CLOSING THE DOOR ON PERMANENT INCORRIGIBILITY: JUVENILE LIFE WITHOUT PAROLE AFTER *JONES V. MISSISSIPPI*

*Juliet Liu**

In April 2021, the U.S. Supreme Court decided Jones v. Mississippi, *its latest opinion in a line of cases addressing when, if ever, a child should be sentenced to life in prison with no hope of parole or release. Although* Jones *purported to resolve division among lower courts over the findings that a sentencing court must make about a child defendant's character and prospects for reform and rehabilitation, the decision will likely lead to further disagreement among courts.*

This Note argues that although the Supreme Court's jurisprudence has protected children from harsh sentences, it has also opened a Pandora's box. By introducing the idea of permanent incorrigibility—that is, that any child could be found to be permanently incapable of change—the Court invited lower courts to engage in a dangerous predictive game. This Note argues that the question of whether permanent incorrigibility is the correct standard is the wrong debate to have. Although this Note endorses the importance of judicial discretion in sentencing, it posits that permanent incorrigibility is not a question of discretion because it is an impossible determination.

This Note ultimately argues that although critics of Jones *are correct to condemn the decision for not requiring a more stringent standard, the problem began much earlier with the introduction of the permanent incorrigibility principle. To counter the inconsistency that* Jones *is likely to cause, this Note argues that the Court can—and should—issue a categorical ban on juvenile life without parole. In the interim, this Note also proposes two smaller fixes that states can implement.*

* J.D. Candidate, 2023, Fordham University School of Law; B.A., 2017, Wellesley College. Thank you to Professor Youngjae Lee for his knowledge and guidance throughout this process. I would also like to thank Julia Hatheway and the other members of the *Fordham Law Review* for their feedback and meticulous editing. Finally, thank you to my family and friends—especially Mom, Dad, Max, and Trevor—for their constant love and encouragement.

INTRODUCTION

On November 17, 2021, seventy-five-year-old Henry Montgomery logged onto a Zoom meeting from the Louisiana State Penitentiary.[1] Referred to as "Angola" after the plantation on which it was built, the Louisiana State Penitentiary is the largest maximum-security prison in the United States.[2] It is also where Montgomery had been incarcerated for the past fifty-eight

1. *See* Rebecca Santana, *Henry Montgomery, at Center of Juvenile Life Debate, Is Free*, ASSOCIATED PRESS (Nov. 17, 2021), https://apnews.com/article/crime-louisiana-montgomery-henry-montgomery-f74f4e7351b3d72bd1ce1685279c9727 [https://perma.cc/3PAZ-7QBL].

2. *See* Anat Rubin, Tim Golden & Richard A. Webster, *Inside the U.S.'s Largest Maximum-Security Prison, COVID-19 Raged. Outside, Officials Called Their Fight a Success.*, PROPUBLICA (June 24, 2020, 4:45 PM), https://www.propublica.org/article/inside-the-uss-largest-maximum-security-prison-covid-19-raged [https://perma.cc/A3WA-CLC2].

years.[3] Due to the COVID-19 pandemic, Montgomery's third attempt to obtain parole took place via videoconference.[4]

When he was seventeen, Montgomery was convicted of murdering Charles Hurt, a deputy sheriff in East Baton Rouge, Louisiana.[5] A jury originally sentenced Montgomery to death, but the Louisiana Supreme Court overturned his conviction after finding that public sentiment against Montgomery and an atmosphere of "intense passion" for Hurt had prejudiced the trial.[6] On retrial, a second jury returned a verdict of guilty without capital punishment.[7] In Louisiana, the verdict triggered a mandatory sentence of life in prison without the possibility of parole.[8]

In 2016, at age sixty-nine, Montgomery appealed his sentence to the U.S. Supreme Court.[9] Four years earlier, the Court ruled in *Miller v. Alabama*[10] that sentencing schemes that impose mandatory life without parole sentences on individuals under eighteen are unconstitutional.[11] Montgomery claimed that *Miller* announced a new substantive constitutional rule because it protected a class of defendants—those under eighteen—from a category of punishment.[12] Under the Court's jurisprudence, substantive rules apply retroactively.[13] In his appeal, the Court decided in Montgomery's favor.[14] Acknowledging that its holding created a risk that individuals across the country were serving sentences in violation of the U.S. Constitution, the Court noted that states could remedy these sentences by creating opportunities for parole.[15] Around 800 people who had been sentenced to life without parole as children[16] obtained release after the Court decided *Montgomery*.[17]

---

3. *See* Elyse Carmosino, *Convicted of Murder at 17, His Case Changed Juvenile Sentences. Louisiana Freed Him at Age 75.*, ADVOCATE (Nov. 17, 2021, 11:29 AM), https://www.theadvocate.com/baton_rouge/news/article_8b7188a8-47b5-11ec-ac41-6befdfb0d59c.html [https://perma.cc/NTN4-HL8E].

4. *See* Santana, *supra* note 1.

5. Montgomery v. Louisiana, 577 U.S. 190, 194 (2016).

6. *Id.*; *see also* State v. Montgomery, 181 So.2d 756, 757, 761–62 (La. 1966).

7. *Montgomery*, 577 U.S. at 194.

8. *Id.*

9. *See id.* at 194–97.

10. 567 U.S. 460 (2012).

11. *Id.* at 489.

12. *Montgomery*, 577 U.S. at 208.

13. *Id.* at 206 (defining a substantive rule as one that "alters the range of conduct or the class of persons that the law punishes" (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004))).

14. *Id.* at 212.

15. *Id.*

16. This Note makes the decision to characterize individuals under eighteen years of age as "children" as opposed to "juveniles" to serve as a reminder that, despite being defendants in criminal cases, individuals facing life without parole under the age of eighteen are still children. For a similar discussion on how "the writer's choice of label is always purposeful," see Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 458 n.7 (2012).

17. Santana, *supra* note 1.

Montgomery entered the care of the Louisiana Parole Project after taking his first steps outside of Angola in nearly six decades.[18] Andrew Hundley, a former "juvenile lifer" and the first to obtain parole in Louisiana after the Court decided *Montgomery*,[19] founded the organization to support incarcerated individuals upon their release from prison.[20] Incarcerated individuals face a host of potential challenges when they leave prison, including serious mental health issues and post-traumatic stress disorder.[21] For people who begin their sentences as children, the process of reentering society can be even more challenging.[22]

Since Henry Montgomery was sentenced, juvenile life without parole sentences have become increasingly rare due to changes at the state[23] and federal[24] level. However, imposing the sentence remains lawful in about half of states,[25] and the Supreme Court has stopped short of issuing a categorical ban.[26] On April 22, 2021, the Supreme Court decided *Jones v. Mississippi*,[27] its latest opinion addressing the constitutionality of juvenile life without parole sentences.[28] The Court granted certiorari to resolve division among lower courts over what factual findings, if any, a judge must make before

18. *Id.*; *see also Who We Are*, LA. PAROLE PROJECT, https://www.paroleproject.org/ [https://perma.cc/L27B-KMET] (last visited Nov. 7, 2022).

19. *See* Grace Toohey, *The "Power of Second Chances": How this 37-Year-Old, Once in Prison, Is Now an LSU Grad*, ADVOCATE (May 10, 2019, 6:07 PM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_03c590ae-72a9-11e9-8d2b-4b78d19fcd5b.html [https://perma.cc/8ABK-H4NM].

20. *What We Do: Reentry*, LA. PAROLE PROJECT, https://www.paroleproject.org/property-manager/ [https://perma.cc/3A5K-5P63] (last visited Nov. 7, 2022).

21. *See* Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [https://perma.cc/PRP9-4ZDY]. *See generally* REUBEN JONATHAN MILLER, HALFWAY HOME: RACE, PUNISHMENT, AND THE AFTERLIFE OF MASS INCARCERATION (2021) (discussing the challenges of reentry following a prison sentence, as well as the compounding effects of race, class, and family status on life after release).

22. *See Juvenile Lifers Highlight Prisoner Re-Entry Struggles*, PITTSBURGH POST-GAZETTE (Nov. 19, 2021, 12:00 AM), https://www.post-gazette.com/opinion/editorials/2021/11/19/Juvenile-lifers-highlight-prisoner-re-entry-struggles/stories/202111190018 [https://perma.cc/N6WC-8S3Y].

23. *A State-by-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 30, 2017, 9:26 PM), https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/ [https://perma.cc/A6DF-VZAX].

24. *See infra* Part I.C; *see also* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1787 (2016) (noting the way in which the Supreme Court's jurisprudence has "limited the extent to which juveniles may be exposed to the harshest criminal sentences").

25. Anne Teigen, Miller v. Alabama *and Juvenile Life Without Parole Laws*, NAT'L CONF. OF STATE LEGISLATURES (May 12, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life-without-parole-laws.aspx [https://perma.cc/XC9K-RE6K].

26. *See* Nina Totenberg, *Supreme Court Rejects Restrictions on Life Without Parole for Juveniles*, NPR (Apr. 22, 2021, 11:17 AM), https://www.npr.org/2021/04/22/989822872/supreme-court-rejects-restrictions-on-life-without-parole-for-juveniles [https://perma.cc/3S8T-TMQP].

27. 141 S. Ct. 1307 (2021).

28. *Id.* at 1313.

imposing a sentence of life without parole on a defendant who is under eighteen.[29]

In a 6–3 decision written by Justice Kavanaugh, the Court held that sentencing courts need not make any factual finding, either explicitly or implicitly, about a child's character or potential for reform before imposing a sentence of life without parole.[30] A formal finding of "permanent incorrigibility" is not required.[31] According to the majority, when a judge chooses whether to impose a sentence of life without parole, the discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.[32] A court can now satisfy constitutional requirements by stating that it has considered the mitigating qualities of youth without elaborating on its reasoning or analysis.[33]

Jones technically resolved the split among lower courts by ruling that it is not necessary to make a finding as to a child's potential for rehabilitation prior to sentencing them to life without parole.[34] However, *Jones* may engender further inconsistency as courts that once made permanent incorrigibility determinations adjust course.[35]

At first blush, *Jones* poses considerable difficulty for those who support restrictions on juvenile life without parole sentences. By striking down the permanent incorrigibility principle, *Jones* makes it easier for sentencing judges to impose juvenile life without parole sentences because the

---

29. *Id. Compare, e.g.*, Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018) (articulating the *Miller* standard as limiting life without parole sentences to "those rare juvenile offenders whose crimes reflect permanent incorrigibility"), *and* Commonwealth v. Batts, 163 A.3d 410, 416 (Pa. 2017) (creating a presumption against life without parole sentences for defendants under the age of eighteen and placing a burden on the government to prove, beyond a reasonable doubt, that the defendant is "incapable of rehabilitation" before a life without parole sentence is available), *with* United States v. Sparks, 941 F.3d 748, 756 (5th Cir. 2019) (noting that a court fulfills its obligation under *Miller* by considering mitigating evidence of youth, but that *Miller* does not require a trial court to make a specific factual finding or "quote certain magic words" to show that the defendant is permanently corrupt), *and* State v. Ramos, 387 P.3d 650, 665–66 (Wash. 2017) (holding that an explicit finding of permanent corruption is not required as a matter of federal constitutional law under *Miller*).

30. *Jones*, 141 S. Ct. at 1311.

31. *Id.* at 1313. This Note uses "permanently incorrigible," "permanently irredeemable," and "permanently corrupt" interchangeably, as reflected in the Court's own opinions. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 472–73, 479–80 (2012) (using "permanent incorrigibility" and "irreparable corruption" to refer to the same principle throughout the opinion).

32. *Jones*, 141 S. Ct. at 1313.

33. *See* Andrew Cohen, *Supreme Court: Let's Make It Easier for Judges to Send Teenagers to Die in Prison*, BRENNAN CTR. FOR JUST. (Apr. 27, 2021), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-lets-make-it-easier-judges-send-teenagers-die-prison [https://perma.cc/EYM3-VWJ4].

34. *Jones*, 141 S. Ct. at 1318–19.

35. *See* Rachel López, *SCOTUS Dodges on Human Redemption, Leaves It to States*, BLOOMBERG L. (June 11, 2021, 4:01 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X1AQPRFO000000 [https://perma.cc/86SL-96UX] (predicting that *Jones* will likely render "future appeals based on the failure to consider youth, as required by *Miller*, basically null").

mitigating qualities of youth are assumed.[36] *Jones* also revives discussion about the inherent difficulty, if not impossibility, of implementing the permanent incorrigibility principle[37]—a problem noted by critics and proponents of the majority opinion alike.[38] But even if the permanent incorrigibility standard is problematic because it implies the existence of a permanently irredeemable child, some supporters of limitations on juvenile life without parole sentences find that the principle discourages imposition of juvenile life without parole in most cases.[39]

In response to the tangled web of the Court's juvenile life without parole jurisprudence, and in the absence of a categorical ban on the punishment, this Note poses a simple question following *Jones*: what now? This Note argues that the problem began long before *Jones*; that decision merely exposed an issue inherent in the Supreme Court's permanent incorrigibility analysis. To support this contention, this Note analyzes whether and how courts engage in a meaningful consideration of youth when sentencing children to life without parole. It then summarizes emerging trends as courts apply and interpret *Jones*.

Ultimately, this Note makes two arguments: one theoretical and one practical. First, it argues that courts are not rigorously considering youth because such a consideration is an impossible predictive exercise that is incompatible with the Supreme Court's own conception of the nature of youth. The Court can and should issue a categorical ban on life without parole sentences for people under eighteen. If the Court declines to issue a categorical ban, this Note then suggests that courts treat *Jones* as a

36. *See id.* (noting that *Jones* holds that "if the sentencer had discretion to consider youth, then it should be assumed they did"); *see also Jones*, 141 S. Ct. at 1319 (same).

37. *See, e.g.*, Davis v. State, 415 P.3d 666, 679 (Wyo. 2018) (stating that "the task of determining whether a juvenile is permanently incorrigible is difficult, if not impossible").

38. *Compare, e.g.*, John Pfaff, *It Is Ludicrous for the Supreme Court to Say Children Are Irredeemable*, WASH. POST (Apr. 23, 2021, 3:12 PM), https://www.washingtonpost.com/outlook/2021/04/23/jones-mississippi-supreme-court-life-sentence/ [https://perma.cc/75U6-9BLW] (arguing that the debate over whether a finding of permanent incorrigibility is necessary in *Jones* wrongly "presupposes that such [a finding is] possible"), David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 69 (2021) (arguing that Jones "ask[ed] for very little and receiv[ed] even less"), *and* Mary Marshall, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1635 (2019) (arguing that the "fundamental instability" of the Court's juvenile life without parole jurisprudence is the impossible predictive exercise of judging whether a child is permanently irredeemable), *with* Transcript of Oral Argument at 15–16, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259), https://www.supremecourt.gov/oral_arguments/audio/2020/18-1259 [https://perma.cc/7WU9-XQJK] (click "View") (documenting Justice Alito's questioning of David M. Shapiro, counsel for Jones, regarding how the permanent incorrigibility principle takes the courts into "very deep theological and psychological waters"), *and Jones*, 141 S. Ct. at 1322 (noting that determining the proper sentence for a youth offender "raises profound questions of morality and social policy").

39. *See Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting) (emphasizing that, if courts were bound by the permanent incorrigibility principle, juvenile life without parole would be a "disproportionate sentence for all but the rarest children"); *see also* Miller v. Alabama, 567 U.S. 460, 479 (2012) ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

constitutional floor and employ a multi-pronged approach focused on ensuring meaningful opportunities for release after sentencing.

This Note proceeds in three parts. Part I traces the evolution of the juvenile justice system and discusses the Supreme Court's jurisprudence around punishing children. Part II illustrates the paradox arising out of the Supreme Court's invocation of permanent incorrigibility and further explores how courts have attempted to give meaning and shape to the consideration, both before and after *Jones*. Part III first argues that a categorical ban is the optimal solution, and, although unlikely to occur, is supported by the Court's precedents. Part III then proposes two practical suggestions to circumvent the uncertainty wrought by *Jones*.

I. FROM CHILDREN TO DEFENDANTS: THE MAKING OF THE "JUVENILE OFFENDER" AND JUVENILE LIFE WITHOUT PAROLE AT THE SUPREME COURT

This part outlines the historical and legal backdrop of the juvenile life without parole sentence and the Supreme Court's jurisprudence in the area. Part I.A provides a brief overview of current trends and statistics in youth sentencing to frame the stakes of the discussion on the future of juvenile life without parole. Part I.B summarizes how social and legal forces throughout U.S. history have transformed the justice system's treatment of children who commit crimes. Finally, Part I.C examines landmark Supreme Court cases that shaped federal law concerning juvenile life without parole.

A. Juvenile Life Without Parole Today

The United States stands alone in the global community as the only nation where an individual may face life in prison without parole for a crime committed before their eighteenth birthday.[40] Today, twenty-five states and the District of Columbia have abolished life sentences without the possibility of parole for people under eighteen, but half of the states still authorize the sentence.[41] At the beginning of 2020, 1,465 people were serving juvenile life without parole sentences in the United States.[42] Roughly two-thirds of these offenders serve their sentences in three states: Pennsylvania, Michigan, and Louisiana.[43]

Although all individuals serving juvenile life without parole sentences committed brutal crimes as children, there is evidence that many children

40. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/H9E7-GSTU].

41. *Id.*

42. *Id.*

43. TARIKA DAFTARY-KAPUR & TINA ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE (2020), https://digitalcommons.montclair.edu/cgi/viewcontent.cgi?article=1084&context=justice-studies-facpubs [https://perma.cc/4F7E-LZJZ].

who receive the sentence grow up in traumatic environments.[44] Data indicates that many children who are sentenced to life without parole suffer abuse and neglect from an early age.[45] Poverty, housing insecurity, and other circumstantial factors outside the control of children often compound the effects of that trauma.[46] A 2012 survey of 1,579 individuals serving juvenile life without parole sentences found that 79 percent regularly experienced violence in their childhood homes.[47] Additionally, 47 percent of respondents were victims of physical abuse, with 77 percent of girls reporting sexual abuse.[48] Juvenile lifers also tend to experience housing and education insecurity as children: 18 percent of those surveyed were not living with a close adult relative just before their incarceration, while others reported experiencing homelessness and group home living situations.[49] Fewer than half of those surveyed reported attending school at the time of their offense.[50]

Furthermore, Black youth receive life without parole sentences at higher rates than their white, Latinx, Asian American, and Indigenous American peers.[51] A 2016 analysis of sentencing data from state departments of corrections found that over 65 percent of individuals serving juvenile life sentences are Black.[52] In some states, for example North Carolina, nearly 90 percent of juvenile lifers are children of color.[53] Controlling for the crime committed and accounting for disparities in arrest rates, Black children are sentenced to life without parole at almost twice the rate of white children.[54] This means that racial disparities originate not at the point of arrest, but rather with prosecutorial decision-making and the sentencing practices of courts.[55]

---

44. Rovner, *supra* note 40; *see also* ASHLEY NELLIS, SENT'G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY (2012), https://www.prisonlegalnews.org/media/publications/sentencing_project_the_lives_of_juvenile_lifers_survey_findings_2012.pdf [https://perma.cc/75X9-R6J6].

45. NELLIS, *supra* note 44.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; *see also* CAMPAIGN FOR FAIR SENTENCING OF YOUTH, THE TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/6TQ2-ZWGP] (noting that approximately 72 percent of children sentenced to life without parole since 2012 are Black).

52. John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 575–76, 578 (2016).

53. *Id.* at 579.

54. *Id.*

55. *See id.* at 578; *see also* Joshua Aiken, *Why Do We Lock Juveniles Up for Life and Throw Away the Key?: Race Plays a Big Part*, PRISON POL'Y INITIATIVE (Sept. 15, 2016), https://www.prisonpolicy.org/blog/2016/09/15/juvenile_lwop/ [https://perma.cc/7ADF-9WUR].

Juvenile life without parole sentences are increasingly rare due to a trend toward abolition among states.[56] However, the sentence remains constitutionally permissible under the Eighth Amendment,[57] and many individuals are still serving juvenile life without parole sentences across the country.[58] Evidence shows that the punishment disproportionately affects people of color, those who experience trauma growing up, and those who lie at the intersection of those identities and experiences.[59] Thus, despite the downward trend in new juvenile life without parole sentences, it is important to understand the history and development of the criminal justice system as it applies to youth.

B. How Children Become Defendants

In the span of a century, the process by which the law handled children who commit crimes shifted from rehabilitative to punitive.[60] The story of children in the justice system begins with the Progressive reform movement of the late eighteenth and early nineteenth centuries.[61] In response to the burgeoning industrial society of the United States and the urbanization and immigration that came with it, Progressive reformers, who were mostly white upper- and middle-class city-dwellers, invoked the principle of parens patriae[62] to increase the presence of the state in traditionally private family matters.[63]

Commentators regard the creation of juvenile court as the crowning achievement of Progressive-Era welfarism.[64] Progressive reformers' invention of a separate court system for children stemmed from their belief that the government had an interest in stepping in to protect children.[65] The bedrock principles of Progressive-Era juvenile courts were that children were different from adults, and that childhood was worth protecting.[66] For Progressives, these principles warranted the creation of a separate system of justice for children.[67] The early juvenile justice system was oriented not

---

56. *See Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUVENILE SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop/ [https://perma.cc/P3MY-5PCE] (last visited Nov. 7, 2022).

57. *See infra* Part I.C.

58. *See* Rovner, *supra* note 40.

59. *See supra* notes 44–55 and accompanying text.

60. *See* Guggenheim, *supra* note 16, at 466; *see also* Tina M. Robinson, *I Wish I Knew Then What I Know Now: Looking to the Objective Science in Evaluating Juveniles' (In)competency*, 49 SW. L. REV. 144, 147 (2020).

61. *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 19 (2017).

62. *See id.* at 24 (defining parens patriae as the doctrine that recognizes the state as a "parent-surrogate").

63. *Id.*; *see also* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1379–90 (2020) (detailing the rise of Progressive paternalism in the arenas of child welfare and juvenile justice).

64. *See* Huntington & Scott, *supra* note 63, at 1381.

65. *See id.*

66. *See* FELD, *supra* note 61, at 23.

67. *See id.* at 26.

around punishing children when they caused harm, but around assessing the best interests of the child going forward.[68] Though Progressives conceived of juvenile courts as therapeutic settings,[69] scholars today agree that the Progressive project had intentional underlying motives of social control and discrimination targeted at poor and immigrant families.[70]

The Progressive view of children and juvenile courts nevertheless carried the day until 1967,[71] when the Supreme Court decided *In re Gault*.[72] Gerald Gault, a fifteen-year-old, was arrested after making a lewd prank phone call to his neighbor.[73] He was tried in juvenile court in a proceeding that lacked many of the markings of a fair trial—for instance, no witnesses were present, and the court did not produce a record of the hearing.[74] The state argued that because juvenile courts were rehabilitative and not adversarial in nature, there was no need for procedural formality—in fact, such formality would detract from the project of juvenile courts.[75] The Court rejected that argument and held that children were entitled to due process, even in juvenile court.[76] *Gault* marked a turning point in how the law treats children: by bestowing children with procedural rights, the Court signaled that children were independent legal actors who could make use of those rights in an adversarial setting.[77]

The evolution from child to defendant crystallized in the 1990s.[78] Both political parties, in response to rising crime rates and increasingly tense race relations, united around the common refrain that children who committed crimes deserved to be punished like adults.[79] The resulting "adult time for adult crime"[80] philosophy developed in tandem with the birth of the mythological, racialized concept of a "superpredator."[81] According to Professor John J. DiIulio Jr., who coined the term in a 1995 opinion piece, a superpredator was a young criminal whose impulsivity and lack of remorse

68. *See id.* at 33–34; *see also* Vanessa Carroll, *Cultivating Boyhood and Girlhood: The Role of Gender in Progressive Era Juvenile Justice Reform in Wisconsin*, 22 WIS. WOMEN'S L.J. 133, 139 (2007).

69. *See* FELD, *supra* note 61, at 31.

70. *See id.*; *see also* Huntington & Scott, *supra* note 63, at 1382.

71. FELD, *supra* note 61, at 31; *see also* Huntington & Scott, *supra* note 63, at 1386 (noting that by the 1960s, critics of juvenile delinquency proceedings began to deride the informal procedures and the fact that the proceedings often harmed children of color under the guise of benevolence and welfare).

72. 387 U.S. 1 (1967).

73. *Id.* at 4–5.

74. *See id.* at 5.

75. *See id.* at 25–26; *see also* Guggenheim, *supra* note 16, at 467.

76. *See In re Gault*, 387 U.S. at 30–31.

77. *See* FELD, *supra* note 61, at 64.

78. *See id.* at 89.

79. *See id.*; *see also* Huntington & Scott, *supra* note 63, at 1386–87.

80. *See* Linda J. Collier, *Adult Crime, Adult Time*, WASH. POST, Mar. 29, 1998, at C01 (arguing that "[c]hildren who knowingly engage in adult conduct and adult crimes should automatically be subject to adult rules and adult prison time").

81. *See* FELD, *supra* note 61, at 105.

posed a threat to society.[82] No significant statistical evidence supported the existence of the superpredator.[83] Rather, the racially coded figure stoked fear and disdain, primarily toward Black youth.[84] Lawmakers seized on the ensuing moral panic to amend transfer laws, which fundamentally changed the treatment of children who committed crimes.[85] Between 1992 and 1999, for example, all but one state amended their transfer laws to make it easier for children to be tried in adult court and receive adult sentences.[86]

Transfer laws dictate how and under what circumstances the law authorizes children to be transferred from juvenile court to adult criminal court.[87] Generally, children are transferred to adult court when charged with serious crimes.[88] There are three main, overlapping mechanisms by which children end up in adult court: judicial waiver, legislative offense exclusion, and prosecutorial direct file.[89] First, judicial waiver statutes exist in a majority of states and permit judges to waive juvenile court jurisdiction and transfer a child to criminal court after conducting a hearing to determine the child's amenability to treatment and their threat to public safety.[90] Second, because legislatures create juvenile courts, statutes may also delineate whether and when a child will be transferred to adult court based on the child's age and the severity of the offense.[91] For example, a sixteen-year-old convicted of murder might be eligible for juvenile court in some states but ineligible in others.[92] Finally, prosecutorial direct file refers to a prosecutor's choice to directly charge a crime in adult court when juvenile courts and adult courts share concurrent jurisdiction.[93]

As a result of the racialized fear of the 1990s, "get tough" laws worked to lower the age of eligibility for transfer, thus capturing a larger swath of young offenders than before.[94] These laws also shifted discretion to prosecutors, who could charge crimes more aggressively because they were not bound by judicial neutrality.[95] The story of how children like Henry Montgomery become criminal defendants in adult court is thus a story of Supreme Court jurisprudence dating back to *In re Gault*. Part I.C explains the other part of Montgomery's story by summarizing the development of juvenile life without parole sentences in Supreme Court jurisprudence.

---

82. *See* Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth that Demonized a Generation of Black Youth*, MARSHALL PROJECT (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/D4AF-BL6G].

83. *Id.*

84. *See* FELD, *supra* note 61, at 105.

85. *Id*.

86. Mills et al., *supra* note 52, at 585.

87. *See* FELD, *supra* note 61, at 108.

88. *Id.* at 109.

89. *Id.*

90. *Id.*

91. *Id.* at 109–10.

92. *Id.*

93. *Id.* at 110, 115.

94. *Id.* at 110.

95. *Id.*

C. Juvenile Life Without Parole at the Supreme Court

The Eighth Amendment prohibits cruel and unusual punishment.[96] The Supreme Court has noted that "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment."[97] The Court employs a two-step "evolving standards of decency" analysis to determine whether a punishment violates the Eighth Amendment.[98] At the first step, the Court reviews "objective indicia" of society's evolving standards of decency that demonstrate a consensus against a particular criminal sanction.[99] To ascertain whether there is a national consensus against the punishment at issue, the Court looks to legislative enactments and state practice across the country.[100] The second step requires the Court to exercise "its own independent judgment" to determine whether the punishment comports with the Court's precedent and the history and purpose of the Eighth Amendment.[101]

Although evidence of national consensus against a form of punishment is "entitled to great weight," it is not on its own determinative: the ultimate task of interpreting the Eighth Amendment remains the province of the Court.[102] When exercising its own independent judgment to assess the constitutionality of a punishment, the Court balances the culpability of a class of offenders, informed by their shared characteristics, with the severity of the punishment.[103] The Court also analyzes whether the punishment as applied to that class of offenders serves legitimate penological purposes.[104] Beginning with *Eddings v. Oklahoma*,[105] the Supreme Court has issued a series of decisions interpreting the Eighth Amendment to protect children from extreme punishment. At the core of the Court's jurisprudence is the premise that children are less culpable than adults.[106] This section

96. U.S. CONST. amend. VIII.

97. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016).

98. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); *see also* Weems v. United States, 217 U.S. 349, 378 (1910) (noting that the cruel and unusual punishment clause of the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (pointing out that the drafters of the Eighth Amendment delegated the task of determining which punishments are cruel and unusual "to future generations of judges").

99. Roper v. Simmons, 543 U.S. 551, 564 (2005).

100. *Id.* at 563.

101. Graham v. Florida, 560 U.S. 48, 61 (2010).

102. *Id.* at 67.

103. *Id.*

104. *Id.* at 67–68.

105. 455 U.S. 104 (1982).

106. *See id.* at 115–16 (noting that "youth is more than a chronological fact . . . [i]t is a time and condition of life when a person may be most susceptible to influence and psychological damage," and that "[e]ven the normal 16-year-old customarily lacks the maturity of an adult"); Thompson v. Oklahoma, 487 U.S. 815, 823 (1988) (relying on the "experience of mankind" to uphold a ban on capital punishment for those under sixteen at the time of the crime); Roper v. Simmons, 543 U.S. 551, 553–54 (2005) (holding that neither retribution nor deterrence, as penological goals, can justify the imposition of the death penalty on children because the Eighth Amendment prohibits the state's "extinguish[ing] [a child's] life and [their] potential to attain a mature understanding of [their] own humanity"); *Graham*, 560 U.S. at 68 (holding

summarizes the Supreme Court's youth-punishment cases, beginning with *Eddings* and ending with *Jones*.

In *Eddings*, the Supreme Court considered whether the trial court erred when it refused to consider, as a matter of law, mitigating evidence of a sixteen-year-old's traumatic childhood and emotional disturbance before imposing the death penalty for first-degree murder.[107] The Court held that the sentencing court violated the Constitution when it sentenced Monty Lee Eddings to death.[108] The Court found that the decisions of the lower courts ran afoul of the rule announced in *Lockett v. Ohio*.[109] In *Lockett*, the Court made clear that a sentencing court in a capital punishment case must be permitted to consider any relevant mitigating factor or evidence.[110] In *Eddings*, the Court noted that "[e]ven the normal [sixteen-year-old]" lacks the maturity of an adult.[111] Justice Lewis F. Powell Jr., writing for the majority, further noted that Eddings was not a normal sixteen-year-old.[112] Eddings grew up with "serious emotional problems" and experienced neglect and violence at home.[113] These factors were relevant to the question of an appropriate punishment and the Court held that the trial court should have considered evidence of Eddings's childhood as mitigating evidence.[114]

The Court came closer to issuing a categorical ban on the death penalty for children in *Thompson v. Oklahoma*.[115] In *Thompson*, the Court held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on children who were under sixteen at the time of their offense.[116] William Thompson and three other individuals were convicted of murdering Thompson's former brother-in-law.[117] The trial court sentenced Thompson, then fifteen years old, to death.[118] Using the Court's evolving-standards-of-decency analysis, Justice John Paul Stevens first invoked the words of Justice Powell to express that "the experience of mankind" recognizes fundamental differences between children and adults.[119] Before addressing the central question of whether the Eighth Amendment prohibited imposing the death penalty on children under sixteen, Justice Stevens highlighted some more quotidian examples of how state and

---

that life without parole sentences for nonhomicide crimes committed by youth violate the Eighth Amendment because children are less culpable); Miller v. Alabama, 567 U.S. 460, 471 (2012) (stating that "children are constitutionally different from adults for purposes of sentencing" because of their "diminished culpability and greater prospects for reform").

107. *Eddings*, 455 U.S. at 113–15.
108. *See id.* at 104, 117.
109. 438 U.S. 586 (1978).
110. *Eddings*, 455 U.S. at 112.
111. *Id.* at 116.
112. *Id.*
113. *See id.*
114. *Id.* at 116–17.
115. 487 U.S. 815 (1988).
116. *Id.* at 838.
117. *See id.* at 819.
118. *Id.*
119. *See id.* at 823 (quoting Goss v. Lopez, 419 U.S. 565, 590–91 (1975) (Powell, J., dissenting)).

federal law treated children differently than adults.[120] For instance, children under sixteen were not able to vote, sit on a jury, marry without parental consent, or purchase alcohol.[121] For the *Thompson* majority, these well-settled[122] distinctions between the legal treatment of children and adults cautioned against imposing adult punishment on children, even when they commit ostensibly adult crimes.[123]

The Court then determined that trends among state legislatures, juries, prosecutors, and the international community all advised against the acceptability of capital punishment for those under sixteen.[124] Articulating the Court's independent judgment, Justice Stevens reasoned that children are less culpable than adults and thus should not receive the same punishment.[125] Justice Stevens further opined that children are so fundamentally different from adults that the basis for such a conclusion "is too obvious to require extended explanation."[126]

Nearly twenty years after *Thompson*, the Court issued its first categorical ban on extreme punishment for children in *Roper v. Simmons*.[127] At seventeen, Christopher Simmons committed what the Court described as a "chilling, callous" murder for which he was sentenced to death.[128] At trial, Simmons presented mitigating evidence to show the jury that his difficult home background, erratic attendance at school, and early substance use should temper the severity of his punishment.[129] The question presented to the Supreme Court in *Roper* was whether the Eighth Amendment forbids capital punishment of a juvenile offender older than fifteen but younger than eighteen at the time of the crime.[130]

Writing for the majority, Justice Anthony Kennedy answered that the Eighth Amendment did prohibit the imposition of the death penalty on all individuals under eighteen.[131] Employing the Court's two-part evolving-standards-of-decency analysis, Justice Kennedy first assessed the objective indicia of national consensus against the punishment.[132] At the time, thirty states had already abolished the death penalty as applied to children.[133] Among states that had not prohibited the punishment, its imposition was nevertheless infrequent.[134] Based on this pattern, the Court

120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.* at 836–38.
124. *Id.* at 833.
125. *Id.* at 834.
126. *Id.* at 835; *see also* Gina Kim, Note, *The Impermissibility of Police Deception in Juvenile Interrogations*, 91 FORDHAM L. REV. 247, 266 & n.151 (2022).
127. 543 U.S. 551, 575 (2005).
128. *Id.* at 556.
129. *See id.* at 559.
130. *Id.* at 555–56.
131. *Id.* at 575.
132. *Id.* at 564.
133. *Id.*
134. *Id.*

identified a national consensus among the states that children are categorically less culpable than adults.[135]

Justice Kennedy then set forth the Court's independent judgment.[136] In holding that the death penalty for children violates the Eighth Amendment, Justice Kennedy articulated three fundamental differences that set children apart from adults in the criminal punishment context.[137] First, children lack maturity and tend to act more recklessly as a result.[138] Second, children are more vulnerable to outside pressures and the circumstances of their upbringing and environment because they lack the resources and ability to fully extricate themselves from negative influences.[139] Third, a child's personality is not as fully formed as that of an adult; because children's characters are still in flux as they grow older, crimes they commit as children are more likely to reflect "transient immaturity" than a permanently immoral and depraved character.[140] Justice Kennedy emphasized that even children who commit brutal crimes are capable of change.[141] The Court's identification of these broad distinctions between children and adults drew on a combination of scientific data and what "any parent knows."[142] These tenets were sufficient to support a total ban on the imposition of the death penalty for individuals under eighteen.[143]

Despite the Court's categorical declaration, Justice Kennedy acknowledged that, at least hypothetically, there could exist a child who defied the three principles that distinguish children from adults.[144] Even though the Court outlined reasons for finding children as a class to be less deserving of punishment than adults, it nevertheless acknowledged that there could be a child who *was* just as culpable as an adult.[145] *Roper* stands out as the first instance in which the Court issued a categorical ban on a specific punishment for children. But it also signifies the moment at which the Court opened the door to rhetoric surrounding potential "depravity" in children.[146]

Six years later, the Court issued a second categorical ban on punishment for children in *Graham v. Florida*.[147] The Court held that life without parole is an unconstitutional punishment if imposed for a nonhomicide offense committed by a child.[148] Terrance Graham was sentenced to life without parole for an attempted robbery.[149] The Court vacated his conviction,

135. *Id.*
136. *Id.* at 575.
137. *Id.* at 569–70.
138. *Id.* at 569.
139. *Id.* at 570.
140. *Id.* at 573.
141. *See id.* at 570.
142. *Id.* at 569.
143. *Id.* at 572.
144. *Id.*
145. *Id.*
146. *Id.*
147. 560 U.S. 48 (2010).
148. *Id.* at 82.
149. *Id.* at 57.

holding that the Eighth Amendment bars a sentence of life without parole for children when they commit nonhomicide offenses.[150] Writing for the majority again, Justice Kennedy drew primarily from the analysis set forth in *Roper* to justify a complete bar on life without parole for nonhomicide offenses.[151] Justice Kennedy echoed his *Roper* majority opinion by citing not only neuroscientific principles and other data, but also the common sense notion that "equat[ing] the failings of a minor with those of an adult" would be "misguided."[152]

As in *Roper*, the Court in *Graham* acknowledged the possibility that there could be children who deserve to be punished like adults because of psychological maturity, evidence of serious depravity, or both.[153] However, the Court again referenced the difficulty of finding a child to be permanently irredeemable to caution against punishing adults like children in practice.[154] According to *Graham*, even assuming that it were possible for a child to be just as culpable as an adult, the task of differentiating between children who have the capacity for change and those who do not is near impossible.[155]

When the Court decided to hear *Miller v. Alabama*, a consolidated decision containing the cases of two fourteen-year-olds sentenced to life without parole for murder, previous decisions made the Court seem amenable to issuing a third categorical ban.[156] However, the Court ultimately declined the invitation.[157] Instead, the majority in *Miller* held that life without parole sentences imposed on children are only unconstitutional when the sentencing scheme mandates the imposition of the punishment.[158]

On the one hand, *Miller* built on *Roper* and *Graham* by reemphasizing that children are constitutionally different from adults.[159] The Court emphasized that its findings with respect to youth were grounded in "common sense."[160] *Miller* determined that a mandatory minimum sentence of life without parole as applied to children is unconstitutional because it strips sentencing authorities of the ability to consider the distinctive attributes of a defendant's youth.[161] The Court provided the following factors as examples of such attendant characteristics: immaturity, impetuosity, family and home life, the

150. *Id.* at 82.

151. *See* Guggenheim, *supra* note 16, at 462 (noting that the Court "borrowed all of the ideas underlying its conclusion [in *Graham*] . . . that the Constitution categorically forbids imposing a sentence less than death on certain juveniles . . . from *Roper*").

152. *Graham*, 560 U.S. at 68 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

153. *Id.* at 77.

154. *Id.*

155. *Id.*

156. *See* Adam Liptak, *Supreme Court Revisits Issue of Harsh Sentences for Juveniles*, N.Y. TIMES (Mar. 20, 2012), https://www.nytimes.com/2012/03/21/us/supreme-court-revisits-issue-of-sentences-for-juveniles.html [https://perma.cc/G94D-7KUL] (noting that a majority of justices "appeared prepared to take an additional step in limiting [juvenile life without parole sentences], but it was not clear whether it would be modest or large").

157. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012).

158. *Id.* at 489.

159. *Id.* at 471.

160. *Id.*

161. *See id.* at 474.

circumstances of the offense, familial and peer pressure, inability to deal with law enforcement and attorneys, and the possibility of reform.[162] Courts and commentators now treat these characteristics as the "*Miller* factors."[163]

For Miller, those attributes would have been important considerations in determining his sentence. By the time of his crime, Miller had been in and out of foster care due to his mother's struggle with addiction and his stepfather's abuse.[164] Miller also began using alcohol and drugs as a child.[165] Throughout his childhood, Miller attempted suicide four times, with the first attempt occurring when he was six years old.[166] The Court reasoned that Miller's traumatic upbringing affected his decision to commit a crime.[167] The Court considered it "beyond question" that Miller deserved punishment for his crime; however, the fact that the sentencing judge did not have the discretion to consider the effect of Miller's childhood in his decision-making and actions constituted a violation of the Eighth Amendment.[168]

On the other hand, *Miller* signified a departure from precedent as well.[169] Though the Court recognized that children are categorically different from adults for sentencing purposes, the Court stopped short of issuing a categorical ban like those in *Roper* and *Graham*.[170] Furthermore, the Court relied on its belief in children's diminished culpability and heightened capacity for change in *Roper* and *Graham* to note that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[171] In so holding, the Court reasoned that finding a child who is "permanently incorrigible" would be exceedingly difficult, thus protecting all but a few children from receiving the maximum sentence of life without parole.[172]

The majority relied on the figure of the "rare juvenile offender whose crime reflects irreparable corruption"[173] to support its prediction that most young offenders are capable of reform.[174] However, the majority did not declare how courts should draw the line between redeemable and irredeemable.[175] Thus, after *Miller*, child defendants convicted of homicide are still eligible for a life without parole sentence so long as the sentencing judge had occasion to hear mitigating evidence.[176]

---

162. *Id.* at 477–78.
163. Marshall, *supra* note 38, at 1643 n.74.
164. *Miller*, 567 U.S. at 467.
165. *Id.*
166. *Id.*
167. *Id.* at 478–79.
168. *Id.* at 479.
169. *See* Marshall, *supra* note 38, at 1636.
170. *See Miller*, 567 U.S. at 479.
171. *Id.*
172. *Id.* at 479–80.
173. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
174. *See id.*
175. *See id.* at 480.
176. *Id.* at 479; *see also* Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 497 (2013).

In *Montgomery v. Louisiana*,[177] the Court held that *Miller* applied retroactively.[178] The Court found that *Miller* announced a new substantive rule of constitutional law.[179] Because *Miller* concluded that mandatory juvenile life without parole sentences are unconstitutional, the majority reasoned that the ruling created a risk that many juvenile lifers' sentences violated the Constitution.[180] The Court noted that *Miller* prescribes a procedure whereby a court considers youth and its characteristics as part of a sentencing hearing.[181] Thus, *Montgomery* opened the door for individuals serving pre-*Miller* juvenile life without parole sentences to resentencing or parole consideration.[182]

Most recently, the Court held in *Jones v. Mississippi* that neither its precedent nor the Eighth Amendment requires a sentencing court to make a separate factual finding of permanent incorrigibility before sentencing a child to life in prison.[183] Brett Jones was fifteen years old when he was convicted of killing his grandfather.[184] Like many juvenile lifers, Jones had an opportunity for a resentencing after the Supreme Court decided *Miller* and *Montgomery*.[185] At Jones's resentencing, the judge "acknowledged that he had discretion" under the recent decisions to impose a lesser sentence but determined that life without parole remained appropriate.[186] Jones appealed, arguing that in order to comply with *Miller*, a sentencing judge must make a separate factual finding that the defendant is permanently incorrigible.[187] At the very least, Jones argued that sentencing judges must make an on-the-record explanation with an implicit finding of incorrigibility.[188]

The majority firmly rejected both of Jones's arguments in holding that a sentencing judge having discretion to impose a lower sentence is "both constitutionally necessary and constitutionally sufficient."[189] Accordingly, *Jones* officially foreclosed the inference that many lower courts had been making based on *Graham*, *Miller*, and *Montgomery*: that sentencing a child to life requires finding that a child is permanently incapable of rehabilitation.[190]

177. 577 U.S. 190 (2016).
178. *Id.* at 212.
179. *Id.*
180. *Id.*
181. *Id.* at 210.
182. *Id.* at 212.
183. Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021).
184. *Id.* at 1309.
185. *Id.* at 1313.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *See id.* at 1321; *see, e.g.*, United States v. Conyers, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016) (holding that juveniles may be sentenced to life imprisonment so long as the court "finds that the defendant is irredeemable and so culpable as to warrant a life sentence"); People v. Botello, 259 Cal. Rptr. 3d 93, 103 (Ct. App. 2020) (finding that a trial court judge must "expressly find 'irreparable corruption' or 'permanent incorrigibility' prior to imposing life without parole sentences upon juvenile offenders"); People v. Holman, 91 N.E.3d 849, 863

In light of the Supreme Court's jurisprudence, Part II highlights how even before *Jones*, courts fractured on the question of whether to employ the permanent incorrigibility principle. Part II then examines the way in which *Jones* exacerbated the inconsistency.

II. ARE COURTS CONSIDERING YOUTH?

"Do you think that there are any human beings who are not capable of redemption?"[191] Justice Alito posed this question to counsel for Brett Jones during oral argument in *Jones*.[192] The central issue in *Jones* was whether sentencing judges must make a specific finding that a child is permanently incorrigible—that is, not capable of rehabilitation or redemption—before imposing a sentence of life without parole.[193]

Early in oral argument, Justice Alito remarked that asking judges to make such a determination would lead "the courts of this country into very deep theological and psychological waters."[194] While critics of the decision claimed that the Court's rejection of the permanent incorrigibility principle stripped *Miller* and *Montgomery* of their substance and protective power,[195] the notion that the incorrigibility inquiry is problematic unites both Justice Alito, who joined the majority opinion, and critics of the decision.[196]

This part explores the problems and inconsistencies arising out of courts' application of *Miller* and *Montgomery*. Part II.A analyzes pre-*Jones* decisions to illustrate that some courts adopted the permanent incorrigibility principle and some did not. Part II.B then looks at post-*Jones* cases to show early trends. Finally, Part II.C analyzes arguments about judicial discretion, which lie at the center of the sentencing debate.

A. Applying Miller *and* Montgomery *in the Lower Courts: Justice by Geography?*

Following *Montgomery*'s announcement that *Miller* introduced a new substantive rule of constitutional law,[197] lower courts applied varying standards in sentencing new juvenile lifers and resentencing individuals already serving mandatory life without parole sentences.[198] This part argues

(Ill. 2017) (interpreting *Miller* to mean that a child may be sentenced to life without parole "only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation").

191. Transcript of Oral Argument, *supra* note 38, at 16.

192. *Id.*; *see also* Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 317 (2021).

193. *Jones*, 141 S. Ct. at 1311.

194. Transcript of Oral Argument, *supra* note 38, at 15.

195. *See Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting) (arguing that the majority "gut[ted]" *Miller* and *Montgomery*); *see also* Cohen, *supra* note 33.

196. *See supra* note 38 and accompanying text.

197. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

198. *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 161 (2017) (noting that the key disagreements between states in interpreting *Miller* after *Montgomery*

that these differences create "justice by geography."[199] Specifically, it analyzes cases that demonstrate the way in which courts and judges applied their own gloss to *Miller*.[200] To establish a baseline, Part II.A.1 summarizes the reasoning of courts that have either abolished or created presumptions against juvenile life without parole sentences. Part II.A.2 then presents cases in which appellate courts found that lower courts had inadequately considered youth. Finally, Part II.A.3 discusses cases in which appellate courts held that a finding of permanent incorrigibility was unnecessary.

1. States That Have Abolished or Adopted Presumptions Against Juvenile Life Without Parole

Over the last eight years, several states have eliminated or restricted juvenile life without parole sentences.[201] While most states have banned the sentence through legislation,[202] Iowa and Massachusetts have abolished juvenile life without parole sentences through their courts.[203] Similarly, Pennsylvania courts have created a strong presumption against life without parole for individuals under eighteen.[204] This section discusses those decisions and their implications in turn.

---

stem from whether to interpret *Montgomery* as permitting discretion in sentencing or instead as obligating the creation of additional protections for children).

199. The phrase "justice by geography" originally described the way in which juvenile justice administration varies by jurisdiction and even within jurisdictions. *See* Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 157 (1991). This Note employs the term to refer to the fact that the imposition of juvenile life without parole sentences similarly varies by state, circuit, and even judge.

200. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that a judge or jury "must have the opportunity" to consider the mitigating qualities of youth before imposing life without parole); *Montgomery*, 577 U.S. at 195 (noting that *Miller* required sentencing courts to consider children's "diminished culpability and heightened capacity for change" before imposing a sentence of life without parole).

201. *See A State-By-State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 13, 2017), https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85 [https://perma.cc/AT6N-5MB5].

202. *See, e.g.*, VT. STAT. tit. 13, § 7045 (2022); NEV. REV. STAT. § 176.025 (2021); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE ANN. tit. 11, §§ 636(b), 4209, 4209A, 4204(A) (2012)); H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (enacting W. VA. CODE §§ 61-11-23, 62-12-13b (2014)); S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending ARK. CODE ANN. §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618 (2016)); S.B. 394, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (amending CAL. PENAL CODE § 3051 (West 2016)).

203. *See Iowa Supreme Court Abolishes Death-in-Prison Sentences for Children*, EQUAL JUST. INITIATIVE (May 7, 2016), https://eji.org/news/iowa-supreme-court-abolishes-juvenile-life-without-parole/ [https://perma.cc/BF7J-6Z9C]; Ray Sanchez, *Massachusetts Top Court Strikes Down Life Without Parole for Juveniles*, CNN (Dec. 24, 2013, 1:30 PM), https://www.cnn.com/2013/12/24/justice/massachusetts-life-without-parole-junveniles/index.html [https://perma.cc/XQ5K-NB4K].

204. *See The Batts II Decision: The Favorable and Where It Falls Short*, ABOLITIONIST L. CTR. (June 29, 2017), https://abolitionistlawcenter.org/2017/06/29/the-batts-ii-decision-the-favorable-and-where-it-falls-short/ [https://perma.cc/DD6R-UHU5].

In *Diatchenko v. District Attorney for Suffolk District*,[205] decided a year after *Miller*, the Supreme Judicial Court of Massachusetts ruled that the discretionary imposition of a sentence of life without parole for a seventeen-year-old convicted of homicide violated the state constitution.[206] Gregory Diatchenko appealed his sentence thirty-one years after being convicted of first-degree murder.[207] Exercising its authority to interpret the Massachusetts state constitution to extend greater protection than the U.S. Constitution, the court held that even discretionary life without parole sentences violated the protections of the Massachusetts constitution.[208] In reaching its conclusion, the court emphasized advancements in adolescent brain development research and the "myriad significant ways" that this development affects a child's personality, behavior, and actions.[209] Because an adolescent's brain and character are still developing by the age of eighteen, the court reasoned that no judge can determine at the point of sentencing that a child is irretrievably depraved at the point of sentencing.[210] The court then held that because of a child's capacity for change, any life without parole sentence would foreclose opportunities for reform and release, in violation of the state constitution.[211]

Three years later, the Iowa Supreme Court similarly issued a categorical ban on juvenile life without parole in *State v. Sweet*.[212] When he was seventeen, Isaiah Sweet shot and killed his grandfather and his grandfather's wife, both of whom had raised Sweet after his birth mother was unable to care for him.[213] According to Sweet, his grandfather was verbally and emotionally abusive and regularly told Sweet to kill himself.[214] By the time of the murders, Sweet had attempted suicide several times.[215] Sweet also abused drugs, was a binge drinker, and engaged in reckless behavior with friends, including asking a friend to burn him with a cigarette fifteen times.[216]

At his sentencing, the defense offered the expert testimony of Dr. Stephen Hart, a clinical psychologist who specialized in assessing violence,

205. 1 N.E.3d 270 (Mass. 2013).
206. *Id.* at 284–85.
207. *Id.* at 286.
208. *Id.* at 283, 284–85.
209. *Id.* at 283–84.
210. *Id.* at 284–85 ("Simply put, 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.").
211. *Id.* at 285.
212. 879 N.W.2d 811 (Iowa 2016).
213. *Id.* at 812. The court noted that the events leading up to Sweet's placement with his grandparents were unclear. Sweet reported that a neighbor raped him when he was four, causing authorities to terminate his parents' rights. Sweet's mother reported that she could not pursue custody because she was in a domestic violence situation, but that she did not want Sweet to live with his grandfather because he and his wife abused Sweet's mother as a child. *See id.* at 814.
214. *Id.*
215. *Id.*
216. *Id.* at 815.

predicting risk, and diagnosing psychopathic personality disorder.[217] Based on Sweet's upbringing, environment, age, and early-onset severe attention deficit disorder, Dr. Hart concluded that Sweet's ability to make decisions was severely limited by immaturity.[218] He further testified that seventeen-year-old Sweet's developmental age was somewhere between twelve and fourteen.[219] Dr. Hart testified that Sweet's prospects for rehabilitation were "mixed" and estimated that a determination as to his potential for rehabilitation could be made when Sweet turned thirty.[220] After hearing this testimony and Sweet's own testimony that he was remorseful, the trial court sentenced Sweet to life in prison without the possibility of parole.[221] The judge listed the *Miller* factors but focused on the nature of the crime and characterized Dr. Hart's assessment of Sweet's potential for reform as "overly optimistic."[222]

On appeal, the Iowa Supreme Court expressly rejected the "minimalist approach" of deciding whether Sweet was permanently incorrigible under *Roper* and *Miller*.[223] The court instead focused on what it perceived as a core tension in *Miller*.[224] Though sentencing judges had discretion over when to impose life without parole on a child offender, use of the *Miller* factors to determine the issue of rehabilitation potential and permanent incorrigibility was overly speculative and impossible in practice.[225] The court emphasized that, because of the nature of youth, asking a sentencing judge to apply the *Miller* factors in a principled manner would be "asking the sentencer to do the impossible."[226] The court also noted the risk of inconsistent analysis when considering the mitigating factors of a child's upbringing: while some judges could interpret trauma as a result of abuse and neglect as cutting against prospects for rehabilitation, others could see the trauma as a "contraindication" for life without parole, because it would remain to be determined how the individual would develop in a structured, rehabilitative environment.[227] Therefore, the court issued a categorical ban on juvenile life without parole sentences.[228] The court further determined that parole boards would be better suited to discerning whether and when children who commit crimes may be released.[229]

---

217. *Id.*
218. *Id.* at 816.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 834.
224. *Id.* at 836–37.
225. *Id.*
226. *Id.* at 837.
227. *Id.* at 838.
228. *Id.* at 839.
229. *Id.* (noting that parole boards may be able to answer the question of irreparable corruption only after time has passed and "opportunities for maturation and rehabilitation have been provided, and . . . a record of success or failure in the rehabilitative process is available").

In *Commonwealth v. Batts*,[230] the Supreme Court of Pennsylvania took a different approach, opting to keep the possibility of imposing juvenile life without parole open, but restricting it by creating a presumption against it. Qu'eed Batts was fourteen years old when he was sentenced to life in prison without the possibility of parole.[231] Batts was born to a thirteen-year-old mother and, beginning at age five, moved within the foster care system on his own.[232] When Batts was in the ninth grade, an older member of a gang instructed Batts to shoot and kill two other teenage boys.[233] Batts complied, afraid that the older member would kill him if he did not do as he was told.[234] The trial court sentenced Batts to life in prison without parole after finding that Batts had failed to satisfy his burden of proving by a preponderance of the evidence that his case should be transferred to juvenile court.[235] Despite extensive lay and expert testimony supporting Batts's chances of rehabilitation, the trial judge determined Batts was a "severe threat to the public" with a "well-developed criminal mentality."[236]

In hearing Batts's case for the second time,[237] the Supreme Court of Pennsylvania adopted a presumption against the imposition of life without parole for children.[238] Responding to the state legislature's failure to take "appreciable steps" to create or revise sentencing statutes to protect children convicted of first-degree murder prior to *Miller*, the court invoked its judicial authority to devise a new safeguard.[239] Its solution was to create a strong presumption against the imposition of life without parole for individuals under eighteen.[240] To impose a juvenile life without parole sentence, Pennsylvania prosecutors bear the burden of proving that a child is deserving of the sentence beyond a reasonable doubt.[241] The key principle underlying this presumption is that all children—even those who commit brutal crimes—are capable of rehabilitation.[242] One commentator has characterized *Batts* as a reasonable interpretation of Supreme Court precedent and an example of a state court exercising its authority to create additional protections beyond those articulated by the Supreme Court's

230. 163 A.3d 410 (Pa. 2017).
231. *See id.* at 415.
232. *See id.* at 416 (noting that, between the ages of five through twelve, Batts lived in eleven homes across nine cities and two states, and transferred schools eleven times).
233. *See id.* at 417.
234. *See id.*
235. *See id.* at 418.
236. Commonwealth v. Batts, 66 A.3d 286, 288–89 (Pa. 2013).
237. *See* Casey Matsumoto, *"Permanently Incorrigible" Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole*, 88 GEO. WASH. L. REV. 239, 260 (2020).
238. *See Batts*, 163 A.3d at 459–60.
239. *See id.* at 450–51.
240. *See id.* at 459–60.
241. *See id.* at 455.
242. *See id.* at 451–52 (stating that a presumption arises "if a fact constitutes 'a conclusion firmly based upon the generally known results of wide human experience,'" and that the core principle of *Roper*, *Graham*, *Miller*, and *Montgomery* is that children change as they age and are thus capable of rehabilitation (quoting Watkins v. Prudential Ins. Co. of Am., 173 A. 644, 648 (Pa. 1934))).

decisions.[243] State supreme courts in Connecticut, Indiana, Missouri, and Utah have crafted presumptions against life without parole under their state constitutions.[244]

Diatchenko, *Sweet*, and *Batts* are examples of courts going beyond the Supreme Court's decisions to abolish or restrict juvenile life without parole under state constitutions. All three decisions also indicate judicial reckoning with the permanent incorrigibility standard and whether and how it should be applied before sentencing children to life without parole. While *Diatchenko* and *Sweet* swept broadly to abolish the sentence altogether, *Batts* represents a significant protection in the form of a strong presumption against juvenile life without parole.[245] The next section presents cases in which appellate courts vacated sentences because trial judges did not make a finding of permanent incorrigibility.

2. Cases Finding an Inadequate Consideration Under the Permanent Incorrigibility Principle

After *Miller* and *Montgomery*, some courts interpreted the decisions as requiring a finding of permanent incorrigibility before imposing a sentence of life without parole on a person under age eighteen. In *Veal v. State*,[246] the Supreme Court of Georgia held that a trial court's failure to make a finding that the defendant was permanently incorrigible required a remand for resentencing.[247] Robert Veal was seventeen when he committed the crimes for which he was prosecuted.[248] The prosecutor recommended life without parole, arguing that the deterrent effect of the sentence would outweigh any possibility that Veal would "have some moment of self-reflection 30 years down the road."[249] At sentencing, the judge did not explicitly address Veal's age or the characteristics of his youth and upbringing.[250]

On appeal, the Supreme Court of Georgia interpreted *Montgomery* as permitting juvenile life without parole sentences only for rare offenders whose crimes exhibit irretrievable depravity and who are thus incapable of rehabilitation.[251] The court determined that the trial court had not made the determination of incorrigibility that *Miller* and *Montgomery* required.[252]

---

243. *See* Matsumoto, *supra* note 237, at 262.

244. *See* Hoesterey, *supra* note 198, at 165; State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015); Conley v. State, 972 N.E.2d 864, 871 (Ind. 2012); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013); State v. Houston, 353 P.3d 55, 77, 83 (Utah 2015).

245. *See Batts*, 163 A.3d at 460.

246. 784 S.E.2d 403 (Ga. 2016).

247. *Id.* at 412.

248. *Id.* at 405.

249. *Id.* at 409.

250. *Id.* (noting that, at sentencing, the trial judge said only, "based on the evidence and, in particular—please make sure all cell phones are turned off . . .—it's the intent of the court that the defendant be sentenced to the maximum" (alteration in original)).

251. *Id.* at 411–12.

252. *Id.*

A California Court of Appeal made a similar finding in *People v. Padilla*.[253] After serving fifteen years of his life-without-parole sentence, Mario Salvador Padilla filed a petition for a writ of habeas corpus asking for a resentencing under *Miller*.[254] The court found that judges operating under *Miller* must answer the question of whether a child's crime reflects irreparable corruption rather than transient immaturity.[255] The distinction between these two points is a question of permanent incorrigibility.[256] Furthermore, *Montgomery* instituted a "stringent" requirement that courts determine the existence of permanent incorrigibility.[257] In remanding Padilla's case for resentencing, the court found that the sentencing judge did not adequately consider Padilla's youth and his characteristics to determine whether he was permanently incorrigible—instead, the court erroneously focused on the nature of the crime and not the potential for Padilla's rehabilitation.[258]

In *Davis v. State*,[259] the Wyoming Supreme Court applied similar reasoning to a term-of-years sentence that amounted to a de facto life without parole sentence.[260] The Wyoming Supreme Court reversed and remanded Donald Davis's sentence because the trial court failed to adequately consider Davis's youth.[261] The *Davis* court emphasized that *Miller* and *Montgomery* provided "little guidance" to courts in making the permanent incorrigibility determination.[262] However, the Wyoming Supreme Court held that the trial court must have abused its discretion in sentencing Davis because it did not adequately consider Davis's youth as a mitigating factor.[263] The court acknowledged the difficulty of parsing the trial court's reasoning, especially because the trial court addressed the *Miller* factors as an intermingled "narrative."[264] Nonetheless, the Wyoming Supreme Court found that the trial court did not properly weigh the *Miller* factors to support its finding of permanent incorrigibility.[265]

The foregoing cases are instances of state courts providing a different response to *Miller* and *Montgomery* than those discussed in Part II.A.1. Rather than issuing categorical bans or creating strong presumptions against juvenile life without parole, these appellate courts vacated convictions and remanded after finding that sentencing courts had not properly considered youth. The implication of these holdings is that some courts interpreted

253. 209 Cal. Rptr. 3d 209 (Ct. App. 2016).
254. *Id.* at 211.
255. *Id.* at 219–20.
256. *Id.*
257. *Id.* at 220–21 (holding that a trial court "must assess the *Miller* factors with an eye to making an express determination" as to whether the defendant is permanently incorrigible).
258. *Id.* at 221.
259. 415 P.3d 666 (Wyo. 2018).
260. *Id.* at 677.
261. *Id.* at 671.
262. *Id.* at 680.
263. *Id.* at 695.
264. *Id.* at 688.
265. *Id.* at 695.

Miller and *Montgomery* as requiring a finding of permanent incorrigibility.[266] The next section covers yet another distinct response to *Miller* and *Montgomery*, discussing cases in which courts did not require a finding of permanent incorrigibility.

3. Cases Not Requiring a Finding of Permanent Incorrigibility

Before *Jones*, while some state courts required a sentencing court to make a finding of permanent incorrigibility before sentencing a child to life without parole, others read *Miller* and *Montgomery* as only requiring the existence of discretion in a sentencing decision.[267] The U.S. Supreme Court would later adopt the latter group's approach in *Jones*.[268]

In *People v. Skinner*,[269] the Michigan Supreme Court reversed the Michigan Court of Appeals's holding that the trial court had erred in failing to make an explicit finding of irreparable corruption.[270] The court noted that the court of appeals's opinion was "internally inconsistent"[271] and thus settled the question by holding that *Miller* and *Montgomery* do not require an explicit factual finding of incorrigibility.[272] The court noted that the *Miller* opinion utilized the word "think" rather than "hold" in expressing that occasions for imposing life without parole sentences would be rare.[273] Thus, according to the Michigan Supreme Court, *Miller* did not require a factual finding of incorrigibility.[274]

The Mississippi Court of Appeals came to a similar conclusion in *Ealy v. State*.[275] The court found that the Eighth Amendment and the U.S. Supreme Court's jurisprudence do not require a specific finding of permanent incorrigibility.[276] The court found it sufficient that the sentencing judge "heard testimony" and "witnessed Ealy's demeanor" at a sentencing hearing.[277]

Thus, after *Montgomery* and before *Jones*, state supreme courts were split on various aspects of the Supreme Court's jurisprudence, with a fundamental disagreement over whether *Miller* and *Montgomery* required factual findings

266. *See* Hoesterey, *supra* note 198, at 161, 190–91.

267. *See id.* at 192–93 (presenting a table listing states that, after *Montgomery* but prior to *Jones*, did not require a court to find a child permanently incorrigible prior to imposing a life without parole sentence).

268. Jones v. Mississippi, 141 S. Ct. 1307, 1310 (2021).

269. 917 N.W.2d 292 (Mich. 2018).

270. *Id.* at 312.

271. The Michigan Court of Appeals had held that a jury was not required because no factual finding of irreparable corruption was necessary, but, perplexingly to the Michigan Supreme Court, it also held that the trial court had erred by failing to make a finding as to the defendants' incorrigibility. *Id.*

272. *Id.* at 317.

273. *Id.* at 312–13.

274. *Id.* at 317.

275. 324 So.3d 306 (Miss. Ct. App. 2019).

276. *Id.* at 314–15.

277. *Id.* at 315.

on permanent incorrigibility.[278] While *Jones* ostensibly answered this question in the negative, several cases decided after *Jones* show that the decision will likely contribute to further disagreement and a lack of clarity among the states. The opinions discussed next indicate instances in which courts grappled with the permanent incorrigibility standard and whether to apply it. The next section discusses recent cases, decided after *Jones*, to highlight how courts have fared without the permanent incorrigibility principle.

B. The Effect of Jones

In *Jones*, the Supreme Court held that a sentencing court is not required to make a factual finding of permanent incorrigibility before imposing a sentence of life without parole on a child offender.[279] Additionally, sentencing judges are not required to make any on-the-record statements with the underlying implication that they have deemed the defendant to be permanently incorrigible.[280] The Court held that the requirement for juvenile life without parole to be a discretionary sentence, established by *Miller*, is both constitutionally necessary and constitutionally sufficient.[281] *Jones* assumes that judges will carefully consider youth when they have discretion to do so.[282] Therefore, after *Jones*, the question of judicial discretion will likely be an important one.[283] This section discusses a set of early cases interpreting the Court's decision in *Jones*.

In *State v. Haag*,[284] the Washington Supreme Court held that the trial court abused its discretion in resentencing Timothy Haag, who was sentenced to life without parole at age seventeen after being convicted of murder.[285] After the U.S. Supreme Court decided *Miller*, Washington passed a "*Miller*-fix" statute.[286] Adopted in a number of jurisdictions, these statutes create the right to a parole hearing after a fixed number of years for people who were sentenced to life without parole as children.[287] Haag was resentenced under Washington's *Miller*-fix statute to a minimum sentence of forty-six years and a maximum of life in prison.[288] The Washington Supreme Court held that

278. Hoesterey, *supra* note 198, at 161.
279. 141 S. Ct. 1307, 1321 (2021).
280. *Id.* at 1309.
281. *Id.* at 1308.
282. *See id.* at 1317; *see also supra* notes 35–36 and accompanying text.
283. *See* Adam Lamparello, *Life Imprisonment Without Parole for Juvenile Offenders: An Analysis of Jones v. Mississippi*, APP. ADVOC. BLOG (Apr. 24, 2021), https://lawprofessors.typepad.com/appellate_advocacy/2021/04/life-imprisonment-without-parole-for-juvenile-offenders-an-analysis-of-jones-v-mississippi.html [https://perma.cc/AG7Y-ANEV].
284. 495 P.3d 241 (Wash. 2021).
285. *Id.* at 243, 244–45, 251–52.
286. *See* Maya L. Ramakrishnan, *Providing a Meaningful Opportunity for Release: A Proposal for Improving Washington's* Miller*-Fix*, 95 WASH. L. REV. 1053, 1054 (2020).
287. *See id.*; *see also* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 192–93 (2014).
288. *Haag*, 495 P.3d at 245.

the forty-six-year minimum sentence constituted an unconstitutional de facto life without parole sentence.[289]

In remanding for resentencing, the court ruled that the lower court erred when it emphasized retributive factors over mitigating factors such as Haag's youth and details of his abusive upbringing.[290] While the court sympathized with the sentencing judge's "daunting task" of weighing the heinous details of Haag's crime against his youth,[291] it ultimately concluded that the sentencing court had not made a meaningful consideration of the ways in which Haag, then seventeen, was different from an adult.[292] The court noted that a meaningful consideration of youth at sentencing requires "far more than [a] simpl[e] recit[ation] [of] the differences between juveniles and adults."[293] The court noted that, in considering youth, sentencing judges must evaluate mitigating evidence and testimony of expert and lay witnesses as appropriate.[294] Crucially, the court noted that sentencing judges must provide a thorough explanation of their reasoning.[295]

Finally, the Washington Supreme Court rejected the court of appeals's reasoning that trial courts have complete discretion to "weigh the factors however they see fit."[296] Even under the generous abuse-of-discretion standard,[297] the court found reversible error because the trial court did not engage in a meaningful consideration of youth.[298]

Justice Debra L. Stephens wrote separately to disagree with the majority's holding that Haag's new term-of-years sentence amounted to a de facto sentence of life without parole.[299] She emphasized that *Jones* made clear that the Eighth Amendment "permits a sentencing court to impose life without parole sentences on juvenile homicide offenders, even if they are not permanently incorrigible."[300] Justice Stephens also opined that though she may have preferred an interpretation designating permanent incorrigibility as the appropriate standard, *Jones* foreclosed that holding under the Eighth Amendment.[301]

In *United States v. Grant*,[302] the U.S. Court of Appeals for the Third Circuit held that a de facto life without parole sentence did not violate the

289. *Id.* at 251.
290. *Id.* at 245.
291. *Id.* at 244.
292. *See id.* at 247.
293. *Id.* (quoting State v. Delbosque, 456 P.3d 806, 814 (Wash. 2020)).
294. *Id.*
295. *See id.*
296. *Id.* at 249.
297. *See, e.g.*, United States v. Ramos, 979 F.3d 994, 998 (2d Cir. 2020) (characterizing the abuse-of-discretion standard of review as "lenient"); United States v. Johnson, 572 F.3d 449, 454 (8th Cir. 2009) (noting that the abuse-of-discretion standard is "deferential"); United States v. Rosales-Bruno, 789 F.3d 1249, 1255 (11th Cir. 2015) (emphasizing that although the deference accorded to district courts "is not unlimited, it is substantial").
298. *See Haag*, 495 P.3d at 251–52.
299. *Id.* at 252 (Stephens, J., concurring in part and dissenting in part).
300. *Id.* at 254.
301. *Id.* at 255.
302. 9 F.4th 186 (3d Cir. 2021).

Eighth Amendment because, under *Jones*, the Constitution only requires that the sentencing court could have imposed a lower sentence on account of the defendant's youth.[303] The Third Circuit opined that *Miller* actually "took pains to preserve" life without parole sentences for children.[304] Therefore, the court opted for a narrow reading of *Miller* that focused on the fact that *Miller*'s precise holding was a ban on *mandatory*, but not *discretionary*, life without parole sentences.[305] Then, the court found that *Jones* does not guarantee particular findings or outcomes; it only guarantees that sentencing will be discretionary.[306] The court invoked *Jones* to note that the existence of discretionary sentencing procedures ensures that juvenile life without parole sentences will necessarily be rare.[307] This reading assumes that judges will wield their discretion carefully.[308] Under this logic, a judge does not have to explain their decision in "endless detail" because their consideration of youth is assumed to be adequate.[309]

The U.S. Court of Appeals for the Ninth Circuit set forth an almost identical analysis in *United States v. Briones*.[310] There, the defendant argued that the sentencing court did not conduct a meaningful review of whether Briones's crimes reflected permanent incorrigibility.[311] The Ninth Circuit emphasized that *Jones* does not require a finding of incorrigibility.[312] During Briones's original sentencing, the district court judge stated that "in mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs."[313] The Ninth Circuit noted that the district judge had actually done more than what was required under Supreme Court precedent and the Eighth Amendment.[314] The Ninth Circuit thus adopted *Jones*'s narrow reading of *Miller* and *Montgomery*, and rejected Briones's argument to expand its reading of the precedent.[315] The court focused on how, when a judge possesses discretion to consider youth, it can be assumed that the judge will do so.[316] The next section takes a closer look at the issue of judicial discretion in sentencing.

303. *Id.* at 198.
304. *Id.* at 194.
305. *Id.*
306. *Id.* at 196.
307. *Id.* at 196–97; *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021) (noting that "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth").
308. *See Grant*, 9 F.4th at 198 (emphasizing the "general latitude" of sentencing courts).
309. *See id.*
310. 18 F.4th 1170 (9th Cir. 2021).
311. *Id.* at 1174.
312. *Id.* at 1175.
313. *Id.* at 1174.
314. *Id.* at 1176.
315. *See id.*
316. *See id.*

C. Sentencing Children to Life Without Parole: A Question of Discretion

At the core of the decisions discussed above is a question of what level of discretion to afford sentencing judges, and whether and how sentencing judges explain their reasoning, analysis, and thought process before meting out a punishment. The U.S. Supreme Court has long recognized and shown appreciation for the gravity of the task that is sentencing, especially when the defendant is a child.[317] Today, some commentators stress that, in the criminal process, sentencing is more important than trial.[318]

In 2005, the landmark Supreme Court case *United States v. Booker*[319] reinvigorated judicial discretion in sentencing by holding that the once mandatory provisions of the Federal Sentencing Guidelines are now advisory.[320] Since *Booker*, federal judges have enjoyed a "renewed level of discretion" in issuing punishment.[321] This discretion is important because a central tenet of punishment is that "individual cases require individualized responses."[322]

The goals of criminal punishment—including both general and specific deterrence, as well as retribution and rehabilitation—do not land on individual offenders in the same way, and a healthy level of judicial discretion accounts for this.[323] Professor Charles J. Ogletree, Jr. noted as much almost two decades before *Roper*: "[A]n obvious example is the age of the offender. Because youths are 'less mature and responsible than adults,' and hence less culpable for criminal conduct, retribution is a less defensible punishment objective than is rehabilitation with regard to youthful offenders."[324] Judicial discretion in sentencing ensures that judges give the

317. *See* Graham v. Florida, 560 U.S. 48, 77 (2010) (opining that "perhaps no . . . judicial responsibilities are more difficult than sentencing" because it requires trial judges to "seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society"); *see also* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("We have often noted that judges in this country have long exercised discretion . . . in imposing sentence[s] within statutory limits in the individual case."); Williams v. New York, 337 U.S. 241, 246 (1949) (acknowledging that "both before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise . . . wide discretion . . . in determining the kind and extent of punishment to be imposed").

318. Scott, *supra* note 287, at 201; *see also* Alan Dubois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT'G REP. 84, 84 (2005) (arguing that "sentencing has become by far the most important stage of the criminal process for most defendants," and that "as the stakes at sentencing have increased," so too has the need for "more rigorous sentencing procedures").

319. 543 U.S. 220 (2005).

320. *Id.* at 246.

321. Eric G. Barber, *Judicial Discretion, Sentencing Guidelines, and Lessons from Medieval England, 1066–1215*, 27 W. NEW ENG. L. REV. 1, 4 (2005).

322. D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 49 DUQ. L. REV. 65, 82 (2007).

323. *Id.* at 82–83.

324. Charles J. Ogletree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1958 (1988); *see also* Roper v. Simmons, 543 U.S. 551, 553 (2005) (noting that "[o]nce juveniles' diminished culpability is recognized,"

personhood of the accused due attention, and that punishments fit the crime.[325]

Justice Thomas's dissent in *Miller* excoriated the majority for what he perceived as a tempering of judicial discretion in the context of juvenile life without parole sentencing.[326] By leaving discretionary sentences available but emphasizing the way in which appropriate occasions for imposing the sentence would be "uncommon," the majority, at least in Justice Thomas's view, was prophylactically restricting trial judges' discretion to impose it.[327]

At the same time, the Court has frequently stated that judicial discretion should be limited in the context of sentencing children. During oral argument in *Miller*, Bryan Stevenson, counsel for petitioners, reminded the Court of its reasoning in *Graham*: because even experts struggle to say whether long-term projections of rehabilitation are possible, the imposition of a discretionary juvenile life without parole sentence for a nonhomicide offense is categorically invalid.[328] Indeed, in *Graham*, the majority indicated a level of skepticism about a judge's ability to determine, on a case-by-case basis, which offenders were incorrigible and which were not.[329] Thus, *Graham* represents an acceptable limit on judicial discretion.[330] This limit is not borne out of any doubt about a judge's ability to exercise discretion, but rather from the impossibility of making such a determination and the stakes of potential mistakes.[331]

Jones represents a departure from the reasoning in *Graham*. For the majority, whether a judge possesses and exercises their discretion to sentence a child to life without parole is both the beginning and end of the inquiry.[332] According to Justice Kavanaugh, such a holding was appropriate considering the Court's precedent.[333] Under the majority's interpretation, *Miller* and *Montgomery* do not require a specific finding of incorrigibility.[334] The

---

neither the penological goal of retribution nor deterrence "provides adequate justification for imposing [certain penalties like capital punishment] on juveniles").

325. Ogletree, *supra* note 324, at 1954 (remarking that a sentencing scheme that "ignores every personal characteristic of the offender" is likely to lead to "gross miscarriages of justice in individual cases").

326. Miller v. Alabama, 567 U.S. 460, 509 (2012) (Thomas, J., dissenting).

327. *See id.*

328. Transcript of Oral Argument at 21, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646), https://www.supremecourt.gov/oral_arguments/audio/2011/10-9646 [https://perma.cc/DHZ9-27SV] (click "View").

329. Graham v. Florida, 560 U.S. 48, 77–78 (2010).

330. *See id.* at 79.

331. *See id.* (noting that a sentence of life without parole imposed on a child "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope").

332. Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2021) ("[A] State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.").

333. *See id.* at 1321.

334. *See id.* at 1317 (rejecting the argument that permanent incorrigibility is an eligibility criterion for juvenile life without parole and noting that *Montgomery* "explicitly stated that 'a finding of fact regarding a child's incorrigibility . . . is not required'" (alteration in original) (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016))); *id.* at 1318 (opining that if the *Miller* or *Montgomery* Courts "wanted to require sentencers to also make a factual finding

majority endorsed the view that if a sentencing court has discretion to consider youth, the court "necessarily *will*" consider youth.[335] This determination assumes that the existence of discretion is equivalent to the judicious exercise of discretion.[336] To illustrate by way of a hypothetical, the *Jones* majority would not have a problem with two judges considering the same defendant's youth differently and arriving at different sentences.[337] All that matters is that each judge had the discretion in the first place.[338]

Critics of *Jones* were quick to condemn the decision.[339] The primary point of contention from the dissenters in *Jones* was that the decision distorted precedent and left a black box of judicial discretion where the permanent incorrigibility principle used to be.[340] However, Kristina Kersey, senior youth defense counsel at the National Juvenile Defender Center, is one critic of *Jones* who has shown that advocates may find room within the decision to continue protecting the rights of child defendants.[341] For instance, Kersey characterizes the permanent incorrigibility principle as a "red herring" in the Court's jurisprudence that should no longer guide courts in their decision-making.[342] Kersey also encourages advocates and defense counsel to take advantage of broad judicial discretion to fashion creative arguments to present to courts.[343] Finally, Kersey recognizes that the *Jones* decision gives states the option to provide additional limits on the sentence.[344] Part III provides three solutions to the issues created and exacerbated by *Jones*.

III. CHARTING A PATH FORWARD IN THE WAKE OF *JONES*

The Supreme Court's jurisprudence in the realm of juvenile life without parole sentencing is a Gordian knot. It is true that the Court's decisions since *Roper* significantly protect children who commit crimes and enter adult criminal courts as a result.[345] Over the span of about a decade, the Supreme Court took steps to protect children from the harshest punishments that the

of permanent incorrigibility, the Court easily could have said so"); *id.* (noting that in *Miller*, the Court stated that a discretionary sentencing procedure "would itself help make life-without-parole sentences 'relatively rar[e]'" (alteration in original) (quoting Miller v. Alabama, 567 U.S. 460, 483–84 n.10 (2012)); *id.* at 1320 (emphasizing that "*Miller* did not say a word about requiring some kind of particular sentencing explanation with an implicit finding of permanent incorrigibility, as *Montgomery* later confirmed").

335. *See id.* at 1319.

336. *See id.* (rejecting the argument that "meaningful daylight" exists between a judge's discretion to consider youth and a judge's actual consideration of youth).

337. *See id.*

338. *See id.* at 1319–20.

339. *See supra* notes 33, 35, 38, and accompanying text.

340. *See Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting) (arguing that the Court's decision "guts" *Miller* and *Montgomery* by removing the permanent incorrigibility principle).

341. KRISTINA KERSEY, NAT'L JUV. DEF. CTR., KEEPING UP WITH THE *JONES*ES: 10 THINGS I KINDA MAYBE DON'T HATE ABOUT *JONES* (2021), https://njdc.info/wp-content/uploads/Keeping-up-with-the-Joneses-7-2.pdf [https://perma.cc/KGV2-H6QD].

342. *See id.*; *see also* Pfaff, *supra* note 38.

343. *See* KERSEY, *supra* note 341.

344. *See id.*

345. *See supra* Part I.C.

criminal justice system metes out—including the death penalty.[346] *Miller* guaranteed that no jurisdiction can enact a mandatory sentencing scheme that automatically sentences children to life without parole.[347] And as a result of *Montgomery*, hundreds of juvenile lifers, including Montgomery himself, can obtain parole and a second chance at freedom.[348] At the same time, the justices began toying with the concept of incorrigibility early on—setting off a frenzy of lower court opinions that treated incorrigibility as the standard.[349] *Jones* threw a wrench in this practice by expressly rejecting the notion that judges must make explicit or implicit findings of incorrigibility.[350] The problem *Jones* does not solve is how courts can meaningfully and consistently determine when a sentence of juvenile life without parole is appropriate.[351]

Considering this doctrinal predicament, this part sets forth potential options to untangle the knot. Specifically, it proposes both an idealistic, long-term solution and two modest practical suggestions in the interim. First, Part III.A argues that the Court's precedent supports a categorical bar to the imposition of juvenile life without parole sentences that would provide the most complete resolution of the problem. Part III.A envisions what it would look like if the Court were to revisit *Miller* and adopt a constitutional prohibition on the sentence. However, given the reality of the current Court's political makeup,[352] Part III.B proposes that (1) individual state courts should treat *Jones* as a constitutional floor and nevertheless engage in a searching review of what youth means in a particular context; and (2) courts should also focus on meaningful opportunities for release, because the permanent incorrigibility principle has proven to be a less than tidy inquiry.

A. Categorically Capable of Rehabilitation: Revisiting Miller *to Address the Permanent Incorrigibility Problem*

This section addresses the issue set forth in Part II by arguing that the remedy to the problem that the permanent incorrigibility principle has wrought is to revisit *Miller*. This section argues that previous decisions in the youth sentencing context provide precedential building blocks for a categorical bar to life without parole sentences for children under eighteen. A categorical ban would not only comport with the Court's precedent, but it

346. *See supra* Part I.C.
347. *See supra* Part I.C.
348. *See supra* Part I.C.
349. *See supra* note 190 and accompanying text.
350. *See supra* Part I.C.
351. *See supra* Part II.B.
352. *See, e.g.*, Linda Greenhouse, Opinion, *The Supreme Court Is Now 6–3. What Does That Mean?*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/opinion/supreme-court-amy-coney-barrett.html [https://perma.cc/C8Q4-RTED]; Ariane de Vogue, *Major 6–3 Rulings Foreshadow a Sharper Supreme Court Right Turn*, CNN (July 1, 2021, 6:26 PM), https://www.cnn.com/2021/07/01/politics/supreme-court-6-3-conservative-liberal/index.html [https://perma.cc/2DPX-62YT]. The six conservative justices made up the majority in *Jones*, with Justices Stephen G. Breyer, Sotomayor, and Kagan dissenting.

would also shut the door on the problematic permanent incorrigibility principle.

Miller is an outlier in the Supreme Court's youth sentencing jurisprudence because it stopped short of a categorical ban where other decisions did not.[353] *Roper* issued a categorical ban on the death penalty for children[354] and *Graham* did the same for life without parole in nonhomicide cases.[355] In *Roper* and *Graham*, the Court applied its evolving-standards-of-decency analysis to conclude that each punishment was categorically unconstitutional.[356] By contrast, the *Miller* Court specifically rejected the opportunity to issue a categorical ban.[357] There are two specific missteps in the Court's decision in *Miller*.

First, *Miller* differs from its predecessors in terms of how the Court framed its precedent. Writing for the majority, Justice Kagan noted that the questions in *Miller* implicated the strand of the Court's precedent concerning categorical bans on disproportionate punishment.[358] However, Justice Kagan also found that *Miller* triggered a second set of cases requiring individualized consideration in the capital sentencing context.[359] By pairing the two sets of cases, the Court effectively avoided fitting *Miller* into the former group involving categorical bans.[360] Instead, the Court's approach in *Miller* melds together two lines of the Court's jurisprudence.[361]

The Court's reliance on two strands of precedent in *Miller* also hinges on the assumption that the permanent incorrigibility principle is sound. Although the Court's precedent in the second line of jurisprudence requires sentencing judges to be able to consider the mitigating qualities of youth, the cases discussed in Part II.A.2 illustrate that such consideration of youth often becomes an analysis of whether a particular defendant is capable of rehabilitation.[362] Furthermore, if the Court did not implicitly endorse the permanent incorrigibility principle in *Miller*, it could have issued a categorical ban. Instead, the Court expressly stated that its decision did not foreclose a court's ability to make a judgment of permanent incorrigibility.[363] By leaving that possibility open, the Court indicated that because some children could be found to be permanently incapable of rehabilitation, such a categorical ban would not be appropriate.[364]

While the Court reasoned that its holding—which barred *mandatory* sentences of life without parole—was sufficient, this Note disagrees. The

353. *See supra* Part I.C.
354. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005).
355. *See* Graham v. Florida, 560 U.S. 48, 82 (2010).
356. *Roper*, 543 U.S. at 552.
357. Miller v. Alabama, 567 U.S. 460, 479 (2012).
358. *Id.* at 470.
359. *Id.*
360. *See id.* (noting that the "confluence" of these two lines of cases formed the basis of the Court's narrow ruling).
361. *See id.*
362. *See supra* Part II.A.2.
363. *Miller*, 567 U.S. at 480.
364. *See id.* at 483.

Court in *Miller* misstepped first by couching the issue in an amalgamation of two strands of precedent when it could have built on *Roper* and *Graham* to issue a categorical ban on the logic that children are, as a class, less culpable than adults. Second, the Court also erred when it hedged on the permanent incorrigibility principle: in the same paragraph of the opinion, the Court acknowledged how difficult such a principle would be, while also saying that it did not foreclose this determination.

Even though this Note argues that *Miller* is a flawed opinion for those two reasons, there is enough precedential material in the opinion for the Court to issue a categorical ban in the future. A categorical bar on juvenile life without parole sentences is the best resolution of the issue because it would end the permanent incorrigibility conversation in a way that *Jones* did not: by protecting defendants under eighteen.[365] The central flaw in *Miller*'s reasoning is that it assumes the ability of a sentencing judge to consider the mitigating qualities of youth and to make a prediction about a particular young offender's capacity for reform and change.[366] *Jones* further exacerbates the problem by expressly holding that no factual finding, either explicit or implicit, is required to levy the harsh punishment of juvenile life without parole.[367] This logic is defective for two reasons: permanent incorrigibility is an impossible predictive exercise,[368] and the lack of any procedural requirements creates room for unfettered discretion.[369]

The Court's Eighth Amendment evolving-standards-of-decency analysis supports a categorical ban as well.[370] Under the first step, which requires the Court to assess "objective indicia" of consensus against juvenile life without parole, there is strong evidence of consensus against the sentence.[371] For instance, thirty-one states and the District of Columbia do not have any individuals serving juvenile life without parole sentences.[372] Furthermore, the Court has sometimes turned to international opinion concerning the continuing acceptability of a particular form of punishment or sentence.[373] On that front, there is clear international consensus against juvenile life without parole. There are no known cases of juvenile life without parole sentences being imposed outside the United States.[374] Furthermore, the United Nations General Assembly consistently calls for the abrogation of

365. *See supra* Parts I.C, II.B.
366. Marshall, *supra* note 38, at 1635.
367. *See supra* Part I.C.
368. *See supra* Part II.A.1; *see also* Marshall, *supra* note 38, at 1641.
369. *See supra* Part II.A.
370. *See supra* Part I.C.
371. *See supra* Part I.A; *see also supra* note 201.
372. Rovner, *supra* note 40.
373. *See* Graham v. Florida, 560 U.S. 48, 80 (2010) (noting that the Court's examination of international consensus and practices is "a longstanding practice").
374. COLUM. L. SCH. HUM. RTS. INST., CHALLENGING JUVENILE LIFE WITHOUT PAROLE: HOW HAS HUMAN RIGHTS MADE A DIFFERENCE? (2014), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/jwlop_case_study_final.pdf [https://perma.cc/Z7K4-XDK4].

juvenile life without parole sentences.[375] Thus, under the first step of the Court's evolving-standards-of-decency analysis, there is strong evidence of domestic and international consensus against juvenile life without parole sentences.

As for the Court's independent judgment, the groundwork in *Roper* and *Graham* provides a strong foundation for the Supreme Court to emphasize that children are different from adults and thus should never be subject to life in prison without the possibility of release.[376] And the Court stated in *Graham* that the principle of incorrigibility is not consistent with youth.[377] Such a move by the Court is ultimately unlikely, however, given the current composition of its membership.[378] Since *Miller* was decided, Justices Anthony Kennedy and Ruth Bader Ginsburg, who both joined the tightly split 5–4 majority opinion in *Miller*, are no longer on the bench.[379] Justice Kennedy in particular wrote the majority opinions in *Roper*,[380] *Graham*,[381] and *Montgomery*.[382] His absence will likely make a majority vote favoring a categorical ban nearly impossible to attain.[383]

There is an argument that *Jones* is constitutionally sufficient because it gives courts discretion to impose less than life without parole. However, given all that the Court has said about how children are constitutionally different for the purposes of sentencing, there is a better argument that *Jones* fails to faithfully adhere to established precedent that the Court has established, and that there is room to remedy the effect of *Jones* and *Miller* by issuing a categorical ban. Given the unlikelihood of a categorical ban in the near term, the next section sets forth two modest, incremental changes that will help resolve the tension created after *Jones*.

B. Focusing on Jones *as a Floor and Meaningful Opportunities for Release*

If the Court does not revisit *Miller* and issue a categorical ban on juvenile life without parole sentences, then an alternative approach to alleviating the foreseeable discrepancies among lower courts after *Jones* lies with the states. This section proposes two mechanisms by which state courts, legislatures, and parole boards can continue to protect the Eighth Amendment rights of children who are convicted of crimes.

1. *Jones* as a Floor

Absent a ruling from the Supreme Court or federal legislation banning the sentence, more states should follow the lead of the state courts discussed in

375. *See id.*
376. *See supra* Part I.C.
377. *Graham*, 560 U.S. at 73.
378. *See* Marshall, *supra* note 38, at 1668.
379. Miller v. Alabama, 567 U.S. 460, 463 (2012).
380. Roper v. Simmons, 543 U.S. 551, 554 (2005).
381. 560 U.S. at 51.
382. Montgomery v. Louisiana, 577 U.S. 190, 192 (2016).
383. *See* Marshall, *supra* note 38, at 1669.

Part II.A.1. Indeed, *Jones* itself suggests as much: Justice Kavanaugh closed his opinion by recommending that Jones and other incarcerated individuals present their arguments to "state officials authorized to act on them."[384] Because the Court has passed this issue to the states, state courts should respond by offering greater protection than *Jones* does to children who are potentially subject to juvenile life without parole sentences. In so doing, state courts could abolish the sentence on a de facto basis, either by instituting a stringent permanent incorrigibility standard test that no one can pass or by emulating the holdings in *Sweet* and *Diatchenko* by issuing a categorical ban.

In choosing to go beyond *Jones*, state courts would adhere to the traditional view that individual judges must retain discretion during the sentencing process.[385] In fact, judges who conduct a more stringent analysis of mitigating evidence than *Jones* requires would protect the legitimacy of judicial decision-making at the sentencing stage.[386] Both commentators and the Court have emphasized the importance and gravity of judicial discretion at sentencing.[387] *Jones*'s assumption that a judge will necessarily exercise their discretion if it exists is not a satisfactory answer, given the gravity of the rights at stake. Instead, judges who meticulously review mitigating evidence will do more to uphold what Justice Kennedy in *Graham* described as the most difficult judicial task.[388]

Furthermore, a state high court's abolition of juvenile life without parole would not encroach on judicial discretion, either. This is because permanent incorrigibility findings are impossible.[389] For the same reason, neither would abolition be driven by a distrust or skepticism of the judiciary's ability to mete out fair and consistent punishment. The problem is inherent in the permanent incorrigibility inquiry itself. Thus, encouraging state courts to go beyond *Jones* will not offend the notion of judicial discretion. The next section introduces and builds on the scholarship of Professor Alexandra Harrington to propose a method by which courts can protect the rights of children at various points throughout the sentencing process.

2. Meaningful Opportunities for Release

Professor Harrington argues that because the Court has endorsed parole as a way to remedy the constitutional violations posed by mandatory life without parole sentences, one way to comport with the Court's promises would be to reform the mechanisms behind parole board review.[390] First, Professor Harrington proposes a presumption of release for people who were children at the time of the crime.[391] Second, Professor Harrington suggests

384. Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021).
385. *See supra* Part II.C.
386. *See supra* note 317 and accompanying text.
387. *See supra* Part II.C.
388. Graham v. Florida, 560 U.S. 48, 77 (2010).
389. *See* Marshall, *supra* note 38.
390. Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1173 (2021).
391. *Id.* at 1178–79.

that courts should conduct an independent judicial review of parole board decisions to determine whether evidence supports overcoming the presumption.[392] Professor Harrington's suggestions focus on the Court's guarantee in *Montgomery* of meaningful opportunities for release.[393] According to Professor Harrington's argument, the Supreme Court's line of youth sentencing cases "transform [parole] from a discretionary, subjective determination [to] . . . a substantive, Eighth Amendment right."[394]

Professor Harrington's suggested presumptions and reforms would benefit individuals currently serving life without parole sentences imposed when they were children.[395] To build on Professor Harrington's proposals, states should implement a multi-pronged approach that institutes a series of presumptions from sentencing to parole review.

This multi-pronged approach would increase protections by creating strong presumptions against continued imprisonment at multiple points throughout an individual's sentencing and incarceration. The first prong would adopt the Supreme Court of Pennsylvania's presumption against the imposition of a juvenile life without parole sentence in the first place, as established by *Batts*.[396] To overcome the presumption, the prosecution would have to prove beyond a reasonable doubt that a child defendant is permanently incorrigible.[397]

If the prosecution overcomes the presumption, then the second and third prongs, as devised by Professor Harrington, would provide protection throughout incarceration. Professor Harrington's first proposal is that there be a presumption in favor of release during parole board review.[398] This presumption would have to be overcome by clear and convincing evidence that release should not be granted.[399] Professor Harrington's proposal that the evidence of rehabilitation be current also impliedly rejects the permanent incorrigibility principle by adopting something closer to a "wait-and-see" approach to examining prospects for rehabilitation.[400]

If the state again overcomes the presumption in favor of release, then the third and final protective prong would be Professor Harrington's suggestion that courts conduct independent judicial review of parole board decisions.[401] Although there are valid arguments against giving the judiciary the power to review parole board decisions, Professor Harrington argues that the Supreme Court's youth sentencing jurisprudence "provide[s] reason to question this traditional understanding of parole" and the judiciary's role in reviewing

392. *Id.*
393. *See* Miller v. Alabama, 567 U.S. 460, 479 (2010).
394. Harrington, *supra* note 390, at 1179.
395. *See id.* at 1175.
396. *See* Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017); *supra* Part II.A.1.
397. *See Batts*, 163 A.3d at 460.
398. Harrington, *supra* note 390, at 1178–79.
399. *Id.* at 1212.
400. *See id.* at 1213 (emphasizing that "the requirement to overcome the presumption of release should be focused on current evidence of the parole applicant's lack of rehabilitation").
401. *Id.* at 1178–79.

parole decisions.[402] Thus, because of the unique interest of individuals who were sentenced as children in being released, judicial review would be appropriate as a final backstop.[403]

The above multi-pronged approach would protect children from being sentenced to die in prison, even if a categorical ban never materializes. Instituting a presumption against the sentence itself, in addition to a presumption in favor of release, would guarantee that judges, parole boards, and other authorities continue to meaningfully consider whether a child is deserving of a life in prison.

CONCLUSION

Over the past decade, the Supreme Court has issued a series of decisions that chip away at the harsh sentences imposed on children who commit crimes. The Court relied on contemporary neuroscientific and commonsense understandings of the line between childhood and adulthood to support its conclusions. However, the Court also opened the door to the idea of permanent incorrigibility: the notion that a "rare juvenile" who is permanently corrupt and therefore deserving of adult punishment can exist. The introduction of that term, which is peppered throughout the Court's jurisprudence, set off a split among lower courts that *Jones* attempted to resolve.

Jones negated the assumption that many lower courts had been making—that for a child to receive life without parole, a court would have to find that they are permanently incorrigible. To comply with *Jones*, a court need not make any factual findings or statements on the record before imposing the harshest sentence available to those under eighteen. In the wake of *Jones*, courts will likely struggle with balancing trust in judicial decision-making against protecting the Eighth Amendment rights of children.

To settle these impending conflicts, a categorical ban established by the Supreme Court is necessary. However, given the composition of today's Court, smaller, more modest changes can also be implemented to protect children both at sentencing and while they are incarcerated. *Jones* affords judges the discretion to sentence children to life in prison without the possibility of release. Now, it is incumbent on states to take their own steps to protect children, under the Eighth Amendment, from the harshest punishment available to them.

402. *Id.* at 1199.
403. *See id.* at 1204.