Missouri Law Review

Volume 87 | Issue 2 Article 11

Spring 2022

Children Sentenced to Die in Prison: Why a Lifetime Behind Bars is No Longer Justified for Juvenile Offenders

Logan Moore

NOTE

Children Sentenced to Die in Prison: Why a Lifetime Behind Bars is No Longer Justified for Juvenile Offenders

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

*Logan Moore**

I. INTRODUCTION

Brett Jones turned fifteen years old the summer before he was set to start high school.[1] Twenty-three days later, he was arrested and charged as an adult.[2] Now, he will spend the rest of his life behind bars.[3] In the United States, a fifteen-year-old child cannot legally vote,[4] drink alcohol,[5] or – in most states – drive a car without adult supervision.[6] That same

*B.S., Truman State University, 2019; J.D. Candidate, University of Missouri School of Law, 2023; Associate Member, *Missouri Law Review*, 2021–2022; Senior Note and Comment Editor, *Missouri Law Review*, 2022-2023. I am extremely grateful to Associate Dean Paul Litton for his insight, guidance, and support during the writing of this Note. I would also like to thank the members of the *Missouri Law Review* for their help in the editing process.

[1] Shirley L. Smith, *Mississippi man's case could affect fate of hundreds of juvenile lifers*, MISS. CTR. FOR INVESTIGATIVE REPORTING (Oct. 20, 2020), https://www.mississippicir.org/news/mississippi-mans-case-could-affect-fate-of-hundreds-of-juvenile-lifers [https://perma.cc/88YB-FREK].

[2] Jones v. Mississippi, 141 S. Ct. 1307, 1312 (2021); *Id.* at 1338 (Sotomayor, J., dissenting).

[3] *Id.* at 1312–13 (majority opinion).

[4] *See* U.S. CONST. amend. XXVI, § 1.

[5] *See* 23 U.S.C. § 158 (1984); *Alcohol Policy*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-policy#:~:text=The%20Federal%20Uniform%20Drinking%20Age,State%20abides%20by%20that%20standard [https://perma.cc/KL5U-QVQV] (last visited on Feb. 14, 2022).

[6] *See Driving Age by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/driving-age-by-state [https://perma.cc/3MSV-DR4M] (last visited on Feb. 14, 2022).

fifteen-year-old, however, who is not considered responsible enough to buy a ticket to an R-rated movie, may be sentenced to life in prison without the opportunity for parole ("LWOP").[7] Not only is the United States the only nation which permits LWOP sentences for fifteen-year-olds,[8] but the decision of the Supreme Court of the United States in Brett Jones's case makes it clear that a sentencing judge does not even need to find that juveniles like Jones are "irreparably corrupt" or incapable of reform before imposing the harshest sentence available.[9]

Part II of this Note outlines the relevant facts and procedural background of *Jones v. Mississippi*.[10] Part III summarizes the Court's relevant Eighth Amendment jurisprudence. Part IV details the majority, concurring, and dissenting opinions in *Jones*, which fundamentally disagreed about how to apply juvenile sentencing precedents. Part V first explores why both the majority and dissent ultimately failed to provide any clarification on the important question of which juveniles may receive an LWOP sentence and which juveniles may not. It then analyzes the consequences of this failure and discusses why a categorical ban is the best solution to the juvenile LWOP sentencing problem.

II. FACTS AND HOLDING

Brett Jones was sentenced to die in prison for a crime he committed when he was fifteen years old.[11] Until that point, Jones had been the victim of neglect and abuse for most of his short life.[12] His mother abused alcohol, suffered from mental health issues, and frequently left Jones and his brother unattended throughout Jones's childhood.[13] His biological father physically abused his mother – he knocked out her teeth and broke her nose multiple times – until the two separated when Jones was young.[14] When Jones was around ten years old, he and his younger brother began to suffer verbal and physical abuse from their stepfather.[15] He would grab

[7] *See, e.g.*, *Jones*, 141 S. Ct. at 1312–13 (Brett Jones was sentenced to LWOP when he was fifteen years old.).

[8] Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENTENCING PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/5QUX-334U].

[9] *Jones*, 141 S. Ct. at 1315–23. LWOP is the most extreme punishment available to juvenile offenders because the Court banned capital punishment for juvenile offenders in 2005. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005).

[10] *Jones*, 141 S. Ct. 1307.

[11] *Id.* at 1338 (Sotomayor, J., dissenting).

[12] *Id.*

[13] Jones v. State, 285 So. 3d 626, 630 (Miss. Ct. App. 2017).

[14] *Jones*, 141 S. Ct. at 1338 (Sotomayor, J., dissenting).

[15] *Jones*, 285 So. 3d at 630.

them by the neck and toss them around, leaving marks and bruises.[16] Jones was beaten with belts, switches, and paddles, and frequently referred to by "cruel epithets."[17] According to Jones's grandmother, Jones was the subject of much of the abuse because he was "simply 'easier to hurt and beat.'"[18]

Jones began to contemplate harming himself at the age of eleven or twelve to escape "the panic and the hurt" he felt.[19] He experienced hallucinations and was prescribed antidepressant medications.[20] In the summer after Jones finished eighth grade, his stepfather grabbed him by the throat after he arrived home late one night.[21] When Jones fought back, the police were called to the house and Jones was arrested.[22] Jones was effectively kicked out of the house, and moved in with his grandparents in Mississippi.[23] After the move, his antidepressant medications were suddenly cut off.[24]

When Jones moved, his girlfriend ran away from her home in Florida to be with him and live at his grandparents' house in secret.[25] On August 9, 2004, Jones's grandfather discovered that Jones's girlfriend was living at the house and forced her to leave.[26] Later that same day, Jones and his grandfather got into an argument in the kitchen.[27] His grandfather cornered him, "got in his face," and swung at him.[28] Jones testified that he had a knife in his hand from making a sandwich, and that he "threw the knife forward," stabbing his grandfather, because he "[did not] have anywhere to go between the corner and [his grandfather]."[29] His grandfather momentarily backed up but continued to come after Jones.[30] As they continued to fight, Jones ultimately stabbed his grandfather seven more times.[31] His grandfather staggered outside and died on the ground.[32]

---

[16] *Id.*
[17] *Jones*, 141 S. Ct. at 1338 (Sotomayor, J., dissenting).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Jones*, 285 So. 3d at 630.
[22] *Jones*, 141 S. Ct. at 1338 (Sotomayor, J., dissenting).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1338–39.
[27] Jones v. State, 285 So. 3d 626, 628 (Miss. Ct. App. 2017).
[28] *Id.*
[29] *Id.* (quoting Jones's trial testimony).
[30] *Id.*
[31] *Jones*, 141 S. Ct. at 1312; *Jones*, 285 So. 3d at 628.
[32] *Jones*, 141 S. Ct. at 1312.

Jones attempted to save his grandfather with CPR.[33] When that failed, he tried to cover up his actions.[34] He pulled his grandfather's body into the laundry room, used a hose to clean the blood off of himself, threw his shirt in the garbage, and moved a car over the carport floor to cover up blood spots.[35] A neighbor saw him outside in a bloody shirt, and Jones claimed that the blood was a joke.[36] When he was arrested later that night, he agreed to be interviewed by a police officer without invoking his right to silence or counsel.[37]

At Jones's trial, the jury rejected his self-defense argument and found him guilty of murder.[38] He received an LWOP sentence pursuant to a Mississippi statutory mandate.[39] He then moved for post-conviction relief in state court on the grounds that the mandatory sentence violated the Eighth Amendment.[40] After the state trial court and the Mississippi Court of Appeals denied the motion, Jones appealed to the Mississippi Supreme Court.[41] During that time, the Supreme Court of the United States held that *mandatory* juvenile LWOP sentences were unconstitutional.[42] The Court's holding required sentencers to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[43] It identified several factors that a judge should consider, including a juvenile defendant's chronological age and its hallmark features, family and home environment, incompetence associated with youth, and the circumstances surrounding the crime.[44] In the wake of that decision, the Mississippi Supreme Court ordered a new sentencing hearing for Jones in which the judge was to take these factors into account before selecting an appropriate sentence.[45]

The new sentencing hearing took place roughly ten years after Jones was originally convicted and sentenced to prison.[46] At the hearing, Jones provided evidence that he was capable of rehabilitation and had "matured significantly since his crime."[47] Jones, his mother, and his younger brother all testified about the verbal and physical abuse Jones endured from the

---

[33] *Id.* at 1339 (Sotomayor, J., dissenting).
[34] *Id.*
[35] *Jones*, 285 So. 3d at 628.
[36] *Jones*, 141 S. Ct. at 1339 (Sotomayor, J., dissenting).
[37] *Id.*
[38] *Id.* at 1312 (majority opinion).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* (citing Miller v. Alabama, 567 U.S. 460 (2012)).
[43] *Miller*, 567 U.S. at 480.
[44] *See id.* at 477.
[45] *Jones*, 141 S. Ct. at 1312–13.
[46] *See* Jones v. State, 285 So. 3d 626 (Miss. Ct. App. 2017).
[47] *Jones*, 141 S. Ct. at 1339 (Sotomayor, J., dissenting).

ages of ten to fifteen.[48] An officer who knew Jones from Jones's time at a correctional facility testified that Jones got along with others, stayed out of trouble, obtained his GED, and became "'almost like [a] son'" during that time.[49] Jones's grandmother – the widow of the man he stabbed – testified that she continued to speak with Jones weekly to provide him encouragement and "remain[ed] steadfast in her belief that [Jones] is not and never was irreparably corrupt."[50] Nevertheless, the sentencing judge determined that LWOP remained the appropriate sentence.[51] The Mississippi Court of Appeals affirmed the judgment, and the Supreme Court of the United States granted certiorari to address disagreement and uncertainty about how to interpret its recent juvenile sentencing holdings.[52]

Jones argued that the Court's recent decisions in *Miller v. Alabama* and *Montgomery v. Louisiana* require more than just the *discretion* to impose a sentence less than LWOP.[53] He raised three arguments to support his contention that a sentencer was further required to make a separate factual finding of permanent incorrigibility before imposing LWOP on a juvenile offender.[54] First, he claimed that the Constitution *requires* such a finding before a juvenile is eligible for LWOP, similar to some of the Court's death penalty cases, where the Court recognized that the factual finding of an intellectual disability or a lack of sanity renders a defendant ineligible for capital punishment.[55] Second, Jones argued that the *Montgomery* Court held that *Miller* was a substantive rule, and thus the Court must have envisioned *more than* just a discretionary sentencing hearing at which factors related to youth are considered.[56] Third, he reasoned that *Miller* and *Montgomery* sought to ensure that juvenile

---

[48] *Jones*, 285 So. 3d at 630.

[49] *Id.* at 631.

[50] *Jones*, 141 S. Ct. at 1339 (Sotomayor, J., dissenting) (internal quotations omitted).

[51] *Id.* at 1313 (majority opinion).

[52] *Id.* Some courts applied the Supreme Court's decision in *Miller v. Alabama* to *all* cases in which a juvenile was sentenced to LWOP, while other courts applied the ruling to only *mandatory* juvenile LWOP sentences. 567 U.S. 460 (2012); *see Jones*, 141 S. Ct. at 1313 (*comparing* Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018); *with* United States v. Sparks, 941 F.3d 748 (5th Cir. 2019)).

[53] *Jones*, 141 S. Ct. at 1313; *see Miller*, 567 U.S. 460; Montgomery v. Louisiana, 577 U.S. 190 (2016).

[54] *Jones*, 141 S. Ct. at 1314–15.

[55] *Id.* at 1315 (citing Atkins v. Virginia, 536 U.S. 304 (2002) (lack of intellectual disability as a criterion); Ford v. Wainwright, 477 U.S. 399 (1986) (sanity as a criterion)).

[56] *Jones*, 141 S. Ct. at 1316–17. The *Miller* Court held that mandatory juvenile LWOP sentences were unconstitutional. *Miller*, 567 U.S. at 479. The *Montgomery* Court held that the *Miller* holding applied retroactively and thus established that *Miller* created a *substantive* constitutional rule. *Montgomery*, 577 U.S. at 212.

LWOP sentences were rare, and a specific fact-finding requirement was necessary to accomplish that objective.[57] Jones alternatively argued that if a sentencer is not required to make a separate permanent incorrigibility finding, he must *at least* provide an on-the-record explanation with an implicit finding of permanent incorrigibility to ensure that a juvenile offender's age is considered.[58]

The Court held that a sentencer is not required to either make a separate factual finding of permanent incorrigibility or provide an on-the-record sentencing explanation with an "implicit finding" of permanent incorrigibility before imposing a sentence of LWOP on a juvenile homicide offender.[59]

III. LEGAL BACKGROUND

The Supreme Court has consistently referred to "the evolving standards of decency that mark the progress of a maturing society" to determine whether a particular criminal punishment violates the Eighth Amendment.[60] The Court has looked to relevant state legislative actions and patterns in jury determinations as evidence of these evolving standards.[61] Over the past few decades, the Court has established two strands of Eighth Amendment precedent:[62] (1) cases with *substantive* holdings – adopting categorical bans on particular sentences for certain classes of offenders or crimes,[63] and (2) cases with *procedural* holdings – prohibiting various mandatory sentencing statutes and requiring sentencing authorities to follow certain processes.[64]

The Court recently confronted these two lines of precedent in a trio of cases related to juvenile LWOP sentencing.[65] In the first case – *Miller* – the Court analyzed both lines of precedent and held that mandatory

---

[57] *Jones*, 141 S. Ct. at 1318.

[58] *Id.* at 1319.

[59] *Id.* at 1315–23.

[60] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 58 (2010); Roper v. Simmons, 543 U.S. 551, 561 (2005); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988); Woodson v. North Carolina, 428 U.S. 280, 301 (1976).

[61] *See, e.g.*, *Graham*, 560 U.S. at 62–67; Atkins v. Virginia, 536 U.S. 304, 313–19 (2002); *Thompson*, 487 U.S. at 822–33; *Woodson*, 428 U.S. at 291–99.

[62] Miller v. Alabama, 567 U.S. 460, 470 (2012) ("The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment.").

[63] *See, e.g.*, *Roper*, 543 U.S. at 578–79 (creating a categorical prohibition on juvenile capital punishment).

[64] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608–09 (1978) (requiring consideration of mitigating factors in death penalty cases).

[65] *See* Jones v. Mississippi, 141 S. Ct. 1307 (2021); Montgomery v. Louisiana, 577 U.S. 190 (2016); *Miller*, 567 U.S. 460. Sections C and D of this Part will focus on *Miller* and *Montgomery*.

juvenile LWOP sentences were unconstitutional.[66] In the second case – *Montgomery* – the Court was required to decide whether the *Miller* Court's decision was more like the substantive or procedural line of holdings to resolve the open question of whether *Miller* categorically banned LWOP for a certain class of offenders.[67] The third case – *Jones* – is the subject of this Note.

A. Substantive Eighth Amendment Rulings

In 2005, the Court in *Roper v. Simmons* determined that the evolving standards of decency – especially legislative actions and enforcement patterns that had emerged over the previous fifteen years – indicated a national consensus against the practice of executing *any* juvenile offender.[68] Specifically, only six states had actually executed juvenile offenders during that period,[69] and thirty states had prohibited the juvenile death penalty altogether by 2005.[70] The Court also noted three general differences between juveniles and adults to demonstrate that juveniles cannot be considered amongst the "worst offenders" eligible for capital punishment: (1) a lack of maturity and an underdeveloped sense of responsibility are much more common in juveniles, (2) juveniles are much more susceptible to peer pressure, and (3) the personality traits of juveniles are much less formed.[71] Therefore, the Court categorically banned capital punishment for all offenders who were under eighteen years old at the time of their crimes.[72]

Five years after the Court prohibited the death penalty for juveniles, it confronted for the first time a categorical challenge to LWOP sentences for non-homicide offenders under eighteen years old.[73] In *Graham v. Florida*, the Court determined that actual sentencing practices indicated that very few juveniles were serving LWOP sentences for non-homicide

---

[66] *Miller*, 567 U.S. at 470.

[67] *Montgomery*, 577 U.S. at 206 (A procedural rule "regulates only the manner," while a substantive rule "prohibits a certain category of punishment" for certain defendants.).

[68] *Roper*, 543 U.S. at 564–75. In 1988, the Court held that the death penalty was unconstitutional when imposed on offenders under the age of sixteen. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). But one year later, in *Stanford v. Kentucky*, the Court made clear that its holding in *Thompson* was limited to offenders under sixteen years old. 492 U.S. 361, 380 (1989).

[69] *Roper*, 543 U.S. at 564.

[70] *Id.* Twelve states had abandoned the death penalty altogether, and eighteen states maintained it but excluded juveniles from its reach. *Id.*

[71] *Id.* at 569–70.

[72] *Id.* at 578.

[73] Graham v. Florida, 560 U.S. 48, 64 (2010).

offenses.[74] By 2010, there were only around 124 such offenders,[75] all of whom were sentenced among just eleven states.[76] As for the penological justifications, the Court noted that there were no legitimate retribution, deterrence, incapacitation, or rehabilitation rationales.[77] Acknowledging that LWOP is especially harsh for juveniles because they will serve a much greater percentage of their lives in prison than adult offenders who receive the same sentence,[78] the Court held that the Constitution prohibits LWOP sentences for non-homicide juvenile offenders.[79]

B. Procedural Eighth Amendment Requirements

In two cases in the late 1970s, the Court established that mandatory death penalty statutes were unconstitutional, and it created a procedural requirement under the Eighth Amendment – that a sentencer consider relevant mitigating factors at the sentencing phase before imposing a sentence of death.[80] In *Woodson v. North Carolina*, the Court determined that there was a significant societal development towards the rejection of mandatory death sentences because they failed to allow for particularized consideration of defendants' individual characteristics.[81] In *Lockett v. Ohio*, the Court clarified what the particularized consideration should entail: "the sentencer… [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[82]

---

[74] *Id.* at 62–64.

[75] *Id.* at 64.

[76] *Id.* Seventy-seven of the non-homicide juvenile LWOPers were sentenced in Florida, and the remaining sentences were imposed among a total of only ten states. *Id.*

[77] *Id.* at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

[78] *Id.* at 70.

[79] *Id.* at 82.

[80] Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (holding that a statutory mandate of the death penalty for first-degree murder violated the Eighth Amendment because it did not allow for "consideration of the character and record of the individual offender"); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors").

[81] *Woodson*, 428 U.S. at 304 ("Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.").

[82] *Lockett*, 438 U.S. at 604.

C. Miller v. Alabama

An examination of both the substantive and procedural Eighth Amendment precedents led the Court to conclude that mandatory juvenile LWOP sentences were unconstitutional.[83] According to the Court in *Miller v. Alabama*, the cases categorically banning certain juvenile punishments – specifically, *Roper* and *Graham* – established that children are constitutionally different from adults for sentencing purposes because of (1) psychological distinctions between juvenile and adult minds,[84] and (2) diminished penological justifications of LWOP for children.[85] The procedural cases – namely, *Woodson* and *Lockett* – represented a shift toward individualized sentencing in cases involving the most serious punishments.[86] Considered together, these two lines of cases taught that a mandatory sentencing scheme for juvenile LWOP "poses too great a risk of disproportionate punishment."[87] It precludes a review of crucial individualized sentencing factors, such as immaturity, family and home environment, peer pressures, and incompetency in dealing with prosecutors.[88]

While the *Miller* Court explicitly declined to address the argument that the Eighth Amendment requires a categorical ban of all juvenile LWOP sentences,[89] it seemed to make conflicting statements about

[83] Miller v. Alabama, 567 U.S. 460, 470 (2012). The petitioners in *Miller v. Alabama* were both fourteen years old at the time they committed their respective crimes, and each was sentenced to LWOP without the sentencing authority having any discretion to impose a lesser punishment. *Id.* at 465. One petitioner was convicted of capital felony murder and aggravated robbery for his participation in the robbery of a video store. *Id.* at 465–66. The second petitioner was convicted of murder in the course of arson. *Id.* at 468–69.

[84] *Id.* at 471–72. The Court pointed to findings in *Roper* – that adolescents develop patterns of problem behavior at a relatively smaller rate – and *Graham* – that brain science developments show differences in the parts of the brain involving behavior control – to support the notion that children have a lessened moral culpability. *Id.*

[85] *Id.* at 472–73. The retribution rationale is lacking because a juvenile offender cannot be as blameworthy as an adult offender. *Id.* at 472. A deterrence justification is insufficient because the same characteristics which make juveniles less culpable also make them less likely to deliberate potential punishments. *Id.* Incapacitation could not be used for support because "incorrigibility is inconsistent with youth." *Id.* at 472–73 (quotations omitted). Rehabilitation is not a proper justification because LWOP is at odds with any capacity to change. *Id.* at 473.

[86] *Id.* at 476 ("[T]hese decisions too show the flaws of imposing mandatory [LWOP] sentences on juvenile homicide offenders" because mandatory sentences "preclude a sentencer from taking account of an offender's age and the wealth of characteristics attendant to it.").

[87] *Id.* at 479.

[88] *Id.* at 477–78.

[89] *Id.* at 479.

whether its holding was more substantive or procedural in nature.[90] On one hand, the Court noted that its decision "[did] not categorically bar a penalty for a class of offenders," but rather "mandate[d] only that a sentencer follow a certain process."[91] If a *procedural* rule was announced – as the previous language suggests – a sentencer would be required merely to consider certain factors before imposing a punishment.[92] However, the Court alternatively suggested that juvenile LWOP sentences would be rare because they would involve the difficult distinction between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[93] If a distinction between those that are immature and those that are irreparably corrupt is required, it implies that LWOP is unconstitutional for a certain class of offenders – those that are *not* irreparably corrupt – and thus that the *Miller* holding is *substantive*.[94]

D. Montgomery v. Louisiana

In *Montgomery v. Louisiana*, the Court addressed the confusion surrounding the scope of the *Miller* decision.[95] Specifically, the *Montgomery* Court faced the question of whether *Miller* applied retroactively to juvenile offenders whose sentences were final when *Miller* was decided.[96] The Constitution requires that state courts give retroactive effect to *Miller* if it announced a *substantive rule* of constitutional law.[97] A substantive rule is one which "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'"[98] Therefore, *Miller* established a substantive constitutional rule if it created a categorical prohibition on LWOP sentences for a certain class of juvenile offenders.[99]

---

[90] *See id.* at 479–80, 483.

[91] *Id.* at 483.

[92] *Id.* at 503.

[93] *Id.* at 479–80 (quotations omitted).

[94] *Id.* at 482; *see also* Montgomery v. Louisiana, 577 U.S. 190, 206–12 (2016).

[95] *Montgomery*, 577 U.S. at 206–12.

[96] *Id.* at 194. In 1963, the petitioner in *Montgomery* was convicted of murder for the killing of a Louisiana sheriff. *Id.* He was seventeen years old at the time of the crime, and he was sentenced to LWOP pursuant to a mandatory Louisiana statute. *Id.*

[97] *Id.* at 200. To come to this conclusion, the Court cited to *Teague v. Lane*, which set forth the framework for retroactivity in federal collateral review cases. *Id.* (citing Teague v. Lane, 489 U.S. 288 (1989)). The *Teague* framework "requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings." *Id.* at 198–99. The Court in *Montgomery* limited its holding to substantive rules under the *Teague* framework. *Id.* at 200.

[98] *Id.* at 206 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

[99] *Id.*

In the *Montgomery* Court's analysis of *Miller*, it acknowledged that *Miller* (1) recognized that children are constitutionally different for sentencing purposes,[100] and (2) made clear that a juvenile LWOP sentence should be reserved for the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible."[101] Thus, the Court concluded that *Miller* "did *more than* require a sentencer to *consider* a juvenile's youth."[102] While the Court noted that "*Miller* did not impose a formal factfinding requirement,"[103] it also stated that "[e]ven if a court considers a child's age before sentencing him or her to [LWOP], that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[104] Based on its interpretation of *Miller*, the Court determined that the holding prohibited LWOP sentences for the class of juvenile offenders whose crimes showed the immaturity that comes with youth.[105] Therefore, the Court held that *Miller* announced a substantive rule of constitutional law and must be applied retroactively.[106]

Confronted with *Miller* and *Montgomery*, the *Jones* Court had the opportunity to clarify and add to the *Montgomery* Court's language about the class of juvenile offenders exempt from LWOP sentences.[107] It ultimately chose to take a step back.[108]

IV. INSTANT DECISION

The ultimate issue in *Jones* was whether a sentencing judge is required to make a separate finding that a juvenile is permanently incorrigible before the judge sentences the juvenile to LWOP.[109] The answer depends on two important considerations: (1) how to interpret what is required by the *Miller* and *Montgomery* holdings, and (2) where to draw the line between formal requirements and guided discretion.[110] This Part

---

[100] *Id.* at 206–07.

[101] *Id.* at 208.

[102] *Id.* (emphasis added).

[103] *Id.* at 211.

[104] *Id.* at 208 (quotations omitted).

[105] *Id.*

[106] *Id.* at 212. The Court recognized Louisiana's argument that *Miller* created merely a procedural rule; but the Court stated that the argument "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Id.* at 209–11 (quotations omitted).

[107] Jones v. Mississippi, 141 S. Ct. 1307 (2021).

[108] *See id.* at 1311.

[109] *Id.*

[110] *Id.* at 1311–37.

examines the difference between how the majority, concurrence, and dissent addressed these questions.

A. Justice Kavanaugh's Majority Opinion

The majority held that *Miller* and *Montgomery* do not impose a requirement that a sentencing judge either (1) make a separate finding of permanent incorrigibility,[111] or (2) provide an on-the-record explanation with an implicit finding of permanent incorrigibility.[112]

The majority first considered the argument that a separate finding of permanent incorrigibility is required in juvenile LWOP sentencing procedures.[113] It stated that "*Miller* mandated 'only that a sentencer follow a certain process'" and "*Montgomery* then flatly stated that . . . 'a finding of fact regarding a child's incorrigibility . . . is not required.'"[114] Thus, the majority argued, "*Miller* and *Montgomery* squarely rejected such a requirement."[115]

The majority noted that the *Miller* Court "declined to characterize permanent incorrigibility as [an] eligibility criterion" because even psychologists struggled to identify which crimes reflected irreparable corruption.[116] Thus, it contended, the *Montgomery* Court made clear that what was required by *Miller* was just "[a] hearing where youth and its attendant characteristics are considered as sentencing factors…" as opposed to a specific finding of incorrigibility.[117] The majority additionally relied on data from *Miller* to support the conclusion that a discretionary sentencing system is sufficient to ensure that juvenile LWOP sentences are relatively rare.[118]

The majority then considered Jones's alternative argument that a sentencer must at least provide an on-the-record explanation to ensure that the defendant's youth was considered.[119] It ultimately determined that such an explanation is not required because (1) it would be nearly impossible for a sentencer to avoid *considering* a defendant's youth if the defense raises that factor, (2) *Miller* "did not even hint at requiring an on-

---

[111] *Id.* at 1313.

[112] *Id.* at 1319.

[113] *Id.* at 1314.

[114] *Id.* at 1314–15 (quotations omitted).

[115] *Id.* at 1314.

[116] *Id.* at 1315.

[117] *Id.* at 1317.

[118] *Id.* at 1318. The *Miller* Court noted that only about fifteen percent of all juvenile LWOP sentences occurred in states which allowed for discretionary sentencing, while the other eighty-five percent came from the twenty-nine jurisdictions which had mandatory sentencing guidelines. *See* Miller v. Alabama, 567 U.S. 460, 483 n.10 (2012).

[119] *Jones*, 141 S. Ct. at 1319.

the-record sentencing explanation," and (3) the Court has never required a similar explanation in analogous death penalty cases.[120]

B. Justice Thomas's Concurrence

While Justice Thomas agreed with the majority that there is no constitutional requirement of a separate permanent incorrigibility finding in juvenile LWOP sentencing procedures, he thought the majority read *Montgomery* incorrectly in coming to that conclusion.[121] Although he believed that *Miller* announced a purely procedural rule – that a juvenile LWOP sentence must involve an individualized sentencing process – he argued that the rule was expanded when the *Montgomery* Court applied it retroactively.[122] Thus, Justice Thomas stated that the *Montgomery* holding established that "there must be a determination as to whether Jones falls within [the] protected class" of offenders who are exempt from juvenile LWOP sentences.[123]

C. Justice Sotomayor's Dissent

The dissent argued that the majority's failure to follow the holdings in *Miller* and *Montgomery* essentially permits a juvenile to be sentenced to LWOP even if his crime "reflects unfortunate yet transient immaturity."[124] Justice Sotomayor pointed to the *Montgomery* Court's own language to support her position that *Miller* and *Montgomery* required a separate factual finding of permanent incorrigibility: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[125] The dissent raised several reasons for its fundamental disagreement with the majority's holding.[126]

First, the dissent reiterated that the Court has consistently recognized that children are constitutionally different from adults for sentencing

---

[120] *Id.* at 1319–21.

[121] *Id.* at 1323 (Thomas, J., concurring).

[122] *Id.* at 1324–25 (citing Teague v. Lane, 489 U.S. 288 (1989)) (explaining that the *Teague* doctrine required the Court in *Montgomery* to "rewrite [*Miller*] into a substantive rule" to apply it retroactively); *see supra* note 97 and accompanying text.

[123] *Jones*, 141 S. Ct. at 1326 (Thomas, J., concurring). Justice Thomas suggested that the class of offenders subject to the prohibition are those "whose crimes reflect transient immaturity." *Id.* at 1325.

[124] *Id.* at 1328 (Sotomayor, J., dissenting).

[125] *Id.* at 1328 (quoting Montgomery v. Louisiana, 577 U.S. 190, 208 (2016)).

[126] *Id.* at 1328–37.

purposes.[127] Second, it argued that the majority "distort[ed] *Miller* and *Montgomery* beyond recognition."[128] Justice Sotomayor acknowledged that while *Montgomery* stated that "*Miller* did not impose a formal factfinding requirement," it also clarified that the lack of a formal factfinding requirement "does not leave [s]tates free to sentence a child whose crime reflects transient immaturity to [LWOP]."[129] According to the dissent, there was clear articulation throughout *Montgomery* to indicate the essential holding of *Miller* – that juvenile LWOP sentences are reserved for those offenders whose crime reflects irreparable corruption.[130] Third, the dissent stated that the majority ignored half of *Miller*'s reasoning by stating that the holding was limited to *mandatory* LWOP sentences.[131] To the contrary, the dissent argued, *Miller* relied on *two* sets of cases – the *Roper*/*Graham* line of juvenile sentencing cases and the *Woodson*/*Lockett* line of analogous death penalty cases – and was clear that it drew primarily from the juvenile sentencing line, which established categorical bans on juvenile capital punishment and juvenile LWOP for non-homicide offenders.[132] Thus, the *Miller* Court's reliance on *Roper* and *Graham* was evidence that it intended to set a substantive limit on juvenile LWOP sentences.[133] Lastly, the dissent argued that the majority's holding could not be reconciled with the Court's precedents, such as the *Teague* doctrine discussed previously – which established that substantive constitutional rules receive retroactive application.[134]

---

[127] *Id.* at 1328. The dissent cited specific language from *Roper*, *Graham*, *Miller*, and *Montgomery* which indicates that youth matters in sentencing. *Id.* (citations omitted); *see Montgomery*, 577 U.S. at 213 (Juveniles "must be given the opportunity to show their crime did not reflect irreparable corruption . . . ."); Miller v. Alabama, 567 U.S. 460, 470–71 (2012) ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on [juveniles] . . . ."); Graham v. Florida, 560 U.S. 48, 72 (2010) ("[I]ncorrigibility is inconsistent with youth."); Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[Juveniles] cannot with reliability be classified among the worst offenders.").

[128] *Jones*, 141 S. Ct. at 1330 (Sotomayor, J., dissenting).

[129] *Id.* at 1330–31 (internal quotations omitted).

[130] *Id.* The *Miller* holding "did more than require a sentencer to consider a juvenile offender's youth before imposing [LWOP]." *Id.* An LWOP sentence may violate the Eighth Amendment "[e]ven if a court considers a child's age before sentencing him or her to [LWOP]" if that child's crimes "reflect transient immaturity." *Id.* Thus, the dissent argued, "the linchpin of the [majority's] opinion" – the *Montgomery* language that "a finding of fact regarding a child's incorrigibility . . . is not required" – failed to address the other language throughout *Montgomery* which held that *Miller* was substantive. *Id.*

[131] *Id.* at 1332.

[132] *Id.*

[133] *Id.* at 1332–33.

[134] *Id.* at 1334–37; *see supra* note 97 and accompanying text ("The *Teague* framework 'requires the retroactive application of new *substantive*' rules.").

V. COMMENT

The Court granted certiorari in Brett Jones's case "[i]n light of disagreement in state and federal courts about how to interpret *Miller* and *Montgomery*."[135] It failed, however, to provide the necessary clarity, as four Justices pointed out that even the majority's application of *Miller* was directly inconsistent with the Court's position in *Montgomery*.[136] Justice Thomas – who joined the majority's 6-3 judgment – argued that the *Montgomery* Court "could not have been clearer that [the *Miller*] rule transcended mere procedure."[137] In fact, *Montgomery* explicitly stated that "[*Miller*] rendered [LWOP] an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth."[138] Thus, the majority relied on an incorrect interpretation of *Montgomery*,[139] and it transformed the substantive line drawn by *Miller* into one "more fanciful than real."[140]

While the dissent adopted a more accurate and complete reading of *Miller* and *Montgomery*, its conclusion too leaves clarification to be desired.[141] According to the dissent, a failure to separate juvenile offenders "who may be sentenced to [LWOP] from those who may not" is a violation of the Eighth Amendment.[142] But, what is the rule to be applied when making that important separation between classes of juvenile offenders? If it is "permanent incorrigibility" – as Jones suggested – what does it look like to be permanently incorrigible at less than eighteen years old?[143] If the requirement is to separate between *crimes* which reflect

---

[135] *Id.* at 1313.

[136] *See id.* at 1323 (Thomas, J., concurring) ("[I]n reaching [its] result, the majority adopts a strained reading of *Montgomery* . . . ."); *id.* at 1328 (Sotomayor, J., dissenting) ("[The majority's] conclusion would come as a shock to the Courts in *Miller* and *Montgomery*.").

[137] *Id.* at 1325 (Thomas, J., concurring).

[138] Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (quotations omitted).

[139] *See Jones*, 141 S. Ct. at 1313–23. The majority circumvented the *Teague* doctrine when it concluded that *Miller* merely required a discretionary sentencing procedure. *Id.*; *see also id.* at 1324–26 (Thomas, J., concurring) (explaining that under the *Teague* approach, the *Miller* rule must have been substantive; and substantive rules "include those that prohibit a certain category of punishment for a class of defendants . . .").

[140] *Id.* at 1326 (Thomas, J., concurring).

[141] *Id.* at 1332–33 (Sotomayor, J., dissenting). According to the dissent, *Miller* drew on *Roper* and *Graham* to "set a substantive limit on [juvenile LWOP]," and *Montgomery* explicitly rejected the misinterpretation that *Miller* mandated "only that a sentencer follow a certain process." *Id.*

[142] *Id.* at 1337.

[143] *Id.* at 1314 (majority opinion) ("According to Jones, the sentencer must also make a separate factual finding of *permanent incorrigibility* before sentencing a murder under eighteen to [LWOP]." (emphasis added)).

"transient immaturity" and those that reflect "irreparable corruption" – as the *Montgomery* Court stated – how should a sentencer approach that determination?[144] With many of these questions left unanswered after *Jones*, it is clear that both the majority and dissent failed to fully address the confusion surrounding *Miller* and *Montgomery*.[145]

The Court's lack of clarification on these issues fails to confront the near impossibility of *properly* considering youth as a mitigating factor, and it effectively permits racially disproportionate sentencing practices. A categorical ban of juvenile LWOP is necessary to solve both of these problems.

A. "Un-guided" Discretion

The Court's rationale for leaving full discretion to sentencers is that they "cannot avoid considering the defendant's youth if [they] have discretion to consider that mitigating factor."[146] Even if this broad generalization is true, it still leaves two major problems unsolved. First, *considering* a juvenile's youth is only half the battle; a sentencer must also understand how it indicates which juveniles should be sentenced to LWOP and which should not.[147] Second, the rationale underestimates the problems of broad discretion by suggesting that the mere consideration of youth is all that matters. Too much discretion has led to many other problems as well; namely, LWOP sentencing trends based on constitutionally impermissible factors.[148]

1. The Prediction Predicament

In *Graham*, the Court warned that even if LWOP sentences are merited for some juveniles, "it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[149] In fact, evidence suggests that a prediction

---

[144] Montgomery v. Louisiana, 577 U.S. 190, 209 (2016) ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.").

[145] *See Jones*, 141 S. Ct. at 1313–23, 1328–37 (Sotomayor, J., dissenting).

[146] *Id.* at 1319–20 (majority opinion).

[147] *Montgomery*, 577 U.S. at 208 ("*Miller* . . . did *more than require a sentencer to consider a juvenile offender's youth* . . . it rendered [LWOP] an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." (emphasis added)).

[148] *See, e.g.*, Rovner, *supra* note 8 ("Racial disparities plague the imposition of [juvenile LWOP] sentences.").

[149] Graham v. Florida, 560 U.S. 48, 77 (2010).

about whether a juvenile offender is capable of rehabilitation is almost impossible.[150]

This difficulty is exemplified in studies of brain development – showing that the mental capacity for self-regulation is still being formed during adolescence –[151] and recidivism – indicating that very few juvenile offenders continue to reoffend as adults.[152] Taken together, these two lines of study suggest that *almost* all juvenile offenders will self-regulate at a much higher rate and commit crime at a much lower rate as they age. That begs the question: how does a sentencer predict which small number of offenders will continue to commit crimes? While this may explain why the majority was reluctant to mandate a specific finding of incorrigibility, the Court has discussed on multiple occasions the importance of distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[153] If the Court wants to avoid the imposition of LWOP sentences on juveniles who are *not* irreparably

[150] *See, e.g.*, Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 684 (2016) ("[P]rediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error."); Kimberly Larson, Frank DiCataldo & Robert Kinscherff, Miller v. Alabama*: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 319, 336 (2013) [hereinafter Larson, *Implications for Forensic Mental Health*] ("[T]here is currently no basis in current behavioral science nor well-informed professional knowledge that can support any reliable forensic expert opinion on the relative likelihood of a specific adolescent's prospects for rehabilitation at a date that may be years to decades in the future."); *Jones*, 141 S. Ct. at 1315 (noting that even expert psychologists struggle to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity" and those "whose crime reflects irreparable corruption").

[151] *See, e.g.*, Alex R. Piquero, *Youth Matters: The Meaning of* Miller *for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 349–50 (2013) [hereinafter Piquero, *Youth Matters*] (noting that as individuals move from middle to late adolescence, a strengthening of self-regulation and change in the way the brain responds to rewards is consistent with an "eventual precipitous decline in delinquency and crime observed in very early adulthood").

[152] *Id.* (explaining that "Offending peaks" occur in the late teenage years between age fifteen and nineteen, and "[o]nly a very small number of persons continue to offend into and throughout adulthood").

[153] Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (internal quotations omitted)). The appropriate occasions for juvenile LWOP will be rare because it requires the difficult distinction between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Miller v. Alabama, 567 U.S. 460, 479 (2012).

corrupt, its current approach is insufficient because it is nearly impossible for judges to make that distinction – especially without any guidance.

Another difficult factor to take into account at the sentencing phase is an individual juvenile offender's childhood experiences. A 2012 survey of juvenile LWOPers showed that, as children, an overwhelming majority regularly witnessed violence in their homes, and almost half were the victims of physical abuse.[154] Some reported being homeless, and less than half were still attending school at the time of their offenses.[155] While it is estimated that around twenty-five to thirty-four percent of the general population experience at least one childhood trauma, that number jumps to ninety-three percent for children entering the criminal justice system.[156] Even the most traumatized juveniles are still much better candidates for rehabilitation than their adult counterparts, however, so a finding of incorrigibility is still incredibly difficult and requires much more than unguided discretion.[157]

Balancing individual childhood experiences with broad scientific research highlights the difficulty in determining which juveniles deserve a lifetime in prison. Judges are ill-equipped to accurately make that distinction and are "poor at predicting which offenders will return to crime."[158] A group of former juvenile court judges admitted as much in

---

[154] Ashley Nellis, Ph.D., *The Lives of Juvenile Lifers: Findings from a National Survey*, SENTENCING PROJECT, https://www.sentencingproject.org/publications/the-lives-of-juvenile-lifers-findings-from-a-national-survey/ [https://perma.cc/KDQ6-TCL4]. The survey interviewed 1,579 individuals, which was roughly sixty-nine percent of all individuals serving such sentences at that time. *Id.* Seventy-nine percent regularly witnessed violence in their homes, forty-seven percent were physically abused, and fifty-four percent reported witnessing weekly neighborhood violence as well. *Id.* Over three-fourths of the girls surveyed reported histories of sexual abuse during their adolescence. *Id.*

[155] *Id.* About one-third reported living in public housing, forty-seven percent stated they were still in school when they committed their crime, and over eighty percent of the respondents reported they had either been suspended or expelled from school at some point. *Id.* Additionally, forty percent were enrolled in special education courses at some point during their short academic careers. *Id.*

[156] CAMPAIGN FOR FAIR SENTENCING YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 8 (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/85FG-F8F7]. Researchers have defined adverse childhood experiences as "emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, household substance abuse, household mental illness, parental separation, and having an incarcerated household member." *Id.*

[157] Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *The Supreme Court and the Transformation of Juvenile Sentencing*, MODELS FOR CHANGE, 9 (2015). The heightened neuroplasticity in children's brains "support the view that juveniles not only are less culpable than adults, but also are likely to be better candidates for rehabilitation." *Id.*

[158] Piquero, *Youth Matters*, *supra* note 151, at 356.

an amicus brief to the *Miller* Court: "Having spent decades overseeing the cases of juvenile[s]… [we] strongly believe that the criminal justice system cannot predict what kind of person a fifteen-year-old juvenile offender will be when he is 35, or 55, or 75."[159] While this is the precise reason that the majority avoided requiring judges to make a separate finding of permanent incorrigibility,[160] if judges cannot be expected to accurately and appropriately impose a sentence when *given* a standard, how are they expected to do so with no standard at all? Neither the *Miller* Court nor the *Montgomery* Court believed that children capable of reform should be sentenced to LWOP.[161] If the current practice of discretion is resulting in these impermissible sentences, a standard must be put in place to solve that problem. If it is nearly impossible to find a workable standard, a more substantive constitutional approach must be taken.

2. Racial Bias in Juvenile LWOP Sentencing

The inaccurate sentencing concern is further magnified due to evidence that sentencing discretion is being exercised disproportionately on the basis of race. Not only is there a disparity based on the race of the *offender*;[162] but an even bigger gap exists based on the race of the *victim*.[163] And, since *Miller* – which suggested that the "appropriate occasions for sentencing juveniles to [LWOP] [would] be uncommon" –[164] the racial disparity has worsened.[165] From 2012 to 2018, about seventy-two percent of children sentenced to LWOP were Black.[166]

A possible explanation for the discrepancy is no less problematic than the statistics themselves: Black juveniles are viewed as more likely to be

[159] Brief for Petitioner at 1, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646, 10-9647).

[160] *See* Jones v. Mississippi, 141 S. Ct. 1307, 1315 (2021) ("[I]t is difficult even for expert psychologists to differentiate between juveniles that are irreparably corrupt and those that are not.").

[161] *See supra* note 153 and accompanying text.

[162] Nellis, *supra* note 154 (of the juvenile lifers surveyed in 2012, sixty percent were Black and less than twenty-five percent were white).

[163] *Id*. The survey analyzed the FBI data on juvenile homicide arrests in states that permitted juvenile LWOP from 1976 to 2012. *Id.* During that time, only twenty-three percent of juvenile homicide arrests involved a Black offender and a white victim, but forty-three percent of all juvenile LWOP sentences during that time period involved Black offenders and white victims. *Id.* By contrast, 6.5% of the arrests involved white offenders and Black victims, but only 3.6% of the juvenile LWOPers were white offenders who murdered a Black victim. *Id.*

[164] Miller v. Alabama, 567 U.S. 460, 483 (2012).

[165] *See Tipping Point*, *supra* note 156.

[166] *Id.*

violent or reoffend as adults.[167] For instance, observational studies showed that officers were more likely to attribute crimes committed by Black youths to character traits rather than external factors; and by contrast, white youths were more likely to have their crimes attributed to their social surroundings.[168] Black children are additionally much more likely to be viewed as adults than white children.[169] When judges have the discretion to impose a sentence after merely "considering an offender's youth and attendant circumstances,"[170] data that suggest Black children are viewed as more mature and more violent is extremely troubling. Because a juvenile viewed as older and more likely to reoffend seemingly has a higher likelihood of being classified as "irreparably corrupt," these biases remain dangerous in the context of sentencing practices even with the addition of a separate factfinding requirement.

3. What is the Alternative?

To reiterate, the Court has consistently stated that juvenile LWOP sentences are reserved for the "rare juvenile offender[s] whose crime[s] reflec[t] irreparable corruption."[171] There is plenty of evidence to show, however, that the risk of imposing a sentence of LWOP on a juvenile offender who is *not* permanently incorrigible is too great to justify the arbitrary discretion upheld in *Jones*.[172] The lack of guidance from the Court has led to a "you just know it when you see it" approach to juvenile sentencing, and that approach has led to racially disproportionate

---

[167] *See generally* John Paul Wilson, Nicholas O. Rule & Kurt Hugenberg, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOCIAL PSYCHOLOGY 59, 60 (2017) ("A long history of psychological research has found that . . . Black people are subject to automatic negative stereotypes and prejudice."). Psychological research shows that Black men are more likely than white men "to be misremembered as carrying a weapon . . . , to activate concepts related to crime . . . , [and] to be seen as threatening or aggressive." *Id. See also* Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, at 52 (2010) ("[R]acial disparities in the decision to detain and incarcerate youths are influenced by race and risk factors . . . .").

[168] Fagan, *supra* note 167, at 52.

[169] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOCIAL PSYCHOLOGY 526, 541 (2014) ("Black children may be viewed as adults as soon as thirteen, with average age overestimations of Black children exceeding four and a half years in some cases.").

[170] *See* Jones v. Mississippi, 141 S. Ct. 1307, 1314 (2021).

[171] *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190, 208 (2016); *Jones*, 141 S. Ct. at 1326 (Thomas, J., concurring).

[172] *Jones*, 141 S. Ct. at 1317 (majority opinion) (stating that *Miller* required merely a "discretionary sentencing procedure"); *see* Graham v. Florida, 560 U.S. 48, 70 (2010) ("[LWOP] is an especially harsh punishment for a juvenile."); *see supra* notes 150–60 and accompanying text.

sentencing practices.[173] The solution suggested by the dissent – a separate finding of permanent incorrigibility – will cause its own problems by forcing judges to make a near-impossible prediction about whether or not a child is capable of reform.[174] Thus, the only constitutional way to address this conflict is a categorical prohibition on juvenile LWOP.

B. The Standards of Decency have Evolved

The easiest way to address the difficult problems surrounding juvenile LWOP sentencing is to do away with it altogether. From *Roper* to *Montgomery*, it seemed the Court was heading toward such a categorical ban.[175] The majority in *Jones*, however, was not only reluctant to continue down that path, but it backpedaled off of what was required under *Miller* and *Montgomery*.[176] Nevertheless, an examination of current state legislative actions and sentencing practices shows that a national consensus has formed in opposition to juvenile LWOP sentences.[177] And an analysis of the penological justifications for such a penalty indicate that a lifetime in prison is disproportionate for offenders under eighteen years old at the time of their crimes.[178]

1. The Objective Indicia of Contemporary Values

Today's "evolving standards of decency that mark the progress of a maturing society" are evidence that it is time to reassess the constitutionality of juvenile LWOP.[179] In *Roper*, the Court determined that the fact that thirty out of fifty states had abandoned juvenile capital punishment signified that the national consensus had shifted.[180] And in both *Roper* and *Graham*, the Court supported its holdings with reference to sentencing practices that showed only a small number of juvenile

---

[173] *Cf. Jones*, 141 S. Ct. at 1322 (stating that *Miller* resentencings have decreased the number of juveniles on LWOP); *see supra* notes 162–70.

[174] *See supra* Section V.A.1.

[175] *See* Montgomery v. Louisiana, 577 U.S. 190 (2016); Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[176] *Jones*, 141 S. Ct. at 1317 ("Despite the procedural function of *Miller*'s rule, *Montgomery* held that [it] was substantive . . . but the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller*.").

[177] *See* Rovner, *supra* note 8 ("The momentum to protect youth rights in the criminal legal system is clear.").

[178] *See, e.g.*, *Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

[179] *See, e.g.*, Rovner, *supra* note 8.

[180] *Roper*, 543 U.S. at 564; *see supra* note 70 and accompanying text.

executions or non-homicide juvenile LWOP sentences, respectively.[181] As of 2021, twenty-five states plus the District of Columbia have categorically banned LWOP sentences for juveniles; and seven other states have limited its application.[182] There is a strong "trend toward abolition" – which "carrie[d] special force" in *Roper* –[183] as all but five of the states that have banned juvenile LWOP did so over the last ten years.[184] Additionally, at the start of 2020, 1,465 people were serving juvenile LWOP sentences.[185] That number is a thirty-eight percent drop from 2016, and a forty-four percent drop from 2012.[186] Of the twenty-five states that have not categorically prohibited the punishment, nine currently do not have anyone serving a juvenile LWOP sentence.[187]

The *Jones* majority relied on these sentencing trends as evidence that "*Miller* and *Montgomery* have been consequential."[188] It argued that the statistics prove what *Miller* predicted to be true: that "a discretionary sentencing procedure [will] help[] make [juvenile LWOP sentences] relatively rare."[189] The majority of juvenile LWOP sentencing changes, however, have come about through the *legislative* process;[190] and a discretionary system that results in *less* juvenile LWOP sentencing does not necessarily result in *more accurate* juvenile sentencing.[191] The current legislative and sentencing patterns make it clear that society continues to evolve its view that children are constitutionally different from adults for the purposes of criminal punishment. Just as it was in 2005 and 2010,[192] society in 2021 is prepared to recognize that sentencing any juvenile offender to LWOP is disproportionate and unconstitutional.

---

[181] *Roper*, 543 U.S. at 564; *Graham*, 560 U.S. at 62–64.

[182] Rovner, *supra* note 8. Many of the new state juvenile sentencing laws require mandatory minimums for parole, such as a chance for parole after fifteen years in Nevada and West Virginia, or a chance of parole after up to forty years in Nebraska. *Id.*

[183] *Roper*, 543 U.S. at 566 ("[N]o State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, *carries special force* . . . ." (emphasis added)).

[184] Rovner, *supra* note 8.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021).

[189] *Id.*

[190] *See* Rovner, *supra* note 8.

[191] *See* Piquero, *Youth Matters*, *supra* note 151, at 356; *see also supra* notes 158–59 and accompanying text.

[192] Roper v. Simmons, 543 U.S. 551, 564 (2005); Graham v. Florida, 560 U.S. 48, 62–64 (2010).

2. Unjustified Sentencing

The penological justifications for juvenile LWOP sentences are completely absent. For support, it is not necessary to look any further than the Court's own language.[193] In *Graham*, the Court noted that the deterrence and rehabilitation rationales are not sufficient for juvenile LWOP sentences.[194] With respect to deterrence, it stated that "juveniles' lack of maturity... often result[s] in impetuous actions and decisions," and thus, "they are less likely to take a possible punishment into consideration when making decisions."[195] For rehabilitation, "the penalty forswears altogether [that] ideal" because the defendant is denied "the right to reenter the community."[196] There is also evidence to suggest that there is a lack of a rehabilitation-focused atmosphere in prisons for persons serving LWOP.[197] Data from the 2012 survey of juveniles sentenced to LWOP showed that roughly two-thirds were prevented from participating in programming either because they will never be released from prison, or because they were being held in prisons without sufficient programming.[198]

Additionally, incapacitation cannot justify juvenile LWOP. This rationale is important to control recidivism.[199] Due to developments in self-regulation and responses to rewards, however, very few juvenile offenders continue to reoffend as adults.[200] In addition, most juvenile lifers engage in constructive change during their incarceration when given the opportunity.[201] Of those surveyed in 2012, two-thirds obtained a high school diploma or GED, many attempted to maintain close ties with loved ones through various forms of communication, and the number of disciplinary actions against them declined as the years passed.[202]

Lastly, the retributive justification is lacking for juvenile LWOP sentences. While the Court's analysis in *Graham* was confined to juveniles who did not commit homicide,[203] the same logic applies to *all* juvenile offenders. At the "heart of the retribution rationale" is the

---

[193] *See Roper*, 543 U.S. at 571–74; *Graham*, 560 U.S. at 71–74.

[194] *Graham*, 560 U.S. at 72.

[195] *Id.*

[196] *Id.* at 74.

[197] *See* Nellis, *supra* note 154.

[198] *Id.* Some of the respondents had already completed all of the available programming. *Id.*

[199] *Graham*, 560 U.S. at 72 ("Recidivism is a serious risk to public safety, and so incapacitation is an important goal.").

[200] *See* Piquero, *Youth Matters*, *supra* note 151, at 349–58.

[201] *See* Nellis, *supra* note 154.

[202] *Id.*

[203] *Graham*, 560 U.S. at 71–72 ("[R]etribution does not justify imposing [LWOP] on the less culpable juvenile nonhomicide offender.").

principle that "criminal sentence[s] must be directly related to [] personal culpability."[204] It is clear that children are less personally culpable than adults.[205] Given that the vast majority of juvenile offenders experienced some sort of childhood trauma – for many, sexual or physical abuse –[206] their crimes, *including* homicide, may likely be attributed to factors other than an "irretrievably depraved" character.[207] Even where they are not, however, the dissent pointed out that "Jones and juvenile offenders like him seek only the possibility of parole, not the certainty of release …."[208] Surely, a sentence that requires a child to spend his life in prison unless he can demonstrate he has rehabilitated himself cannot be viewed as insufficient to "right the balance for the wrong to the victim."[209] The evolving standards of decency reflect that the majority of Americans share this belief.[210]

In the Court's own language, "[t]o justify [LWOP] on the assumption that the juvenile offender forever will be a danger to society," a sentencer is required "to make a judgment that the juvenile is incorrigible."[211] If a *child* is truly – and for the sake of argument, even accurately – considered permanently incorrigible, however, does that not say more about the system that is supposed to rehabilitate him than it does about the child himself? Twelve years ago, the Court asserted that "incorrigibility is inconsistent with youth."[212] If anything has changed over the last decade-plus, it is certainly that there is *more* evidence to support that conclusion.

The best solution to the confusion and difficulty surrounding juvenile LWOP sentencing is to categorically prohibit the punishment for all juveniles. As the standards of decency continue to evolve, the Court will have no choice but to continue down the path it was on prior to *Jones* toward that destination.

---

[204] *Id.* at 71.

[205] *Id.*; *see supra* notes 71, 77–78, 149–52 and accompanying text.

[206] Nellis, *supra* note 154 and accompanying text.

[207] *See supra* notes 154–57 and accompanying text.

[208] Jones v. Mississippi, 141 S. Ct. 1307, 1340 (2021) (Sotomayor, J., dissenting).

[209] *Graham*, 560 U.S. at 72 ("[W]hether viewed as an attempt to express the community's moral outrage or as an attempt to *right the balance for the wrong to the victim*, the case for retribution is not as strong with a minor as with an adult." (emphasis added)).

[210] *See* Rovner, *supra* note 8; *see also supra* Section V.B.1.

[211] *Graham*, 560 U.S. at 72.

[212] *Id.* at 73 (citation omitted).

VI. CONCLUSION

Brett Jones experienced just fifteen years of life outside of prison before he was arrested and sentenced to life without parole.[213] Throughout the majority of that time, he was abused and neglected by the people in his life who were supposed to care for him the most.[214] If the circumstances surrounding his crime do not reflect an "unfortunate yet transient immaturity," it is difficult to envision circumstances that would.[215] Because it is nearly impossible for a sentencing judge to make that determination, however, it is time for the Court to get rid of life without parole for juvenile offenders. A criminal justice system that is set up to *punish* Brett Jones and other children like him by deeming them "permanently incorrigible" rather than help them is flawed. In the words of the Court, "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[216] Like Brett Jones, many juveniles deserve the opportunity to show that they are not "irreparably corrupt". As Brett Jones himself told the court at his resentencing hearing,

> I'm not the same person I was when I was 15.... I've become a pretty decent person in life… all I can do is ask you ... please give me just one chance to show the world, man, like, I can be somebody. I've done everything I could over the past ten years to be somebody.... I can't change what was already done. I can just try to show ... I've become a grown man.[217]

[213] *Jones*, 141 S. Ct. at 1312.
[214] *Id.* at 1338 (Sotomayor, J., dissenting).
[215] *See id.* at 1337–41.
[216] *Graham*, 560 U.S. at 79.
[217] *Jones*, 141 S. Ct. at 1340–41 (Sotomayor, J., dissenting).