JONES V. MISSISSIPPI: AN ABANDONMENT OF PRECEDENT AND THE EVOLVING STANDARDS OF TREATMENT OF JUVENILE OFFENDERS

Jamie L. Menarde

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I. INTRODUCTION

The Eighth Amendment of the United States Constitution prohibits the use of cruel and unusual punishment within our criminal justice system.[1] Since its adoption, this amendment has been interpreted to protect American citizens from punishments disproportionate to the crimes they have committed.[2] Over the last few decades, punishment of juvenile offenders has come to the forefront of Eighth Amendment jurisprudence.[3]

The law recognizes differences between juvenile and adult offenders, including their comparative cognitive abilities and impulse control.[4] These differences require juvenile offenders to be punished or sentenced differently. A punishment fit for an adult offender may be disproportionate when the same crime is committed by a juvenile.[5] Juveniles are still developing and are often much more susceptible to outside influences than their adult counterparts.[6] Juvenile sentencing reflects these physiological and cognitive differences.

Deterrence, retribution, incapacitation, and rehabilitation are among the key justifications for punishment in the American criminal justice system. Arguably, the most important of these is

1. U.S. CONST. amend. VIII.

2. *See generally* Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419 (1995) (explaining the intent of the Eighth Amendment's prohibition on cruel and unusual punishments).

3. Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013).

4. Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 2464 (2012).

5. *Id.* at 481, 132 S. Ct. at 2470 ("We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.").

6. *Id.* at 471, 132 S. Ct. at 2464.

rehabilitation. The goal of punishment should not simply be to lock citizens up and throw away the key, but rather to reform a person's behavior in hopes that they will make useful contributions to society once rehabilitated. Whether someone who has committed a heinous crime is redeemable or has been rehabilitated enough to reintegrate back into society is a looming question. That is: can people often depicted as cold and calculated, who "knew" what they were doing, and knew it was wrong ever be rehabilitated? What happens when the person who committed the crime was a child? For adults, the hope of rehabilitation may be lost in the case of the most egregious offenses when the offender knowingly and intentionally undertakes the act. For juveniles, it is a much more difficult question to answer because under the law, juveniles typically do not have the requisite intent needed and lack the ability to fully understand the consequences of their actions.

So how does the justice system determine which juveniles are without hope or chance for rehabilitation? This article will address the Supreme Court's evolving interpretation of the Eighth Amendment regarding sentencing juvenile offenders for serious crimes and its recent abandonment of precedent. The Supreme Court, with a new configuration of justices most recently after the death of Ruth Bader Ginsburg, issued an opinion in *Jones v. Mississippi* on April 22, 2021, which abandons and overrules key precedent regarding juveniles sentenced to life without parole.[7]

II. JUVENILES ARE DIFFERENT

A. Neuroscience and Psychology Show Juveniles' Brains are Still Developing

There is a large body of research devoted to the neurological and psychological differences in adolescents' minds in comparison to those of adults.[8] These differences include a lack of maturity in regions of the brain that relate to impulse control and risk

7. Jones v. Mississippi, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021).
8. Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026-27 (2010).

avoidance.[9] Impulse control and risk avoidance are two important functions of the brain that keep most people from committing crime. As examples, impulse control keeps us from punching someone that says something that offends us, and risk avoidance keeps us from stealing the thing we see at the store we want so badly but cannot afford. Mentally competent adults are thought to be able to balance risks and rewards before committing crime, and that is why our society imposes punishment on these individuals.

In addition to neurological functions being underdeveloped among adolescents, there is also evidence to suggest that adolescents are far more susceptible to outside influences from their environment.[10] In their article about brain development and social context, Scott, Duell, and Steinberg address skeptics' concerns that if the underdeveloped brain leads to crime, then all adolescents should engage in criminal activity.[11] They argue it is not biological immaturity alone that leads teenagers to commit crime, but the dynamic interaction between the still-maturing individual and their social environments that lead some teenagers to offend while others refrain.[12]

B. Criminal Law Has Evolved to Treat Juvenile Offenders Differently

Under our criminal justice system, people who commit crime before the age of eighteen are generally adjudicated in a separate system from adults—the juvenile justice system. Juvenile justice systems typically allow for more lenient punishments, such as being incarcerated until the age of 21 and the ability to have criminal records expunged upon reaching the age of majority. Each state has its own process for how a juvenile may be waived into adult criminal court, but the issue arises once the juvenile lands there. Should the juvenile receive the same sentence as an

9. *Id.*

10. Elizabeth Scott, Natasha Duell & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. U.J.L. & POL'Y 13, 24 (2018).

11. *Id.* at 24-28.

12. *Id.*

adult? Over the past few decades, the Supreme Court has addressed this issue.

In 1988, the Supreme Court ruled that sentencing an offender who was *under the age of 16* when they committed their offense to death violated the Eighth Amendment's ban on cruel and unusual punishment.[13] A year later, the Court ruled 16 and 17-year-olds at the time of their offense *could* constitutionally be sentenced to death.[14] In 2002, the Court decided a case concerning the treatment of adult "mentally retarded offenders" and the rationale used in that case has largely been applied in succeeding cases concerning juvenile offenders.[15] In *Atkins v. Virginia*, the Court prohibited the execution of offenders deemed to be "mentally retarded," and they relied heavily on the idea of a consensus against this practice.[16] This led to the Court's seminal decision on juveniles and capital punishment, *Roper v. Simmons*.[17]

In *Roper v. Simmons*, the Court overruled *Stanford v. Kentucky* and provided that no juvenile could constitutionally be sentenced to capital punishment.[18] Like in *Atkins v. Virginia*, the Court seemed to rest on the idea of a growing consensus against the practice of sentencing juveniles to death.[19] In *Roper*, the Court found that there were differences between juveniles and adults, such as a lack of maturity, an underdeveloped sense of responsibility, increased vulnerability and susceptibility to

13. Thompson v. Oklahoma, 487 U.S. 815, 815 (1988) ("Eighth Amendment . . . prohibits the execution of a person who was under 16 years of age at the time of his or her offense").

14. Stanford v. Kentucky, 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

15. Juveniles have been analogized as a class of offenders similar to mentally retarded offenders in that it would be cruel and unusual to sentence them to death. *Roper*, 543 U.S. at 564.

16. Atkins v. Virginia, 536 U.S. 304, 304 (2002) ("a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal") (language from case, i.e., "mentally retarded," is outdated but still good law).

17. *Roper*, 543 U.S. 551.

18. *Id.*

19. *Id.* at 568 ("[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment").

negative influences and external pressure, and the immature and transitory formation of character found in youth that required the difference in sentencing.[20] The Court justified its expansion of Eighth Amendment prohibitions by explaining that it is necessary to refer to "the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual."[21]

It was not until 2010 that the Court addressed life without parole sentences for juvenile offenders, the next category of punishment below the death penalty.[22] In *Graham v. Florida*, the Court ruled life without parole for juvenile *nonhomicide* offenders violated the Eighth Amendment.[23] This sentence was addressed again in 2012 in *Miller v. Alabama*.[24] In *Miller*, the Court found mandatory sentencing schemes providing for life without parole regardless of the age of the offender at the time of the offense violated the Eighth Amendment.[25] Again, the Court stressed that the concept of proportionality, a center point of the Eighth Amendment, should be viewed through the evolving standards of decency in society.[26] *Miller* set out a list of characteristics that are different for youth from adults, highlighted that a juvenile offender has a different competency and ability to assist in their defense, and acknowledged the complete disregard for the possibility of rehabilitation under mandatory sentencing schemes.[27]

The *Miller* Court did not address a categorical ban on life without parole sentences for all juvenile offenders.[28] Instead, the Court held that this sentence should be rare and reserved only for the juvenile whose crime reflects "irreparable corruption," *not*

20. *Id.* at 569-70.
21. *Id.* at 560-61.
22. Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010).
23. *Id.*
24. Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).
25. *Id.*
26. *Id.* at 469, 132 S. Ct. at 2463.
27. *See generally Miller*, 567 U.S. 460, 132 S. Ct. 2455 (stressing the differences between juveniles and adults).
28. *Id.* at 483, 132 S. Ct. at 2471-72.

the juvenile whose crime reflects "unfortunate yet transient immaturity."[29] This left the door open for the Court to address this issue and determine if this rule should apply retroactively for juveniles who have already been sentenced to life without parole. In *Montgomery v. Louisiana*, the Court expounded upon its decision in *Miller*, further clarifying that only juveniles determined to be "irreparably corrupt" should be sentenced to life without parole.[30] This created a new substantive rule which applied retroactively, allowing all offenders serving a life without parole sentence for crimes committed before the age of 18 to be resentenced according to the rule.[31]

C. What Does "Permanent Incorrigibility" Mean and Must It Be Expressly Found?

The Court in *Graham* likened the sentence of life without the possibility of parole to the death penalty itself.[32] A juvenile life without parole sentence "means the denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the convict], he will remain in prison for the rest of his days."[33] When addressing who among juvenile offenders are deserving of this punishment, the Court in *Miller* and *Montgomery* came to the conclusion that this sentence should be reserved for those "permanently incorrigible."[34] These are the juvenile offenders who cannot be rehabilitated and whose crimes cannot be explained by transient immaturity.[35]

The issue of permanent incorrigibility was recently addressed

29. *Id.* at 479-80, 132 S. Ct. at 2469-70.

30. Montgomery v. Louisiana, 577 U.S. 190, 208, 136 S. Ct. 718, 734 (2016) ("*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption'").

31. *Id.* at 206, 136 S. Ct. at 732-33.

32. Graham v. Florida, 560 U.S. 48, 69, 130 S. Ct. 2011, 2027 (2010).

33. *Id.* at 70, 130 S. Ct. at 2027-28.

34. *See generally Miller*, 567 U.S. 460, 132 S. Ct. 2455; *Montgomery*, 577 U.S. 190, 136 S. Ct. 718.

35. *See generally Miller*, 567 U.S. 460, 132 S. Ct. 2455; *Montgomery*, 577 U.S. 190, 136 S. Ct. 718.

in the *Jones* decision.[36] Brett Jones was convicted and sentenced to life without parole in 2005 for the murder of his grandfather, when Jones was just 15 years old.[37] In the wake of *Miller*, but before the decision in *Montgomery*, the Mississippi Supreme Court vacated his sentence, but once again sentenced him to life without parole on remand.[38] Jones appealed this decision to the Supreme Court. Mississippi argued to the Court that it had done everything required of it including considering the factors set out in *Miller* at Jones' resentencing hearing.[39] At resentencing, Mississippi did not make an express finding of permanent incorrigibility before sentencing Jones to life without parole.[40] Jones argued, however, that the trial judge did not understand the requirements under *Miller* which were more thoroughly explained in *Montgomery*, necessitating a finding of permanent incorrigibility.[41]

Mississippi contended that it should be left up to the states to determine which juvenile offenders are those rare offenders that cannot be rehabilitated and should qualify for life without parole sentences.[42] However, it appears clear that the Court was cautious of this in its decisions in *Miller* and *Montgomery* using terms like "permanent incorrigibility" to classify the "rare offender" who should qualify for life without parole.[43] This ought to mean that at least some sort of finding, whether explicit or implicit, of permanent incorrigibility must be made before a juvenile can be determined to be one who cannot be rehabilitated. That, at a minimum, was lacking in Mississippi's decision.

Jones did not argue that the judge needed to make an *express* finding of permanent incorrigibility on the record but did argue that the judge clearly did not understand that even an implicit

36. Jones v. Mississippi, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021).
37. *Id.* at 1312, 209 L. Ed. 2d. at 397-98.
38. *Id.* at 1312-1313, 209 L. Ed. 2d at 397-99.
39. *Id.* at 1313, 209 L. Ed. 2d at 398-99.
40. *Id.*
41. *Id.*
42. *Id.*
43. *See generally* Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012); Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718 (2016).

finding of such is required.[44] Jones argued it was error not to consider his capacity for rehabilitation which could be evidenced through his good behavior in the years he spent in prison under the idea he would never get out.[45] Further, Jones argued the Mississippi judge could not have reasonably made even an implicit finding of permanent incorrigibility in his case because of the immature nature of the crime itself.[46] Jones killed his grandfather in a heat of passion during a fight about Jones' girlfriend.[47] Jones argued this is an immature reason for murder and therefore, the crime reflected transient immaturity, the very thing *Miller* and *Montgomery* protect against.[48]

However, the majority in *Jones* ruled exactly the opposite, holding that no finding of permanent incorrigibility is required before a sentencer can impose a life without parole sentence on an offender who was below the age of 18 at the time of their offense.[49]

D. *Mississippi v. Jones* Has Abandoned the Evolution in Treatment of Juvenile Offenders

The issue before the court in *Jones* was whether *Miller* and *Montgomery* provided that a certain class of offenders could not constitutionally receive a life without parole sentence.[50] In her dissent, Justice Sotomayor argued that *Miller* and *Montgomery* created a class of offenders, similar to those in *Roper* and *Atkins* which cannot constitutionally be sentenced to life without parole.[51] That class of offenders is juveniles whose crimes reflect

44. *Jones*, 141 S. Ct. at 1319, 209 L. Ed. 2d at 404-06 (an analysis of all the factors which are different for youth may be enough to evidence an implicit finding of permanent incorrigibility).

45. *Id.* at 1339, 209 L. Ed. 2d at 427-28 (Sotomayor, J., dissenting) (capacity for rehabilitation is a key difference between youth and adults, and therefore, not considering this factor made it unlikely that there was even an implicit finding of permanent incorrigibility).

46. *Id.* at 1340, 209 L. Ed. 2d at 428-29.

47. *Id.* at 1339, 209 L. Ed. 2d at 427-28

48. *Id.*

49. *See generally Jones*, 141 S. Ct. 1307, 209 L. Ed. 2d 390.

50. *Id.* at 1313, 209 L. Ed. 2d at 398-99.

51. *Id.* at 1328, 209 L. Ed. 2d at 415-16 (Sotomayor, J., dissenting).

"unfortunate yet transient immaturity."[52] Given this classification, sentencers would have to make a finding that a juvenile is permanently incorrigible before sentencing them to life without parole. However, the *Jones* Court found that *Miller* and *Montgomery* did not create this class of offenders.[53]

In the majority opinion, Justice Kavanaugh made many references to one specific paragraph in *Montgomery* which stated, "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility."[54] To be specific, this line from *Montgomery* was cited or referenced *thirteen times* within the majority's twenty-two-page opinion. Justice Sotomayor took issue with the Court's "fixation" on that line from *Montgomery* and claimed the Court distorted both the decisions of *Miller* and *Montgomery* "beyond recognition."[55] For reasons which will be further discussed *infra*, the majority's opinion overrules *Montgomery* in substance, if not in name.[56] The decision in *Jones* essentially renders *Montgomery* meaningless and appears to put an end to what could be described over the past few decades as an evolving standard in sentencing juveniles differently from adults.

III. THE *JONES* COURT ESSENTIALLY OVERRULED *MONTGOMERY*'S PROTECTIONS WHICH WILL HAVE A NEGATIVE IMPACT ON JUVENILE OFFENDERS

A. The Court Ignored Its Own Precedent on Substantive Rules

The retroactivity doctrine created in *Teague v. Lane* states that a new constitutional rule is considered substantive, and thus retroactive, if it alters the range of conduct or the class of persons that the law punishes.[57] The Court in *Montgomery* found that the decision in *Miller* was a new constitutional rule which was to be

52. *Id.* at 1328, 209 L. Ed. 2d at 415.

53. *See generally Jones*, 141 S. Ct. 1307, 209 L. Ed. 2d 390.

54. *Id.* at 1313, 209 L. Ed. 2d at 398 (quoting Montgomery v. Louisiana, 577 U.S. 190, 211, 136 S. Ct. 718, 735 (2016)).

55. *Id.* at 1330-31, 209 L. Ed. 2d at 417-20 (Sotomayor, J., dissenting).

56. *Id.* at 1327, 209 L. Ed. 2d at 413-15 (Thomas, J., concurring).

57. Teague v. Lane, 489 U.S. 288, 311 (1989).

applied retroactively, therefore falling within the *Teague* doctrine for substantive rules.[58] In his concurring opinion in *Jones*, Justice Thomas wrote that *Montgomery* created a concrete class of offenders, i.e. juveniles whose crimes reflect transient immaturity, who are categorically exempt from the sentence of life without parole.[59] Otherwise the "line" *Miller* drew between transient immaturity and irreparable corruption is "more fanciful than real."[60] The majority opinion even acknowledged this by saying that states are not free to sentence a child whose crime reflects transient immaturity to life without parole.[61] "To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."[62]

Because the majority opinion, the concurring opinion, and the dissenting opinion all acknowledged in some capacity that under *Miller* and *Montgomery* juveniles whose crimes reflect transient immaturity are not constitutionally eligible to be sentenced to life without parole, the majority's opinion is flawed. As Justice Thomas points out in his concurrence, the Court should have either followed *Montgomery* and required Mississippi to determine whether Jones fell within the categorically exempt class of offenders or should have outright overruled *Montgomery*.[63] Instead, the Court held a "state's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[64] This is irreconcilable with *Miller* and *Montgomery* because a state's discretionary sentencing system, as the one in *Jones*, does not necessarily determine whether or not the offender falls within the protected class of offenders exempt from life without parole.

The majority strains the reading of *Miller* and *Montgomery* to imply the Court in those cases was only concerned with ensuring juvenile life without parole sentences be relatively rare. The

58. *See generally Montgomery*, 577 U.S. 190, 136 S. Ct. 718.
59. *Jones*, 141 S. Ct. at 1326, 209 L. Ed. 2d at 413-14 (Thomas, J., concurring).
60. *Id.*
61. *Id.* at 1315 n.2, 209 L. Ed. 2d at 401 n.2 (majority opinion).
62. *Id.*
63. *Id.* at 1326-27, 209 L. Ed. 2d at 413-15 (Thomas, J., concurring).
64. *Id.* at 1313, 209 L. Ed. 2d at 399 (majority opinion).

majority believes these cases only require states to consider a defendant's youth before sentencing him to life without parole and that this alone will make juvenile life without parole sentences relatively rare.[65] This is inconsistent with the *Teague* doctrine and the substantive nature of *Montgomery*'s holding because even if courts consider youthfulness, it does not mean that a child whose crime reflects transient immaturity will not be sentenced to life without parole. All the Justices agreed that this violates the Eighth Amendment under *Miller* and *Montgomery*.[66] Further, the Court's assertion that discretionary sentences which consider youthfulness alone will make juvenile life without parole sentences relatively rare has not been proven. For example, in Louisiana there is no required finding of permanent incorrigibility, only a discretionary hearing which considers youthfulness, and 57% of the juveniles in that state have been resentenced to life without parole.[67]

If *Miller* and *Montgomery* created a class of offenders that are ineligible for life without parole sentences, Jones deserved a determination that he did not fit in that class before being sentenced to life without parole. Mississippi failed him in this regard and the *Jones* Court erred in ruling in favor of Mississippi. Jones' crime epitomizes "unfortunate yet transient immaturity."[68] He had a long history of physical and emotional abuse, and mental illness.[69] He resorted to murdering his grandfather over a disagreement about his girlfriend shortly after his fifteenth birthday.[70] Jones' attorney placed evidence of his abuse, neglect, and mental illness on the record; described the fundamental immaturity in the crime itself; and how Jones engaged with police immediately after the commission of the murder.[71] Yet, Mississippi never even rebutted this evidence of

65. *Id.* at 1318, 209 L. Ed. 2d at 403-04.

66. *See generally Jones*, 141 S. Ct. 1307, 209 L. Ed. 2d 390..

67. *Id.* at 1333 n.10, 209 L. Ed. 2d at 422 n.10 (Sotomayor, J., dissenting).

68. *Id.* at 1337, 209 L. Ed. 2d at 426.

69. *Id.* at 1338, 209 L. Ed. 2d at 426-27.

70. *Id.*

71. *Id.* at 1338-39, 209 L. Ed. 2d at 426-29 (explaining how Jones' interactions with the police following his horrible actions further demonstrated his lack of maturity).

transient immaturity.[72] While evidence of immaturity and rehabilitation do not excuse Jones for his crime, it is likely to show that Jones fell within a class of offenders that are categorically exempt from life without parole sentences.[73]

B. The *Jones* Court Incorrectly Found That a Required Finding of Permanent Incorrigibility Unduly Broadens *Miller* and *Montgomery*

The *Jones* Court held that a required finding of permanent incorrigibility before sentencing a juvenile to life without parole would "unduly broaden" the decisions set forth in *Miller* and *Montgomery*.[74] However, as discussed above, these decisions created a new substantive constitutional rule. For this rule to have any meaning, the Court in those cases must have intended for there to be at least *some* determination that a child is permanently incorrigible before they may be sentenced to life without parole. The Court states in a footnote, "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."[75] But, as Justice Sotomayor points out, requiring states to make a determination of permanent incorrigibility does not intrude more than necessary because there is no mandate for any particular procedure in doing so.[76]

The majority rejects the idea altogether that permanent incorrigibility is an ineligibility criterion similar to insanity or intellectual disability because it is more difficult to determine, even by expert psychologists.[77] This implies that both insanity and intellectual disabilities are easy to evaluate. "This notion . . . might come as news to the States that have spent years chasing

72. *Id.* at 1340, 209 L. Ed. 2d at 428-29.

73. *Id.* at 1339, 209 L. Ed. 2d at 428 (stating there is a strong likelihood that Jones is constitutionally ineligible for LWOP).

74. *Id.* at 1321, 209 L. Ed. 2d at 407-08 (majority opinion).

75. *Id.* at 1315 n.2, 209 L. Ed. 2d at 401 n.2.

76. *Id.* at 1331, 209 L. Ed. 2d at 418-19 (Sotomayor, J., dissenting).

77. *Id.* at 1315, 209 L. Ed. 2d at 401 (majority opinion).

the ever-evolving definitions of mental incompetence promulgated by this Court" writes Justice Thomas.[78]

There are a number of ways in which Mississippi could have determined whether a juvenile offender is one whose crime reflects transient immaturity or irreparable corruption.[79] The states are free to determine which category of offender a juvenile belongs. Since the *Miller* and *Montgomery* decisions, some states have made it a requirement for the prosecution to prove irreparable corruption beyond a reasonable doubt, while other states have simply required a formal fact finding on the record of permanent incorrigibility.[80] The problem in *Jones* is there was *no* determination of whether his crime reflected transient immaturity or permanent incorrigibility in *any* procedural manner.[81] Therefore, the majority's opinion allows juveniles whose crime reflects unfortunate yet transient immaturity to be sentenced to die in prison, in direct violation of *Miller*.[82] "Requiring sentencers to make an explicit or implicit determination of permanent incorrigibility before sentencing a juvenile offender to [life without parole] imposes no costs that justify overturning precedent."[83] To quote Justice Kavanaugh's own words in a recent opinion, stare decisis is critical to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."[84]

C. Constitutional Law Should Evolve with Society's Evolving Standards

The evolution of cases on sentencing have all relied heavily on the idea of a national consensus being important.[85] The decision in *Atkins* was based largely on an apparent consensus

78. *Id.* at 1326, 209 L. Ed. 2d at 413 (Thomas, J., concurring).
79. *Id.* at 1331, 209 L. Ed. 2d at 418-19 (Sotomayor, J., dissenting).
80. *Id.*
81. *Id.*
82. *Id.* at 1328, 209 L. Ed. 2d at 415.
83. *Id.* at 1336, 209 L. Ed. 2d at 424.
84. Ramos v. Louisiana, 140 S. Ct. 1390, 1411, 206 L. Ed. 2d 583, 607 (2020).
85. *See supra* Section II.B.

against executing the mentally disabled.[86] The Court in *Atkins* stated, "[i]t is not so much the number of these States [that forbid execution of mentally disabled] that is significant, but the consistency of the direction of change."[87] Similarly, the Court relied on an expanding consensus in *Roper* when it banned the execution of juveniles.[88] In *Jones,* the majority acknowledged that the Court has considered "whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' demonstrated a 'national consensus' in favor of the criterion."[89] The Court relied on the premise that there was no consensus at the time of *Miller* for requiring a finding of permanent incorrigibility.[90] However, this ignores whether there is a consensus at the time *Jones* was decided.

Today, twenty-five states and the District of Columbia have banned life without parole sentences for juveniles altogether.[91] In a handful of states where there is no ban on life without parole for juveniles, no one is currently serving the sentence.[92] Further, there was a 38% decrease in life without parole sentences for crimes committed as juveniles from 2016 to 2020.[93] There is a shift away from the imposition of juvenile life without parole sentences. Further, fifteen states have acknowledged a ban on juvenile life without parole sentences for juveniles not found to be permanently incorrigible.[94] Therefore, it is apparent that societal standards are evolving away from the imposition of life without parole on juvenile offenders altogether, or at the very least for juvenile offenders who are not permanently incorrigible. The *Jones* Court erred in finding no consensus at the time of

86. *See supra* note 16 and accompanying text.

87. Atkins v. Virginia, 536 U.S. 304, 304 (2002).

88. *See supra* notes 17-19 and accompanying text.

89. Jones v. Mississippi, 141 S. Ct. 1307, 1315, 209 L. Ed. 2d 390, 401 (2021) (quoting *Graham*, 560 U.S. at 61).

90. *Id.*

91. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Apr. 13, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

92. *Id.*

93. *Id.*

94. *Jones*, 141 S. Ct. at 1336, 209 L. Ed. 2d at 424 (Sotomayor, J., dissenting).

Miller because society's standards are always evolving, and it is important to draw on the consensus at the time a decision is made.

D. State Discretion Will Lead to Disparities in Sentencing

Giving states full discretion on determining which juvenile offenders may be sentenced to life without parole will lead to great disparities in sentencing juveniles among the states. Currently, the states have each approached juvenile sentences of life without parole differently.[95] As of 2017, twenty-nine states and the federal government still allow for the maximum punishment of life without parole for juvenile offenders.[96] This means punishment for the same crime could be vastly different for a juvenile depending on what state they are in. And with children and juveniles likely having little say in where they reside, this makes the patchwork of systems patently unfair.

Following *Miller*, Pennsylvania ruled that there is a presumption against juvenile life without parole sentences that the state must rebut through proof beyond a reasonable doubt that the juvenile is forever incorrigible and without any hope for rehabilitation.[97] In the wake of this decision, "[f]ewer than 2 percent of resentencings in Pennsylvania have resulted in the reimposition of" a life without parole sentence.[98] Meanwhile, in Louisiana where there is no required finding of permanent incorrigibility, 57% of resentencing hearings have resulted in the reimposition of a life without parole sentence.[99] *Jones* affords states great latitude in determining how to sentence juveniles to life without parole.[100]

Further, discretionary hearings to determine life without

95. *See generally* Kallee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130 (2017) (comparing each of the fifty states' approaches to juvenile life without parole sentences).

96. *Id.* at 151.

97. Commonwealth v. Batts, 163 A.3d 410, 454-55 (Pa. 2017).

98. *Jones*, 141 S. Ct. at 1334, 209 L. Ed. 2d at 422 (Sotomayor, J., dissenting).

99. *See supra* note 67.

100. *Jones*, 141 S. Ct. at 1323, 209 L. Ed. 2d at 409.

parole sentences for juveniles also pose the risk of bias and a disparate impact on juveniles of color. The racial disparity in juvenile executions existed before the ban in *Roper*.[101] From 1973 to 2004, black juvenile offenders accounted for 50% of those juveniles executed, while white juvenile offenders only accounted for 45%.[102] Racial disparities have continued to plague juvenile life without parole sentences.[103] "While 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of [juvenile life without parole] sentences are for an African American convicted of this crime."[104]

"The racial disparities in juvenile [life without parole] sentencing are stark."[105] An astonishing "70 percent of all [juvenile offenders] sentenced to [life without parole] are children of color."[106] Before *Graham* and *Miller*, black juvenile offenders were sentenced to life without parole *ten times* more often than white offenders.[107] These disparities have not improved since *Miller*. After *Miller*, 72% of juvenile life without parole sentences were imposed on black juveniles compared to 61% before *Miller*.[108] In today's society, it is important we do not overlook the dangers of our inherent (and implicit) biases and the disparate impact such biases may have on juveniles of color.

101. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – February 29, 2004*, OHIO N. UNIV. (Mar. 1, 2004), http://www2.law.columbia.edu/fagan/courses/law_socialscience/juvenile_justice/documents/Streib_JuvDeathMar2004.pdf.

102. *Id.*

103. Rovner, *supra* note 91.

104. *Id.*

105. *Jones*, 141 S. Ct. at 1334 n.11, 209 L. Ed. 2d at 422 n.11 (Sotomayor, J., dissenting).

106. *Id.*

107. *Id.*

108. *Id.*

IV. A CATEGORICAL BAN ON JUVENILE LIFE WITHOUT PAROLE SENTENCES OR A REQUIRED FINDING OF PERMANENT INCORRIGIBILITY WOULD HAVE BEEN MORE CONSTITUTIONALLY SOUND

A. A Categorical Ban Was a Constitutional Option Before the Court

The Court could have followed society's more current and growing consensus toward a categorical ban on the imposition of life without parole sentences on juveniles. Following the Court's decision in *Miller*, Massachusetts instituted a categorical ban on life without parole for juveniles.[109] The Massachusetts Supreme Judicial Court reasoned:

> Because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved . . . [t]herefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.[110]

The Supreme Judicial Court, like the *Graham* Court, found a striking resemblance between juvenile life without parole sentences and the death penalty, ultimately leading it to the decision to ban this sentence as it had banned the death penalty long before.[111] Similarly, in *State v. Bassett*, Washington invalidated all juvenile life without parole sentences reasoning that courts are unlikely to make an accurate determination between transient immaturity and irreparable corruption, and this is an unacceptable risk.[112]

In her 2017 article on state responses to *Montgomery*, Alice Hoesterey contends that because there is this split between whether courts have to make an express determination of irreparable incorrigibility, a categorical ban on life without

109. Diatchenko v. DA, 1 N.E.3d 270 (Mass. 2013).
110. *Id.* at 284.
111. *Id.*
112. *See generally* State v. Bassett, 428 P.3d 343 (Wash. 2018).

parole sentences for juveniles is the only constitutionally sound approach.[113] As stated before, juveniles, unlike adults, have little to no control over which state they reside in. Therefore, it would be rational to conclude it is unfair for a juvenile residing in one state to be subject to the harshness of a life without parole sentence for the same crime a juvenile commits in another state not subject to that same penalty. This premise is especially true for a justice system grounded on equal protection under law, for all American citizens.

Further, one can argue that a categorical ban on juvenile life without parole sentences would have been the correct constitutional remedy in *Jones*, because life without parole for juvenile offenders does not meet the goals of four justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation. The *Miller* Court stated that the justifications for punishment are lacking regarding life without parole sentences imposed on juvenile offenders.[114] Retribution, the offender's blameworthiness, is diminished in juvenile offender cases due to their underdeveloped maturity.[115] Deterrence does not apply to juvenile life without parole sentences because "the same characteristics that render juveniles less culpable than adults . . . make them less likely to consider potential punishment."[116] When considering the incapacitation justification for punishment, the Court actually states that deciding a juvenile will forever be a danger to society requires a finding that he is incorrigible, and "incorrigibility is inconsistent with youth."[117] Finally, the Court concludes rehabilitation does not justify juvenile life without parole because the sentence itself "forswears altogether the rehabilitative ideal."[118]

113. Alice R. 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, 187 (2017).

114. Miller v. Alabama, 567 U.S. 460, 472, 132 S. Ct. 2455, 2454-65 (2012) (citing Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026 (2010)).

115. *Id.*

116. *Id.* (citing *Graham*, 560 U.S. at 72, 130 S. Ct. at 2028).

117. *Id.* at 472-73 (citing *Graham*, 560 U.S. at 72-73, 130 S. Ct. at 2028-29).

118. *Id.* at 473 (citing *Graham*, 560 U.S. at 74, 130 S. Ct. at 2030).

B. Some Form of Finding of Permanent Incorrigibility is the Minimum the Court Should Have Found

To avoid the aforementioned disparate impacts in the sentencing of juveniles, the minimum the *Jones* Court should have established is a required finding that a juvenile is permanently incorrigible before sentencing him or her to life without parole. Without further guidance from the Court as to how sentencers should decide to impose this penalty, the door will be left open for inequality and future litigation to address the issue. An acknowledgment of the offender's age and youthfulness at the time of his offense balanced against the severity of his offense is not enough to justify the imposition of a life without parole sentence on a juvenile.

Where the Mississippi court went wrong in *Jones* was in the judge broadly considering Jones' age at the time of his offense without making any implicit or explicit finding of permanent incorrigibility.[119] The Superior Court of Pennsylvania in *Commonwealth v. Knox* set out a list of criteria a judge should consider following the *Miller* decision.[120] In *Knox*, the court held:

> [A]lthough *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.[121]

Pennsylvania's interpretation of *Miller* is helpful because it lays out a more concrete and rigorous analysis courts should go through before imposing life without parole. As stated above, the simple requirement that courts must make *some* sort of finding of

119. *See generally* Jones v. Mississippi, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021).

120. Commonwealth v. Knox, 50 A.3d 732, 745 (Pa. Super. Ct. 2012).

121. *Id.*

permanent incorrigibility still leaves open how to procedurally approach making the finding.

The Alabama Supreme Court also laid out objective factors to be weighed in juvenile life without parole cases.[122] In *State v. Henderson*, the justices wrote, "we believe that providing the trial court with guidance on individualized sentencing for juveniles charged with capital murder comports with the guidelines of *Miller*."[123] Some factors may not apply in each juvenile's case, and some of the factors may overlap, but each should be considered and balanced against the weight of a life without parole sentence.[124]

North Carolina even enacted a statute that provides a list of mitigating factors defendants or defendants' counsel may submit to the court.[125] The factors include but are not limited to: age; immaturity; ability to appreciate risks and consequences; intellectual capacity; prior record; mental health; familial or peer pressure; and likelihood of rehabilitation.[126] In North Carolina, the state and the defendant or defendant's counsel can present argument for or against the sentence of life imprisonment with parole, but the defendant or the defendant's counsel has the right to the last argument.[127]

In Brett Jones' case, an analysis of these factors would have likely shown he is not permanently incorrigible. He was 15 at the time of the offense, and as the defense pointed out, killed his grandfather during an argument about his girlfriend, an immature reason.[128] Additionally, there was evidence of past abuse and a bad family dynamic.[129] Jones' biological father was an alcoholic who abused his mother until they split up when Jones was two years old.[130] His situation only worsened from

122. *See generally Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013).
123. *Id.*
124. *Id.*
125. N.C. GEN. STAT. § 15A-1340.19B (West 2012).
126. *Id.*
127. *Id.*
128. Jones v. Mississippi, 141 S. Ct. 1307, 1339, 209 L. Ed. 2d 390, 427-28 (2021) (Sotomayor, J., dissenting).
129. *Id.* at 1338, 209 L. Ed. 2d at 426 (majority opinion).
130. *Id.*

there when his mother remarried his stepfather. Jones' mother and grandmother both testified to the severity of abuse he faced by his stepfather, including beatings and only ever being referred to by derogatory names rather than his real name.[131] Jones also suffered from mental health issues that led him to begin cutting himself at the age of eleven or twelve.[132] He suffered from hallucinations and was on antidepressant medication.[133] When Jones finally stood up for himself against his stepfather, the police were called, and he was arrested.[134] Prior to his grandfather's murder, this was Jones' only other contact with the juvenile justice system.[135] He was then kicked out of his home and sent to live with his grandparents, abruptly cutting off his medications.[136]

Following the murder, Jones agreed to be interviewed by three police officers with no parent or guardian present and without invoking his right to counsel.[137] One study likened one-fifth of fourteen and fifteen-year-olds, such as Jones, to seriously mentally impaired adults because neither can competently assist in their defense.[138] Finally, Jones had a nearly spotless disciplinary record while incarcerated for years.[139] His prison unit manager vouched for his good behavior and strongly believed he is capable of rehabilitation.[140] All these factors weighed together in Jones' case could not reasonably lead a sentencer to find him permanently incorrigible. Without a finding of permanent incorrigibility, it was disproportionate under the Eighth Amendment to uphold Jones' life without parole sentence.

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1338 n.17, 209 L. Ed. 2d at 426-27 n.17.

136. *Id.* at 1338, 209 L. Ed. 2d at 427.

137. *Id.* at 1339, 209 L. Ed. 2d at 428.

138. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003).

139. *Jones*, 141 S. Ct. at 1339, 209 L. Ed. 2d at 428 (Sotomayor, J., dissenting) (explaining how Jones had spent more than five years in prison committing only two disciplinary infractions).

140. *Id.* ("his unit manager came to think of Jones 'almost like [a] son'").

IV. CONCLUSION

The Eighth Amendment of the Constitution prohibits disproportionate punishments for crime.[141] A punishment that cannot be justified by any of the recognized reasons for punishment, such as incapacitation, retribution, deterrence, and rehabilitation, is inherently disproportionate. Science, societal consensus, and the law have recognized that children are different. Their brains are still developing, and they lack the maturity needed to fully appreciate the risks and consequences of their actions. For these reasons, precedent has evolved to prohibit the execution of offenders who were juveniles at the time of their crime and the imposition of life without parole for juvenile nonhomicide offenders.[142]

The Court's decision in *Jones v. Mississippi* will inevitably lead to disproportionate and unequal treatment under law for juveniles sentenced to life without parole, especially for people of color.[143] As this paper has outlined, the determination of permanent incorrigibility should be the minimum requirement in these cases. However, the majority's opinion allows juveniles to die in prison for crimes reflecting unfortunate yet transient immaturity.[144] This is in direct opposition to *Miller*'s holding. Requiring a finding of permanent incorrigibility imposes no additional costs and is minimal in comparison to the result in *Jones*, that has essentially reversed course on Supreme Court precedent.[145] "A departure from precedent demands special justification."[146] The Court gave no such special justification here. Therefore, the Court erred in *Jones*, and children across the country sentenced to die in prison, who face "a denial of hope itself," will bear the burden.

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141. *See supra* Section I.

142. *See supra* Section II.B.

143. *See supra* Section III.D.

144. *Jones*, 141 S. Ct. at 1328, 209 L. Ed. 2d at 415 (Sotomayor, J., dissenting).

145. *See supra* Section III.B.

146. *Jones*, 141 S. Ct. at 1335, 209 L. Ed. 2d at 424 (Sotomayor, J., dissenting) (quoting Gamble v. United States, 139 S. Ct. 1960, 1969, 204 L. Ed. 2d 322, 325 (2019)).