients to be of transformative significance to the Supreme Court's Eighth Amendment jurisprudence."); Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 723, 732, 735 (noting that, because *Atkins* was the first Supreme Court case to find an American criminal practice excessive in the absence of an overwhelming legislative consensus, it had "opened the path not only to other proportionality limitations on the reach of the death penalty, but also to the prospect of judicial abolition of the death penalty itself"); Steiker, *U.S.*: Roper v. Simmons, *supra* note 6, at 164-65 (noting that *Roper* "appears to be part of a larger effort to regulate" the American death penalty system and "provides a blueprint not simply for increased judicial regulation of the capital practices but also for judicial abolition of the American death penalty altogether").

126 William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1054 (2013) (symposium keynote remarks). *See generally* Gertner, *supra* note 7 (proposing answers to Eighth Amendment jurisprudence questions raised at the University of Missouri School of Law symposium).

127 Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1088-89 (2013).

128 *Id.*

129 *See, e.g.*, Shin, *supra* note 13, at 477-81 (discussing how excessive punishments are judged by currently prevailing standards and how defendants with diminished capacity are not likely to be deterred); Winick, *supra* note 13, at 819-23 (2009) (discussing how the death penalty may be a disproportionate punishment for defendants with mental illness because it may not meet the penological goals of retribution and deterrence).

130 *See generally* Arya, *supra* note 14 (suggesting that lawyers use *Graham* to challenge the constitutionality of adult court transfer statutes).

## II. PROPORTIONALITY SLIPPAGE

What has received much less attention, however, is whether these decisions have achieved in practice what they promised in principle. While several scholars have studied the implementation of the individual decisions,[132] none have yet examined the implementation of the Court's modern proportionality jurisprudence in the aggregate.

While the seventy-four inmates whose sentences were implicated by *Kennedy* and *Roper* have obtained relief,[133] a review of the states' implementation of *Atkins*, *Miller*, and to a lesser extent, *Graham* reveals that the decisions simply have not produced in practice what they promised in principle. This constitutional slippage can be attributed both to the structural features of state criminal justice

131 *See, e.g.*, William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 353-56 (2014) (arguing for extension of *Miller* rule to all cases where defendant faces death-in-custody sentence); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 49-52 (2013) (positing that *Miller* undermines the legitimacy of mandatory sex offender registries for juveniles); Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 59-60 (2013) (arguing that *Miller* calls into question current juvenile transfer laws); Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 101-03 (2013) (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether); Sarah A. Kellogg, Note, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After* Miller v. Alabama, 55 B.C. L. REV. 265, 292-95 (2014) (noting that *Miller* calls into question general legislation designed to address gang crime as it applies to juveniles); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1482-85 (2012) (suggesting that the Court's decision in *Miller* affirms that "youth matters in sentencing").

132 *See, e.g.*, Chang et al., *supra* note 17, at 91-103 (examining the implementation of *Miller*); Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1087-88 (2014); Drinan, *supra* note 17, at 64-82 (analyzing the implementation of *Graham*); Mary Price, *Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from* Miller v. Alabama, 78 MO. L. REV. 1147, 1154-56 (2013); Therese A. Savona, *The Growing Pains of* Graham v. Florida*: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182, 197-210 (2012); Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 724-31 (examining the implementation of *Atkins*).

133 Two inmates were serving the sentence proscribed in *Kennedy* — Patrick Kennedy and another Louisiana inmate. Kennedy v. Louisiana, 128 S. Ct. 2641, 2644 (2008). Their sentences were commuted to life without parole in 2008. *See* Bill Mears, *Child Rapists Can't Be Executed, Supreme Court Rules*, CNN (June 25, 2008, 8:02 PM EDT), http://www.cnn.com/2008/CRIME/06/25/scotus.child.rape/index.html. Seventy-two inmates in seven states — Georgia, Louisiana, Missouri, Oklahoma, South Carolina, Texas and Virginia — were impacted by *Roper*, and all of them have been resentenced to life without parole. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2004: YEAR END REPORT, (Dec. 2004), http://www.deathpenaltyinfo.org/files/pdf/DPICyer04.pdf.

processes and also to a dearth of procedural prescription in the decisions themselves.

### *A. Procedural Evasion*

At a rudimentary level, political scientists define the implementation of a judicial decision as the process through which political authorities carry out the action (or avoid the action) called for (or prohibited) in a court ruling.[134] This process flows through four primary populations, they posit: the decision-maker (the court); the interpreting population (lower court judges, executive actors, and policy-makers, for example); the implementing population (again, judges, executive actors, policy-makers, and depending on the mandate, front-line bureaucrats); and the consumer population (in the Eighth Amendment context, defendants and inmates).[135]

Because the implementation of a Supreme Court mandate is especially diffuse, the interpreting and implementation populations have considerable opportunity to alter the scope of the decision or evade it altogether. Lower court judges might attempt to block the decision of a higher court, avoid applying it on procedural grounds, or use their interpretive power to restrict or limit the application of the decision.[136] Members of the implementing population — legislators, prosecutors and bureaucrats, for example — may acknowledge a decision but fail to address it, revise a statute but to do so in a way that avoids some the consequences of the decision, fail to make organizational changes to comply with the decision, or make "cosmetic" changes to give the appearance of conformity with the order.[137] As Stephanos Bibas and Richard Bierschbach have written, "[t]he Court's constitutional regulation of the death penalty has . . . resulted in a system in which capital sentencing determinations are filtered through multiple viewpoints that act as veto gates, giving each actor a chance to influence the process and kick the defendant out of the pipeline."[138]

---

[134] *See, e.g.*, Kapiszewski & Taylor, *supra* note 18, at 806-07; Spriggs, *supra* note 18, at 587.

[135] *See generally* Bradley C. Canon, *Courts and Policy: Compliance, Implementation, and Impact*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 435, 435-66 (John B. Gates & Charles A. Johnson eds., 1991).

[136] BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 37-43 (2d ed. 1998).

[137] *Id.* at 62-72.

[138] Bierschbach & Bibas, *supra* note 28, at 409.

Commentators have long recognized that the law in principle is rarely the law in practice. In 1930, Karl Llewellyn distinguished between "paper" rules and "real" rules;[139] a half century later, Larry Sager explored the gaps between "true" and enforced constitutional rights;[140] and in 1999, Dan Farber talked about "slippage" — the gap between what law mandates and what actually happens.[141] States' implementation of *Atkins*, *Graham* and *Miller* suggests that the theoretical prospects of "slippage" have materialized in many instances. As explored in Part II B,[142] this was all but guaranteed by the minimalism of the decisions themselves, which left it to the States to answer important definitional questions about who should and should not receive the proscribed punishments; to replace newly unconstitutional statutes or sentencing schemes with constitutional alternatives; to filter petitions for relief through their post-conviction apparatuses; and in the cases of *Graham* and *Miller*, to confer sentencing and release authority on judges, juries and parole boards. These requirements have run head long into four structural and cultural features of many states' criminal justice processes: cultural resistance to drawing upon scientific expertise in criminal justice policy-making; elected officials' apparent belief that "tough on crime" policies continue to pay political dividends; the procedural rigidity of state (and federal) post-conviction processes; and the lack of robust parole systems. The ensuing friction has meant that many of the inmates ostensibly eligible for some form of relief continue to serve their infirm sentences, others have been resentenced to functionally equivalent sentences, and several states have not taken any steps to revise their infirm statutes. The net effect has been, in the words of Carol and Jordan Steiker, the states' "procedural evasion of [the Court's] new substantive rights."[143]

---

[139] Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 447-48 (1930).

[140] *See* Sager, *supra* note 19, at 1214-15.

[141] *See* Farber, *supra* note 19, at 298; *see also* John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 249-50 (2015) (in the criminal justice enforcement context, "[s]lippage here refers to the risk that political policy makers will write loose rules" because they devalue the right and interests of criminal defendants).

[142] *See infra* Part II.B.

[143] Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 731. This is not to say that these decisions have been entirely unproductive. In the juvenile sentencing arena, *Miller* has prompted the abolition of juvenile life without parole in nine states. John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 552 (2016).

1. Eschewing Expertise

Unlike much of Western Europe, criminal justice policy-making in most U.S. states remains highly politicized, and legislators rarely rely on autonomous, politically insulated experts.[144] Thus, when faced with the critical definitional questions left open by *Atkins*, *Graham* and *Miller* — how to define intellectual disability, what constitutes a non-homicide offense, and which juveniles are sufficiently irredeemable that they should receive life without parole sentences — many states have responded with non-scientific and ad hoc legislative and judicial schemes.

In *Atkins*, the Supreme Court embraced two clinical definitions of intellectual disability, one used by the American Association on Mental Retardation (AAMR) (now called now the American Association on Intellectual and Developmental Disabilities (AAIDD)),[145] and the other utilized by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).[146] Both define intellectual disability as characterized by (1) sub-average intellectual functioning with (2) concurrent deficits in adaptive functioning that (3) manifest during childhood.[147] As long as state definitions of intellectual disability "generally conform[ed]" with these clinical measures, they would be upheld, the *Atkins* Court said.[148]

Yet, fourteen years after *Atkins* was decided, courts and legislatures in the twenty[149] affected states continue to debate how to define intellectual disability, how to measure it, and how to allocate burdens of proof. Notably, few states have relied on expert input to develop definitional thresholds and processes.[150] While most states define

144 David Garland, *Penality and the Penal State*, 51 CRIMINOLOGY 475, 484, 493-508 (2014).

145 Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

146 *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000)); *see also* David DeMatteo, Geoffrey Marczyk, & Michele Pich, *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After* Atkins, 25 BEHAV. SCI. & L. 781, 783-84 (2007).

147 *See Atkins*, 536 U.S. at 308 n.3.

148 *See id.* at 308 n.3, 317 & 317 n.22.

149 *See id.* at 342 (Scalia, J., dissenting) (noting that at the time of *Atkins*, only 47% of states that employed capital punishment barred execution of the mentally handicapped).

150 *See generally* DeMatteo, Marczyk & Pich, *supra* note 146 (noting that many

intellectual disability through some combination of the three prongs,[151] many add very little specificity.[152] Thus, while state standards may appear to comport with prevailing scientific measures, they are often so vague and generalized that they produce considerable variation when they are applied.[153]

There is also significant variation in the weight given to IQ scores and the development of cut-offs. Arkansas, for example, has established a rebuttable presumption of mental retardation when a defendant's IQ is 65 or lower;[154] Delaware, Indiana, Kentucky, Nebraska, and North Carolina utilize a cut-off of 70;[155] and Colorado, Georgia, and Missouri do not utilize a cut-off of any kind.[156] Studies suggest that state deviations from clinical definitions of intellectual disability have created a substantial relief gap because courts have been forced to rely on historical stereotypes rather than clinical standards and diagnostics.[157]

states "use criteria for mental retardation that are not entirely consistent with accepted clinical standards"); Natalie A. Pifer, *The Scientific and the Social in Implementing* Atkins v. Virginia, 41 LAW & SOC. INQUIRY 1036 (2015) (arguing that "drawing boundaries around intellectual disability in capital cases requires law to grapple with fluid scientific and social constructs").

151 *See, e.g.*, ALA. CODE 1975 § 15-24-2 (2017); ARIZ. REV. STAT. ANN. § 13-753(K)(3); ARK. CODE ANN. § 5-4-618 (2017); CAL. PENAL CODE § 1376 (2017); COLO. REV. STAT. ANN. § 18-1.3-1101 (2017); DEL. CODE ANN. tit. 11, § 4209(d)(3)(D) (2017); FLA. STAT. § 921.137 (2017); GA. CODE ANN. § 17-7-131(a)(3) (2017); IDAHO CODE § 19- 2515A(1)(A) (2017); IND. CODE § 35-36-9-2 (2017); KAN. STAT. ANN. § 76-12b01(D) (2017); KY. REV. STAT. ANN. § 532.130(2) (2017); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H) (2017); ME. REV. STAT. ANN. tit. 34-B, § 5001(3) (2017); MASS. GEN. LAWS ch. 123B, § 1 (2017); MICH. COMP. LAWS § 330.1100b(12) (2017); MISS. CODE ANN. § 41-21-61(F) (2017); MO. STAT. § 630.005(20) (2017); NEV. REV. STAT. § 174.098(7) (2017); N.C. GEN. STAT. § 15A-2005(a)(1)(A) (2017); OKLA. STAT. ANN. tit. 21, § 701.10b (2017); S.C. CODE ANN. § 44-20-30(12) (2017); TENN. CODE ANN. § 39-13- 203(A) (2017); TEX. HEALTH & SAFETY CODE ANN. § 591.003(15-A) (2017); UTAH CODE ANN. § 77-15A-102 (2017); VT. STAT. ANN. tit. 1, § 146 (2017); VA. CODE ANN. § 19.2-264.3:1.1(A) (2017); WASH. REV. CODE § 10.95.030(2)(a) (2017); WYO. STAT. ANN. § 25-5-102(b)(xx) (2017).

152 *See* DeMatteo, Marczyk, & Pich, *supra* note 146, at 786-87, 789.

153 Pifer, *supra* note 150, at 1039 (citing John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009)); *see* Julie C. Duvall & Richard J. Morris, *Assessing Mental Retardation in Death Penalty Cases: Critical Issues for Psychology and Psychological Practice*, 37 PROF. PSYCHOL. 658, 658 (2006).

154 ARK. CODE ANN. § 5-4-618 (2017).

155 *See* DeMatteo, Marczyk, & Pich, *supra* note 146, at 785-87.

156 *See* COLO. REV. STAT. § 18-1.3-1101(2) (2017); GA. CODE ANN. § 17-7-131(a)(3) (2017); MO. STAT. § 565.030(6) (2017).

157 *See, e.g.*, John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical*

Like *Atkins*, *Graham* spawned considerable debate over definitions — in this case, what constitutes a "'nonhomicide' offense"[158] — how to identify the class of individuals to whom the decision applies,[159] and what the appropriate replacement sentence should be.[160] Even though *Graham* expressly relied on adolescent brain science and the behavioral features of youth that make juveniles neurologically different from adults (immaturity and limited self-control; increased susceptibility to peer pressure and inability to escape criminogenic environments; and the transient nature of adolescent personality development), many states do not incorporate science into law-making and sentencing. In 2012, the Chairman of the Texas House Corrections Committee acknowledged that "[t]he brain development studies have been part of the discussion and will continue to be," but then went on to say: "the main issue we're dealing with is providing proper security. . . . If you're getting assaulted by a youth, it doesn't make much difference to you whether his brain will not fully develop until he's twenty-five. We have to have a safe environment in these (lockups) to have any success at programming and rehabilitation."[161]

The implementation of *Miller v. Alabama* has also been stymied by definitional questions. In *Miller*, the Court held that sentencing juveniles to mandatory life without parole (juvenile life without parole) violates the Eighth Amendment because it precludes the sentencer from taking into account the juvenile's age and other

*Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 TENN. L. REV. 625, 626 (2009); Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 818-24 (2007); James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from* Penry *to* Atkins, 33 N.M. L. REV. 173, 174 (2003).

158 *See, e.g.*, Arrington v. State, 113 So. 3d 20, 22-23 (Fla. Dist. Ct. App. 2012) (holding that felony murder constitutes a "homicide offense").

159 Identifying those eligible for relief under *Graham* proved especially difficult in Florida — so much so that in 2010, the Florida Bar Foundation awarded Barry University Law School a $100,000 grant to "address the legal and policy questions raised by the *Graham* decision, as well as individual client needs." Drinan, *supra* note 17, at 53 n.5 (citing Nancy Kinnally, *Foundation Supports Efforts to Ensure Fair Sentencing for Juveniles*, FLA. B. NEWS (Oct. 15, 2010), https://thefloridabarfoundation.org/foundation-supports-efforts-to-ensure-fair-sentencing-for-juveniles/).

160 The Florida Supreme Court recently overturned as excessive the sentences of two juveniles who were given 70- and 90-year terms. *See* Gridine v. Florida, No. SC12-1223, 674-75 (Fla. 2015); Henry v. Florida, No. SC12-578, 679-80 (Fla. 2015).

161 Mike Ward, *Report on Adolescent Brains Hits Nerve in Criminal Justice Debate*, AUSTIN AM. STATESMAN (Aug. 6, 2012, 8:59 PM), http://www.statesman.com/news/news/state-regional-govt-politics/report-on-adolescent-brains-hits-nerve-in-criminal/nRNKT.

mitigating factors.[162] At the time of *Miller*, twenty-eight jurisdictions authorized mandatory juvenile life without parole, fifteen jurisdictions allowed for discretionary juvenile life without parole, and eight jurisdictions had no form of juvenile life without parole.[163] *Miller* thus invalidated sentencing statutes in twenty-eight states, calling into question the sentences of more than 2,100 inmates.[164]

Yet, while the Court struck down the infirm statutes, ordered states to undertake "individualized sentencing" that accounted for the "mitigating qualities of youth" before sentencing juveniles to the harshest punishments,[165] and declared that such offenders must be afforded a "meaningful opportunity to obtain release,"[166] it said nothing about when, how, and with what states should replace their proscribed laws. As with *Atkins* and *Graham*, many states have resorted to ad hoc legislative and judicial schemes.[167]

2. Staying Tough

Despite a broad-based consensus that criminal justice reform is needed, elected officials in nearly every state continue to benefit politically — or believe they benefit politically — from taking tough-on-crime approaches to criminal justice policy-making and sentencing.[168] While voters have taken direct steps to curb mass incarceration,[169] state legislators and executive branch officials simply have not. As Michael Tonry recently observed, no state has repealed a three-strikes, truth-in-sentencing, or adult life without parole law.[170] "No statutory changes have fundamentally altered the laws and policies that created the existing American sentencing system, mass incarceration, and the human, social, and economic costs they engendered," he writes.[171] The implementation of *Atkins*, *Graham* and *Miller* bears this out in two primary ways. Many states have taken

[162] *See* Joshua Rovner, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2016), http://sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf.

[163] *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 n.10 (2012).

[164] *See id.* at 2467, 2471.

[165] *Id.*

[166] *Id.* at 2469.

[167] *See* Chang et al., *supra* note 17, at 101-03.

[168] *See* Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 506-07 (2014).

[169] *See id.* at 509 (citing California referendums narrowing three strikes and increasing opportunities for probation).

[170] *Id.* at 506.

[171] *Id.* at 510.

highly restrictive and punitive remedial approaches, and some states simply have not acted.

In an effort to limit *Atkins* claims, several states have created stringent burden-shifting procedures and standards of proof that effectively deny protection to any inmate who cannot bring forward an iron-clad claim. Texas courts, for example, have openly questioned whether those classified as "mentally retarded" are sufficiently less culpable to deserve exemption from the death penalty and devised their own test for mental retardation, which departed significantly from established professional standards.[172] Georgia requires a capital defendant to establish her mental retardation "beyond a reasonable doubt" to be exempt from execution.[173]

In Florida, recent litigation has spawned over contentions by prosecutors that the IQ scores of African Americans and Latinos/as should be "ethnically adjusted" upward to account for cultural disadvantage.[174] Prosecutors in Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio have made the same arguments.[175] Collectively, these measures have had "the undeniable consequence of permitting the execution of persons with mental retardation."[176]

The starkest evidence of the impact of states' ad hoc responses to *Atkins* may be in the individual stories. A recent study showed that, in the decade after *Atkins* was decided, just 371 of the 4,819 (7.7%) death row inmates or capital defendants who could have raised *Atkins* claims did so, and, of these, roughly half prevailed.[177] One of those who did not prevail was Marvin Wilson. In 2004, Mr. Wilson's IQ was measured at sixty-one, and he had multiple adaptive deficits.[178] At age

---

[172] *See Ex Parte* Briseno, 135 S.W.3d 1, 5-6 (Tex. Crim. App. 2004) (suggesting that categorical ban should be limited to those offenders with mental retardation who would be deemed worthy of protection by a consensus of "Texas citizens"); *see also Ex parte* Rodriguez, 164 S.W.3d 400, 404 (Tex. Crim. App. 2005) (Cochran, J., concurring) (stating that the defendant's scores did not necessarily show mental retardation because the verbal IQ test "is really culturally based").

[173] *See, e.g.*, Head v. Hill, 587 S.E.2d 613, 621 (Ga. 2003).

[174] *See* Hodges v. State, 55 So. 3d 515, 525 (Fla. 2010) (per curiam) (stating that the defendant's low IQ scores could be discounted because "IQ tests tend to underestimate particularly the intelligence of African-Americans"), *cert. denied*, 132 S. Ct. 164 (2011).

[175] Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87, 109 (2015).

[176] Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 729.

[177] Blume et al., *A Tale of Two*, *supra* note 22, 396-97, 396 n.20.

[178] Pifer, *supra* note 150, at 1036 (citing Andrew Cohen, *supra* note 24; John Rudolf, *Marvin Wilson Execution: Texas Puts Man with 61 IQ to Death*, HUFFINGTON POST (Aug. 7, 2012, 8:53 PM), http://www.huffingtonpost.com/2012/08/07/marvin-

fifty-four, he reportedly sucked his thumb and could not tie his shoes.[179] Mr. Wilson bore the signs of convergence of all three *Atkins* prongs: sub-average intellectual functioning with concurrent, substantial deficits in adaptive functioning manifesting in childhood.[180] Yet, Mr. Wilson's *Atkins* claim was denied by Texas courts under the seven non-scientific factors set forth by the Texas Court of Criminal Appeals in 2004 in *Ex parte Briseno*.[181] According to Texas courts, Mr. Wilson did not meet Texas' definition of intellectual disability and, in August 2012, he was executed.[182]

Another inmate who did not prevail on his *Atkins* claim was Ramiro Hernandez. Mr. Hernandez had IQ scores as low as 52, 54 and 57, but the prosecution's expert, who had not in fact tested him, argued that Mr. Hernandez's test scores should be measured against others of Mexican heritage and not the standardized norm of the community as a whole.[183] The case eventually made its way to the Fifth Circuit, where the Court agreed that, "[w]hen scaled to Mexican norms, [Mr. Hernandez] scored exactly [seventy] on the *one* . . . test."[184] Mr. Hernandez filed a writ of *certiorari* before the U.S. Supreme Court seeking review of Texas' use of ethnic IQ adjustments,[185] but the

wilson-execution-texas_n_1753968.html).

179 Pifer, *supra* note 150, at 1.

180 *Id.*

181 *See, e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004) ("There are, however, some other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder: (1) Did those who knew the person best during the developmental stage — his family, friends, teachers, employers, and authorities — think he was mentally retarded at that time, and if so, act in accordance with that determination?; (2) Has the person formulated plans and carried them through or is his conduct impulsive?; (3) Does his conduct show leadership or does it show that he is led around by others?; (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?; (5) Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?; (6) Can the person hide facts or lie effectively in his own or others' interests?; [and] (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?").

182 *See* Pifer, *supra* note 150, at 1036.

183 *See* Hernandez v. Stephens, 537 F. App'x 531, 536-37 (5th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 1760 (2014).

184 *Id.* at 539.

185 Hernandez v. Stephens, 134 S. Ct. 1760, 1760 (2014).

Supreme Court denied certiorari in 2014 without opinion.[186] Mr. Hernandez was executed in April 2014.[187]

While the majority of the 123[188] inmates eligible for relief under *Graham* have received new sentences, many of those sentences exceed the inmate's life expectancy. The Youth Defense Institute at Barry University School of Law in Florida estimated that approximately seventy-five inmates have been resentenced under *Graham*, but in thirty of the cases, the new sentences exceeded fifty years.[189] Florida's response to *Graham* has been especially punitive and inconsistent. In the wake of *Graham,* Florida's Second, Fourth and Fifth District Courts held that sentences of 60,[190] 65,[191] 90,[192] 100,[193] and 130 years[194] did not violate the Eighth Amendment, while the First District extended *Graham* to lengthy term-of-years sentences that amount to de facto life sentences.[195] The range of inmates and resentencing options is set forth below.

---

[186] *Id.*

[187] Sanger, *supra* note 175, at 116 (citing Ian Smith, *How Race-Based IQ Handicapping Led to A Man's Execution*, DAILY CALLER (Aug. 28, 2014, 7:38 PM), http://dailycaller.com/2014/08/28/how-race-based-iq-handicapping-led-to-a-mans-execution).

[188] Based on the evidence before it, the *Graham* Court determined that, at the time of the decision, there were 123 non-homicide juvenile offenders serving life without parole sentences nationwide and seventy-seven of them were in Florida prisons. Graham v. Florida, 560 U.S. 48, 64 (2010) ("Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States — California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia." (citations omitted)). The Court cited to a Florida study that identified 109 inmates. PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (2009). The court further identified 14 additional inmates through its own research, bringing the total to 123. *Graham*, 560 U.S. at 64.

[189] Erik Eckholm, *Juveniles Facing Lifelong Terms Despite Rulings*, N.Y. TIMES (Jan. 19, 2014), http://www.nytimes.com/2014/01/20/us/juveniles-facing-lifelong-terms-despite-rulings.html.

[190] Guzman v. State, 110 So. 3d 480, 481 (Fla. Dist. Ct. App. 4th 2013) (holding that trial court's imposition of 60-year sentence on juvenile offender did not constitute cruel and unusual punishment).

[191] Walle v. State, 99 So. 3d 967, 968 (Fla. Dist. Ct. App. 2d 2012).

[192] Henry v. State, 82 So. 3d 1084, 1085-89 (Fla. Dist. Ct. App. 5th 2012), *rev'd*, 175 So.3d 675 (Fla. 2015).

[193] Johnson v. State, 108 So. 3d 1153, 1153-54 (Fla. Dist. Ct. App. 5th 2013).

[194] Mediate v. State, 108 So. 3d 703, 704 (Fla. Dist. Ct. App. 5th. 2013).

[195] *See* Adams v. State, 188 So. 3d 849, 851 (Fla. Dist. Ct. App. 2012) (holding that because 58.5 year sentence was a de facto life sentence imposed on a juvenile for non-homicide offenses, it violated the Eighth Amendment); Floyd v. State, 87 So. 3d 45, 45

Chart 1: Juvenile Life Without Parole (JLWOP) in 11 U.S. States Affected by *Graham v. Florida* (2010)[196]

| STATE | NUMBER OF INMATES | RESENTENCING RANGE |
|---|---|---|
| CALIFORNIA | 4 | Life with possibility of parole |
| DELAWARE | 1 | 25 years to life |
| FLORIDA | 77 | 25 to 45 years to life |
| IOWA | 6 | 25 years to life |
| LOUISIANA | 17 | Life with possibility of parole |
| MISSISSIPPI | 2 | Life with possibility of parole |
| NEBRASKA | 1 | N/A |
| NEVADA | 5 | Life to 100 years+ |
| OKLAHOMA | 1 | Life with possibility of parole |
| SOUTH CAROLINA | 1 | Life with possibility of parole |
| VIRGINIA | 8 | Life to 100 years+ |
| **TOTAL** | **123** | |

Since *Miller* was decided in 2012, twenty-one states have changed their laws to some extent, resulting in what some commentators have described as "an incoherent patchwork" of solutions.[197] Some state legislatures have proactively rewritten their infirm statutes to require sentencers to consider a host of individualized factors before imposing harsh sentences upon juveniles,[198] while others have taken pains to prevent individualized sentencing hearings altogether.[199] Eight states

(Fla. Dist. Ct. App. 2012) (reversing an 80 year sentence for a 17 year-old defendant).

196 Data is taken from *Graham v. Florida*, 560 U.S. 48, 63-64 (2010) and from ANNINO ET AL., *supra* note 188, at 14.

This data does not include juveniles who received juvenile life without parole sentences for non-homicide offenses at the same time they received a juvenile life without parole sentence for a homicide offense. *Graham*, 560 U.S. at 63. "It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination." *Id.*

197 Chang et al., *supra* note 17, at 91.

198 Hawaii, for instance, now requires sentencing courts to consider 15 such factors before sentencing any juvenile convicted of homicide. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014); *see also* Commonwealth v. Knox, 50 A.3d 732, 745 (Pa. Super. Ct. 2012) (holding that, prospectively, Pennsylvania courts must account numerous age-related factors); S.B. 9, 147th Gen. Assemb. (Del. 2013), http://legis.delaware.gov/BillDetail?LegislationId=22426 (authorizing a judge to impose a discretionary sentence upon a juvenile convicted of first-degree murder which accounts for age-related sentencing factors).

199 *See* TEX. PENAL CODE ANN. § 12.31(a)(1) (2017); *see also* Lewis v. State, 428 S.W.3d 860, 863-64 (Tex. Crim. App. 2014) ("*Miller* does not entitle all juvenile offenders to individualized sentencing. It requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole. . . . [U]nder Section 12.31 of the [Texas] Penal Code, juvenile offenders in Texas do not now face life

have abolished juvenile life without parole,[200] while others have explicitly retained the punishment.[201]

As Chart 2 indicates, the laws enacted by states in response to *Miller* provide mandatory minimums ranging from a chance of parole after fifteen years (in Connecticut) to forty years (in Texas and Nebraska).[202] Thirty-two states still allow life without parole as a sentencing option for juveniles,[203] and in most states, the question of virtual life without parole has yet to be addressed. Seven states have not addressed *Miller* in any way.

Chart 2: Juvenile Life Without Parole (JLWOP) in 28 U.S. States Affected by *Miller v. Alabama* (2012)[204]

| STATE | INMATES SERVING MAND. JLWOP | CURRENT RESENTEN-CING RANGE | REVISIONS TO LAWS MADE UNCONSTITUTIONAL BY *MILLER* |
|---|---|---|---|
| ALABAMA | 62[205] | Life to JLWOP | No new legislation; Sup. Ct. held that courts must consider 14 *Miller* factors before sentencing to JLWOP, *State v. Henderson*, 144 So. 3d 1262 (2013). |
| ARKANSAS | 58[206] | 28 years to JLWOP | Legislature retained JLWOP for capital murder, H.B. 1993 (2013). |
| CONNECT-ICUT | 4[207] | 25-60 yrs (with parole at 15-30 yrs) | Legislature abolished JLWOP, S.B. 796 (2015). |

without parole at all."). "At least seven states — Virginia, Georgia, Nevada, New Mexico, Tennessee, West Virginia, and Wisconsin — [have responded with schemes that] eviscerate the considerations underlying *Miller* by limiting its application, in any form, to mandatory sentences of life without parole." Chang et al., *supra* note 17, at 98.

200 Wyoming, for example, has abolished juvenile life without parole and replaced it with a range of 25 years to life with periodic review. H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013).

201 32 states still allow the punishment as a sentencing option for juveniles. JOSHUA ROVNER, SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (July 2016) [hereinafter JLWOP OVERVIEW], http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf.

202 PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER *MILLER V. ALABAMA* 18, 59, 87 (July 8, 2015), http://www.phillipsblack.org/s/Juvenile-Life-Without-Parole-After-Miller.pdf.

203 JLWOP OVERVIEW, *supra* note 201.

204 Unless otherwise indicated, data is taken from PHILLIPS BLACK PROJECT, *supra* note 202, and Chang et al., *supra* note 17, at 95 tbl. 1.

205 PHILLIPS BLACK PROJECT, *supra* note 202, at 4.

206 *Id.* at 10.

207 *Id.* at 17-18.

| | | | |
|---|---|---|---|
| DELAWARE | 16[208] | 25 years to life | Legislature functionally abolished JLWOP, S.B. 9 (2013). |
| FLORIDA | 218[209] | 35 to JLWOP | Retained JLWOP; ordered automatic resentencing most serving mandatory JLWOP, H.B. 7035 (2014). |
| HAWAII | 0 | Life (parole varies) | Legislature abolished JLWOP, H.B. 2116 (2014). |
| IDAHO | 4 | Life to JLWOP | None |
| ILLINOIS | 94[210] | Life to JLWOP | None |
| IOWA | 45[211] | Judicial Discretion | None |
| LOUISIANA | 300[212] | 30 years to JLWOP | Retained JLWOP, HB 152 (2013) |
| MASS. | 57[213] | 20-30 years to life | Sup. Ct. abolished JLWOP, *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); new legislation enacted, Mass. Gen. L. Ch. 265, § 2 (2015). |
| MICHIGAN | 360[214] | 25 years to JLWOP | Retained JLWOP, S.B. 319 (2014). |
| MINNESOTA | 7[215] | 30 years to JLWOP | No legislation; *State v. Ali* (2014) (in absence of constitutional statute, revived 30 to JLWOP). |
| MISSISSIPPI | 84[216] total | Life to JLWOP | No new legislation; Sup. Ct. declared existing laws unconstitutional; resentencing ordered, *Parker v. State*, 119 So. 3d 987 (Miss. 2013). |
| MISSOURI | 84[217] | Life to JLWOP | None |
| NEBRASKA | 9[218] | 40 years to JLWOP | Retained JLWOP, LB 44 (2013). |
| NEW HAMPSHIRE | 5[219] | Life to JLWOP | None |

[208] *Id.* at 20.
[209] *Id.* at 26-27.
[210] *Id.* at 33.
[211] *Id.* at 37.
[212] *Id.* at 42.
[213] Chang et al., *supra* note 17, at 95.
[214] PHILLIPS BLACK PROJECT, *supra* note 202, at 49.
[215] *Id.* at 51.
[216] *Id.* at 53.
[217] *Id.* at 55.
[218] *Id.* at 59.
[219] *Id.* at 63.

| | | | |
|---|---|---|---|
| NEW JERSEY | 0[220] | Life to JLWOP | None |
| N. CAROLINA | 79[221] | 25 years to life | Abolished JLWOP for fel. murd., S.B. 635 (2012) |
| OHIO | 5[222] | 25 to 30 years to JLWOP | No new legislation; Sup. Ct. held that courts must consider youth as a mitigating factor before sentencing to LWOP, *State v. Long*, 8 N.E.3d 890 (Ohio 2014). |
| PENNSYL-VANIA | 450[223] | 25 - life (under 15) 35 - JLWOP (15-17) | Abolished JLWOP for under 15; S.B. 850 (2012). |
| S. CAROLINA | 26 | Life | No new legislation, but inmates being resentenced pursuant to: *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014) |
| S. DAKOTA | 3[224] | Judicial discretion. | Retained JLWOP, S.B. 39 (2013). |
| TEXAS | 17[225] | 40 years to life | Abolished JLWOP, S.B. 2 (2015) |
| VERMONT | 0 | Judicial Discretion | None |
| VIRGINIA | 22[226] | Life to JLWOP | None |
| WASHING-TON | 17[227] | 25 years to JLWOP | Abolished JLWOP for under 16. Wash. Rev. Code § 10.95.030 (3)(a)(i) (2015). |
| WYOMING | 4[228] | 25 years to life | Abolished JLWOP, Wyo. Stat. Ann. §§ 6-2-101(b), 6-10-301(c) (2013). |

3. Post-Conviction Impediments

*Atkins*, *Graham* and *Miller* claims have also been derailed by the ubiquitous hurdles — such as retroactivity bars,[229] stringent default doctrines[230] and lack of counsel[231] — that plague post-conviction in

[220] *Id.* at 65.
[221] *Id.* at 69.
[222] *Id.* at 71.
[223] *Id.* at 77.
[224] *Id.* at 82.
[225] *Id.* at 87.
[226] *Id.* at 91.
[227] *Id.* at 94.
[228] *Id.* at 99.
[229] *See, e.g.*, *id.* at 2.
[230] The Fifth Circuit, for example, rejected the argument that the limitations period should yield to claims of actual innocence based on evidence of mental retardation. *See, e.g.*, *In re* Lewis, 484 F.3d 793, 798 n.20 (5th Cir. 2007).

most states, and by overt obfuscation and the creation of lax evidentiary rules that allow the admission of otherwise prejudicial evidence.[232] A recent survey of *Atkins* claims conducted by Professors John Blume, Sheri Lynn Johnson, Paul Marcus and Emily Paavola reveals the tremendous variation in success rates among states. As Chart 3 shows, while the success rate for *Atkins* claims in North Carolina between 2002 and 2014 was over 80%, for example, it was approximately 15% in Alabama, 11% in Georgia, and 0% in Florida[233] — a disparity that "corresponds with the availability of funding for post-conviction litigation" in the respective states.[234] During the relevant period, Florida employed such a strict definition of intellectual disability that no claims prevailed.[235] In fact, as already discussed, Florida's scheme was so problematic that, in 2014, the Supreme Court struck a portion of it, declaring that it created "an unacceptable risk that persons with intellectual disability will be executed."[236]

Chart 3: *Atkins* Claims Decided on the Merits, 2002–2013[237]

| STATE | *ATKINS* CLAIMS DECIDED ON MERITS | CLAIMS AFFIRMED | CLAIMS DENIED |
|---|---|---|---|
| ALABAMA | 34 | 5 | 29 |
| ARIZONA | 11 | 5 | 6 |
| ARKANSAS | 4 | 1 | 3 |
| CALIFORNIA | 5 | 2 | 3 |
| COLORADO | 4 | 3 | 1 |
| FLORIDA | 24 | 0 | 24 |
| GEORGIA | 9 | 1 | 8 |
| IDAHO | 1 | 0 | 1 |
| ILLINOIS | 0 | 0 | 0 |
| INDIANA | 6 | 2 | 4 |
| KENTUCKY | 9 | 1 | 8 |
| LOUISIANA | 11 | 4 | 7 |

231 *Cf. DOJ Statement of Interest on Juvenile Access to Counsel*, NAT'L JUV. DEFENDER CTR., http://njdc.info/doj-statement-of-interest-on-juvenile-access-to-counsel (last visited Mar. 4, 2016) (discussing the Justice Department's statement noting juvenile's insufficient access to counsel).

232 *See, e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004) (utilizing a judicially created test for mental retardation that explicitly requires focus on the defendant's behavior during the crime).

233 Blume et al., *A Tale of Two*, *supra* note 22, at 412-13.

234 *Id.* at 412 (citing Blume, Johnson & Seeds, *supra* note 157, at 629).

235 *See, e.g.*, Head v. Hill, 587 S.E.2d 613, 270 (Ga. 2013).

236 Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).

237 These statistics are taken from Blume et al., *A Tale of Two*, *supra* note 22, at 412.

| | | | |
|---|---|---|---|
| MISSISSIPPI | 14 | 8 | 6 |
| MISSOURI | 6 | 3 | 3 |
| NEBRASKA | 1 | 0 | 1 |
| NEVADA | 2 | 1 | 1 |
| NEW JERSEY | 1 | 0 | 1 |
| NEW MEXICO | 0 | 0 | 0 |
| NEW YORK | 0 | 0 | 0 |
| N. CAROLINA | 34 | 28 | 6 |
| OHIO | 20 | 5 | 15 |
| OKLAHOMA | 10 | 3 | 7 |
| OREGON | 1 | 0 | 1 |
| PENNSYLVANIA | 16 | 10 | 6 |
| S. CAROLINA | 6 | 5 | 1 |
| TENNESSEE | 8 | 0 | 8 |
| TEXAS | 45 | 8 | 37 |
| UTAH | 2 | 1 | 1 |
| VIRGINIA | 7 | 0 | 7 |
| **TOTAL** | **291** | **96** | **195** |

What has consumed courts over the last several years, however, is identifying the individuals to whom *Miller* applies. While *Graham* spawned some litigation over its retroactive application,[238] *Miller* created a firestorm. When *Miller* was decided, approximately 2,000 of the 2,500 juveniles serving life without parole sentences had been sentenced under mandatory schemes.[239] The vast majority of those sentences were final and could be challenged only on collateral review. Because the Court said nothing about *Miller*'s application to these cases, states were left to wrestle with the Court's modern retroactivity jurisprudence — the so-called *Teague* doctrine — which confines

[238] *See, e.g.*, Kleppinger v. State, 81 So. 3d 547, 550 (Fla. Dist. Ct. App. 2012) (holding *Graham* applies retroactively); Bonilla v. State, 791 N.W.2d 697, 700-01 (Iowa 2010) (same); State v. Dyer, 77 So. 3d 928, 929 (La. 2011) (holding compliance with *Graham* required removal of the defendant's parole eligibility restriction). *But see* Lawson v. Pennsylvania, No. Civ.A. 09-2120, 2010 WL 5300531, at *3 (E.D. Pa. Dec. 21, 2010) ("[T]here is no indication that the Supreme Court has held *Graham* retroactively applicable on collateral review . . . ."); Jensen v. Zavaras, Civil Action No. 08-cv-01670-RPM, 2010 WL 2825666, at *1-2 (D. Colo. July 16, 2010) ("Given the Court's recognition of the many state statutes that permit life without parole for juvenile non-homicide offenders shown in the appendix to the opinion and the premise that Graham's sentence was contrary to the majority's view of 'evolving standards of decency' it is inconceivable that this new rule will be applied retroactively to invalidate sentences imposed in those states.").

[239] Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, J., dissenting).

relief under new constitutional rules to cases that were not yet final at the time the rule was announced.[240]

Between 2012 and early 2016, courts in six states — Alabama,[241] Louisiana,[242] Michigan,[243] Minnesota,[244] Ohio,[245] and Pennsylvania[246] — (comprising nearly 1,200 of the 2,100 inmates)[247] refused to review mandatory juvenile life without parole sentences, declaring that *Miller* does not apply retroactively to cases on collateral review. However, courts in fourteen states — Arkansas,[248] Connecticut,[249] Florida,[250] Illinois,[251] Iowa,[252] Massachusetts,[253] Mississippi,[254] Nebraska,[255] New Hampshire,[256] North Carolina,[257] South Carolina,[258] Tennessee,[259] Texas,[260] and Wyoming[261] (comprising just over 600 inmates)[262] ruled

[240] *See* Teague v. Lane, 489 U.S. 288, 316 (1989).

[241] Williams v. State, 183 So. 3d 198, 219-20 (Ala. Crim. App. 2014).

[242] State v. Tate, 130 So. 3d 829, 843-44 (La. 2013).

[243] People v. Carp, 852 N.W.2d 801, 849 (Mich. 2014).

[244] Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013).

[245] State v. Shingleton, No. 25679, 2013 WL 5172952, at *1 (Ohio Ct. App. Sept. 13, 2013).

[246] Commonwealth v. Cunningham, 81 A.3d 1, 9-10 (Pa. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

[247] Chang et al., *supra* note 17, at 94.

[248] Hobbs v. Gordon, 434 S.W.3d 364, 369-70 (Ark. 2014).

[249] Casiano v. Comm'r of Correction, 115 A.3d 1031, 1047-48 (Conn. 2015), *cert. denied sub nom.* Semple v. Casiano, 136 S. Ct. 1364 (2016).

[250] Falcon v. State, 162 So. 3d 954, 963-64 (Fla. 2015); *see also* Cotto v. State, 141 So. 3d 615, 621 (Fla. Dist. Ct. App. 2014); Toye v. State, 133 So.3d 540, 547 (Fla. Dist. Ct. App. 2014).

[251] People v. Davis, 6 N.E.3d 709, 722-23 (Ill. 2014), *cert. denied sub nom.* Illinois v. Davis, 135 S. Ct. 710 (mem.) (2014).

[252] State v. Null, 836 N.W.2d 41, 72-76 (Iowa 2013); *see also* State v. Ragland, 836 N.W.2d 107, 122 (Iowa 2013).

[253] Diatchenko v. Dist. Attorney, 1 N.E.3d 270, 286-87 (Mass. 2013).

[254] Jones v. State, 122 So. 3d 698, 703 (Miss. 2013).

[255] State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014), *cert. denied sub. nom.* Nebraska v. Mantich 135 S. Ct. 67 (2014).

[256] *In re* New Hampshire, 103 A.3d 227, 236 (N.H. 2014); *see also* Tulloch v. Gerry, Nos. 12-CV-849, 13-CV-050, 13-CV-085, 08-CR-1235, 2013 WL 4011621, at *9 (N.H. Super. Ct. July 29, 2013).

[257] *See* State v. Lovette, 758 S.E.2d 399, 409-10 (N.C. Ct. App. 2014).

[258] Aiken v. Byars, 765 S.E.2d 572, 578 (S.C. 2014).

[259] Darden v. State, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *9-11 (Tenn. Crim. App. Mar. 13, 2014).

[260] *Ex parte* Maxwell, 424 S.W.3d 66, 75-76 (Tex. Crim. App. 2014).

[261] State v. Mares, 335 P.3d 487, 508 (Wyo. 2014).

[262] Chang et al., *supra* note 17, at 94.

the other way. Federal courts were generally inhospitable to *Miller* petitioners, affirming most state court decisions denying retroactivity.[263] The retroactivity question has preoccupied both advocates and scholars.[264]

[263] *See, e.g.*, Johnson v. Ponton, 780 F.3d 219, 226 (4th Cir. 2015); *In re* Morgan, 713 F.3d 1365, 1367-68 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013); Grant v. U.S., No. 12-6844, 2014 WL 5843847, at *5-7 (D.N.J. Nov. 12, 2014); Starks v. Easterling, No. 3:11-0615, 2014 WL 4347593, at *10-11 (M.D. Tenn. Sept. 2, 2014); Martin v. Symmes, No. 10-CV-4753, 2013 WL 5653447, at *15 (D. Minn. Oct. 15, 2013); *see also* Dumas v. Clarke, No. 2:13-cv-398, 2014 WL 2808807, at *9-10 (E.D. Va. June 20, 2014); Landry v. Baskerville, No. 3:13CV367, 2014 WL 1305696, at *10-11 (E.D. Va. Mar. 31, 2014); Sanchez v. Vargo, No. 3:13CV400, 2014 WL 1165862, at *8-9 (E.D. Va. Mar. 21, 2014); Stewart v. Clarke, No. 2:13cv388, 2014 WL 2480076, at *3 (E.D. Va. Mar. 13, 2014), *report and recommendation adopted*, 2014 WL 1899771 (E.D. Va. 2014). *But see* Songster v. Beard, 35 F. Supp. 3d 657, 664-65 (E.D. Pa. 2014); McLean v. Clarke, No. 2:13cv409, 2014 WL 5286515, at *12-13 (E.D. Va. June 12, 2014); Alejandro v. U.S., Nos. 13 Civ. 4364(CM), S4 98 Cr. 290-06(CM), 2013 WL 4574066, at *1-2 (S.D.N.Y. Aug. 22, 2013).

[264] *See, e.g.*, Moriearty, *supra* note 40; s*ee* Erwin Chemerinsky, *Juvenile Life-Without Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. (Aug. 8, 2012, 1:30 PM), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen ("[T]he *Miller* court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively."); Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 385-86 (2013) (arguing that *Miller* is retroactive under *Teague v. Lane* as a substantive rule that is categorical in nature); Eric Schab, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 215 (2014) ("[Miller], when taken together with . . . *Roper v. Simmons*, *Graham v. Florida*, and *J.D.B v. North Carolina*, creates a watershed rule that 'kids are different' and must be treated differently throughout the criminal trial process."); *The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 276, 286 (2012) (concluding that "an implementation of procedural safeguards true to *Miller*'s underlying premises amounts to something close to a de facto substantive holding"); Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 IND. L. REV. 931, 970 (2015) (arguing *Miller* "has both a procedural . . . and a substantive component," and the substantive component should be applied retroactively); Molly F. Martinson, Comment, *Negotiating* Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2190-91 (2013) (arguing that *Miller* represents a substantive change in Eighth Amendment jurisprudence and therefore, must be applied to defendants whose sentences are already final); *cf.* Beth A. Colgan, Alleyne v. United States*, Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L. REV. DISCOURSE 262, 265 (2013) ("*Miller*'s requirement that sentencers consider age and its attendant consequences in cases involving juveniles — making age at the time of the offense a fact that triggers

This patchwork of retroactivity rulings has had stark implications. In the six states that declined to apply *Miller* retroactively, some individuals sentenced to mandatory life without parole as juveniles were eligible to benefit from *Miller*, while others were not, based upon nothing more than an accident of timing. Between states, two defendants convicted of the same crime on the same day might have entirely different prospects for release depending where they lived. Thus, in theory, a *Miller* petitioner in Minnesota who was convicted in 2005 for a homicide committed when she was sixteen years old, but whose case was final when *Miller* was decided, would remain condemned to die in prison, while a *Miller* petitioner across the border in Iowa, convicted of the same offense, at the same age, on the same day, and whose case was also final, would have an opportunity for release.

In January 2016, the Supreme Court stepped in. Granting the petition of an inmate who had been incarcerated for nearly fifty-three years for killing a sheriff's deputy in Louisiana,[265] the Court held that *Miller* does in fact apply to the 2,100 inmates whose cases were final when the decision was issued.[266] In *Montgomery v. Louisiana*, the Court held *Miller* established a substantive rule of constitutional law because it rendered life without parole unconstitutional for a class of defendants because of their status as juveniles.[267]

The Court also answered a second question — whether it even had jurisdiction to decide whether the Supreme Court of Louisiana properly refused to give retroactive effect to *Miller*.[268] The Court concluded that it did, reasoning that when a new substantive rule of constitutional law controls the outcome of a case, as it did in *Miller,* the Constitution requires state collateral review courts to give retroactive effect to that rule, regardless of when the conviction in that case became final.[269] "There is no grandfather clause that permits States to enforce punishments the Constitution forbids," Justice Kennedy wrote.[270]

whether the mandatory minimum sentence of life without parole applies — converts age to an element of the underlying offense, rendering *Miller* a substantive rule that must be applied retroactively.").

265 Montgomery v. Louisiana, 136 S. Ct. 718, 723 (2016).

266 *Id.* at 736-37.

267 *Id.*; *see also* Moriearty, *supra* note 40, at 981.

268 *Montgomery*, 136 S. Ct. at 723-24.

269 *Id.* at 729.

270 *Id.* at 731.

*Montgomery* is significant not only for what it did in practice — providing an opportunity for resentencing to at least 1,200 individuals who had been denied it by the states in which they are incarcerated — but also for what it signaled: the Court's recognition that many states were continuing, even after *Roper*, *Graham* and *Miller*, to punish juvenile offenders as harshly as they would adults. *Montgomery* also clarified that juvenile life without parole is presumed to be unconstitutional unless the juvenile is found to be "irreparab[ly] corrupt[]" or "permanently incorrigible."[271] *Montgomery* therefore expanded the Court's ruling in *Miller* by increasing the likelihood that a juvenile homicide defendant would be able to show, at the time of sentencing, that he is in fact amenable to rehabilitation. In addition, by asserting its jurisdiction to decide the question of *Miller*'s retroactivity, the Court also tacitly acknowledged that it had, in the years prior, constricted federal review of state interpretations of constitutional law to a level that was untenable.

Yet, even for those *Miller* inmates who were declared eligible for resentencing far in advance of *Montgomery*, few have received new sentences.[272] And some have died in prison waiting to learn whether *Miller* applies retroactively. Robert Howard, an inmate who was incarcerated as a juvenile in Louisiana's infamous Angola prison in 1967, and had become well-known for his writing and youth work, was denied clemency requests for more than thirty years.[273] Most recently, in March 2015, Governor Bobby Jindal denied a unanimous clemency request by the Board of Pardons and Parole.[274] Weeks later, Mr. Howard was diagnosed with liver cancer, and he died in August 2015[275] — five months before the U.S. Supreme Court declared in *Montgomery* that *Miller* affords him relief.

---

[271] *Id.* at 734.

[272] *See* SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 3-4 (2014), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf; MICHELLE KIRBY, JUVENILE SENTENCING LAWS AND COURT DECISIONS AFTER *MILLER V. ALABAMA*, https://www.cga.ct.gov/2015/rpt/2015-R-0089.htm (last visited Oct. 10, 2016) (collecting the litigation following *Miller*, few of which resulted in actual resentencing).

[273] Liliana Segura, *Supreme Court Gives New Hope to Juvenile Lifers, but Will States Deliver?*, INTERCEPT (Jan. 26, 2016, 2:51 PM), https://theintercept.com/2016/01/26/montgomery-v-louisiana-supreme-court-gives-new-hope-to-juvenile-lifers-will-states-deliver.

[274] *Id.*

[275] *Id.*

4. The Parole Problem

In *Montgomery*, Justice Kennedy tried to reassure those states worried about processing hundreds of *Miller* claims that state courts need not re-litigate every mandatory juvenile life without parole sentence.[276] Instead, he advised, *Miller* could be satisfied by allowing juvenile homicide offenders to be considered for parole. "[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption," Justice Kennedy wrote, "and, if it did not, their hope for some years of life outside prison walls must be restored."[277] *Graham* also promised individualization at the back-end in the form of a parole hearing.[278] "A State need not guarantee the offender eventual release," the Court noted, as long as he is afforded "some realistic opportunity to obtain release before the end of that term."[279]

The Court's assurances raise far more questions than they answer, however. When during the course of incarceration must states provide this opportunity for release? How often must such opportunities be provided? What constitutes a "meaningful" opportunity? Do existing parole procedures fulfill these mandates?

The problem, of course, is that state parole systems are not what they used to be. During the 1990s, amid the ideological movement from rehabilitation to retribution, the U.S. parole system constricted significantly. Release rates fell sharply, as truth-in-sentencing laws proliferated.[280] Between 1976 and 1999, the percentage of total parole releases that were discretionary fell from sixty-five percent to twenty-four percent.[281] Today, more than three-quarters of parole releases are automatic,[282] and nearly half the states and the federal government have largely dismantled their parole systems; just twenty-four states have parole boards that operate with complete discretionary review.[283]

---

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

277 *Id.* at 736-37.

278 *See* Graham v. Florida, 560 U.S. 48, 75 (2010).

279 *Id.* at 82.

280 *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES (Oct. 2, 2005), http://www.nytimes.com/2005/10/02/national/02life.html.

281 Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1749 n.14 (2012) (citing JEREMY TRAVIS & SARAH LAWRENCE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 4-5 (2002)).

282 *Id.*

283 Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 627, 631-32 (Joan Petersilia & Kevin R. Reitz eds. 2012).

Thus far, most of the remedies created by states simply make juvenile offenders eligible for parole under existing state parole practices.[284] And while they have focused on the timing of eligibility for release, they have said little about how, or even whether, parole boards can provide a meaningful opportunity.[285] These are questions that scholars have now begun to explore.[286]

This is not to say that *Miller* has not yielded meaningful change. Since *Miller*, nine states have eliminated juvenile life without parole.[287] Preliminary data in two states suggests that as many as four out of five inmates granted resentencing hearings received a sentence that includes the possibility of parole.[288] As commentators have noted, "the direction, consistency, and rate of change all suggest a mounting consensus against [juvenile life without parole]."[289] Other states have recently raised the jurisdictional age for adult court, limiting the availability of juvenile life without parole and other adult sentences for juvenile offenders in those states.[290] But these advances have been hard-won, to be sure. And there remain dozens of individuals in states across the country, who were sentenced to die in prison as juveniles, and who may well be resentenced to finish out those sentences.

### *B. Substantive and Procedural Minimalism*

In many respects, the "slippage" of the Court's substantive proportionality mandates is a natural and even foreseeable consequence of the decisions themselves, which are substantively and procedurally lean. Moreover, at the same time the Court was issuing these decisions, it was also, through a series of parallel decisions,

---

284 Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 383-96 (2014) [hereinafter *Review for Release*].

285 *Id.*

286 *See id.*; *see also* Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 311-14 (2012); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 10-30 (2011).

287 John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U L. REV. 535, 552 (2016).

288 *Id.* at 570 (citing data from Mississippi and Washington).

289 *Id.* at 556.

290 *See* H.B. 2404, 98th Gen. Assemb. (Ill. 2013, *amending* 705 ILL. COMP. STAT. ANN. 404/5-120 West 1987) (changing jurisdictional age from 17 to 18); H.B. 305, Reg. Sess. Ch. 250 (N.H. 2015) (*amending* N.H. REV. STAT. ANN. § 6230:1 (N.H. 2015)) (changing jurisdictional age from 16 to 17).

safeguarding the States' autonomy over their criminal and collateral proceedings. Together, these features have made it far easier for states to evade the Court's proportionality mandates.

1. Regulatory Reticence

In *Atkins*, *Graham* and *Roper*, the Court delegated to states critical definitional and procedural decisions about who was, and who was not, eligible for relief; how and when to make such a determination; how to replace newly unconstitutional statutes or sentencing schemes and with what alternatives. In the case of *Graham*, states were given discretion to decide what constitutes a "non-homicide offense," and with *Miller*, how to determine which juveniles are sufficiently culpable to receive life without parole. With both *Graham* and *Miller*, states were left to decide what constitutes a "meaningful opportunity" for release; whether *de facto* life sentences for juveniles are constitutional; how and in accordance with what standard states should establish back-end release mechanisms; and who should make release decisions. As delineated in Part II.A,[291] the Court's refusal to answer these questions and regulate these issues has led to arbitrary and, in some cases, patently unjust outcomes.

In the years leading up to *Atkins*, the Court issued numerous rulings that placed procedural constraints on the imposition of the death penalty — covering everything from mitigating evidence,[292] to victim impact evidence,[293] to what jurors must be told about alternative penalties,[294] to prosecutorial misconduct.[295] Yet, in *Atkins*, the Court expressly left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on executing the mentally retarded.[296] Though the Court referenced the DSM-IV-TR and AIDD, it did not mandate that states rely on clinical definitions of intellectual disability. It also said nothing about who should decide whether a capital defendant is intellectually disabled, what standard of proof should be utilized, and who should bear the burden of proof.

The Court's failure to address these questions has been highly problematic. Nowhere has this been more evident than in Florida, where, in the fourteen years since *Atkins* was decided, *Atkins* claims

[291] *See supra* Part II.A.
[292] Woodson v. North Carolina, 428 U.S. 280, 302-05 (1976).
[293] Payne v. Tennessee, 501 U.S. 808, 827-30 (1991).
[294] Jones v. United States, 527 U.S. 373, 389-91 (1999).
[295] Darden v. Wainwright, 477 U.S. 168, 178-83 (1986).
[296] Atkins v. Virginia, 536 U.S. 304, 317 (2002).

have rarely been successful. This may well have been what prompted the Court to intervene in 2014 in *Hall v. Florida*.

In 2001, a year before *Atkins* was decided, Florida enacted a statute that defined intellectual disability as a "'significantly subaverage general intellectual functioning.'"[297] Though the statute itself did not impose a strict IQ cut-off, the Florida Supreme Court interpreted it as imposing a cut-off of seventy.[298] Freddie Lee Hall had an IQ score of seventy-one, but challenged his death sentence with, among other things, a Florida trial court's finding that "there was 'substantial evidence in the record' to support the finding that 'Freddie Lee Hall ha[d] been mentally retarded his entire life.'"[299] Nonetheless, the Florida Supreme Court rejected this evidence because Mr. Hall had not demonstrated that he had an IQ of seventy or below.[300] He was therefore deemed eligible for execution.[301]

In 2014, the Supreme Court held that the Florida Supreme Court's imposition of a strict IQ cut-off and rejection of other evidence of intellectual disability violated *Atkins* for three reasons:[302] first, Florida's rule was inconsistent with clinical practice;[303] second, other states had rejected such rigid rules;[304] and, third, diagnosing intellectual disability required the incorporation of clinical expertise.[305] "[C]linical definitions of intellectual disability . . . were a fundamental premise of *Atkins*,"[306] the Court noted. The Court's message was clear: "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."[307] While *Hall* may be just a modest step toward providing greater protection for criminal defendants with intellectual disabilities, it constitutes an important acknowledgment that the Court's failure to provide "definitive procedural or substantive guides" [308] for determining when

[297] FLA. STAT. § 921.137 (2001), *invalidated by* Hall v. Florida, 134 S. Ct. 1986 (2014).

[298] *See* Cherry v. State, 959 So. 2d 702, 712-13 (Fla. 2007) (per curiam), *abrogated by* Hall v. Florida, 134 S. Ct. 1986 (2014).

[299] Hall v. Florida, 134 S. Ct. at 1991.

[300] Hall v. State, 109 So. 3d 704, 710 (Fla. 2012), *opinion withdrawn* by Hall v. State, No. SC10-1335, 2016 WL 4697766 (Fla. Sept. 8, 2016).

[301] *Id.* at 711.

[302] *See id.* at 2000-01.

[303] *Id.* at 1995.

[304] *Id.* at 1996-98.

[305] *Id.* at 1999.

[306] *Id.* at 1989.

[307] *Id.* at 1998.

[308] Bobby v. Bies, 556 U.S. 825, 831 (2009).

a person is intellectually disabled for Eighth Amendment purposes, had led to outcomes that are constitutionally intolerable.

In *Graham*, the Court's refusal to provide a procedural roadmap for states prompted objections from the Court's own Justices. In a plaintive dissent, Justice Thomas wrote:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,' but must provide the offender with 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.[309]

As Part II.A[310] makes clear, Justice Thomas's words have proved prescient. Because many states no longer have robust discretionary parole systems,[311] they have had to create alternative sentencing and release structures. This raises critical questions about whether parole boards, judges or appointed commissions are best equipped make release decisions. In Florida, for example, rather than reinstitute parole, the Florida legislature decided that those eligible for resentencing under *Graham* and *Miller* must apply to states courts for second look sentencing hearings[312] — a decision that has proven cumbersome since nearly 300 inmates were impacted by the decisions. Other states have taken different approaches.[313] The problem, of course, is that it is not yet clear whether any of these approaches will

[309] Graham v. Florida, 560 U.S. 48, 123 (Thomas, J., dissenting) (citation omitted).

[310] *See supra* Part II.A.

[311] *See* Russell, *Review for Release*, *supra* note 284, at 376 (concluding through a survey of state parole boards that, "important features are missing from existing parole release processes in many states — features that are needed to ensure meaningful hearings for juvenile offenders").

[312] FLA. STAT. § 921.1402 (2017).

[313] In Louisiana, for example, a 2013 statute allows parole eligibility for juvenile offenders after 35 years in first- and second-degree murder cases. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013). The statute requires the parole board to meet in a three-member panel, and, when assessing whether the release of a juvenile offender is appropriate, the board must consider an "evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender." LA. REV. STAT. ANN. § 15:574.4(D)(1) (2017).

actually provide *Graham* inmates with a "meaningful opportunity" for release.[314]

*Miller*'s primary unanswered question — whether the decision applies retroactively — has now been answered by the Court in *Montgomery v. Louisiana*. But what about the other open questions? *Miller* mandated that, before sentencing a juvenile to life without parole, sentencers must consider "youth and attendant characteristics."[315] But what are the "attendant characteristics" of youth? Should familial circumstances come into play? What about socioeconomic disadvantage? Harmful peer influences? Poor educational opportunities? And how should these characteristics be weighed?

States have struggled to answer these questions. It has been more than three years since the Minnesota Supreme Court announced that *Miller* invalidated its first-degree murder sentencing statute as to juveniles.[316] Since then, multiple bills have been brought before both the Minnesota Senate and House of Representatives which propose alternative sentencing schemes for juveniles convicted of aggravated forms of homicide.[317] Yet, the legislature has failed to enact remedial legislation.

In October 2014, a divided Minnesota Supreme Court held that, despite the Minnesota Legislature's failure to act, the Minnesota trial courts nonetheless had the "inherent judicial authority to hold a *Miller* hearing" at sentencing and on remand prior to resentencing to determine whether to impose a sentence of life in prison with the possibility of parole at thirty years, or life without the possibility of parole.[318] According to the Minnesota Supreme Court, a "*Miller* hearing" should, among other things, afford "the juvenile [the opportunity to] present evidence to establish the existence of any mitigating circumstances."[319]

The Minnesota Supreme Court's holding in *State v. Ali* was the subject of intense debate among the Justices. The primary objection to

---

[314] *See* Russell, *Review for Release*, *supra* note 284, at 396-406 (discussing the potential limitations of current state parole practices).

[315] Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

[316] *See* Chambers v. State, 831 N.W.2d 311, 323 (Minn. 2013) *overruled by* Jackson v. State, 883 N.W.2d 272 (2016).

[317] *See, e.g.*, S.F. 994 art. 2., 89th Minn. Leg. 2015 (abolishing juvenile life without parole and replacing it with a scheme of life in prison with the possibility of parole at 20 years).

[318] State v. Ali, 855 N.W.2d 235, 239 (Minn. 2014) (Gildea, C.J.).

[319] *Id.* at 257.

*Ali* is that the Court's proposed remedy constitutes an impermissible intrusion upon the province of the Minnesota Legislature.[320] By remanding Mr. Ali's case to the state trial court and ordering the court to decide whether, after a *Miller* hearing, Mr. Ali should be sentenced to life without parole or life imprisonment with the possibility of release after thirty years, the Minnesota Supreme Court "encroach[ed] on the Legislature's responsibility to fix the limits of punishment," Justice Alan Page wrote in dissent.[321] Instead, the proper remedy was to remand the case to the district court with instructions to impose a sentence of life imprisonment with the possibility of release.[322] Justice David Stras agreed, noting that "[i]t is well established that the judiciary does not write statutes; nor do we amend them, no matter the circumstances."[323] The proper remedy, according to Justice Stras, was to "remand the case to the district court with instructions to impose a sentence of life with the possibility of release."[324]

The Minnesota trial court took a different approach altogether. Minnesota Judge Peter Cahill determined that, if he issued a sentence of thirty years to life — the lowest end of the range prescribed in *Ali* — he need not hold a *Miller* hearing at all.[325] The problem, however, was that Mr. Ali had been convicted in 2010 on three counts of murder, and had already received sentences of thirty years to life on two of the three.[326] Thus, far from affording Mr. Ali the *Miller* tripartite (individualized consideration, a chance to present mitigating evidence, and a meaningful opportunity for release), the combined action (or inaction) of the Minnesota Legislature, the Minnesota Supreme Court, and the Minnesota trial court meant that Mr. Ali now sits in a Minnesota state prison with a sentence of ninety years to life.[327] This outcome almost certainly contravenes *Miller*.

---

[320] *Id.* at 262, 266 (Page, J., concurring and dissenting in part); *id.* at 268-69 (Stras, J., concurring and dissenting in part).

[321] *Id.* at 267 (Page, J., concurring and dissenting in part).

[322] *Id.*

[323] *Id.* at 268 (Stras, J., concurring and dissenting in part) (citing Axelberg v. Comm'r of Pub. Safety, 848 N.W.2d 206, 213 (Minn. 2014); *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 15154 (Minn. 2014); *In re* Estate of Karger, 93 N.W.2d 137, 142 (Minn. 1958)).

[324] *Id.* at 269.

[325] David Chanen, *Seward Market Killer First in State to Reverse Prayer Life-Without-Parole Sentence*, STAR TRIB. (Jan. 6, 2016, 9:51 AM), http://www.startribune.com/juvenile-killer-first-in-state-to-reverse-rare-life-without-parole-sentence/364328081/.

[326] *Id.*

[327] *Id.*

In November 2016, the Supreme Court stepped in yet again, granting certiorari, vacating judgment, and remanding five Arizona cases. In each, the trial courts had sentenced juvenile defendants to life without parole without addressing "whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[328] In her concurrence, Justice Sotomayor clarified that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[329]

Would it have made a difference if the Court in *Miller*, or more recently in *Montgomery*, had said more about what a *Miller* hearing should entail? Or whether the imposition of a functional life without parole sentence without such a hearing is constitutional? Quite possibly.

2. Substantive Minimalism

Despite their nominal substance, *Graham*, and especially *Miller*, are narrow decisions. Both decisions are grounded in the Eighth Amendment's substantive proportionality framework, but neither decision is purely categorical. Though it bans juvenile life without parole for non-homicide offenders, *Graham* does not prevent juveniles from being denied parole and spending their lives in prison. In *Miller*, the Court opted for the narrowest of three possible rulings sought by the petitioners. Instead of striking down all life without parole sentences for juveniles as cruel and unusual, or banning such sentences for those fourteen and under, the Court merely banned the imposition of mandatory life without parole.[330] Since striking down mandatory life without parole was "sufficient to decide [the] cases,"[331] the Court did not take on the broader issues. Nor did *Miller* foreclose the possibility that juvenile homicide offenders would be sentenced to life without parole at trial, or resentenced to life without parole on collateral review.

328 Tatum v. Arizona, 131 S.Ct. 11, 12 (2016) (Sotomayor, J., concurring).

329 *Id.*

330 *See* Petition for Writ of Certiorari at 9-30 Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646), 2011 WL 5322568, at *9-29; Petition for Writ of Certiorari at 8-25, 31-35, Jackson v. Hobbs, 132 S. Ct. 2455 (2012) (No. 10-9647), 2011 WL 5322575 at *8-25, *31-35. The Supreme Court consolidated *Jackson* with *Miller* for decision. *See Miller*, 132 S. Ct. at 2455.

331 *Miller*, 132 S. Ct. at 2469.

The Court's efforts to avoid a broad ruling in *Miller* have been called "unprincipled" and "unsound."[332] While *Miller* "purport[s] to embrace both *Roper* and *Graham*," it "veers far from the principles of those cases," Mary Berkheiser writes.[333] As some scholars have observed, the notion that a discretionary life sentence is somehow less disproportionate than a mandatory one "without looking to a problematic measure of severity beyond sentence length, such as 'expected value' or the hopelessness that can accompany life without parole," is difficult to defend.[334] Yet, as Richard Bierschbach and Stephanos Bibas have argued, the Court seemed to recognize that taking this step "could radically expand Eighth Amendment proportionality law, sweeping conditions of confinement and similar circumstances within its scope."[335]

The Court's decision to take a narrow path in both *Graham* and *Miller* is likely the product of its broader commitment to judicial minimalism. Indeed, a number of commentators have argued that judicial minimalism is a hallmark of the Roberts Court.[336] *Miller* may also reflect the Court's concerns that it was not faithful enough to a minimalist approach in *Roper*. Justice O'Connor's primary objection in *Roper* was that the Court did not need to impose "an arbitrary, categorical age-based rule," but rather "through individualized sentencing" could "give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his

---

[332] Mary Berkheiser, *Developmental Detour*: *How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 501, 507 (2013).

[333] *Id.* at 501.

[334] *See, e.g.*, Bierschbach & Bibas, *supra* note 28, at 398-99, 416 (arguing that "[i]f life imprisonment for juveniles were itself substantively cruel . . . the Court should have banned it outright instead of simply leaving open a chance at parole or allowing sentencers to impose LWOP on certain killers." (citing Bierschbach, *Proportionality and Parole*, *supra* note 281, at 1759-64; Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 77 (2010))).

[335] *Id.* at 416.

[336] *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (making the case that Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer were minimalists); Berkheiser, *supra* note 332, at 515 ("On the Roberts Court, all but the Court's two most conservative jurists have embraced judicial minimalism in one form or another."); David D. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES (June 22, 2009), http://www.nytimes.com/2009/06/22/us/politics/22mentors.html (quoting former Yale Law Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor's approach in a controversial case as one of "judicial minimalism"); Cass R. Sunstein, *Minimal Appeal*, NEW REPUBLIC (Aug. 1, 2005) [hereinafter *Minimal Appeal*], https://newrepublic.com/article/64638/minimal-appeal (noting that Justice Roberts was likely to follow in O'Connor's minimalist footsteps).

cognizance of the consequences of his actions, and so forth."[337] Chief Justice Roberts made a similar argument in his concurrence in *Graham*.[338]

Yet, as Cass Sunstein has noted, judicial minimalism can impose significant burdens and lead to unpredictable outcomes.[339] In avoiding an outright prohibition on life without parole for juveniles convicted of homicide, the Court left broader substantive questions about diminished culpability, mitigation, amenability to rehabilitation and meaningful opportunity for release, along with doctrinal questions about retroactivity, to be answered by the elected officials in the twenty-eight affected states. "It is in courtrooms across the country that the harsh mischief of minimalism will run its course," Mary Berkheiser writes, "with outcomes uncertain and a life outside prison walls a mere hope."[340] In any constitutional context, this dynamic risks undermining the public's perception of the Court's legitimacy,[341] but unpredictability, disunity and error are especially intolerable when it comes to the regulation of our harshest punishments, because the costs are so great.

3. AEDPA and *Teague*

Compounding the impact of the Court's minimalist and deregulatory approach in *Atkins*, *Graham* and *Miller* are its parallel efforts to safeguard the states' autonomy over their criminal and collateral proceedings through a series of decisions that limit federal review and restrict retroactivity. Over the last several decades, the Court has imposed significant procedural constraints on inmates' ability seek and obtain federal review of post-conviction claims. These constraints were expanded exponentially with the passage of the Anti-

[337] *See* Roper v. Simmons, 543 U.S. 551, 602-03 (2005) (O'Connor, J., dissenting).

[338] *See* Graham v. Florida, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring) (agreeing that Graham's sentence violated the Eighth Amendment, but advocating reliance on existing precedents allowing for consideration of the particular defendant and particular crime at issue, rather than creating a new constitutional rule, as the majority had done).

[339] *See* Cass Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 825 (2007).

[340] Berkheiser, *supra* note 332, at 516.

[341] Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 312-14 (1998) (stating that when the Court adopts a minimalist framework it may result in many important issues being left unresolved and diverging implementation standards).

Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[342] which the Court has interpreted in the narrowest fashion. In combination with the Court's non-retroactivity jurisprudence, the Court's decisions have significantly limited the ability of state inmates to obtain habeas corpus relief.

Once hailed as the Great Writ, habeas corpus has been substantially diminished over the last three decades. During the 1980s and 1990s, the Court significantly constrained access to the federal courts through the use of procedural default, exhaustion, and other requirements.[343] With few exceptions, the Court treated these procedural requirements as bars to the adjudication of federal constitutional claims, rationalizing this approach as necessary to promote the principles of federalism and finality.[344]

The impact of these restrictions was amplified by the enactment of the AEDPA.[345] Section 2254 of the AEDPA prohibits federal habeas relief for any claim "adjudicated on the merits" by the state court unless one of three exceptions is satisfied: (1) the state court decision was "contrary" to clearly established federal law; or (2) the state court decision involved an unreasonable application of clearly established federal law; or (3) the state court decision was based on an unreasonable determination of the facts.[346] It also contains several procedural constraints, including a one-year statute of limitations,[347] a bar on second-and-successive petitions,[348] and an exhaustion requirement.[349] Like its prior decisions, the Court characterized the purpose of the AEDPA as promoting the principles of finality, and federalism."[350]

---

[342] *See* 28 U.S.C. § 2554 (2012).

[343] *See* Murray v. Carrier, 477 U.S. 478, 494-96 (1986) (discussing the need for both cause and prejudice to be shown to overcome a procedural default, "at least in a habeas corpus proceeding challenging a state court conviction," and citing to "principles of comity and federalism").

[344] *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 518 (1982) (noting that the doctrine of comity promotes, in part, judicial efficiency).

[345] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214, 1217-26 (codified in part at 28 U.S.C. §§ 2244-2267 (2012)); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007) [hereinafter *AEDPA's Wrecks*].

[346] 28 U.S.C. § 2254(d)(1) (2012).

[347] *Id.* § 2244(d) (2012).

[348] *Id.* § 2244(b).

[349] *Id.* § 2254(b).

[350] Williams v. Taylor, 529 U.S. 420, 436 (2000).

In the first several years of the AEDPA's existence, the Court granted relief in several cases.[351] But through a series of decisions over the last decade, it has prevented the federal courts from exercising meaningful review over state court adjudication of constitutional claims.[352] A state court decision is "contrary to" clearly established Supreme Court precedent, the Court explained, only if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Court] precedent."[353] Thus, even if a state court interpreted constitutional precedent erroneously, federal habeas relief might still be denied.

Subsequent cases have taken an even more restrictive view. In *Harrington v. Richter*, the Court rationalized its narrow interpretation of the AEDPA by asserting that "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."[354] The net effect of the Court's decisions is that, even though habeas petitions occupy almost seven percent of the federal docket,[355] habeas relief is almost non-existent.[356]

---

[351] *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 379-80 (2005); Wiggins v. Smith, 539 U.S. 510, 518-19 (2003); *Taylor*, 529 U.S. at 420.

[352] *See* Lawrence v. Florida, 549 U.S. 327, 329, 337 (2007) (determining that the one-year statute of limitations § 2244(d)(2) is not tolled during the time between a final state court judgment on a state post-conviction motion and the filing of a petition for certiorari); Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) (finding that, because an untimely state court petition was not "properly filed," habeas petitioner was "not entitled to . . . tolling under § 2244(d)(2)); Carey v. Saffold, 536 U.S. 214, 220 (2002) (interpreting § 2244(d)(2) to mean that a state post-conviction case is pending "until the application has achieved final resolution through the State's post-conviction procedures").

[353] *Williams,* 529 U. S. at 405-06.

[354] Harrington v. Richter 562 U.S. 86, 103 (2011) (explaining that AEDPA section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal).

[355] Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 520-21 (2014) (noting that 6.77 percent of cases filed in the district courts in 2012 sought non-capital post-conviction relief).

[356] *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NATIONAL CENTER FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS; AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 51 n.87, 52 n.89 (2007), http://perma.cc/D5V2-ZB6F (finding a grant rate of 13 percent in capital

The AEDPA has had an especially deleterious impact on *Atkins* claimants. As Lee Kovarsky has written, "[f]ederal courts will . . . encounter meritorious but defective *Atkins* claims because so much of the procedural status of a federal petition turns on the ability of impaired offenders to negotiate extraordinarily complex state post-conviction process without counsel."[357] *Atkins* claims are frequently defaulted because claimants, often acting *pro se*, cannot meet the onerous standards of state post-conviction.[358]

The AEDPA has also derailed *Graham* petitioners. In 2012, in *Bunch v. Smith*, the Sixth Circuit denied habeas relief to a juvenile serving an allegedly unconstitutional sentence by denying that any applicable "clearly established Federal law" existed at all.[359] The petitioner, who was convicted of nonhomicide offenses committed at age sixteen, had been sentenced to eighty-nine years in prison and argued that, under *Graham*, this "functional equivalent" of life without parole for crimes he committed as a juvenile was cruel and unusual punishment. [360] While the Sixth Circuit noted that even the warden had agreed that "Bunch's eighty-nine year aggregate sentence may end up being the functional equivalent of life without parole,"[361] it concluded that *Graham* did not apply because it "did not encompass consecutive, fixed-term sentences."[362] On that basis, the Court held that *Graham* was not "clearly established" for purposes of the AEDPA.[363]

At the same time the Court was restricting habeas, the Court was also issuing numerous decisions restricting the retroactive application of new rules of criminal procedure.[364] Spawned in the 1960s as a

habeas cases but of only 0.34 percent in noncapital habeas cases); *see also* Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 310 (2012) (observing that, after both district and circuit court review, habeas relief was granted in only 0.8 percent of noncapital habeas cases).

357 Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 353 (2010).

358 *Id.* at 354.

359 Bunch v. Smith, 685 F.3d 546, 549-50 (6th Cir. 2012).

360 *Id.*

361 *Id.* at 551; *see also id.* at 553 n.1.

362 *Id.* at 551.

363 *Id.* at 550.

364 *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 349, 358 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), (holding that the Sixth Amendment, which requires a jury (not a judge) to find aggravating factors necessary for imposition of the death penalty, does not apply retroactively to cases on federal habeas review); Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply retroactively to cases on federal habeas review barring the application of new constitutional rules of criminal procedure to convictions that had already

means of cabining the constitutional rights of criminal defendants, it was so readily expanded in cases like *Miranda v. Arizona*[365] and *Mapp v. Ohio*[366] that the Court finally settled in the late 1980s on a doctrine that would allow all new rules of constitutional law to apply retroactively to cases on direct review,[367] but restricted their application to cases on collateral review to limited circumstances.[368] In *Teague v. Lane*, the Court concluded that new constitutional rules would not apply retroactively to cases on collateral review, subject to two exceptions: the first was for rules that "'place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;"[369] and the second, much narrower exception was for watershed rules of criminal procedure that are "implicit in the concept of ordered liberty" and affect the accuracy of the conviction.[370]

Over the years, critics have assailed *Teague*'s self-contradictory definition of a "new rule,"[371] its extraordinarily restrictive second

become final); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 727-32 (2016) (discussing the numerous procedural thresholds that a federal habeas petition must navigate in order to obtain relief).

365 384 U.S. 436, 489-99 (1966).

366 367 U.S. 643, 655 (1961).

367 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . .").

368 *Teague*, 489 U.S. at 305-14 (O'Connor, J., plurality opinion) ("The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.'").

369 *Id.* at 311 (arguing that "in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction" (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))). This was subsequently found to include decisions that place a certain class of persons outside of a state's power to punish. *See* Penry v. Lynaugh, 492 U.S. 302, 339 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (urging courts to rely on the concept of "mental age" when sentencing).

370 *Teague*, 489 U.S. at 311.

371 Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 212 (2005) ("As fifteen years of *Teague* have taught, the new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular." (emphasis added)).

exception for "watershed" rules of criminal procedure,[372] and its treatment of retroactivity as a "threshold test."[373] Since *Teague*, the Court has considered the retroactivity of fifteen new rules of criminal procedure and, until *Montgomery v. Louisiana*, had yet to find that any of them fell within either of the *Teague* exceptions.[374]

Ninth Circuit Judge Stephen R. Reinhardt recently argued that, by "[e]xalting notions of comity and finality above all else, and treating the constitutional rights at stake with the same lack of concern manifest elsewhere in their recent jurisprudence, the conservative justices who form the majority on the current Supreme Court — joined more and more frequently, for differing reasons, by their more moderate colleagues — [have] embarked on a path to render constitutional rulings by state courts nearly unreviewable by the federal judiciary."[375] Whether or not Judge Reinhardt is right about the Justices' sentiments, he is right about the outcome. Operating virtually unchecked by the federal courts, and given license to restrict the remedial scope of the Court's new proportionality rules, it is not surprising that states have taken wildly different approaches to implementation, leaving the substantive mandates announced in *Atkins*, *Graham* and *Miller* to "turn upon . . . trivialities,"[376] "vary from place to place and from time to time,"[377] and to create a procedural landscape that resembles a "crazy quilt."[378] The net effect has been constitutional slippage of the Court's modern proportionality jurisprudence.

---

372 *See, e.g.*, Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CALIF. L. REV. 1677, 1694 (2007) ("[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.").

373 *See, e.g.*, Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 11 (2009) (citing RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.4 (5th ed. 2005) ("There is considerable consensus among commentators . . . that *Teague*'s 'threshold question' rule is misguided.")).

374 *See, e.g.*, Moriearty, *supra* note 40, at 981.

375 Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015).

376 *See* Whren v. United States, 517 U.S. 806, 815 (1996).

377 *See* Virginia v. Moore, 553 U.S. 164, 176 (2008) (quoting *Whren*, 517 U.S. at 815).

378 *See* Kansas v. Marsh, 548 U.S. 163, 185 (2006).

## III. THE COSTS OF SLIPPAGE

The primary rationale for the Court's deregulatory and narrow approach to substantive constitutional decision-making and its jurisdictional deference to state criminal justice policies is the promotion of the principles of federalism and finality. I argue, however, that these rationales are far less compelling, and the constitutional slippage the Court's measures often sow is far less tolerable, in the Eighth Amendment context.

### *A. The Rationales*

Over the last two decades, as the Court has issued numerous decisions restricting both habeas corpus relief and retroactivity, it has repeatedly rationalized its stance as necessary to preserving federalism and finality.[379] Scholars considering the proper scope of collateral review have long raised concerns about finality and federalism as well.[380] While judicial minimalism is generally justified on pragmatic grounds,[381] it, too, is rooted in a presumption of deference to the political branches and, implicitly, to the democratic accountability of

[379] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 730 (1991) ("In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism."); *see also* Duncan v. Walker, 533 U.S. 167, 178 (2001) (explaining that the purpose of the statutory habeas bars is to "further the principles of comity, finality, and federalism" (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000))); *Coleman*, 501 U.S. at 758 (Blackmun, J., dissenting) ("Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests [to support its holding]."); Teague v. Lane, 489 U.S. 288, 308 (1989) (concluding that, in the "interests of comity and finality," new constitutional rules would not apply retroactively to cases on collateral review, subject to two exceptions).

[380] *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452, 528 n.21 (1963) (emphasizing the importance of the finality of criminal judgments); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 152-54 (1970) (citing finality concerns as a basis for limited habeas review); *see also* Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 462 (2011) (noting that "the Rehnquist Court began a federalism revolution that now has been at least partially adopted by the Roberts Court"); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577-79 (1993) (discussing how finality, comity, and federalism interests are invoked in theories on the proper scope of the habeas writ).

[381] SUNSTEIN, *supra* note 336, at 51-54 (arguing that minimalism promotes stability and predictability and also empowers democratic deliberation by giving political decision-makers room to maneuver and respond to constitutional questions left open by the Supreme Court).

state policy-makers.[382] I argue, however, that these rationales are simply less compelling when it comes to the implementation of proportionality mandates.

1. Finality

As Doug Berman wrote, "different conceptual, policy and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction."[383] Since neither the practical burdens of retrial nor theoretical concerns about undermining the consequentialist objectives of punishment are as pronounced with sentences of incarceration as they are with convictions, concerns about preserving final judgments are significantly diminished.[384] Unlike trials, which require extensive resources and depend on evidentiary preservation and presentation, sentencing is at least as prospective as it is retrospective. The risks of inaccuracy, spoiled evidence and procedural illegitimacy are simply not as great during re-sentencing as they are during retrial.[385] Trials also have different objectives than sentencing hearings. While trials "are designed and seek only to determine the binary question of a defendant's legal guilt," sentencing hearings "are structured to assess and prescribe a convicted offender's future and fate."[386] Moreover, reducing a sentence of incarceration may actually save resources that otherwise would have been spent on the operation of corrections systems.

---

[382] *See* Diane Sykes, *Minimalism and Its Limits*, 2015 CATO SUP. CT. REV. 17, 19 (2015) (citing Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369-70 (2006)).

[383] *See* Berman, *supra* note 42, at 152, 165 ("Sentence finality, in short, has gone from being a non-issue to being arguably one of the most important issues in modern American criminal justice systems."); Sarah French Russell, *Reluctance to Resentence: Courts, Congress and Collateral Review*, 91 N.C. L. REV. 79, 88-89 (2012) [hereinafter Russell, *Reluctance to Resentence*] (noting the weakness of finality interests at stake compared to requests for sentence correction). *But see* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 181, 181-82 (2014) (arguing "in defense of the finality of criminal sentences on collateral review").

[384] *See* Moriearty, *supra* note 40, at 981; *see also* Berman, *supra* note 42, at 165-76 (urging policymakers to revisit the proportionality-finality balance in light of the increasing use and length of prison sentences); Russell, *Reluctance to Resentence*, *supra* note 383, at 88-89 (2012) (noting the weakness of finality interests at stake compared to requests for sentence correction).

[385] *See* Berman, *supra* note 42, at 166-68.

[386] *Id.* at 167.

In fact, interests in finality may be even less persuasive in the case of proportionality rules than they are with other sentencing rules. No sentence of incarceration, after all, is ever really *final* until it has been fully served.[387] Since the Court's modern proportionality decisions have proscribed only the harshest sentences for the narrowest classes of individuals, such decisions are more likely than decisions grounded in the Fourth, Fifth and Sixth Amendments, for example, to apply to active prisoners. Those standing to benefit from the application of new proportionality rulings are, as a conceptual matter, the least likely to have final sentences.

2. Federalism

Finally, even if, as the Court has stated, "[n]onuniformity is . . . an unavoidable reality in a federalist system,"[388] there is a point at which society's interests in federalism must yield. Both the Court[389] and the Framers have recognized as much. "The Constitution's text can be read to suggest the Framers were decidedly eager to provide or preserve opportunities for defendants to seek review and reconsideration of their treatment by government authorities," writes Doug Berman.[390] They did so in three primary ways: Article I, Section 9 of the Constitution instructs Congress that the "Privilege of the Writ of Habeas Corpus shall not be suspended;"[391] Article II, Section 2 provides that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States;"[392] and Article III, Section 2 provides that the Supreme Court "shall have appellate Jurisdiction."[393] Thus, while the Framers sought to preserve state sovereignty over matters of criminal process,[394] they were also

[387] *Id.* at 171.

[388] Danforth v. Minnesota, 552 U.S. 264, 280 (2008).

[389] *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 338 (1921) ("The Constitution was intended — its very purpose was — to prevent experimentation with the fundamental rights of the individual.").

[390] *See* Berman, *supra* note 42, at 155.

[391] U.S. CONST. art. I, § 9.

[392] U.S. CONST. art. II, § 2.

[393] U.S. CONST. art. III, § 2.

[394] Berman, *supra* note 42, at 154 (observing that "criminal adjudications in the Founding Era lacked many of the legal formalities and procedural particulars now familiar to modern lawyers: criminal trials, which were frequent and speedy, involved a 'common-sense, public moral judgment' in which laymen were central players" (citation omitted)); *see also* United States v. Lopez, 514 U.S. 549, 564 (1995) ("[I]n areas such as criminal law enforcement or education . . . States historically have been sovereign.").

unequivocal in their intent to give criminal defendants in the colonial era various means of challenging government action. Indeed, at common law, the writ had very little to do with the federalism concerns articulated today.[395]

Despite its dilution over the last three decades, the Court has long embraced the view that one of the critical purposes of post-conviction relief and the writ of habeas corpus is to check the abuse of government power.[396] As Justice Frankfurter wrote a half century ago:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. . . . It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.[397]

Justice Kennedy addressed this proposition in *Montgomery v. Louisiana*. Acknowledging that, when a new substantive rule of constitutional law is established, the Court is "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems," he emphasized that "[f]idelity to this important principle of federalism . . . should not be construed to demean the substantive character of the federal right at issue."[398]

### *B. The Costs*

#### 1. Offending Norms

By contrast, the risks of offending constitutional norms through slippage may be at their most pronounced with Eighth Amendment

---

[395] *See* Bator, *supra* note 380, at 445-46 (analyzing the history and use of federal habeas corpus in the United States).

[396] *See* Brown v. Allen, 344 U.S. 443, 509-512 (1953) (Frankfurter, J., concurring) (discussing the historical significance of the writ of habeas and praising its role in the American criminal justice system).

[397] *Id.* at 512 (Frankfurter, J., concurring).

[398] Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

proportionality rules. Like the writ of habeas corpus, it has long been accepted that one of the Eighth Amendment's primary functions is to serve as a check on states' propensity to overreact in times of moral panic.[399] This premise is especially relevant to the implementation of the Court's contemporary proportionality jurisprudence.

The majority of punishments implicated by *Atkins*, *Graham* and *Miller* were meted during the during the "get tough" era of the 1990s[400] — a period when the incarceration rate in the United States rose exponentially and, in the words of one scholar, this country "witnessed the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts."[401] Yet, by tying the scope of its proportionality protections to state level politics, as it has done with these three decisions, the Court subjects them to the same majoritarian preferences that generated the moral panic and led to the constitutional infirmities in the first place. In the words of Donald Dripps, when it comes to sentencing, policymakers are prone to apathy because they simply do not "give a damn about the rights of the accused."[402]

This may explain why the Supreme Court and lower courts have, historically, afforded a broader remedial scope to new proportionality rules than they have to new Fourth, Fifth, Sixth and Fourteenth Amendment rules. In an article published a quarter century ago, Richard Fallon and Daniel Meltzer argued that an inquiry into the "nature and purpose of [a Constitutional] right" is one appropriate metric for assessing its remedial scope.[403] "At one end [of the

[399] Stinneford, *supra* note 44, at 907 (noting that the historical focus was not on punishments that were '"cruel and rare" but on those that are "cruel and new," which suggests "the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis"); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159-62 (2002) (tracing the ebb and flow of the counter-majoritarian critique of the United States Supreme Court); *cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 2nd ed. (1986) (discussing the counter-majoritarian nature of judicial review).

[400] TONRY, *supra* note 82, at 202-05.

[401] Franklin Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260, 260 (1999).

[402] *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn about the Rights of the Accused*, 44 SYRACUSE L. REV. 1079, 1081 (1993).

[403] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and*

spectrum] lie rules and decisions that hold a defendant's conduct constitutionally immune from punishment," while "at the other end of the spectrum stand rules whose purposes are substantially deterrent," such as the "exclusionary rule."[404] The nature and purpose of the former "clearly calls for retroactive application even of surprising holdings," while the "argument for retroactive application" of the latter is "relatively weak."[405] "Occupying the middle of the spectrum are rules that involve procedural protections, rather than constitutional immunities from prosecution."[406] Though not explicit, Fallon and Meltzer seemed to be distinguishing between Eighth Amendment rules, which should be given broad remedial effect, Fourth and Fifth Amendment rules, for which the argument was weak, and Sixth Amendment rules, which could go either way.

2. Legitimacy

Issuing substantive mandates with no assurance of their enforcement also undermines the Court's own legitimacy. Carol and Jordan Steiker have suggested that "perhaps the Court's willingness to cede to the states the authority to craft procedures reflects its view that the substantive right extends only so far."[407] Or perhaps the Court underestimated the extent to which state procedures would impede the substantive right.[408] Regardless of the Court's rationale, the same questions of legitimacy raised by the excess proceduralization of the 1980s and 1990s are raised by the Court's contemporary proportionality jurisprudence. "A survey of the post-*Atkins* landscape makes clear that the problem of 'legitimation' is not the exclusive province of excessive proceduralism," the Steikers write.[409] Illegitimacy becomes especially problematic where, as here, the vast majority of those who stand to benefit from these substantive rights are people of color.

*Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-53 (1991) (sketching the development of the retroactivity doctrine).

404 *Id.* at 1808.

405 *Id.*

406 *Id.*

407 Steiker & Steiker, *Lessons from Substance*, *supra* note 6, at 731.

408 *Id.* at 732.

409 *Id.* at 733 (emphasis added).

### *C. Anti-Evasion Doctrine*

If the Court is serious about implementing in practice the substantive constraints on punishment that it has imposed through its modern proportionality jurisprudence, it must be willing to better define their scope and regulate their enforcement. Recently, a handful of commentators have explored the use of what they call the Court's prophylactic "anti-evasion doctrines," procedural mandates which seek "to optimize constitutional enforcement by curbing circumvention of constitutional principles."[410] The objective of these standards is to prevent elected officials from "complying with the form of the previously announced rule, while subverting the substance of the constitutional principle the rule sought to implement."[411]

The Supreme Court can and should embed both substantive and procedural "anti-evasion" mandates into its Eighth Amendment sentencing jurisprudence. In the *Atkins* context, the Court's decision in *Hall v. Florida*, which clarifies that *Atkins* requires states to incorporate professional views about threshold IQ scores and adaptive functioning, is a critical first step. To reinforce this mandate, the Court should, in every capital case, place the burden of proof on the State to prove beyond a reasonable doubt that the defendant does not suffer from "mental retardation." Because the capital sentencing process constitutionally requires an exhaustive examination of aggravating and mitigating evidence, such a requirement would not be unduly burdensome.

With respect to *Graham* and *Miller*, the simplest solution would, of course, be for the Court to ban juvenile life without parole altogether. Short of this, the Court should be explicit about the sentences to which the protections articulated in *Miller* and *Montgomery* apply. The Court could define as functional life without parole any term-of-years prison sentence that denies a juvenile defendant the opportunity to demonstrate rehabilitation and obtain release. Several state courts have already adopted such an approach.[412]

---

[410] Denning & Kent, *supra* note 47, at 1776; *see also* Stephenson, *supra* note 47, at 4 (arguing that courts should protect constitutional guarantees by using doctrines designed to raise the cost to government decisionmakers who enact unconstitutional policies).

[411] Denning & Kent, *supra* note 47, at 1776.

[412] In *State v. Null*, for example, the Iowa Supreme Court held that a sentence for a juvenile non-homicide offender that did not grant parole eligibility until age sixty-nine, merited the same analysis as a sentence explicitly termed "life without parole" and was unconstitutional under *Graham*. 836 N.W.2d 41, 71 (Iowa 2013). "[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a

*Hall* and *Montgomery* plainly reflect the Court's efforts to prevent states from circumventing the constitutional principles at stake in *Atkins* and *Miller*. They also indicate that the Court is willing to entertain new constitutional challenges when it comes to the imposition of the harshest punishments on the least culpable of our citizens. Of course, we know from experience that there are associated costs. Placing too much emphasis on procedure risks eclipsing the constitutional principles themselves,[413] which is arguably what happened in the era of excess formalism. But, I argue, the costs of under-enforcement in the Eighth Amendment context are far greater.

## CONCLUSION

The Supreme Court's decisions in *Atkins v. Virginia*, *Roper v. Simmons*, *Kennedy v. Louisiana*, *Graham v. Florida* and *Miller v. Alabama* revitalized the Court's substantive proportionality jurisprudence in critical respects, to be sure. Yet, three of the five decisions simply have not translated to meaningful relief in practice. While the Court may continue to rationalize constitutional slippage as

given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates[,]" the Court explained. *Id.* at 71-72; *see also* State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35-year sentence that would render a juvenile defendant eligible for parole at age 52 because it "effectively deprived [him] of any chance of an earlier release and the possibility of leading a more normal adult life"); Casiano v. Comm'r of Correction, 115 A.3d 1031, 1045 (Conn. 2015) (ruling that a 60-year sentence is the functional equivalent of a life without parole sentence, based on life expectancy and geriatric release arguments); Thomas v. Pennsylvania, No. 10-4537, 2012 U.S. Dist. LEXIS 181876, at *39 (E.D. Pa. June 5, 2012) (holding parole eligibility at age 82 is the functional equivalent of a life without parole sentence because it would surpass the defendant's life expectancy); Adams v. State, 188 So.3d 849, 851-52 (Fla. Dist. Ct. App. 2012) (ruling that a 58.5 year sentence is the functional equivalent of a life without parole sentence because it surpasses life expectancy statistics).

[413] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 542 (1998) (authorizing prisoner's execution and finding that a "grave abuse of discretion" took place on finality and federalism grounds after the Ninth Circuit recalled its mandate and granted habeas relief based on a law clerk miscommunication); Herrera v. Collins, 506 U.S. 390, 411 (1993) (holding that actual innocence claim based on newly discovered evidence was not a ground for federal habeas corpus relief without an independent constitutional violation and that Texas' process did not violate "fundamental fairness," resulting in Petitioner's execution); Report & Recommendation, Chambers v. Roy, No. 14-CV-2552 (PJS/BRT) (D. Minn. Oct. 16, 2015) (analyzing the many procedural bars, prerequisites to federal habeas relief, and deference granted to state adjudications); *see also* Kovarsky, *AEDPA's Wrecks*, *supra* note 345, at 444-46 (2007) (analyzing the guiding principles of modern federal habeas doctrine and the difficulty of obtaining relief).

a necessary byproduct of its deference to society's interests in federalism and finality, these justifications are simply less compelling in the Eighth Amendment context. And the constitutional norms at stake are far too great.

The Court's recent decisions in *Hall v. Florida* and *Montgomery v. Louisiana* reflect the Court's apparent awareness that, if it really wants to end the execution of the intellectually disabled and the indiscriminate life imprisonment of juveniles, it has to say more about how, when, where and to whom the mandated relief applies. Striking a proper balance between substantive mandates and procedural prescription will continue to be important in the coming years as, in all likelihood, the United States moves back toward the more moderate approach to criminal and juvenile justice the rest of the western world has long embraced. As our standards of decency continue to evolve, more substantive proportionality mandates will likely emerge. And with these mandates will come serious questions about their implementation. The Court would do well to consider such questions as it promulgates proportionality.