Note

"Black First, Children Second": Why Juvenile Life Without Parole Violates the Equal Protection Clause

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INTRODUCTION

On February 17, 2021, "America's oldest juvenile lifer was released."[1] News stories featured a photograph of eighty-three-year-old Joe Ligon in a puffy blue vest clutching his red cap.[2] Ligon entered prison at age fifteen and exited sixty-eight years later.[3] When his prison sentence commenced, racial segregation was still legal.[4] As a juvenile, Ligon had joined a group of inebriated teenagers in a spree of robberies and stabbed at least one person during one of them.[5] Ligon says he did not kill anyone that night but admitted to participating in the stabbing.[6] Nonetheless, he pled guilty to two counts of first-degree murder.[7] One night landed Ligon, a then fifteen-year-old Black[8]

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1. Heather Law & Evan Simko-Bednarski, *After 68 Years in Prison, America's Oldest Juvenile Lifer Was Released*, CNN (Feb. 17, 2021), https://www.cnn.com/2021/02/17/us/oldest-juvenile-lifer-released-trnd [https://perma.cc/AW7U-K4RM].

2. *See id.*

3. *Id.*

4. Nelson Oliveira, *Nation's Oldest Juvenile Lifer Released from Prison After Nearly 7 Decades*, N.Y. DAILY NEWS (Feb. 18, 2021), https://www.nydailynews.com/news/national/ny-joe-ligon-nation-oldest-juvenile-lifer-released-from-prison-20210218-azofnevc6vh4lo4rphvijlt3ne-story.html [https://perma.cc/UY99-X8S6].

5. *Id.*

6. *Id.*

7. *Id.*

8. For an explanation on why "Black" is capitalized throughout this Note, but "white" is lowercase, please see Mike Laws, *Why We Capitalize 'Black' (and Not 'White')*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black

teenager, in prison with a mandatory life without parole sentence.[9] In his words, "I got caught up, in terms of being in the streets."[10] But the context of Ligon's offense did not affect his sentence. Nor did his age. Nor did his cognitive development or the external pressures he faced on the night in question. His sentence was automatic.[11]

Ligon's attorney told CNN that "[t]he person that came out of prison in 2021 is 83 years old, has grown, changed, and is no longer a threat."[12] While Ligon perhaps did change over the years, the length of his sentence raises significant questions about whether the purposes of punishment—retribution, deterrence, or rehabilitation[13]—can ever justify locking up a child for seven decades. In addition, Ligon's sentence highlights the economic costs of locking up a child for most of their lifetime.[14] Finally, the story of America's oldest juvenile lifer forces onlookers to ask what mandatory life-in-prison sentencing schemes reflect about our country's values and consider what sanction is truly effective in deterring criminal acts committed at such a young age.

This country's reckoning with harsh juvenile sentencing did not begin until 2005 when the Supreme Court in *Roper v. Simmons* abolished the death penalty for juveniles.[15] The Court explained that juveniles are less blameworthy than adults because of their immaturity, susceptibility to negative influences, and transient personalities.[16] *Graham v. Florida* applied this concept of diminished culpability to children sentenced to juvenile life without parole (LWOP) and banned its imposition on juveniles who were convicted of nonhomicide offenses.[17] In 2012, the Supreme Court in *Miller v. Alabama* categorically

-styleguide.php [https://perma.cc/UY99-X8S6]. However, the issue is nuanced, and therefore the appropriate way to write words describing racial groups may change. For more on this topic, see Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159 [https://perma.cc/7ZJV-T6NF].

9. Law & Simko-Bednarksi, *supra* note 1.

10. *Id.*

11. *Id.*

12. Oliveira, *supra* note 4.

13. UNIV. OF MINN., CRIMINAL LAW 16–17 (Univ. of Minn. Librs. Publ'g 2015) (2010).

14. In 2015, the cost per inmate in Pennsylvania, where Ligon was incarcerated, was $42,727. Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010–2015*, VERA INST. OF JUST. 8 tbl.1 (May 2017), https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf [https://perma.cc/C7AH-FBGJ].

15. Roper v. Simmons, 543 U.S. 551 (2005).

16. *Id.* at 569–72.

17. Graham v. Florida, 560 U.S. 48, 74–75 (2010).

abolished mandatory juvenile LWOP sentencing as a violation of the Eighth Amendment.[18] Four years later, the Court determined in *Montgomery v. Louisiana* that *Miller* applied retroactively to juveniles who, like Ligon, were sentenced before 2012.[19] While both *Miller* and *Montgomery* left open the possibility of discretionary juvenile LWOP so long as mitigating youthful qualities are considered,[20] the Supreme Court held that courts may only impose it upon "the rare juvenile offender whose crime reflects irreparable corruption."[21] However, in 2021 the Supreme Court revisited its decisions in *Miller* and *Montgomery*, and held in *Jones v. Mississippi* that a factual finding of "irreparable corruption" is not required to impose juvenile LWOP.[22] Following *Jones*, this minimal safeguard protecting juveniles from LWOP sentences is no longer required.[23] However, all courts must consider the youthful qualities of the juvenile offender when sentencing, such as immaturity, recklessness, and susceptibility to negative influences.[24] Beyond that, it is up to the court's discretion to determine whether irreparable corruption—deciding if a child is completely incapable of rehabilitation—is a factor in sentencing.[25] And even for states that do rely on irreparable corruption, that standard is also problematic in its application.[26] The United States is also the only country in the world that continues to allow children to be sentenced to LWOP and die in prison.[27]

While neuropsychology and child development have been considered in the courtroom,[28] race has been largely excluded from the

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

19. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016). It should be noted that Ligon was offered parole after he had been in in prison for sixty years due to the *Montgomery* holding but rejected the offer. Law & Simko-Bednarski, *supra* note 1.

20. *Miller*, 567 U.S. at 479; *Montgomery*, 577 U.S. at 208–11.

21. *Miller*, 567 U.S. at 479–80.

22. Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2021). For reference, the Court uses the term "irreparable corruption" and "permanent incorrigibility" interchangeably. *See id.*

23. *See infra* Part I.B.3.

24. *Jones*, 141 S. Ct. at 1316.

25. *Id.*

26. *Infra* Part I.B.2.

27. *Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR. (2020), https://jlc.org/issues/juvenile-life-without-parole [https://perma.cc/47B7-54U6]; Brandon L. Garrett, *Life Without Parole for Kids Is Cruelty with No Benefit*, ATLANTIC (Oct. 19, 2020), https://www.theatlantic.com/ideas/archive/2020/10/life-without-parole-kids-cruelty-no-benefit/616757 [https://perma.cc/AR5P-U55X]. *See generally* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 541 (2017).

28. *See infra* Part I.B.2.

juvenile LWOP conversation. Ligon is just one example of how Black juvenile offenders are more often sentenced to juvenile LWOP compared to white juvenile offenders. When a law is racially discriminatory, it violates the Equal Protection Clause under the Fourteenth Amendment.[29] To analyze whether a law violates the Equal Protection Clause, it must be shown that a law is intentionally discriminatory—either facially or due to disparate impact on a certain group—and that law will be scrutinized under a specific standard of review.[30] Because juvenile LWOP statutes are not facially discriminatory (they do not explicitly mention race), juvenile LWOP falls under a disparate impact argument under the Equal Protection Clause because juvenile LWOP disproportionately impacts Black youth.[31] Strict scrutiny is the standard of review that applies when a law has a discriminatory impact on a racial demographic, meaning the law can only be upheld if it is supported by a compelling governmental interest and the law is narrowly tailored to that purpose.[32]

This Note argues that juvenile LWOP sentences violate the Equal Protection Clause under a disparate impact claim. First, this sentence is unfairly imposed on Black juvenile offenders.[33] It is less common for a Black offender's youthful qualities to outweigh other aggravating factors, and, when applied, the irreparable corruption standard is more often imposed on Black offenders. Second, juvenile LWOP serves no compelling governmental interest because it is based on imprecise and incomplete neuropsychology research.[34] Therefore, there is no justification for juvenile LWOP's discriminatory effects on Black youth. And while the Equal Protection disparate impact argument rarely prevails in the judicial system,[35] the strength of this constitutional argument should incentivize state legislators to categorically abolish juvenile LWOP on a state-by-state basis.

Under the first prong, there are significant racial disparities in juvenile LWOP sentencing. Studies show that the vast majority of youth who receive juvenile LWOP sentences are of color.[36] In 2012, 60% of

29. *See infra* Part II.B.3.

30. *See infra* Part II.B.

31. *See infra* Part II.B.3.

32. *See infra* Part II.B.2.

33. *See infra* Part II.A.

34. *See infra* Part II.C.

35. *See infra* Part II.C.2.

36. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT 4 (May 2021), https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf [https://perma.cc/YHT4-GG6X] (stating that white

juveniles sentenced to LWOP were Black.[37] Additionally, the imprecise definition of "irreparable corruption" leaves the states to determine on an individual basis how the irreparable corruption standard applies.[38] This application leaves more room for implicit biases and stereotyping to dictate who receives juvenile LWOP.[39] Punishments which discriminate on the basis of race are unconstitutional under the Equal Protection Clause.[40] Racially discriminatory laws—both facially discriminatory and those with a disparate impact—are subject to strict scrutiny review, meaning that the discriminatory law may only be upheld if it serves a compelling governmental interest.[41] This Note argues that the statistics regarding juvenile LWOP discrimination are so widespread and egregious that they reflect an intent to discriminate by the state and reveal disparate impacts on a certain racial group, which flag a serious equal protection violation.[42]

Under the second prong, new research on child brain development demonstrates that juvenile LWOP does not serve a compelling governmental interest. First, studies in adolescent neurodevelopment support the fact that juveniles are inherently less culpable for their actions and mistakes due to the lack of brain maturity.[43] Courts are already aware of this research. In *Miller*, the Supreme Court held that youth have a diminished culpability due to their youthful qualities and, therefore, courts must take mitigating factors into account when juveniles are facing LWOP, rather than automatically applying the sentence.[44] The Court in particular noted juveniles' tendencies to accede

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youths are half as likely to receive juvenile LWOP sentences as compared to Black homicide juvenile offenders).

37. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENT'G PROJECT 8 (Mar. 2012), http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf [https://perma.cc/7N8G-2PN9].

38. *See infra* Part I.B.3.

39. *See* Robert S. Chang, David A. Perez, Luke M. Rona & Christopher M. Schafbuch, *Evading* Miller, 39 SEATTLE U. L. REV. 85, 105 (2015) (stating that Black juvenile homicide offenders are more likely to be sentenced to LWOP than white juvenile offenders); Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 183–85 (2017); Amanda Huston, *Jurisprudence vs. Judicial Practice: Diminishing* Miller *in the Struggle over Juvenile Sentencing*, 92 DENV. U. L. REV. 561, 609 (2015).

40. *See* U.S. CONST. amend. XIV.

41. *See infra* Part II.B.

42. *See infra* Part II.A.

43. *See infra* Part II.C.

44. Miller v. Alabama, 567 U.S. 460, 479, 489 (2012).

to peer pressure, have difficulty with impulse control, and lack maturity[45]—the fundamental factors first referenced in *Roper*.[46]

Despite these case holdings, the Court has not considered all elements of juvenile development. Evolving research also shows that one of the primary factors in neurodevelopmental maturity is the presence of trauma.[47] And not only do juvenile's youthful qualities minimize culpability, but patterns in brain development as a person ages also indicate that change in behavior is far more likely than what was previously believed.[48] While the Court mentioned mitigating factors in *Miller*, it did not take into account the environmental factors experienced by a number of the youth who are sentenced to LWOP.[49] Courts today have yet to consider evolving research regarding the age of full brain development and the impact of trauma on the brain.[50]

This Note primarily considers the implications of the *Miller* youth factors, the severe impact LWOP sentencing has on Black youth, and proposes that juvenile LWOP should be abolished for violating Equal Protection rights. Part I will discuss the history of LWOP punishment for children, the increasing limits on those punishments due to Eighth Amendment violations, and recent developments in psychology research that illustrate why juvenile LWOP sentences do not serve a compelling governmental interest. This Part will also discuss juvenile LWOP's inconsistent application due to the arbitrary use of the "irreparable corruption" standard. Part II will describe how juvenile LWOP disparately impacts Black youth, the relevancy of the Equal Protection Clause, and how juvenile LWOP is subject to strict scrutiny review because it falls under a disparate impact claim. Part III will argue that the only viable option is for juvenile LWOP to be categorically abolished because it violates the Equal Protection Clause under a strict scrutiny analysis. This Part will argue, among other things, that juvenile LWOP does not withstand strict scrutiny due to new developments in brain science and statistics demonstrating the disparate impact on Black juveniles. Due to the recent Supreme Court decision in *Jones v. Mississippi*, this Note concludes that the Equal Protection analysis provides a strong constitutional pillar for the Legislature to act with urgency and abolish juvenile LWOP.

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45. *Id.* at 471.
46. Roper v. Simmons, 543 U.S. 551, 569–72 (2005).
47. *See infra* Part I.C.1.
48. *See infra* Part I.C.1.
49. *See infra* Part I.C.1.
50. *See infra* Part I.C.

I. THE HISTORY, LIMITATIONS, AND IMPOSITION OF JUVENILE LIFE WITHOUT PAROLE DEMONSTRATE THAT IT DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST AND THUS SUPPORT AN EQUAL PROTECTION ARGUMENT FOR ABOLISHMENT

Extreme sentencing for juveniles did not appear out of thin air. Over the past few decades, the rate of harsh juvenile sentencing has reflected the rhetoric of politics and trends in psychology research.[51] Scientific theories that were relevant at the peak of sentencing juveniles to LWOP has changed substantially today. Today's research provides new insights into adolescent neurodevelopment and underscores the potential for rehabilitation.[52] Current research also reveals that even beyond the normative immaturity of adolescence, exposure to trauma and environmental factors affect brain development by altering brain connectivity.[53] This means that children exposed to trauma have more difficulty controlling their behavior compared to other adolescents who have not been exposed. However, the plasticity of the juvenile brain and the fact that cognitive development extends well into a person's twenties indicates that reckless juvenile behavior is far from permanent.[54] Any standard that tries to impose juvenile LWOP without taking account all of the relevant factors of juvenile maturity is grossly insufficient and does not serve a compelling governmental interest.

This Part outlines the evolution of juvenile LWOP sentencing and the surrounding psychology research regarding adolescent brain development. Section A describes the history of juvenile LWOP sentencing in the United States. Section B discusses the Supreme Court's application of juvenile LWOP and the "irreparable corruption" standard. Section C analyzes gaps in neuropsychology research and how compounding factors on brain development such as trauma and age should be considered by courts to determine culpability. Overall, current psychology research no longer supports legislative policies that impose juvenile LWOP to protect the public from offenders who are deemed permanently incapable of rehabilitation. As such, this re-

51. *Compare infra* Parts I.A, I.B.2, *with* Rovner, *supra* note 36 ("The Sentencing Project, in its national survey of life and virtual life sentences in the United States found 1,465 people serving JLWOP sentences at the start of 2020. This number reflects a 38% drop in the population of people serving JLWOP since our 2016 count . . . . [Post-*Montgomery*], few youth will be sentenced to life without the possibility of parole.").

52. *Infra* Part I.C.

53. *Infra* Part I.C.1.

54. *Infra* Part I.C.2.

search indicates that juvenile LWOP sentencing does not serve a compelling governmental interest and thus supports an equal protection argument for abolishment.

A. HISTORY OF JUVENILE LIFE WITHOUT PAROLE SENTENCING

In the 1990s, prosecutors and lawmakers used juvenile LWOP sentencing to crack down on teenagers who society feared lacked a moral compass.[55] Since its conception, the rules surrounding juvenile LWOP sentencing have evolved based on policy, developments in neuropsychological research, and most recently, the application of the Eighth Amendment.[56] While juvenile LWOP has become increasingly limited in recent years due to these factors, Supreme Court cases have failed to clearly identify the parameters within which courts may impose juvenile LWOP.[57] The vague constraints promulgated by the Supreme Court have allowed the states to impose the sentence inconsistently[58] and have called into question the legitimacy of the sentence as a form of punishment.[59]

Juvenile LWOP as a sentence became common during an era of tough on crime legislation. Punitive sentences for teenagers increased in the 1990s as a response to an uptick in homicide crimes committed by juveniles in the 1980s.[60] As a result, media coverage of juvenile of-

55. Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 L. & INEQ. 535, 537 (2013). The source of this fear was due to a real increase in homicide crimes committed by juvenile offenders. *Id.* But the amount of media attention exaggerated the gravity of the threat and fed the theory that the juvenile justice system was ineffective. *Id.* at 537–38. This caused legislators to impose much harsher policies, deciding that children and adults should be treated similarly in the criminal justice system to promote effective deterrence. *See id.* As a result, many states reformed their sentencing policies to make it easier for juveniles to be sentenced as adults. *Id.* at 537.

56. *See infra* Part I.B.2.

57. *See infra* Part I.B.3.

58. *See infra* Part I.B.3.

59. *See infra* Part I.B.4.

60. Scott, *supra* note 55, at 537; *see, e.g.*, Hillary Clinton, First Lady, Address at New Hampshire's Keene State College in Support of the 1994 Violent Crime Control Act (1996). To see a video clip of Hillary Clinton's speech regarding super-predators, see C-SPAN, *1996: Hillary Clinton on "Superpredators" (C-SPAN)*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=j0uCrA7ePno (last visited Apr. 20, 2022). Research has also indicated that the initial surge in juvenile crime was partially due to the increased availability of firearms, which led to heightened gang activity. *E.g.*, *Juvenile Crime—Outlook for California Part II*, LEGIS. ANALYST'S OFF. (May 1995), https://lao.ca.gov/1995/050195_juv_crime/kkpart2.aspx [https://perma.cc/V28K-PTJD].

fenses increased significantly and criminologists predicted a continued rise in crime by juveniles.[61] While these predictions did not come to pass,[62] criminologist John Dilulio nonetheless coined the term "super-predator" to describe adolescents that lacked a moral compass, had gang affiliation, and killed innocent bystanders.[63] Dilulio defined super-predators as "kids who have no respect for human life and no sense of the future . . . [who] kill or maim on impulse, without any intelligible motive."[64]

Coverage of the super-predator was often associated with racial minorities.[65] The popularization of the super-predator character in the media and political arenas became so widespread that it amounted to a "moral panic," meaning the societal response to the perceived threat grew out of proportion to the true threat.[66] While the predicted increase in juvenile crime did not occur,[67] the perception of juvenile offenders as "super-predators" has had long-lasting impacts on legislation and juveniles sentences. One such example is juvenile LWOP, a sentence that holds children in prison for life without the chance of release. Today, over 2,500 juveniles have been sentenced to LWOP in the United States.[68]

B. HOW EMERGING NEUROSCIENCE AND THE "IRREPARABLE CORRUPTION" STANDARD IMPACTED STATE TREATMENT OF JUVENILE LWOP

Psychology research caused a reduction in the use of harsh juvenile sentencing schemes. When the *Miller* Court banned mandatory life without parole sentences, it based its decision on the concept that children's characters are "less fixed" than adults and are therefore more prone to rehabilitation.[69] This conclusion contrasts substantially with the mindset surrounding juvenile LWOP sentencing during

61. Scott, *supra* note 55, at 538.

62. *Id.* at 540 (stating that surveys showed the public believed that most crime was committed by juveniles, when in reality only 13% of crime was committed by juveniles).

63. *Id.* at 539.

64. Zachary Crawford-Pechukas, *Sentence for the Damned: Using* Atkins *to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole*, 75 WASH. & LEE L. REV. 2147, 2162–63 (2018) (citation omitted).

65. Scott, *supra* note 55, at 539.

66. *Id.* at 538.

67. *Id.* at 540.

68. *Juvenile Life Without Parole*, ACLU, https://www.aclu.org/issues/juvenile-justice/youth-incarceration/juvenile-life-without-parole [https://perma.cc/N4HE-SEXL].

69. Miller v. Alabama, 567 U.S. 460, 471, 480 (2012).

the moral panic of the 1990s,[70] which argued for tougher sentences on juveniles under the rhetoric of "adult time for adult crimes."[71] Over time, psychologists, psychiatrists, and mental health experts urged the *Roper* Court to consider adolescent brain development in criminal sentencing.[72] Their efforts convinced the *Miller* Court to consider youthful qualities in juvenile LWOP sentencing.[73] The following sections describe the neuropsychology research used to support *Miller*, the Supreme Court's methods of controlling juvenile sentencing, and local state application of juvenile LWOP.

1. Adolescent Brain Development Research in Support of *Miller v. Alabama*

The *Miller* decision considered psychology research finding that juveniles' cognitive, emotional, and psychosocial maturity are still developing during adolescence and, therefore, that juveniles are less responsible for their actions.[74] The prefrontal cortex, otherwise known as the decision-making part of the brain, still develops well into a person's mid-twenties.[75] This means that the part of the brain that controls high order executive functioning, such as behavioral control, impulse control, avoidance of risk, and planning, does not work at full capacity during adolescence.[76] It is for these reasons that children are more prone to acting impulsively or taking on risk without considering the consequences.[77] Because these qualities are considered "transient" and will change once the brain is fully developed, the Supreme Court determined that children are in most cases less culpable for criminal acts than adults.[78]

In the same vein, due to the brain growth experienced during childhood, a juvenile offender's conduct is not predictive of criminal behavior in adulthood.[79] When a child's brain is developing it is prone to plasticity, meaning the child has a capacity to change based on their

70. *See supra* Part I.A.

71. Crawford-Pechukas, *supra* note 64, at 2164.

72. *Id.* at 2168–69.

73. *Id.*

74. *Id.* at 2167; *Miller*, 567 U.S. at 471, 480.

75. Crawford-Pechukas, *supra* note 64, at 2168.

76. Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 210 (2017).

77. Crawford-Pechukas, *supra* note 64, at 2167.

78. Weithorn, *supra* note 76, at 210.

79. Crawford-Pechukas, *supra* note 64, at 2168.

experiences.[80] Brain plasticity indicates that juveniles are more capable of positive development and learning from their previous mistakes than adults.[81] This notion was discussed in the Seventh Circuit decision preceding the *Miller* holding, which denounced the need for a juvenile life imprisonment sentence.[82] Judge Posner stated that imposing a life sentence for a juvenile bank robber was unnecessary because research shows that criminal behavior lessens with age.[83] Judge Posner affirmed that the odds of reoffending at an older age were too speculative to warrant a life sentence.[84] As such, a thirty-year punishment would be an effective form of deterrence.[85]

Juvenile brain development research illustrates why courts have found children to be different from adults in the context of criminal punishment.[86] Rapid brain development not only causes children to have less control over their actions,[87] but also indicates that criminal juvenile behavior is less predictive of criminal behavior in adulthood.[88] Therefore, shorter sentences would still effectively deter criminal conduct overall. This research provides reason for courts to limit extreme criminal sentences for juveniles and, instead, provide opportunities for rehabilitation.

2. The Supreme Court's Intervention and Establishment of the "Irreparable Corruption" Standard

In recent years, the justice system has limited the severity of juvenile sentencing. For instance, *Miller v. Alabama* held mandatory LWOP for juvenile homicide offenders unconstitutional for violating the Eighth Amendment.[89] Mandatory juvenile LWOP means that a juvenile under the age of eighteen is required to receive a life imprisonment sentence without possibility of release based on their specific

80. Weithorn, *supra* note 76, at 220.

81. *Id.* at 222.

82. United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J., concurring).

83. *Id.*

84. *Id.*

85. *Id.* (noting that it is unlikely Jackson would commit another bank robbery if he were released thirty years from now, and therefore a life sentence would be too long).

86. *See supra* note 69 and accompanying text.

87. Weithorn, *supra* note 76.

88. Crawford-Pechukas, *supra* note 64, at 2168.

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

offense.[90] The Court deemed mandatory juvenile LWOP sentencing cruel and unusual punishment under the Eighth Amendment because the sentence was not proportional to the crime and offender.[91] However, the option for sentencing juveniles to LWOP remained open so long as the courts first considered an offender's youthful qualities.[92] To determine culpability and whether juvenile LWOP sentencing is applicable, judges must take into account mitigating factors such as immaturity, compliance with authority, impulse control, and brain development.[93] As a caveat, the Court expressly declared that in general, juvenile LWOP sentencing should be uncommon.[94] If none of the mitigating factors proved substantial, courts could consider the LWOP sentence if the juvenile presented "irreparable corruption."[95]

The Court, however, failed to clearly define "irreparable corruption" or how to apply it. The Court only offered synonyms for the term, such as "incorrigibility,"[96] and did not provide clear guidance for how to measure it.[97] While there is no clear definition of irreparable corruption in *Miller*, the Court cited *Roper v. Simmons*[98] when referencing the term.[99] When considering the death penalty, the *Roper* Court described the possibility of juvenile offenders who lacked youthful qualities and had sufficient psychological depravity to merit full culpability.[100] The Court's references to diagnosis of antisocial disorder imply that "irreparable corruption" included juveniles who were beyond rehabilitation due to severe psychological disorders and lacked empathy to a point where youthful qualities could in no way mitigate the behavior.[101] While the *Roper* Court held that the risk of imposing the death penalty on a youth with "transient immaturity" was too great

90. *Juvenile Life Without Parole*, RESTORE JUST., https://restorejustice.org/issues-solutions/juvenile-life-without-parole [https://perma.cc/J3PT-UVXB].

91. *Miller*, 567 U.S. at 469.

92. *Id.* at 480.

93. *See id.* at 472, 476.

94. *Id.* at 479.

95. *Id.* at 479–80.

96. Montgomery v. Louisiana, 577 U.S. 190, 209 (2016); Crawford-Pechukas, *supra* note 64, at 2179.

97. Crawford-Pechukas, *supra* note 64, at 2179, 2180 n.232.

98. Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for juvenile offenders under the age of eighteen violates the Eighth Amendment and is therefore categorically abolished).

99. *Miller*, 567 U.S. at 479–80.

100. *Roper*, 543 U.S. at 572–73.

101. *See id.* at 573.

with such a severe sentence,[102] the *Miller* Court found juvenile LWOP to be less severe and left open the possibility for judges to decide whether a juvenile was irreparably corrupt and should face life imprisonment.[103]

In 2016, the Supreme Court extended *Miller*'s application in *Montgomery v. Louisiana.* The Court held that *Miller*'s limitation on mandatory LWOP sentencing applied retroactively to juvenile offenders who received LWOP sentences before *Miller* was determined.[104] This decision indicated that *Miller*'s rule was a substantive constitutional rule of law, which includes laws that prohibit a certain category of punishment for offenders based on that person's status.[105] *Miller's* rule is substantive because it determined that a category of punishment—mandatory LWOP—is unconstitutional for juvenile offenders because of their youthful qualities.[106] Substantive constitutional rules have retroactive effect because otherwise there is risk that the defendant "faces a punishment that the law cannot impose upon him."[107] Therefore, any mandatory LWOP sentences imposed on a juvenile before *Miller*'s holding must be reconsidered. However, the Court noted that the states are not required to relitigate all mandatory juvenile LWOP sentences, but instead may consider each offender's parole eligibility.[108] This conclusion upholds the purpose of *Miller*: to treat children differently than adults under the law.

3. *Miller v. Alabama*'s Capricious Application

While the Supreme Court has imposed limits on juvenile punishment in some respects, the courts still have a great deal of discretion in determining how to apply *Miller*. One potential reason for this is because there is no clear rule for how to apply *Miller*, aside from the fact that it can be applied retroactively according to *Montgomery*.[109] The discrepancies in *Miller*'s application appear in two prongs: capricious application of a vague standard and evasion of *Miller*'s purpose to treat juvenile offenders differently.

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102. *Id.* at 573–74.
103. *See Miller*, 567 U.S. at 480.
104. Montgomery v. Louisiana, 577 U.S. 190, 211 (2016).
105. *Id.* at 206.
106. *Id.* at 212.
107. *Id.* (citation omitted); *id.* at 209.
108. *Id.* at 212–13.
109. Hoesterey, *supra* note 39, at 154.

Under the first prong, the ways in which the states sentence children to LWOP vary considerably due to undefined elements of the rule. For instance, finding youth "irreparably corrupt" as a standard to sentencing LWOP creates considerable issues. First, psychology experts have noted that the definition of "irreparable corruption" is nearly impossible to define.[110] Even the *Roper* Court mentioned this difficulty by stating that psychiatrists are forbidden to diagnose juveniles with antisocial personality disorder before the age of eighteen because it is so difficult to determine whether a crime is linked to "irreparable corruption" or "transient immaturity."[111] Second, states weigh the importance of this factor differently. Some state courts have determined that finding irreparable corruption is suggested, but not necessary, to sentence a juvenile to LWOP.[112] Others believe it is a requirement.[113] Additionally, some states hold there is a presumption against imposing juvenile LWOP since the Court stated such sentences should be "uncommon" while others have read *Miller* quite narrowly.[114] A few articles have briefly touched on racial bias as a factor in finding youth irreparably corrupt and should be considered as a reason to not apply LWOP sentencing.[115]

The Supreme Court has failed to provide more clarity on the definition and application of "irreparable corruption." In 2021, the Court held in *Jones v. Mississippi* that a separate factual finding of irreparable corruption is not required to impose a juvenile LWOP sentence.[116] However, the Court did confirm that *Miller* and *Montgomery* require consideration of youthful factors, akin to a mitigating circumstance.[117] So while weighing youthful factors is required across courts, reliance

110. *Id.*

111. Roper v. Simmons, 543 U.S. 551, 573 (2005). It was for this reason that the Court deemed it was too risky to put this determination into the hands of judges when imposing the death penalty for juvenile offenders. *Id.*

112. Hoesterey, *supra* note 39, at 163.

113. *Id.*

114. Supreme courts in Connecticut, Utah, Iowa, Missouri, and Indiana apply *Miller* with a presumption against juvenile LWOP sentencing because such sentences should be "uncommon" according to the Supreme Court's language. Hoesterey, *supra* note 39, at 165. Meanwhile, other state courts, such as Nebraska, have held that no presumption requirement was specifically imposed by the United States Supreme Court, so no presumption is required. *Id.*

115. *See, e.g.*, Robert S. Chang et al., *supra* note 39 ("It is hard to imagine what legitimate factors could explain such a statistically vast [racial] discrepancy. Although the causes of this trend are unclear, it is disturbing that the already disproportionate rate of incarcerated black people also includes children.").

116. Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2016).

117. *Id.* at 1311, 1315.

on the irreparable corruption standard is completely subject to court discretion.[118] This interpretation gives courts free rein to rely on stigmatizing racial information and incomplete psychology research to impose harsher sentences. In short, the irreparable corruption standard is vague, and causes confusion and inconsistent application of juvenile LWOP across states. *Jones v. Mississippi* compounded this issue by explicitly granting courts the choice to rely on this standard or reject it.

Under the second prong, some states have implemented processes that completely evade the purpose of *Miller*, such as transferring children to adult court, imposing de facto life without parole or aggregated sentences, and/or finding felony murder.[119] De facto life without parole and aggregated sentences allow the courts to impose LWOP on children twice for different offenses. Imposing such sentences means that once a child reaches parole eligibility for one offense, they start their sentence for the second offense immediately after.[120] In general, these loopholes avoid treating child offenders differently under the law and minimize any genuine possibility of rehabilitation for juveniles.

4. Legislative Movement Towards Categorically Abolishing Juvenile Life Without Parole

While some states grapple with imposing juvenile LWOP sentences fairly, twenty-five states and the District of Columbia have categorically abolished juvenile LWOP, and nine states that allow LWOP do not have any juveniles serving LWOP sentences.[121] Scholars have observed this pattern towards abolishment, noting that "an average of three states per year have abolished [LWOP] since 2013" and that this reflects society's "evolving standards of decency."[122] Additionally, scholars have called for categorical abolishment of juvenile LWOP for

118. *Id.* at 1322–23.

119. Huston, *supra* note 39.

120. *See* State v. Ragland, 836 N.W.2d 107, 119–21 (Iowa 2013) (discussing how an offender, due to consecutive sentencing, would not be eligible for parole until he was seventy-eight years old despite having a life expectancy of seventy-six years).

121. Rovner, *supra* note 36, at 3 (stating that twenty-five states have banned juvenile life without parole sentencing).

122. Moriearty, *supra* note 27.

reasons regarding inconsistent application[123] and racial bias in sentencing.[124] However, these arguments have not fallen directly under any specific constitutional protections, but rather argue that abolishment is favorable in order to avoid confusion across states, prevent unfair sentencing, and promote national consistency.[125]

It is evident that state legislators could abolish juvenile LWOP most efficiently. Policies categorically barring the sentence for juvenile offenders have already been enforced in over half of the states.[126] While not all states have abolished juvenile LWOP, a shared policy motive for abolishing juvenile LWOP would push the remaining states to act. It is for this reason that using a constitutional basis for abolishing juvenile LWOP would be most effective. A constitutional argument provides a universal justification for abolishing juvenile LWOP across states rather than allowing for disparate state legislative actions. With this method, different state legislators can rely on the same constitutional basis to reform policy more consistently across the United States.

C. NEUROPSYCHOLOGY RESEARCH THE SUPREME COURT FAILED TO ADDRESS

Psychology was the cornerstone for the groundbreaking court decisions regarding criminal punishment for juveniles.[127] As discussed above,[128] children's immaturity, inability to appreciate risks

123. *See* Hoesterey, *supra* note 39, at 185 (calling for a categorical ban to combat the speculative nature of the case-by-case approach to sentences); Elizabeth C. Kingston, *Validating* Montgomery*'s Recharacterization of* Miller*'s Hesitation: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23, 33–38 (2016).

124. *See* Huston, *supra* note 39; Hoesterey, *supra* note 39, at 184–85.

125. *See* Hoesterey, *supra* note 39, at 185–87 (indicating that banning juvenile LWOP is the only option because it is impossible to reliably identify irreparably corrupt offenders, and a state-by-state approach would lead to inconsistent results based on subjective judge opinions); Kingston, *supra* note 123, at 45–50, 52–57 (arguing that, rather than approaching each juvenile LWOP case individually, the sentence should be categorically abolished because not doing so causes inconsistencies with retroactivity jurisprudence and juvenile sentencing, and will avoid violations of Eighth and Sixth Amendment protections).

126. *See supra* note 121 and accompanying text.

127. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 472 (2012) (referring to children's "immaturity, recklessness and impetuosity" as factors that make them less likely to consider future punishment); Roper v. Simmons, 543 U.S. 551, 569 (2005) (noting that juveniles are constitutionally different from adults because they are more susceptible to peer pressure, lack maturity, and are more reckless and impulsive).

128. *Supra* Part I.B.1.

and consequences, and overall youthful qualities makes them "different" from adults in terms of culpability.[129] While these research findings remain true today, new studies have shed even more light on adolescent development and how it implicates their culpability in criminal behavior. It is therefore essential to look deeper into psychological studies regarding adolescent and young adult development to determine the effectiveness of juvenile LWOP sentencing and how juvenile offenders can best be held accountable in proportion to their actions.

1. Influence of Trauma on Brain Development

Juveniles in the criminal justice system have more traumatic experiences and more effects from the events compared to the general juvenile population.[130] A study in 2013 found that 90% of juveniles in the criminal justice system have experienced a traumatic event.[131] Recent research has uncovered that traumatic experiences, such as emotional abuse, physical abuse, sexual abuse, community violence, and domestic violence, impact adolescent brain development. Noting the impact of childhood trauma on the brain is essential because trauma increases the chance of children demonstrating high-risk behaviors during adolescence,[132] and children that endure one traumatic event are more likely to experience multiple traumatic experiences.[133] This research is reflected in the number of juveniles with LWOP sentences that suffered childhood trauma. The Sentencing Project has found that 47% of juveniles convicted of homicide offenses were physically abused, and 79% witnessed violence in their home regularly.[134]

Childhood trauma differs from adult traumatic experiences because the events impact the brain at a vulnerable point of growth and lead to more severe emotional, cognitive, and behavioral symptoms in the long-term.[135] When traumatic experiences occur while the brain is developing, they disrupt the normal developmental progression and

129. *Miller*, 567 U.S. at 470, 480; *Roper*, 543 U.S. at 569.

130. Gene Griffin & Sarah Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD.'S LEGAL RTS. J. 1, 13 (2014).

131. *Id.* at 10–11.

132. Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 213 (2018).

133. *Id.* at 213 n.51.

134. Rovner, *supra* note 36.

135. Gold, *supra* note 132.

the "brain['s] architecture."[136] This disruption occurs because the experiences impact the brain while it is in a vulnerable phase and thus makes the brain more malleable.[137] One such example is the impact on the amygdala, the part of the brain that triggers fight, flight, or freeze responses when faced with threatening situations.[138] When the amygdala senses a threat, it triggers the hypothalamus to release stress hormones.[139] Such responses are normal survival instincts, but excessive release of stress hormones (such as if a child is repeatedly exposed to traumatic events) can alter brain connectivity.[140] When a child is repeatedly exposed to high-stress situations, it can alter the brain's architecture and prevent other parts of the brain from controlling stress hormone levels.[141] The result is adolescents who either overreact to minimal threats or underreact to large threats.[142]

While trauma is an indicator of stunted emotional regulation, lack of impulse control, and difficulty in regulating behavior,[143] the flexibility of the growing brain also provides adolescents the strength to overcome their struggles over time. This concept is known as resilience.[144] If youth have access to positive influences in their lives such as adult mentors[145] and coping mechanisms,[146] then they are more likely to grow positively from their previous experiences.[147] Such research provides hope that reckless juvenile behavior, even when compounded with traumatic experiences, is not indicative of criminal behavior in adulthood.

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136. *Id.*

137. *Id.* at 214.

138. *Id.*

139. *Id.*

140. *Id.* at 214–15.

141. *Id.* at 215. The parts of the brain that work together to control stress hormone levels are the hippocampus and the prefrontal cortex. *Id.* The hippocampus stores long-term memory and the prefrontal cortex controls executive functioning such as impulse control, decision-making, short-term memory, and control of behavior. *Id.*

142. *Id.*; *see also* Griffin & Sallen, *supra* note 130, at 9.

143. *Id.*

144. Weithorn, *supra* note 76, at 216; *see also* Dante Cichetti & Jennifer A. Blender, *A Multiple-Levels-of-Analysis Perspective on Resilience: Implications for the Developing Brain, Neural Plasticity, and Preventative Interventions*, 1094 ANNALS N.Y. ACAD. SCIS. 248, 249 (2006) ("Resilience is a dynamic developmental process that has been operationalized as an individual's attainment of positive adaptation and competent functioning despite having experienced chronic stress or detrimental circumstances, or following exposure to prolonged or severe trauma.").

145. Weithorn, *supra* note 76, at 217.

146. Griffin & Sallen, *supra* note 130, at 20.

147. Weithorn, *supra* note 76, at 217.

The impacts of trauma and resiliency on juvenile behavior are significant. However, the justice system has yet to seriously consider trauma as an element in juvenile sentencing.[148] Although the *Miller* Court emphasized the effect of youthful qualities such as impulse control and risky behavior, it did not focus on trauma even though traumatic events exacerbate such qualities.[149] Courts must consider the prevalence of trauma in juvenile offender profiles.[150]

2. Emerging Adults Ages Eighteen to Twenty-Five and Rehabilitation

Another pressing issue in adolescent psychology is the age at which juveniles should be treated as adults. Research has found that the brain does not fully develop until the age of twenty-five, which conflicts with the legal age of adulthood of eighteen.[151] Young adults ages eighteen to twenty-five, otherwise known as "emerging adults,"[152] maintain brain plasticity which allows for greater chances of rehabilitation and overcoming trauma.[153] This brain plasticity indicates that, like adolescents, emerging adults exhibit similar behavior such as recklessness, risk taking, and influence by peers.[154] While emerging adults are more mature than adolescents in calmer situations, emerging adults tend to act similarly to adolescents in "emotionally arousing" circumstances.[155] This implies that until a person's mid-twenties, culpability is diminished for similar reasons as for adolescents.

These findings bring into question the validity of sentencing emerging adults over the age of eighteen to adult criminal sentences.

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148. Griffin & Sallen, *supra* note 130, at 14.

149. *Id.*

150. *See, e.g.*, Rovner, *supra* note 36, and accompanying text; Griffin & Sallen, *supra* note 130, at 14 (noting that research has found trauma increases a juvenile's chance of offending).

151. Karen U. Lindell & Katrina L. Goodjoint, *Rethinking Justice for Emerging Adults*, JUV. L. CTR. 8 (2020), https://jlc.org/sites/default/files/attachments/2020-09/JLC-Emerging-Adults-9-2.pdf [https://perma.cc/B9UC-K9H5]. *See generally* Tirza A. Mullin, *Eighteen Is Not a Magic Number: Why the Eighth Amendment Requires Protection for Youth Aged Eighteen to Twenty-Five*, 53 U. MICH. J. L. REFORM 807 (2020) (arguing punishment of eighteen-to-twenty-five-year-olds is cruel and unusual because of their diminished capacity).

152. Jeffrey Jensen Arnett, *Emerging Adults*, 55 AM. PSYCH. 469, 469 (2000).

153. Lindell & Goodjoint, *supra* note 151.

154. *Id.* at 4–5.

155. *Id.*

Previous cases have justified the age of eighteen for labeling adulthood mainly because it is consistent with societal expectations.[156] However, emerging adults are similar to adolescents in that their brains are similarly malleable, making them more receptive to rehabilitation.[157] These patterns in brain development align with the "age-crime" curve, which indicates that criminal behavior peaks in adolescence and tapers in a person's mid-twenties.[158] It is for these reasons that academic journals have called into question the legitimacy of charging eighteen-year-old offenders as adults.[159]

Emerging adult research suggests that a court should consider mitigating youthful factors beyond the age of eighteen. Not only does this research bring into question the age of adulthood in the criminal justice system,[160] but it finds that the imposition of severe sentences on juveniles under the age of eighteen is even more unjustified considering their developmental state. While the legal system has yet to change the legal age of adulthood,[161] a new perspective can be provided for the juveniles sentenced to LWOP that are under the age of eighteen and far from entering the stage of fully evolved cognitive functioning.

Overall, this modern research stipulates that juvenile LWOP and vague characteristics such as "irreparable corruption" are outdated, do not accurately represent traits of juvenile offenders, and therefore do not serve the intended purpose of *Miller*: to treat children differently in the criminal justice system. And for sentencing to be justly imposed, both age and race must be considered. The reality is that Black

156. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005); Transcript of Oral Argument at 10, Miller v. Alabama, 567 U.S. 460, 472 (2012) (No. 10-9646) ("I would draw it at eighteen . . . because we've done that previously; we've done that consistently.").

157. Mullin, *supra* note 151, at 814.

158. Lindell & Goodjoint, *supra* note 151, at 5; Mullin, *supra* note 151, at 815.

159. *See* Mullin, *supra* note 151, at 814 (arguing that the age for charging offenders as adults should be raised from eighteen to twenty-five because emerging adults are more similar to juvenile offenders in terms of culpability).

160. *See* Mullin, *supra* note 151.

161. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [perma.cc/CP64-QCDH] (noting that Vermont is the only state that has expanded juvenile court to eighteen-year-old offenders).

offenders are more often incarcerated and subjected to harsher punishment in comparison to white offenders.[162] Juvenile LWOP is no exception. The discussion of juvenile LWOP and its racial implications will be discussed in turn.

II. JUVENILE LWOP DISPROPORTIONATELY AFFECTS BLACK JUVENILES AND THEREFORE REQUIRES AN EQUAL PROTECTION ANALYSIS

The second major issue with juvenile LWOP sentencing is that Black juveniles are more often sentenced to juvenile LWOP due to racial biases.[163] These findings are indicative of equal protection violations. An equal protection claim must first be discussed in the judicial context in order to understand the constitutional argument that would induce legislative bodies to abolish juvenile LWOP.

In the courtroom, applying the Equal Protection Clause to juvenile LWOP turns on two key issues: (1) determining whether there is proof of racial discrimination and (2) deciding which standard of review applies.[164] Section A will discuss the juvenile LWOP sentencing disparities and how Black youth more often receive LWOP sentences. Section B will explain the history of the Equal Protection Clause and how to apply the clause to juvenile LWOP under a disparate impact analysis. Section C will justify why a strict scrutiny analysis applies to juvenile LWOP as a disparate impact claim. In particular, this Section will discuss the element of discriminatory purpose in a disparate impact claim and compare the impact-alone test with separate discriminatory intent.

A. RACIAL DISPARITIES IN JUVENILE LWOP SENTENCING

A major concern is that Black youth are disproportionately sentenced to juvenile LWOP—and, in relevant cases, are identified as ir-

162. Bruce Western & Jessica Simes, *Criminal Justice*, PATHWAYS, Special Issue 2019, at 18, 20 ("Not only are black men locked up at high rates, but their experience of incarceration is unusually harsh, and solitary confinement is common."); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT 6 (Oct. 2021), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/6XJM-DXWJ] ("Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans.").

163. *Infra* Part II.A.

164. *See infra* Part II.B.2.

reparably corrupt—compared to white youth at an irrefutable degree.[165] Academic scholarship has explored the disparate impact of juvenile LWOP on youth of color throughout the years.[166] The level of disparate impact on Black youth is illustrated by (1) sentencing demographics and (2) surveys on implicit bias. These findings on racial discrimination indicate that juvenile LWOP should be subject to an equal protection analysis under the Fourteenth Amendment.

First, the juvenile LWOP sentencing demographics reveal that the sentence is disproportionately imposed on Black youth. A 2012 study revealed that 60% of juveniles sentenced to LWOP were Black.[167] This is especially significant when considering that Black youth represent only 14% of the entire United States juvenile population.[168] In 2015, Black defendants across the nation were twice as likely to receive juvenile LWOP sentences as white defendants for the same crime.[169] Studies have also found that Black youth are over four times more likely to be incarcerated compared to white youth.[170] This issue has been proven to be prevalent in forty-five states,[171] meaning that across the country judges and prosecutors are imposing harsher sentences on Black youth compared to white youth.

Second, qualitative research has indicated that implicit biases in the justice system play a significant role in racial sentencing disparities.[172] For instance, many Americans, including those in the justice system such as judges and probation officers, have subconsciously linked the super-predator myth regarding violence, gang association, and crime with Black youth.[173] Despite the fact that psychologists have

165. *See* Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1063–65 (2013) (showing that Black children are sentenced to juvenile LWOP at a much higher rate than white children); Rovner, *supra* note 36 ("While 23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of JLWOP sentences are for an African American convicted of this crime.").

166. *See, e.g.*, Sterling, *supra* note 165; Hoesterey, *supra* note 39, at 183.

167. Hoesterey, *supra* note 39, at 184; Nellis, *supra* note 37.

168. *Child Population by Race in the United States*, KIDS COUNT DATA CTR. (Sept. 2021), https://datacenter.kidscount.org/data/tables/103-child-population-by-race [https://perma.cc/G6C6-9MQW].

169. David Roper, *Lifers After* Montgomery*: More Scotus Guidance Is Necessary to Protect the Eighth Amendment Rights of Juveniles*, 79 OHIO ST. L.J. 991, 1013, 1013 n.152 (2018).

170. Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. DAVIS J. JUV. L. & POL'Y 169, 175 n.7 (2017).

171. *Id.* at 176.

172. Hoesterey, *supra* note 39, at 184.

173. Sterling, *supra* note 165, at 1065.

suggested that assigning an adolescent the label of "irreparably corrupt" is nearly impossible,[174] judges still impose LWOP sentences to more Black youth in comparison to white youth.[175] Relevant studies illustrate this point. One study provided participants with a fact pattern about a juvenile offender, but one group was told the offender was white and the other was told the offender was Black.[176] The study found that participants who believed the offender was Black were in greater favor of imposing life without parole sentences in comparison to the other group, regardless of political affiliation.[177] This group also believed that the offender was more blameworthy (and therefore had adult culpability) than the group who believed the offender was white.[178]

Judges are not immune to such biases.[179] Implicit racial biases are particularly relevant in juvenile LWOP sentencing because judges are supposed to consider youthful qualities as mitigating factors. Such studies indicate that Black children are in fact not perceived as having diminished culpability under *Miller*.[180]

Many judges subconsciously impose harsher sentences on Black youth for a few reasons. One is that the media has proposed tough-on-crime practices that are often racialized and negatively portray Black offenders.[181] While some may argue that Black juveniles are more likely to commit crimes, this does not hold true statistically. Research has shown that Black youth are actually less likely to commit major

174. Kallee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130, 163–64 (2017).

175. A 2012 study indicated that 60% of juveniles sentenced to LWOP were Black. This is especially significant considering that Black youth represent only 13% of the United States population. Nellis, *supra* note 39; *see also* Darling-Hammond, *supra* note 170.

176. Claire Chiamulera, *Race Affects Perceptions About Sentencing and Culpability of Juvenile Offenders*, 31 CHILD L. PRAC. TODAY 125 (Sept. 2012). This study was composed of 735 white Americans and took place at Stanford University. *Id.* The participants had a mean age of 50.5 years old, with 347 males and 388 females participating. *Id.* The goal was to measure whether white Americans specifically would weigh juvenile status equally for white and Black juvenile offenders. *Id.* After reading a fact scenario, participants were asked to rate on a scale their feelings about the white and Black offender in the fact pattern. *Id.* The scale went from zero (very cold or unfavorable) to 100 (very warm or favorable) and measured political party affiliation. *Id.* Political views did not strongly affect the view of the participants. *Id.*

177. *Id.*

178. *Id.*

179. Darling-Hammond, *supra* note 170, at 179.

180. *See supra* note 165.

181. Darling-Hammond, *supra* note 170, at 175.

crimes in comparison to their white counterparts.[182] Additionally, judges have an issue with conflating Black juvenile offenders with Black adults.[183] Not only are Black juveniles more likely be sentenced to the harshest punishments (such as LWOP),[184] but Black adult offenders are also treated harsher under the law as well.[185] Research has found that Black men who commit identical federal offenses to white men receive sentences that are on average twenty percent longer.[186]

Together, these findings suggest that race is a significant factor when imposing juvenile LWOP. With statistics that flag racial disparities and bias in sentencing, it begs the question whether there is unequal treatment in the imposition of juvenile LWOP that can be deemed unconstitutional. An equal protection analysis is required when a law is unfairly imposed based on race. As a scholarly article so candidly stated, "Black children are black first, children second."[187]

B. EQUAL PROTECTION VIOLATIONS: AN OVERVIEW

Courts have applied the Equal Protection Clause in a variety of monumental civil rights cases to improve the living conditions of United States citizens.[188] Founded on the desire to abolish slavery and provide equal treatment to all persons under the law,[189] courts have used the Clause to invalidate policies that discriminate against certain groups of people in order to keep up with evolving societal standards. Based on the substantial racial divides in juvenile LWOP sentencing,[190] the Equal Protection Clause should protect the rights of juvenile offenders facing LWOP sentences. When applying the Equal Protection Clause, two fundamental factors must be determined: (1) the type of standard of review to use when analyzing the discriminatory law,

182. *Id.*

183. *See id.* at 183.

184. Hoesterey, *supra* note 39, at 184; Nellis, *supra* note 37.

185. *Demographic Differences in Sentencing*, U.S. SENT'G COMMISSION 2 (Nov. 14, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/VYS9-L2ME] (stating that Black male offenders receive harsher sentences than similar white male offenders, averaging at a 19.1% longer sentence).

186. *Id.*; *see also* Weekend Edition Saturday, *Research Finds Racial Disparities in Prison Sentences*, NPR (Nov. 25, 2017), https://www.npr.org/2017/11/25/566438860/research-finds-racial-disparities-in-prison-sentences [https://perma.cc/BZ5F-UWHD] (discussing the research).

187. Sterling, *supra* note 165, at 1068.

188. *Infra* Part II.B.1.

189. *Infra* Part II.B.1.

190. *Supra* Part II.A.

and (2) whether there is discrimination against a protected class.[191] Each factor will be discussed in turn, following the historical context of the Equal Protection Clause.

1. Equal Protection Clause History

The Fourteenth Amendment, which contains the Equal Protection Clause, was ratified in 1868[192] during the Reconstruction Era.[193] The purpose of this amendment was to abolish slavery by granting citizenship and equal rights to Black Americans.[194] The text of the Equal Protection Clause states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[195] At its core, Congress intended the Equal Protection Clause to prevent government entities from discriminating against Black Americans and remedy any injustices that occurred during slavery.[196] This is true not only because of the actual text of the Equal Protection Clause, but also because Section One of the Fourteenth Amendment gives Congress the power to enforce the amendment by passing laws to prevent states from infringing on these individual rights.[197]

The Equal Protection Clause has since been a large marker of social progress and the evolution of United States political values. The Clause was the cornerstone of many groundbreaking civil rights deci-

191. *Supra* Part II.A.

192. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/14thAmendment.htm [https://perma.cc/VV75-6NSD].

193. The Reconstruction Era of the United States occurred from 1865–1877 after the Civil War, which involved reestablishing the Confederate States as part of the United States and integrating recently freed slaves. For more information on the different phases of the Reconstruction Era, see History.com Editors, *Reconstruction*, HISTORY, https://www.history.com/topics/american-civil-war/reconstruction [https://perma.cc/9PTJ-GAPY].

194. History.com Editors, *14th Amendment*, HISTORY, https://www.history.com/topics/black-history/fourteenth-amendment [https://perma.cc/UP49-B5VJ].

195. U.S. CONST. amend. XIV, § 1.

196. History.com Editors, *supra* note 194; Michael A. Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine*, 17 WM. & MARY BILL RTS. J. 607, 613 (2009) ("[T]he Supreme Court articulated what it took to be the general purpose of the Equal Protection Clause: 'The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.'" (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872))).

197. History.com Editors, *supra* note 194.

sions, such as the desegregation of schools in *Brown v. Board of Education* in 1954.[198] Since then, the Court has used the Equal Protection Clause in a variety of cases to strike down laws that discriminate against protected classes of people.[199]

2. Applying the Equal Protection Clause Using Scrutiny Standards

The Equal Protection Clause can be applied to strike down unconstitutionally discriminatory laws. When analyzing a discriminatory statute under the Equal Protection Clause, the court must first use a certain standard of review which will determine whether the law in question is unconstitutional.[200] There are different standards of review that the Court can use to analyze a law and determine whether it is unconstitutional: strict scrutiny, intermediate scrutiny, and rational basis.[201] Strict scrutiny is the standard of review that is relevant for an equal protection analysis.

198. Brown v. Bd. of Educ., 347 U.S. 483, 493–96 (1954) (holding that keeping schools racially segregated was "inherently unequal," so denying Black students admission to schools with white students violated the Equal Protection Clause).

199. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding that a statute which restricts interracial marriages violates the Equal Protection Clause); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that restricting marriage for same-sex couples violates the Equal Protection Clause).

200. Cain Norris & Whitney Turk, *Equal Protection*, 14 GEO. J. GENDER & L. 198, 397 (2013).

201. *Id.* Intermediate scrutiny is applied to cases that involve "quasi suspect" classes, such as gender or legitimacy. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 224, 234 (2006). Under intermediate scrutiny, to uphold an otherwise discriminatory law, it need only have a substantial relationship to the objective of the law and that objective must be important. Craig v. Boren, 429 U.S. 190, 197, 204 (1976). For example, in *Craig v. Boren*, the Court determined that there was no substantial relationship between gender and drunk driving, which made a statute that prevented females from purchasing liquor under the age of eighteen and males under the age of twenty-one unconstitutional under the Equal Protection Clause. *Id.* at 192, 197.

Rational basis review requires only that the discriminatory law be "rationally related to a legitimate governmental purpose" in order to be upheld. *Id.* Rational basis is the least restrictive review and is most often deferential to the legislatures' policy decisions. *Id.* This level of scrutiny applies to any legislative classifications that fall outside of a suspect class, a "quasi-suspect class" or do not violate a fundamental right. Therefore, when there is any claim of discrimination under the Equal Protection Clause, the baseline standard of review is rational basis. Norris & Turk, *supra* note 200, at 405. To read more on what qualifies as a fundamental right outside of the Constitution, see *id.* at 402–03.

Strict scrutiny typically applies when a discriminatory law is directed at a suspect class, such as race or national origin.[202] Once a law is determined to be racially discriminatory, the Court must apply strict scrutiny to determine whether the law can be upheld.[203] Strict scrutiny is the most rigorous method of review because the government must prove that the law furthers a "compelling governmental interest" and is "narrowly tailored" to that interest.[204] This means that, if the court finds there is a compelling governmental interest, then it can uphold the discriminatory law so long as it is not more burdensome than necessary to achieve its objectives and the law is closely related to those objectives.[205] Ultimately, laws that discriminate on the basis of race are not per se unconstitutional, but the most rigid scrutiny shall be used to determine whether the law serves a compelling governmental interest despite its discriminatory effects.[206]

3. Defining Discrimination

The court must also determine whether the law in question discriminates against a suspect class based on racial identity. Only after proving such discrimination exists can a heightened level of scrutiny be applied.[207] To determine whether discrimination is present, the court must first analyze the statute's language. A law can either be facially discriminatory[208] or facially neutral with discriminatory impact.[209] For instance, the juvenile LWOP statutes are facially neutral because they do not explicitly refer to race classifications. But discrimination can occur without discriminatory language. The court can look for disparate impact discrimination, which occurs when a law "cre-

202. Norris & Turk, *supra* note 200.

203. *See Loving*, 388 U.S. at 11.

204. Norris & Turk, *supra* note 200.

205. Kelso, *supra* note 201.

206. *Id.*

207. Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that, while disproportionate impact on a certain race is not irrelevant, that alone does not justify a heightened level of scrutiny under the Equal Protection Clause).

208. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 4–12 (1967) (holding that a statute which expressly restricts marriages based solely on racial classifications violates the Equal Protection Clause).

209. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that a facially neutral law, if applied in a discriminatory way that disproportionately impacts people of a certain race or nationality, violates the Equal Protection Clause).

ates, contributes to, or perpetuates unequal outcomes among different racial groups"[210] without explicit discriminatory language. Therefore, the court will focus on a disparate impact claim when analyzing juvenile LWOP because it is a facially neutral statute.

Parties can bring claims of disparate impact under Title VII of the Civil Rights Act or under the Equal Protection Clause.[211] Under Title VII, which is specific to claims of employment discrimination, there is no requirement to prove intent of discrimination.[212] The party need only show that job requirements cause a disparate impact on a minority group.[213] Then, the defendant has the burden of proving that the job policies were functionally related to job performance.[214] The Supreme Court held that Title VII disparate impact analysis cannot be applied to equal protection claims of racial discrimination.[215] Unlike an employment action, a facially neutral statute analyzed in an Equal Protection argument must have a negative disparate impact on a specific racial group and the party must show that there was intent to apply that law differently towards certain races.[216] In this context, intent means that lawmakers created a discriminatory law at least "in part 'because of,' not merely 'in spite of,'" the harmful effects on a certain group.[217]

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210. Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 415 (1998).

211. Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 656, 661 (2015).

212. *Id.* at 659.

213. *Id.*

214. *Id.* at 656–57, 661. Note that the first case to analyze discriminatory impact was *Griggs v. Duke Power Co.* under Title VII of the Civil Rights Act. *Id.* at 657. The case held that an employer who required a high school diploma and standardized test scores for new employees but not current employees, which had a discriminatory impact on minorities, violated Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 426, 436 (1971). While job requirements were still valid, it had to be shown that these requirements (if they had racial impacts) were functionally related to the job performance. *Id.* at 431. Intent to discriminate did not need to be proved, but rather the requirements had to relate directly to the job, because such requirements could not "'freeze' the status quo of prior discriminatory employment practices." *Id.* at 429–30.

215. Washington v. Davis, 426 U.S. 229, 238–39 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.").

216. Floyd v. City of New York, 959 F. Supp. 2d 540, 571 (2013). This is different from the disparate impact analysis under the Equal Protection Clause. *See Yick Wo*, 118 U.S. at 356; *Washington*, 426 U.S. at 242.

217. Helfand, *supra* note 196, at 624.

Proving discriminatory intent is essential to demonstrating disparate impact against a racial class. In order to argue a facially neutral law is discriminatory, one must provide direct evidence of substantial disparate impact on a specific racial class and evidence of discriminatory purpose.[218] However, it is difficult to prove that a pattern of discrimination against a group is intentional. For example, in *United States v. Armstrong*, in order to prove that Black offenders were more often prosecuted compared to their white counterparts, the plaintiffs had to prove that a white person in a similar situation was not prosecuted solely due to their race.[219] Only after meeting this high burden of proving "discriminatory purpose"[220] could a court examine a racially discriminatory law with a heightened level of scrutiny under the Equal Protection Clause.

Even with stark statistics, a court may have a difficult time discerning a pattern of discrimination as purposeful based on juvenile LWOP sentencing statistics alone.[221] For this reason, courts have relied on a high burden for proving discriminatory purpose. For instance, the court in *Hunter v. Underwood* held that a facially neutral statute purposefully discriminated against a racial group because there was evidence of statements by delegates that claimed the statute's purpose was to "establish white supremacy in this State."[222] These statements, paired with statistics showing discriminatory effects, solidified the disparate impact claim.[223] Such blatant statements would likely be difficult to catch on record today, making explicit proof of discriminatory purpose more difficult to find. However, these challenges may be overcome by analyzing the significance of the statistics using comparative evidence and proving discriminatory intent

218. United States v. Armstrong, 517 U.S. 456, 465 (1996) (stating that in order to prove there was discriminatory impact based on race, it must be shown that a person of a different race in a similar situation was not prosecuted and that it was motivated by a discriminatory purpose).

219. *Id.*

220. *Id.*

221. *See Washington*, 426 U.S. 229 at 239 ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."); *Armstrong*, 517 U.S. at 465 ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.").

222. Hunter v. Underwood, 471 U.S. 222, 229 (1985) (citation omitted).

223. *Id.* at 227 (stating that Black people are at least 1.7 times more likely to suffer disenfranchisement under the statute in comparison to white people).

through implicit racial bias. These approaches will be discussed in turn.

C. APPLYING THE EQUAL PROTECTION CLAUSE TO JUVENILE LIFE WITHOUT PAROLE

To apply the Equal Protection Clause to juvenile LWOP, the court must make a finding of disparate impact—in other words, find that a law intends to discriminate against a group of individuals based on their race.[224] As discussed above, evidence shows that Black juveniles are more often subjected to juvenile LWOP sentences based on race.[225] The court must first define these statistical findings as racial discrimination under a disparate impact claim and then analyze the statute under strict scrutiny.[226] However, it is difficult to prove discriminatory intent when there are no express racial classifications in a statute. The following analysis discusses two ways in which the court can prove discriminatory purpose—and thus, a disparate impact claim—to meet strict scrutiny standards: impact-alone and separate proof of discriminatory purpose. In sum, strict scrutiny applies to juvenile LWOP because the threshold for both the impact-alone test and separate proof of discriminatory purpose are met.[227] And while equal protection claims are notoriously difficult to prove, the argument behind juvenile LWOP is analogous to other successful disparate impact cases.[228] As such, there is sufficient evidence to support a claim of disparate impact on Black juveniles, which is entitled to strict scrutiny review.

1. Applying Strict Scrutiny: Impact-Alone

One way to meet the disparate impact threshold is using statistics alone to prove the discriminatory purpose element of disparate impact, coined as the impact-alone test in legal scholarship.[229] This argument has been used in few cases[230] and presumes that the statistics

224. *See* Scott E. Rosenow, *Heightened Equal-Protection Scrutiny Applies to the Disparate-Impact Doctrine*, 20 TEX. J. C.L. & C.R. 163, 181–84 (2015).

225. *See supra* Part II.A.

226. *Supra* Part II.A.

227. *Infra* Part II.C.5.

228. *Infra* Part II.C.3.

229. *See* Rosenow, *supra* note 224, at 181–82.

230. *E.g.*, Arlington Heights v. Metro. Hous. Dev. Co., 429 U.S. 252, 266 (1997) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that redefining district

are so stark that discriminatory purpose can be inferred from them.[231] If a party used statistics alone as evidence of discrimination, then they would need prove that (1) the statistics illustrate a stark difference in treatment of a specific class, such as race and (2) that there is no other purpose that is nondiscriminatory.[232] As discussed above, juvenile LWOP has a stark impact on Black youth.[233] In 2014, the ACLU reported that Black youth serve juvenile LWOP sentences at a rate ten times higher than white youth.[234] It could be argued that this pattern of impact on Black youth is so clear that it is evidence of discriminatory purpose.[235] The courts have also noted that without comparative evidence—such as comparing a vast number of similarly situated people who did not receive negative treatment[236]—the impact-alone test is not met.[237]

There is a strong argument that disparate impact-alone test would suffice in an analysis of juvenile LWOP because there is sufficient comparative evidence. First, the evidence regarding harsher sentences for Black juveniles coincides with statistics which indicate that racial disparities magnify as the sentences increase in severity.[238] In particular, a study has shown that when controlling for characteristics of the offense, criminal history, defense counsel, age, and education, Black offenders are still given more severe punishments than white offenders.[239] In relation to juvenile offenders, studies have indicated

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boundaries violates the Equal Protection Clause if it has an "inevitable" and obvious discriminatory effect on Black voters).

231. *See* Rosenow, *supra* note 224, at 183–84.

232. *Id.* at 182. For a more in-depth analysis of the impact-alone test and how the burdens of proof apply, see *id.* at 182 n.112.

233. *Supra* Part II.A.

234. *Racial Disparities in Sentencing*, ACLU 4 (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [https://perma.cc/8GES-6KQ9]; *see also* E. Ann Carson, *Prisoners in 2019*, BUREAU OF JUST. STATS. 16 (Oct. 2020), https://www.bjs.gov/content/pub/pdf/p19.pdf [https://perma.cc/YE4T-T48J] ("Black males ages 18 to 19 were 12 times as likely to be imprisoned as white males of the same ages . . . .").

235. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (analyzing a statute that required laundromats in wooden buildings to obtain a permit, resulting in denied permits for over 200 laundromat owners of Chinese descent and eighty out of eighty-one approved permits for similarly situated, non-Chinese laundromat owners); *Gomillion*, 364 U.S. at 340, 342 (1960) (stating that a law that redrew the boundaries of Tuskegee, Alabama, to exclude Black people from the city limits and prevent them from voting was clearly discriminatory).

236. *Yick Wo*, 118 U.S. at 374.

237. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

238. ACLU, *supra* note 234.

239. *Id.*

that such harsh outcomes are a result of racial biases. One Michigan study suggested that race was a significant factor in sentencing, even when controlling for factors such as prior convictions, drug charges, or weapon possession.[240] Such findings indicate that juvenile LWOP sentences are not imposed based on criminal records, but rather on race of the offender. Numerous studies of similar caliber have been condensed into reports that state, nationwide, Black juveniles are twice as likely to receive LWOP sentences as white offenders for the same crime.[241] Based on this reasoning, juvenile LWOP meets the standard for the impact-alone test because the statistics illustrate a discriminatory purpose using comparative measures. Therefore, strict scrutiny should apply.

2. Arguments Against Applying Impact-Alone Test to Juvenile LWOP Are Unpersuasive

Although the statistics above show a disparate impact on Black youth, that fact alone seldom succeeds in a successful equal protection argument.[242] Only in rare cases[243] has the Supreme Court found disparate impact based on statistics alone.[244] The extreme difficulty of bringing disparate impact claims is infamous to the point that legal advocates have pursued other avenues for obtaining remedies for racial disparities.[245] One example alternative is attacking racially oppressive systems through other amendments or different bodies of law.[246] Such arguments suggest that racial disparity claims are best

240. *Id.*

241. Roper, *supra* note 169.

242. Rosenow, *supra* note 224, at 181 ("In 'rare' cases, an unofficial act's uneven impact will be 'stark' enough to prove the act's [discriminatory] purpose.").

243. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886) (permitting white-owned laundromats to operate in wooden buildings while simultaneously denying permits for Chinese applicants), *and* Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960) (altering the boundaries for voting that discriminated against Black voters), *with* Arlington Heights v. Metro. Hous. Dev. Co., 429 U.S. 252, 264–65 ("[*Washington v. Davis*] made it clear that official action will not be held unconstitutional solely because it results in a racially discriminatory impact.").

244. Rosenow, *supra* note 224, at 182–83.

245. Emily Chiang, *The New Racial Justice: Moving Beyond the Equal Protection Clause to Achieve Equal Protection*, 41 FLA. STATE UNIV. 835, 839–44 (2014).

246. *Id.* at 837 (noting that combating the school-to-prison pipeline is best pursued under federal statutes rather than as an Equal Protection claim).

pursued outside of the Equal Protection Clause.[247] In particular, disparate impact claims based on the impact-alone test often fail for criminal statutes.[248] Juvenile LWOP is a criminal sentence imposed through state statutes, so there is no indication that the impact-alone test would suffice to prove a disparate impact claim. Under this framework, a disparate impact claim is already difficult to prove, making an impact-alone test used for a criminal statute especially unlikely to prevail.

However, the evidence of racial disparity in juvenile LWOP sentencing is extreme and therefore still applies under an Equal Protection argument. Even if a court is unlikely to grant a disparate impact claim, the strength of the Equal Protection argument provides a strong constitutional basis for the Legislator to act on a state-by-state basis to abolish juvenile LWOP. Particularly, there are significant differences in juvenile LWOP sentencing compared to other criminal sentences that have failed in a disparate impact argument using impact-alone. For instance, in *McCleskey v. Kemp*, the Supreme Court held that statistics demonstrating that Black offenders more often received the death penalty in comparison to white offenders did not violate the Equal Protection Clause because there was no evidence of discriminatory purpose.[249] The Court differentiated this case from other impact-alone cases[250] by claiming that linking the disparate impact statistics to the death penalty was too broad and considered too many uncontrolled factors regarding trial verdicts, such as the facts of the offense, the characteristics of the defendant, and individual jury decisions.[251] In contrast, successful impact-alone cases related the statistics to "fewer entities, and fewer variables [were] relevant to the challenged decisions."[252]

Like the latter example, there is a single standard in juvenile sentencing which diminishes variability: mitigating youthful qualities.[253] The Supreme Court in *Jones* confirmed this standard as a common

247. *Id.* ("[R]acial justice advocates have engaged in a wholesale replacement of the equal protection framework over the last several decades, and that they have done so deliberately and with great success.").

248. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 294 (1987).

249. *Id.* at 313, 319.

250. *Supra* note 235 and accompanying text.

251. *McCleskey*, 481 U.S. at 294.

252. *Id.* at 295 (noting the success of applying statistics to venire-selection or Title VII cases).

253. *Supra* Part I.B.2.

baseline that requires courts to consider youthful qualities—immaturity, irresponsibility, and recklessness—in addition to culpability.[254] Similarly, successful impact-alone cases did not need to rely solely on the criminal statute and uncontrolled sentencing factors because there was some other common standard that could be analyzed for its impact on individuals.[255] In the context of juvenile LWOP, this means that racial disparities can be clearly measured and compared against a more controlled standard—the consideration of youthful qualities—rather than attributing such statistics to individual judicial decisions.[256] Requiring courts to consider mitigating youthful qualities places juvenile LWOP in a different category from general criminal statutes and implies that the impact-alone test could sufficiently prove discriminatory impact.

Finally, the policy considerations behind limiting impact-alone tests in regard to criminal statutes do not apply to juvenile LWOP. In *McCleskey*, the Court noted that allowing statistics alone to prove discriminatory purpose would open the floodgates and extend Equal Protection violations to all capital cases.[257] However, juvenile LWOP sentencing is unique in that it requires consideration of youthful qualities and, in some states, applying the irreparable corruption threshold, so applying the impact-alone test in this way would not suffice for all criminal statutes. Therefore, the Court's rationale in *McCleskey* is irrelevant.

3. Applying Strict Scrutiny: Separate Discriminatory Intent

It is possible that courts may find that, while the statistics are sufficient to show racial biases in the criminal justice system, they are not specifically tied to juvenile LWOP and do not prove discriminatory purpose.[258] Even with strong numbers, a court may have a difficult

254. Jones v. Mississippi, 141 S. Ct. 1307, 1316, 1333 (2021).

255. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 485, 495 (1977) (describing the common jury selection requirements in the context of determining whether Mexican Americans were discriminated from jury selection).

256. *See McCleskey*, 481 U.S. at 295 n.14.

257. *Id.* at 293. *But see* Annika Neklason, *The 'Death Penalty's* Dred Scott' *Lives On*, ATLANTIC (June 14, 2019), https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424 [https://perma.cc/A6VL-85V8] (discussing the contentious *McCleskey* decision and how state courts and legislators have acknowledged the disparate racial impact caused by such sentences and have made strides to amend or abolish death penalty laws).

258. *See McCleskey*, 481 U.S. at 279 (holding that the death penalty did not violate the Equal Protection Clause despite the fact that statistics showed the death penalty

time discerning a pattern of discrimination as purposeful based on incarceration statistics alone.[259] In that case, a party would need to show discriminatory purpose in addition to the statistics in order to apply strict scrutiny.

Proving purposeful discrimination in juvenile LWOP sentencing is difficult in particular because the language is neutral and there are no legislative statements that to point to discriminatory intent.[260] However, there is a changing consensus in legal scholarship indicating that implicit bias in itself is evidence of discriminatory purpose and violates the Equal Protection Clause.[261] This would coincide with implicit bias studies that suggest judges hold biases against Black juvenile offenders.[262] For instance, one article makes the point that unconscious bias is included in the discriminatory purpose test based on the Supreme Court's previous holdings.[263] The Supreme Court indicates that discriminatory purpose was meant to be a middle ground between two extremes: criticizing a myriad of policies without the discriminatory intent requirement (with an analysis similar to Title

disparately impacted Black offenders in comparison to white offenders because there was no evidence of discriminatory purpose).

259. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."); U.S. v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.").

260. *See supra* notes 222–23 and accompanying text.

261. *See* Ralph Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077 (2001) (describing racial profiling as an intentional consideration of race that disparately impacts racial minority groups); Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. C.R. & C.L. 1, 19 n.65 (2018) (noting the term "racially discriminatory purpose" might not be meant just to include *intentional* racism, but merely distinguish between discriminatory purpose and disparate impact and can be interpreted to mean that purposeful discrimination is met when racial bias (either implicit or conscious) is the source of disparate impact). Purposeful discrimination includes implicit bias because purposeful discrimination was never intended to create a new form of mens rea, but rather to distinguish from disparate impact; therefore, implicit biases could be enough to fall under Fourteenth Amendment protections. Quattlebaum, *supra*. *But see* Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. L. & SOC. CHANGE 451, 463 (2018) (arguing that current Equal Protection interpretations make the burden of proof too high to encompass any disparate impact or implicit bias effects).

262. *Supra* Part II.A.

263. Ralph Richard Banks, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009).

VII)[264] versus allowing facially neutral laws that function like Jim Crow laws.[265] The middle ground includes both discriminatory purpose and motive, which is supported by the fact that the Court has used this language interchangeably.[266] In other words, there is no distinction between discriminatory purpose (conscious discrimination) and motive (unconscious discrimination).[267] This means that both unconscious bias and conscious discrimination would fall in this category.[268] Therefore, extreme implicit biases in sentencing based on race would have discriminatory motivations and meet the intent element of the disparate impact test.[269] As studies discussed earlier have illustrated, implicit bias is clearly present in juvenile LWOP sentencing.[270] With implicit bias as an indicator for discriminatory purpose, strict scrutiny will still apply.

4. Arguments Against Applying the Separate Discriminatory Intent Standard to Juvenile LWOP Are Unpersuasive

However, the implicit bias argument has not yet been widely implemented in Equal Protection cases.[271] There is also scholarship that suggests the Supreme Court's use of the word discriminatory "purpose" rather than discriminatory "motive," is evidence that proof of discriminatory impact must rely on objective factors rather than subjective elements.[272] This assertion directly contradicts the argument above that the Court meant to include both unconscious and conscious discrimination.[273] The Court has yet to parse this difference out, so this perspective is in no way definitive. But a notable point is that the discriminatory intent requirement is not specified in the text of the Equal Protection Clause, but rather was adopted later to prevent

264. *Id.* at 1090.

265. *Id.* at 1093.

266. *Id.* at 1090.

267. *Id.* at 1080.

268. *Id.* at 1090.

269. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509, 514 (2003) (stating that a state action with an invalid motive would be deemed a racial classification, and this reasoning would be used to apply strict scrutiny).

270. *See supra* Part II.A.

271. *See* Elosiebo, *supra* note 261 (noting how the court should adopt a new standard for evaluating Equal Protection violations to be inclusive of discrimination based on implicit biases).

272. Thomas B. Henson, *Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact*, 36 WASH. & LEE L. REV. 109, 115 (1979).

273. *See* Banks, *supra* note 261; Banks, *supra* note 263.

"opening the floodgates" of striking down laws as discussed in *McClesky*.[274] This means that the discriminatory intent standard is not bound to the Equal Protection Clause text and therefore can adapt to include implicit biases.[275] Finally, including implicit bias in a discriminatory intent analysis is in line with evolving social standards which value holding unconscious biases accountable for discriminatory impact.[276] Courts have already started moving in this direction by considering implicit racial biases in their analysis.[277] The Supreme Court has indicated that it may follow suit.[278] And even if the courts are slow to acknowledge implicit bias in the judiciary system, the above argument provides a strong constitutional basis for the Legislator to consider implicit bias as evidence of discriminatory impact.

Additionally, it could be argued that, even though juvenile LWOP has a disparate impact on Black youth, it is not due to discriminatory purpose but rather occurs in spite of the law's existence.[279] This line of thinking would suggest that, even though juvenile LWOP significantly impacts Black youth more than white youth, it is due to increased crime rates amongst Black individuals rather than discriminatory intent. These arguments align with theories that Black juveniles are super-predators or that "Black on Black crime"[280] is the reason that more Black juveniles are sentenced to LWOP. Academics and the media have promulgated this rhetoric.[281]

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274. Alyson Grine & Emily Coward, *Recognizing Implicit Bias Within the Equal Protection Framework*, TRIAL BRIEFS 26, 27 (2017); *supra* note 257 and accompanying text.

275. *See* Grine & Coward, *supra* note 274 ("Each case that interprets the intent standard gives the court a chance to reconsider its meaning and scope.").

276. *Id.* at 29 ("[E]merging developments in social science, law, and education all support the importance of acknowledging unconscious bias within our judicial system.").

277. *Id.* at 28 (noting that the Ninth Circuit has observed that racial stereotypes subconsciously impact people's decision-making); *see, e.g.*, Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994); Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004).

278. *See, e.g.*, Grine & Coward, *supra* note 274, at 30 n.23 (citing Supreme Court cases that acknowledge implicit racial biases in the context of the Equal Protection Clause).

279. *See* Helfand, *supra* note 196.

280. *See* Samara Lynn, *'Black-on-Black Crime': A Loaded and Controversial Phrase Often Heard Amid Calls for Police Reform*, ABC NEWS (Aug. 1, 2020), https://abcnews.com/US/story?id=72051613 [https://perma.cc/4H58-X267] (describing the history of the phrase and how it is used as a "political weapon").

281. *See, e.g.*, John J. Diluio, Jr., *My Black Crime Problem, and Ours*, CITY J. (1996), https://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html [https://perma.cc/G62K-MCJM] ("America's violent crime problem, especially the rage of homicidal and near-homicidal violence, is extremely concentrated among

There are two issues with this argument. First, the super-predator data regarding juveniles has been debunked so it does not support an argument favoring juvenile LWOP sentencing.[282] Second, the amount of crime committed by Black juveniles (even though data suggests that Black juveniles commit less crime than white juveniles)[283] is irrelevant when considering the need for a life sentence. Modern research indicates that juveniles who offend at a young age are capable of reforming due to brain plasticity and resilience.[284] Such research implies that juvenile LWOP should be obsolete and leave decisions regarding rehabilitation capability to the parole board. The fact that 2,500 juveniles have served juvenile LWOP sentences[285] and 60% of juveniles with LWOP sentences are Black[286] suggests that the application of juvenile LWOP does not match the psychology research on reform capability of juvenile offenders. Therefore, juvenile LWOP sentencing goes beyond the concept of existing "in spite of" its impact on Black youth. Outdated research regarding super-predators and adolescent brain development is a weak justification for the sentence's severity, leaving one to conclude that the only reason juvenile LWOP still exists is partly "because of" racial biases.

5. Strict Scrutiny Applies When Using Either Discriminatory Intent Standard

As discussed previously, to argue juvenile LWOP is discriminatory under a disparate impact claim and, thus, that the court should apply strict scrutiny review, one must provide (1) direct evidence of disparate impact on Black juveniles and (2) evidence of discriminatory purpose.[287] The court should apply strict scrutiny to juvenile LWOP because proof of disparate impact is sufficient under either

young urban minority males . . . . For God's sake, let's be truthful. Especially in urban America, white fears of black crime—like black fears of black crime—are rational far more than reactionary or racist.") (internal quotation omitted); *Biden Must Address Black on Black Crime: Former DC Police Detective*, FOX NEWS (June 23, 2021), https://video.foxnews.com/v/6260731965001 (last visited Apr. 20, 2022).

282. *Supra* Part I.A.

283. *See* Darling-Hammond, *supra* note 170.

284. *See supra* Part I.B.1.

285. ACLU, *supra* note 68.

286. Nellis, *supra* note 37.

287. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) (stating that in order prove there was discriminatory impact based on race, it must be shown that a different person in a similar situation of a different race was not prosecuted and that it was motivated by a discriminatory purpose).

standard of discriminatory intent. Per the impact-alone test, the statistics speak for themselves. There are comparable studies to show that juvenile LWOP adversely impacts Black juvenile offenders due to racial identity alone[288] and therefore the statistics are representative of discriminatory intent. The common threshold of measuring mitigating youthful factors also differentiates juvenile LWOP from other criminal statutes, making the impact-alone test applicable.[289] Weighing mitigating youthful qualities involves more than an analysis of the offender and the elements of their crime. Rather, it provides a standard to determine whether a child is capable of rehabilitation due to their maturity level, thus showing how Black youth are stigmatized when the courts measure youthful characteristics, diminished culpability, and inability to rehabilitate.[290]

Alternatively, juvenile LWOP still shows disparate impact under the separate discriminatory purpose standard due to evidence of implicit bias as a form of discriminatory intent. There is a strong argument for interpreting the Equal Protection Clause as inclusive of subconscious bias as a means of discriminatory purpose based on Supreme Court precedent.[291] The courts also appear to be including implicit biases in their decision-making.[292]

The element of discriminatory intent is also met because there is evidence that the juvenile LWOP sentence disparately impact Black juveniles "because of" rather than "in spite of" the law's existence. For instance, the reasons for locking up Black offenders more than white offenders do not align with the reality of crime statistics[293] or neuropsychology research.[294] Research shows that juveniles are capable of rehabilitation due to neuropsychological development and therefore the amount of juvenile LWOP sentences imposed on Black juveniles does not correspond with actual findings of irreparable corruption or measurement of mitigating youthful qualities.[295] Sentencing juveniles to LWOP despite their ability to rehabilitate defies the purpose of the punishment. Therefore, arguments claiming that juvenile LWOP sentences impact Black youth "in spite of" the statute's purpose are false.

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288. *Supra* Part II.A.
289. *Supra* Part II.C.2.
290. Miller v. Alabama, 567 U.S. 460, 479–80 (2012).
291. *Supra* Part II.C.4.
292. *Supra* Part II.C.4.
293. Darling-Hammond, *supra* note 170 and accompanying text.
294. *Supra* Part I.C.
295. *Supra* Part I.C.

Regardless of the measurement of discriminatory intent, juvenile LWOP meets the threshold for proof of disparate impact. Because of the disparate impact LWOP sentencing has against Black juvenile offenders, this qualifies as a racial discrimination under the Equal Protection Clause and therefore demands using a strict scrutiny standard when analyzing the statute.[296] The only solution to combat juvenile LWOP's effects is to analyze under the strict scrutiny standard whether the statute serves a compelling governmental interest.

III. JUVENILE LIFE WITHOUT PAROLE MUST BE ABOLISHED FOR VIOLATING THE EQUAL PROTECTION CLAUSE

Based on the issues discussed above, there is sufficient evidence to support a disparate impact argument under the Equal Protection Clause. Modern psychology combined with evidence of a disparate impact on Black juveniles reveals that the only solution is to analyze whether juvenile LWOP violates the Equal Protection Clause. As discussed, under a strict scrutiny analysis juvenile LWOP can be upheld despite its discriminatory effects if the sentence is deemed to serve a compelling governmental interest.[297] It is clear that juvenile LWOP does not serve any compelling governmental interest. The basis on which juvenile LWOP was justified years ago has since been proven to be insufficient.[298] This next Part will discuss how, per a strict scrutiny analysis, juvenile LWOP violates the Equal Protection Clause because it does not serve a compelling governmental interest and therefore must be categorically abolished. Due to the inconsistencies in the judiciary system, the best course of action is for the Legislator to abolish juvenile LWOP using the Equal Protection argument as a basis for this decision. Section A will discuss how juvenile LWOP violates the Equal Protection Clause because it fails the strict scrutiny analysis and does not serve a compelling governmental interest. Section B will address counterarguments and reaffirm the argument for categorical abolishment by the Legislator. Section C will express how individuals in the legal field can minimize the negative impact of juvenile LWOP sentencing at present.

296. *See infra* Part II.C.5.

297. *Supra* Part II.B.2.

298. *See supra* Part I.C.

A. JUVENILE LIFE WITHOUT PAROLE SENTENCING VIOLATES THE EQUAL PROTECTION CLAUSE

Black juveniles in the criminal justice system more frequently are deemed irreparably corrupt and disproportionately receive LWOP sentences due to systemic racial discrimination and bias.[299] Such treatment based on racial classification is a violation of the Equal Protection Clause. As mentioned above, to prove an Equal Protection violation, there must be proof of racial discrimination, evidence that strict scrutiny applies, and an analysis to show that the violation is not justified under strict scrutiny standards.[300] The statistics show that racial discrimination is apparent due to the disparate impact on Black juvenile offenders and would succeed in an impact-alone test and, in the alternative, proof of implicit bias amounts to the level of separate purposeful discrimination.[301] Strict scrutiny applies because the disparate impact is based on racial identification and is purposeful.[302] Using a strict scrutiny analysis, there is no compelling government interest in sentencing juveniles to LWOP. Therefore, juvenile LWOP sentences violate the Equal Protection Clause and should be abolished.

1. Juvenile LWOP Fails Strict Scrutiny Because It Does Not Serve a Narrowly Tailored Compelling Governmental Interest

Juvenile LWOP does not serve a compelling governmental interest because the justifications for the law are founded on incomprehensive research and are not supported by public policy values. Under the strict scrutiny analysis, racially classifying laws can only be upheld if they serve a compelling governmental interest independent of any racial discrimination.[303] In this context, there must be a compelling governmental interest for imposing juvenile LWOP and the law must be narrowly tailored to this interest.[304] If the Court finds that there is a compelling governmental interest, then a discriminatory law can be upheld so long as it is not more burdensome than necessary to achieve its objectives.[305]

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299. *Supra* Part II.A.

300. *Supra* Part II.B.2.

301. *Supra* Part II.C.5.

302. *Supra* Part II.C.5.

303. Loving v. Virginia, 388 U.S. 1, 11 (1967). The *Loving* Court refers to a compelling governmental interest as a "legitimate governmental purpose." *Id.*

304. *See* Norris & Turk, *supra* note 200.

305. Kelso, *supra* note 201 and accompanying text.

There are a number of core public policy reasons for why juvenile LWOP fails to meet this standard. First, juvenile LWOP sentences are especially cruel because, due to the early age at which juveniles are sentenced to life, they in turn receive comparatively harsher sentences than adults receiving life sentences for committing similar crimes. Therefore, the juvenile's age of offending and their racial identity compounds the severity of the sentence. The sentence is completely disproportionate, and thus grossly unjust. Second, housing juveniles in prison for life expends public funds, costing approximately $2.25 million for a sixteen-year-old to serve a fifty-year sentence.[306] Such funds could be better spent towards rehabilitation resources and preventative measures.[307] In reality, there is minimal evidence to support prison as an effective form of deterrence, whereas noncustodial sentences provide solutions that directly address the underlying issues that cause criminal behavior.[308] Looking to other state's political values supports this point. The fact that more states each year are abolishing juvenile LWOP suggests that the statute does not meet a compelling state interest.[309] More states per year are finding that the sentence does not serve an important purpose and undermines arguments for the minority of states that want to uphold the statute.[310]

More critically, research on psychology and deterrence illustrates that the length and severity of juvenile LWOP sentences is not supported by a compelling governmental interest. Research in brain science undercuts any governmental interest in imprisoning juvenile offenders to die in prison. The purpose of the juvenile LWOP sentence is to imprison juveniles who have no chance of rehabilitating.[311] However, the *Miller* court relied on psychology research that suggested children have diminished culpability and less "fixed" personalities.[312]

306. Rovner, *supra* note 36.

307. *See supra* Part II.C.2.

308. *Alternatives to Imprisonment: The Issue*, PENAL REFORM INT'L (2020), https://www.penalreform.org/issues/alternatives-to-imprisonment/issue [https://perma.cc/JBS4-CCDB].

309. Moriearty, *supra* note 27.

310. *Id.*; Rovner, *supra* note 36, at 3–4.

311. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (suggesting that juvenile LWOP sentences should be reserved for adolescents that display "irreparable corruption"); Kurtis A. Kemper, Annotation, *Construction and Application of Rule Announced in* Miller v. Alabama *That Sentences of Life Without Parole for Persons Under 18 at Time of Committing Homicide Offense Violate Eighth Amendment if Mandatory and Imposed Without Considering Youth-Related Factors*, 16 A.L.R.7th Art. 4 (2016).

312. *Miller*, 567 U.S. at 470–71; *see supra* Part I.B.1.

Brain plasticity, in particular, suggested that juveniles are more capable of positive development and learning from their previous mistakes,[313] which defies any argument that juvenile offenders are incapable of rehabilitation.

In the same vein, a governmental interest based on protecting the public from irreparably corrupt youth in states that apply that standard is illegitimate because irreparable corruption is nearly impossible to define in children,[314] so there is no reason that the label should be imposed more frequently on Black youth. This conclusion is compounded by the fact that youth who endure trauma experience changes in the connectivity in their brain,[315] making such predictions about long-term criminal behavior and culpability far less accurate.[316] This research holds especially weighty significance when compared to the fact that a majority of juveniles sentenced to LWOP suffer from childhood trauma.[317] For instance, The Sentencing Project has found that 47% of juveniles with homicide offenses were physically abused, and 79% witnessed violence in their home regularly.[318] These factors suggest that any criminal behavior committed by juveniles is not indicative of a lifetime of criminal activity.[319]

Additionally, the governmental interests of public safety and crime control do not coincide with research on recidivism. The American Academy of Child and Adolescent Psychiatry recommended that offenders should be eligible for parole five years after their initial sentence or after the age of twenty-five.[320] These findings correspond with research that shows children who experience traumatic events

313. Weithorn, *supra* note 76, at 222–23 (discussing plasticity in the terms of vulnerability).

314. *Supra* Part I.B.3.

315. Gold, *supra* note 132, at 215 (outlining the numerous traumatic factors affecting a child's brain development).

316. *See supra* Part I.C.1.

317. Also, considering that the majority of offenders sentenced to juvenile LWOP are Black, this means that most of the statistics regarding trauma in juveniles with LWOP sentences apply to Black youth. *See* Nellis, *supra* note 37.

318. Rovner, *supra* note 36.

319. *Id.*

320. Spooner & Vaughn, *supra* note 174, at 166; *see also* Kathleen M. Heide, *Juvenile Homicide Offenders Look Back 35 Years Later: Reasons They Were Involved in Murder*, INT'L J. ENV'T RSCH. & PUB. HEALTH, June 2020, at 1, 13 (stating a twenty-year sentence is the suggested amount of time to serve for a juvenile homicide offender because they are most able to rehabilitate after that period).

and commit crime are resilient and can change their behavior.[321] Juveniles that have the support of mentors, learn behavioral skills, and build trusting relationships have the ability to thrive despite their traumatic experiences.[322] Courts have already relied on this logic by justifying limited sentencing due to the fact that a juvenile's traits are "less fixed" and their character is "not as well formed as adults."[323]

Finally, research on emerging adulthood shows that sentencing juveniles to life does not align with a compelling governmental interest because issues of diminished culpability extend well into a person's twenties. Research on young adult brain development suggests that adults ages eighteen to twenty-four maintain brain plasticity like adolescents, which allows for greater chances of rehabilitation and overcoming trauma.[324] Emerging adults have the same developmental qualities that adolescents have, which correlate with criminal offenses, such as impulsivity, susceptibility to peer influence, risky behavior, and poor decision making.[325] This also aligns with the "age-crime" curve, which signifies criminal behavior peaks in adolescence and declines after a person's mid-twenties.[326] Considering that juvenile tendencies are still relevant above the age of eighteen, this suggests that sentencing children under the age of eighteen to LWOP may eradicate any chance of rehabilitation for children who are more than likely to reform their behavior. Such studies further indicate that keeping juvenile offenders in prison for life without possibility of release does not serve a compelling purpose.

This research implies that there is no compelling governmental interest supported by actual findings in adolescent behavior or crime rates. Without a compelling governmental interest, a statute imposing juvenile LWOP disparately on Black youth would not meet strict scrutiny standards.[327] In fact, the governmental interest encouraging longer sentences for juveniles when they are psychologically vulnerable is in conflict with a governmental interest the state has upheld for decades: protection of children. States have long argued a compelling interest in protecting child welfare, thereby giving the government the power to terminate the constitutional rights of guardians that harm a

321. *Supra* Part I.C.1.
322. *See* Weithorn, *supra* note 76 and accompanying text.
323. Miller v. Alabama, 567 U.S. 460, 471, 480 (2012).
324. Lindell & Goodjoint, *supra* note 151.
325. *Id.* at 5.
326. *Id.*; Mullin, *supra* note 151, at 815.
327. *See generally* Kelso, *supra* note 201.

child's wellbeing.[328] This interest has gone so far to argue that greater regulation of children's lives by the state is not only for the benefit of the child, but for the benefit of society.[329] Imprisoning children without a chance of rehabilitation undermines this long held value of protecting children and prioritizing their psychological and emotional wellbeing. Therefore, juvenile LWOP does not meet a compelling governmental interest and does not meet strict scrutiny, thereby violating the Equal Protection Clause. The lack of governmental interest provides a clear public policy reason for the Legislator to spearhead the movement to abolish juvenile LWOP under an Equal Protection argument.

2. Arguments to Maintain Juvenile LWOP Sentencing Are Unpersuasive

It is essential for the Legislature to balance competing policy interests in the pursuit to abolish juvenile LWOP. Even though there is a strong constitutional basis for abolishing juvenile LWOP, differing perspectives among the states are important to consider. One significant reason to uphold juvenile LWOP is the fear that severe offenders, such as homicide offenders, will not be held accountable. News sources have broadcasted this rhetoric about juvenile offenders, in one instance proclaiming that a shooting in Chicago "could have been avoided if the [juvenile] shooter's previous gun crimes had been treated more seriously," and that young offenders commit crime knowing that "if children are caught, the legal system will go easy on them."[330] In the same vein, ensuring that such offenders receive consequences for their actions is a necessary consideration, especially for the victim's loved ones.[331] Juvenile offenders, regardless of race, could

328. Weithorn, *supra* note 76, at 234 (applying parens patriae doctrine to children in a manner broader than to adults).

329. *Id.* at 235.

330. Mary Mitchell, *How Did 16-Year-Old Accused of Killing Melissa Ortega, 8, Get Probation for 3 Armed Carjackings?*, CHI. SUN TIMES (Jan. 28, 2022), https://chicago.suntimes.com/columnists/2022/1/28/22907096/melissa-ortega-emilio-corripio-little-village-gang-shooting-child-victims [https://perma.cc/4AE7-DXWE].

331. *See, e.g.*, Sophie Price, Stella Sechopoulos & James Witty, LAPOP LAB, *Support for Harsher Criminal Punishment Is Greater Among the Young, the Insecure, Victims, and Those with Low Trust in Police*, VAND. U. (June 18, 2019), https://www.vanderbilt.edu/lapop/insights/IO940en.pdf [https://perma.cc/39UF-3SUJ] (finding that those who have been recently victimized by a crime are more likely to support harsher punishment); *see also* Emilee Fannon, *Lawmakers Debate Tougher Punishments, Sentences for Criminals*, WKOW (Feb. 11, 2020), https://www.wkow.com/news/politics/lawmakers-debate-tougher-punishments-sentences-for-criminals/article_fca960ca-4f3e-563d-b67d-dcf7ea9f7000.html [https://perma.cc/MGY3-DKUG] (discussing

reoffend and not be deterred by punishment if juvenile LWOP is abolished.

This argument is unpersuasive because removing juvenile LWOP sentencing does not signify a lack of accountability. Whether a juvenile offender is released is still dependent on a review by a parole board.[332] For those fearful of early release, studies have shown that parole boards are so overly cautious in their release decisions that "they release only a small fraction of those eligible," excluding many who do not pose a threat to the public.[333] But statistics continue to show that parole boards recommend juvenile offenders be eligible for parole after the age of twenty-five.[334] This does not account for existing mandatory minimums for certain offenses.[335] In theory, the parole board provides juvenile offenders with the opportunity to better themselves but still takes into account qualities such as lack of remorse or a refusal to change.[336] While there are extensive discussions about the effectiveness of parole boards that are outside the scope of this Note, the issues with parole boards currently support those in favor of traditional punishment.[337] In short, the possibility of parole in no way guarantees an early release even for those eligible.

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how Wisconsin Republicans are proposing "Tougher on Crime" criminal bills which are predicted to send "hundreds of people back to jail" and overrun capacity).

332. Rovner, *supra* note 36 ("[Reforms since *Graham*] provide an opportunity for individualized review before a parole board or a judge for a new sentence, taking into consideration the unique circumstances of each defendant.").

333. German Lopez, *Prisoners Rarely Get Released on Parole, Even When They're No Longer a Threat. Here's Why.*, VOX (July 13, 2015), https://www.vox.com/2015/7/13/8938061/parole-boards-politics [https://perma.cc/N94C-6MFS] (describing the Marshall Project investigation into parole boards and how they rarely release people in prison on parole due to political conflict).

334. Spooner & Vaughn, *supra* note 174, at 166; Heide, *supra* note 320.

335. *See, e.g.*, James Orlando, *Crimes with Mandatory Minimum Prison Sentences — Updated and Revised*, OLR RSCH. REP. (Sept. 1, 2017), https://www.cga.ct.gov/2017/rpt/2017-R-0134.htm [https://perma.cc/F877-YKH4] (stating that in Connecticut, the charge of murder has a mandatory minimum sentence of twenty-five years). *See generally Minnesota Sentencing Guidelines and Commentary*, MINN. SENT'G GUIDELINES COMM'N (Aug. 1, 2020), https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf [https://perma.cc/39BP-5MSV]. *But see* Rovner, *supra* note 36, at 5 ("In many other countries the period before a mandated sentencing review is 10 to 15 years.").

336. *See generally Parole Board Hearings for Juvenile Offenders*, JUVENILE SENT'G PROJECT (Jan. 2020), https://juvenilesentencingproject.org/wp-content/uploads/model_reforms_parole_hearings_for_juvenile_offenders.pdf [https://perma.cc/JT5K-G6XS].

337. *See, e.g.*, Lopez, *supra* note 333 (noting the political influence on parole boards and how that effects the number of releases rather than inmate's eligibility).

Deterrence from reoffending is another key reason to impose harsher sentences. Some believe that traditional forms of punishment, such as lengthier prison sentences, most effectively deter criminal behavior. However, this argument is also unpersuasive. Generally, little evidence supports the notion that prison sentences actually deter criminal behavior.[338] Research that completed a meta-analysis of 116 studies concluded that custodial sentences do not decrease recidivism rates.[339] Due to the overwhelming consensus of these studies, the ineffectiveness of custodial sentences is considered a "criminological fact."[340] In fact, terms of imprisonment can actually increase recidivism.[341] Once juvenile LWOP is abolished, this may provide an opportunity for policy makers to reframe and consider funding prison resources that would foster resilience and positive change, such as mentorship programs and behavioral skills therapy.[342] Scientific research illustrates the considerable change children are capable of going through despite their encounters with violence.[343] With this knowledge, it leaves policy makers, officers of the court, and the public with one choice: to take responsibility for children's healing and invest in their future.

3. How Individuals in the Judicial System Can Minimize the Impact of Juvenile Life Without Parole Sentences

While awaiting abolishment, judges and prosecutors in states that allow juvenile LWOP can refrain from imposing such sentences. At minimum, judges should consider imposing only life sentences with the possibility of parole for serious offenses. More progressively, judges and prosecutors may take into account the research regarding resilience and rehabilitation capability and impose sentences that align with these theories.[344] For instance, judges could require behavioral classes, workshops that promote mentorship while incarcerated,

338. PENAL REFORM INT'L, *supra* note 308.

339. Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson & Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 353 (2021) ("[S]ophisticated assessments of the research have independently reached the same conclusion. The null effect of custodial compared with noncustodial sanctions is considered a 'criminological fact.'").

340. *Id.*

341. *Id.* ("[T]he current analysis shows that custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation.").

342. *Supra* Part I.C.2.

343. *Supra* Part I.C.2.

344. *See generally Alternatives to Youth Incarceration*, ACLU, https://www.aclu

and community service. All officers of the court should also participate in bias trainings to combat subconscious stereotyping of certain racial groups.[345] These options would combat the harmful effects juvenile LWOP has on Black youth and, in turn, would modernize the court system by aligning sentencing with modern values and research. However, only abolishment will ensure that the damaging effects of juvenile LWOP will be halted permanently across the country.

CONCLUSION

Juvenile LWOP sentencing should be abolished. With states across the country already limiting the use of the statute, it is apparent that moral standards of criminal sentencing for juveniles have evolved, and thus legislators must take action.[346] The science regarding juvenile brains and racial disparities illustrates how juvenile LWOP sentencing does not serve the purpose intended.[347] Young people are locked away before ever having reached their full potential. Rather than protecting the public from supposed "super-predators," juvenile LWOP sentences incarcerate predominately young Black children, prevent any chance of rehabilitation, and in turn force the public to cover the extreme expenses of keeping children behind bars for the entirety of their life.[348] It is time to eliminate this disparity, for it is only one of the many discriminatory laws and procedures that disparately impact Black people in the criminal justice system.[349] Removing criminal sentences which target Black children is the first step.

Although the current Supreme Court Justices are unlikely to support an Equal Protection argument, the Equal Protection analysis provides a strong constitutional basis for legislators to follow the decisions of the thirty-two states who have already abolished juvenile

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.org/issues/juvenile-justice/youth-incarceration/alternatives-youth-incarceration [https://perma.cc/K9B8-5VKP]; *Handbook of Basic Principals and Promising Practices on Alternatives to Punishment*, U.N. OFFICE ON DRUGS & CRIME (2007), https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf [https://perma.cc/YE3U-K6X5].

345. Darling-Hammond, *supra* note 170, at 188 ("[Implicit bias] training for judges and other juvenile court professionals . . . is an effective means of reducing racial disproportionalities in juvenile dispositions.").

346. Moriearty, *supra* note 27.

347. *Supra* Part II.C.

348. *Supra* Part II.C.

349. *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. 10 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/2B5Z-47ZM].

LWOP. There is ample evidence of disparate impact on Black juveniles and discriminatory intent based on implicit biases.[350] This disparate impact claim calls for juvenile LWOP to be analyzed with strict scrutiny.[351] Under a strict scrutiny analysis, juvenile LWOP does not serve a compelling governmental interest.[352] The justifications for juvenile LWOP rely on incomplete research regarding cognitive development and the inability of children to rehabilitate.[353] It is time to modernize criminal punishment of juveniles and force the criminal justice system to comply with societal standards.[354]

There is a single harsh truth that underlies the juvenile LWOP discussion: Joe Ligon will never get those sixty-eight years of his life back. The damage done to a child who enters prison at age fifteen and exits at age eighty-three is irreparable. With the information on cognitive development and racial implications readily accessible, it is the responsibility of Congress, judges, and lawyers to mold the criminal justice system so it mirrors the realities of America's youngest offenders: that children, regardless of their race, are children first.

350. *Supra* Part II.A.
351. *Supra* Part II.B.2.
352. *Supra* Part III.A.1.
353. *Supra* Part I.C.
354. *See supra* Part III.A.2.