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CHILDREN ARE DIFFERENT: JONES V. MISSISSIPPI, JUVENILE LIFE WITHOUT PAROLE, AND WHY YOUTHFULNESS MATTERS IN SENTENCING

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CHILDREN ARE DIFFERENT: *JONES V. MISSISSIPPI*, JUVENILE LIFE WITHOUT PAROLE, AND WHY YOUTHFULNESS MATTERS IN SENTENCING

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I. INTRODUCTION

"We are a country of mercy, and we are a country of vengeance, and we live with both at the same time."[1] This is how Robert Dunham, death penalty expert and Executive Director of the Death Penalty Information Center, describes the United States sentencing system. Battling inside each of us is the desire for people to pay for their wrongdoings, warring against the empathy of our human nature that wants to see the good in people, even criminals.

This internal conflict is rarely on better display than in cases involving child criminals. It is impossible to forget that these children and teenagers are criminal offenders, and in homicide cases, a victim lost their life because of the child's crime. On the other hand, it is easy to see their humanity and remember that they are still children—children who likely experienced unimaginable hurt that caused them to act defiantly toward family and government.

The United States is currently the only nation in the world where life sentences for juveniles are permitted.[2] Due to a recent string of United States Supreme Court cases on the subject of juvenile sentencing, life without parole is only available as a sentence for juveniles who have committed homicide. The topical focus of these recent decisions was on juvenile sentencing, but the determination centered around interpretation of the Eighth Amendment—specifically the Eighth Amendment's prohibition on cruel and unusual punishment.

When evaluating whether something is cruel and unusual under the Eighth Amendment, the Supreme Court typically evaluates the punishment using a standard set out in *Trop v. Dulles*: "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[3] Using this standard, the Court thus far has found that the death penalty for mentally disabled individuals and juveniles constitutes cruel and unusual punishment under the Eighth Amendment, as well as sentencing

1. *The Trials of Gabriel Fernandez: Gabriel's Voice* (Netflix television broadcast Feb. 26, 2020).

2. 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/. In fact, giving children life sentences is condemned by international law. Juvenile life without parole violates the Convention on the Rights of the Child, the International Bill of Rights, and the International Covenant on Civil and Political Rights. *See* Pat Arthur & Brittany Starr Armstrong, *Locked Away Forever the Case Against Juvenile Life Without Parole*, NAT'L CTR. FOR YOUTH L., https://youthlaw.org/news/locked-away-forever. (last visited Feb. 16, 2022).

3. Trop v. Dulles, 356 U.S. 86, 101 (1958).

juvenile offenders to life without parole if that juvenile was convicted of anything other than homicide.

When the U.S. Supreme Court heard the case of *Jones v. Mississippi* in the Spring of 2021, there was a lot at stake for Brett Jones. But there was even more at stake for the future of the juvenile criminal justice system at large. This area of the law has seen a great deal of movement over the past decade through several cases expanding the protections afforded to juvenile offenders. With each new decision, the Court acknowledged increasingly more that children are not adults, so they should be treated differently from adults when it comes to sentencing. The Court also acknowledged that even with violent juvenile offenders, there is realistically only a small group of them that are unable to be rehabilitated and that need to be locked up forever. When it granted certiorari for *Jones v. Mississippi*, the Supreme Court had already held that life sentences for juveniles must be discretionary, and that juvenile life without parole should be reserved for the rare juvenile who is "permanently incorrigible," meaning that they are corrupt beyond repair, unable to be rehabilitated, and unfit to ever reenter society. Brett Jones only wanted the Court to take one small additional step. He was merely asking the Court to require that the sentencing judge give an on-the-record explanation of his finding that the juvenile in question was "permanently incorrigible." But the Court declined to do so and thus declined to extend this marginal protection to violent juvenile offenders.

This Note uses a recent Supreme Court case to advocate for the abolition of life without parole sentences for juveniles. Part II discusses the facts and procedural history of *Jones v. Mississippi*. Part III explains the background and history of juvenile sentencing as it pertains to the Eighth Amendment and addresses how the Supreme Court's recent rulings affected their holding and analysis in *Jones*. Part IV examines this Note's focal case—*Jones v. Mississippi*. Finally, Part V explores changes in the Supreme Court's structure that led to the *Jones* decision, the Eighth Amendment as it relates to *Jones* and juvenile sentencing, factors affecting the sentencing of juveniles, the effect of life without parole on juvenile offenders, and the path forward following the Court's decision in *Jones v. Mississippi*.

II. FACTS AND PROCEDURAL HISTORY

A. Factual History

By 2004, fifteen-year-old Brett Jones had experienced a childhood filled with instability, trauma, and violence. As a child, Jones suffered physical abuse and neglect at the hands of his biological father.[4] His mother remarried, but Jones was again abused and neglected by his new stepfather.[5] During an argument with his stepfather when he was fourteen, Jones's stepfather violently attacked him, but Jones was the one who got arrested as a result of the altercation.[6] Facing threats from his stepfather and the potential for more

4. Jones v. Mississippi, 141 S. Ct. 1307, 1338 (2021).
5. *Id.*
6. *Id.*

instances of abuse, Jones moved from Florida to Shannon, Mississippi, to live with his grandparents, Bertis and Madge.[7]

Throughout his youth, Jones battled mental health issues, including depression and hallucinations.[8] He also struggled with self-harm.[9] While he was still living with his mother and stepfather, Jones began taking antidepressants and other medications for his mental health conditions.[10] But when he suddenly relocated to Mississippi, Jones lost access to these medications.[11] The two-month period without access antidepressants caused disruption in Jones's mental stability and an overall decline in his mental health.[12]

Two months after Jones moved in with his grandparents, Bertis discovered Jones's girlfriend spending the night and demanded that she leave.[13] While Jones was making a sandwich in the kitchen later that day, he and Bertis got into an argument about his girlfriend sleeping over, which escalated into a fistfight.[14] Bertis attempted to hit Jones, so Jones used the steak knife in his hand to stab Bertis.[15] Jones continued stabbing Bertis until the knife broke, then Jones grabbed another knife and continued stabbing his grandfather.[16] He stabbed Bertis a total of eight times.[17] Then Jones attempted to administer CPR, but Bertis had already died.[18] Jones left the house in a frenzy and attempted to tell his grandmother, Madge, what he had done.[19] Later that evening, local police located Jones and took him into custody.[20]

B. Procedural History

Three weeks after his fifteenth birthday in 2005, Brett Jones was convicted of murder, despite his argument that he acted in self-defense. The Circuit Court of Lee County sentenced him to life without parole because, at the time he was convicted, this was the mandatory sentence for a juvenile convicted of homicide.[21] Jones moved for post-conviction relief, arguing that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.[22] The trial court disagreed and upheld his sentence, which the Mississippi Court of Appeals later affirmed.[23]

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7. *Id.* at 1312.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1338-39.
14. *Id.* at 1339.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.*
21. Life without parole is sometimes simply referred to as "LWOP."
22. *Id*. at 1312.
23. *Id.*

Several years after Jones was sentenced in Mississippi, the U.S. Supreme Court decided *Miller v. Alabama*, where the Court held that a sentence of life without parole is only permitted for a juvenile homicide offender if the sentence is not mandatory, giving the judge discretion to impose a lesser sentence.[24] The Court then held in *Montgomery v. Louisiana* that *Miller* applied retroactively.[25] To properly comply with the new *Miller* and *Montgomery* holdings, the Mississippi Supreme Court ordered a resentencing for Jones.[26] Although the resentencing judge acknowledged that he had the discretionary power under *Miller* to grant Jones a lesser sentence, he gave Jones the same sentence again: life without parole.[27]

Jones appealed to the Mississippi Court of Appeals, arguing that both *Miller* and *Montgomery* require a judge to make a separate factual finding that the juvenile was permanently incorrigible before sentencing him to life without parole.[28] But the Mississippi Court of Appeals disagreed and affirmed Jones's sentence, holding that *Miller* and *Montgomery* did not require state trial courts to make such a finding.[29] In 2021, the U.S. Supreme Court granted certiorari for Brett Jones's case to decide the issue of whether *Miller* and *Montgomery* require a formal finding that juvenile offenders sentenced to life without parole ("LWOP") are permanently incorrigible.[30]

III. BACKGROUND AND HISTORY OF THE LAW

A. The History of the Eighth Amendment and Juvenile Sentencing

The Eighth Amendment of the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[31] Conversations about the death penalty, excessive sentencing, and juvenile justice are often centered around the Eighth Amendment's prohibition against cruel and unusual punishment.[32] This flows from the "precept of justice that punishment for crime should be graduated and proportioned."[33]

The Court's interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment as it applies to juveniles was tested when the Court decided the case of *Roper v. Simmons* in 2005.[34] Simmons had committed murder as a teenager and was sentenced to death.[35] His argument before the

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1313.
28. *Id.*
29. *Id.*
30. *Id.*
31. U.S. CONST. amend. VIII.
32. KENNETH W. MILLER & DAVID NIVEN, DEATH JUSTICE: REHNQUIST, SCALIA, THOMAS, AND THE CONTRADICTIONS OF THE DEATH PENALTY 31 (2009).
33. Roper v. Simmons, 543 U.S. 551, 560 (2005).
34. *Id.* at 551.
35. *Id.* at 556.

Court partly relied on a comparison between his case and *Atkins v. Virginia*,[36] the Supreme Court's 2002 decision prohibiting the execution of "mentally retarded" individuals.[37] The Court ultimately agreed with Simmons's reasoning and held that a death penalty sentence cannot be imposed on juvenile offenders for any criminal offense.[38] The Court reasoned that the death penalty is an inappropriate sentence for juvenile offenders because teenagers are more immature and have an underdeveloped sense of responsibility.[39] This immaturity often causes the "recklessness, impulsivity, and heedless risk-taking" that leads some juveniles to engage in criminal activity.[40]

Just sixteen years before *Roper*, the Supreme Court dealt with the same issue in *Stanford v. Kentucky.*[41] But the *Stanford* Court held that execution of juveniles was permissible and constitutional because at the time, there was not enough of a national consensus against the juvenile death penalty to label it "cruel and unusual."[42] So, what changed between *Stanford* and *Roper*? The *Roper* Court acknowledged that state laws and public opinion about the death penalty for juveniles had significantly changed since *Stanford*.[43] By the time *Roper* came before the Court in 2005, twelve states expressly prohibited the juvenile death penalty, and another eighteen states had not officially banned the juvenile death penalty, but judicial interpretation or an express provision ensured that juveniles were excluded from its reach.[44] The remaining twenty states lacked a formal prohibition, but rarely utilized the juvenile death penalty.[45] This brought the *Roper* majority to the conclusion that executing juvenile offenders constitutes "cruel and unusual punishment" under the Eighth Amendment.[46]

In the 2010 case of *Graham v. Florida*, the U.S. Supreme Court held that the Constitution prohibits LWOP sentences for juvenile offenders who are convicted of anything other than homicide.[47] The Court in *Graham* introduced the "permanent incorrigibility" language later used in *Miller*, *Montgomery*, and *Jones*. The "permanent incorrigibility" doctrine requires a judge to justify an LWOP sentence by finding that the juvenile is permanently incorrigible or irreparably corrupt, with absolutely no realistic potential for rehabilitation.[48] The *Graham* Court emphasized that LWOP is an especially harsh sentence for youth who are not yet mature and compared the effects of juvenile LWOP to the death penalty.[49] This reasoning led the Court to conclude that LWOP was only

36. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
37. *Roper*, 543 U.S. at 559-60.
38. *Id.* at 575.
39. *Id.* at 569.
40. Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing *Roper*, 543 U.S. at 569).
41. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).
42. *Id.* at 380.
43. MILLER & NIVEN, *supra* note 32, at 31-32.
44. *Roper*, 543 U.S. at 560.
45. *See id.*
46. *Id.* at 578.
47. Graham v. Florida, 560 U.S. 48, 82 (2010).
48. Miller v. Alabama, 567 U.S. 460, 472-73 (2012).
49. *Graham*, 560 U.S. at 69-70.

an appropriate sentence for juvenile homicide offenders, and no other juveniles.[50]

B. Miller v. Alabama

In *Miller v. Alabama*, the Supreme Court consolidated the cases of two fourteen-year-olds in two different states —Kuntrell Jackson and Evan Miller— who were both convicted of capital murder and sentenced to LWOP.[51] The Supreme Court decided the case in 2012 and held that a *mandatory* sentence of LWOP for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment.[52]

Kuntrell Jackson, a fourteen-year-old from Arkansas, was charged with capital felony murder after he participated in an armed robbery of a store and one of his co-conspirators shot the cashier.[53] Evan Miller, a fourteen-year-old from Alabama, was charged with felony murder after he drunkenly helped a friend set fire to his neighbor's trailer, which resulted in the neighbor's death.[54] Both Jackson and Miller were sentenced to mandatory LWOP.[55] When they appealed to the Alabama and Arkansas Supreme Courts respectively, both boys argued that *mandatory* LWOP sentences for juvenile offenders was cruel and unusual in violation of the Eighth Amendment.[56] But the Alabama and Arkansas Supreme Courts disagreed, holding that mandatory LWOP sentences for juvenile homicide offenders was not cruel and unusual punishment under the Eighth Amendment because *Roper* and *Graham* did not apply to those types of cases.[57]

Ultimately, the Supreme Court consolidated the two cases and disagreed with the Alabama and Arkansas Supreme Courts, holding that mandatory LWOP for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment because it prevents sentencing judges from considering the defendant's age and capacity for change.[58] Instead of categorically prohibiting juvenile LWOP, the majority in *Miller* sought to draw a distinct line between *mandatory* LWOP and *discretionary* LWOP.[59] The Court reasoned that if sentencing judges have discretionary power to consider mitigating factors like youth and immaturity, then the judge will ensure that the punishment is not "cruel and unusual" under the Eighth Amendment.[60] Considering youthfulness would, in theory, help the judge identify "the rare juvenile offender" who deserves LWOP.[61]

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50. *Id.* at 82.
51. *Miller*, 567 U.S. at 465.
52. *Id.*
53. *Id.* at 465-66.
54. *Id.* at 467-69.
55. *Id.* at 466-69.
56. *Id.*
57. *Id.* at 466, 469.
58. *Id.* at 465.
59. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).
60. *Miller*, 567 U.S. at 476-80.
61. Beth Schwartzapfel, *Supreme Court Conservatives Just Made It Easier to Sentence Kids to Life in Prison*, MARSHALL PROJECT (April 30, 2021, 6:00 AM), https://www.themarshallproject.org/2021/04/30/supreme-court-conservatives-just-made-it-easier-to-sentence-

C. Montgomery v. Louisiana

Henry Montgomery was convicted of murder in 1963 when he was seventeen-years-old, and a Louisiana trial court sentenced him to mandatory LWOP.[62] After the United States Supreme Court decided *Miller v. Alabama* in 2012, Montgomery sought a review of his mandatory LWOP sentence.[63] The Louisiana Supreme Court denied review, holding that *Miller* did not apply retroactively.[64] When the Supreme Court granted certiorari for Henry Montgomery's case, the primary goal was to answer one question: whether *Miller* should apply retroactively.[65]

The Court held that *Miller* does apply retroactively but does not require a state court to conduct a formal fact-finding regarding the juvenile's incorrigibility or potential for rehabilitation.[66] The *Montgomery* Court further explained that the state courts must judge whether the juvenile offender is "one of those rare children for whom life without parole is a constitutionally permissible sentence" under *Miller*.[67] But some were confused by *Montgomery*'s holding.[68] The *Montgomery* Court wanted sentencing judges to distinguish between permanently incorrigible juveniles and juveniles acting out of transient immaturity, but did not require those sentencing judges to show that they had made that distinction.[69] The Court's holding was puzzling and somewhat illogical, requiring further interpretation. However, the Court's decision in *Jones v. Mississippi* did not bring the interpretation and clarification that many expected it would.

IV. JONES V. MISSISSIPPI

A. Majority Opinion

In *Jones v. Mississippi*, Justice Kavanaugh delivered the majority opinion for the Court.[70] The Court was primarily concerned with interpreting *Miller* and *Montgomery* and determining whether those cases required trial courts to make a formal finding of permanent incorrigibility before sentencing a juvenile homicide offender to life without parole.[71] *Miller*'s primary holding was that if a juvenile is sentenced to LWOP, it must be *discretionary* and cannot be mandatory.[72] By making LWOP for juveniles discretionary, the *Miller* Court aimed to ensure that only the rare juvenile offender, one who is beyond repair or

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kids-to-life-in-prison.

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

63. *Id.* at 195.

64. *Id.* at 196-97.

65. *Id.* at 197.

66. Jones v. Mississippi, 141 S. Ct. 1307, 1312-15 (2021); *see also Montgomery*, 577 U.S. at 211-12.

67. *Jones*, 141 S. Ct. at 1328 (Sotomayor, J. dissenting).

68. *See* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 68 (2021).

69. *See id.*

70. *Jones*, 141 S. Ct. at 1309.

71. *Id.* at 1318-19.

72. Miller v. Alabama, 567 U.S. 460, 465 (2012).

"permanently incorrigible," would be given that sentence.[73] However, *Miller* did not explain whether the sentencing judge was required to make a formal finding of the juvenile's permanent incorrigibility or explain how he came to the conclusion that the juvenile is one of the rare offenders who is deserving of LWOP.[74]

Brett Jones was represented at the U.S. Supreme Court by an attorney named David Shapiro, who emphasized that his client was asking for very little.[75] Jones was not asking for a reduced sentence or the opportunity for parole, and the Court had already made permanent incorrigibly the rule.[76] Jones's only request was that the judge be required to actually decide whether he—and other similarly situated juvenile homicide offenders—fit into the category of "permanently incorrigible."[77] Jones argued that a separate factual finding of permanent incorrigibility is required to accomplish the primary goal of *Miller*: making juvenile LWOP sentences rare.[78]

Mississippi argued that it had done everything within its power to comply with the *Miller* and *Montgomery* holdings and the Supreme Court agreed, confirming that Mississippi's discretionary sentencing scheme complied with recent Supreme Court cases and was "constitutionally sufficient."[79] The *Jones* Court held that *Miller* does not require the sentencing judge to make a finding of permanent incorrigibility before sentencing a juvenile homicide offender to LWOP, nor does it require the judge to provide an on-the-record explanation of his determination to ensure that the sentencing judge considered the offender's age.[80] The majority explained that *Miller*'s primary objective of ensuring the rarity of juvenile LWOP is sufficiently accomplished by the mere fact that judges have discretion in sentencing.[81] The judge is not required to explain or justify his decision, and no "magic-words" are necessary.[82] The judge who sentenced Jones had the choice of giving him a LWOP sentence or something less, and for the *Jones* majority, that choice alone is enough.

B. Justice Thomas's Concurrence

Justice Thomas's argument in his *Jones* concurrence is fairly straightforward: the Court's holding in *Montgomery* was erroneous and the *Jones* majority should have overruled *Montgomery*.[83] He explained that the *Jones* majority used a "strained reading" of *Montgomery* to use it only for its procedural holding that *Miller* applied retroactively.[84] However, instead of

73. *Id.* at 479-80.
74. *See id.*
75. Shapiro, *supra* note 68, at 68-69.
76. *See id.* at 69.
77. *See id.*
78. Jones v. Mississippi, 141 S. Ct. 1307, 1318 (2021).
79. *Id.* at 1313.
80. *Id.* at 1319.
81. *Id.* at 1318.
82. *See id.* at 1321.
83. *Id.* at 1323 (Thomas, J., concurring).
84. *Id.* at 1323, 1325.

outright overruling *Montgomery*, Justice Thomas argued that the *Jones* majority overruled *Montgomery* in substance but not in name, flatly ignoring the line that *Montgomery* drew between juveniles whose actions reflect fleeting immaturity and those whose actions reflect irreparable corruption.[85]

C. Justice Sotomayor's Dissent

Justice Sotomayor's dissent, joined by Justice Breyer and Justice Kagan, expressed deep frustration with the majority's analysis of both *Miller* and *Montgomery*. Justice Sotomayor pointed out the Court's historical recognition that children are different from adults for purposes of sentencing due to their age, maturity, responsibility, and capacity to make decisions.[86] Further, juveniles are more vulnerable, have less control over their own environment, and are in a highly transitory stage until reaching adulthood.[87]

By emphasizing Brett Jones's humanity and the hardships of his childhood, the dissent attempts to bring the reader back to the essential holding of *Miller*: that "a lifetime in prison is a disproportionate sentence for all but the rarest children, those whose crimes reflect 'irreparable corruption.'"[88] The dissent pointed to specific facts to show that Brett Jones earned his GED while incarcerated and maintained employment, proving himself to be a reliable employee, and was taking college courses to further pursue an education.[89] Jones also expressed deep regret for his actions.[90] He has maintained contact with his grandmother, who testified that she believes Jones "is not and never was irreparably corrupt."[91]

One of the dissent's arguments was that Jones should not be given LWOP under *Miller* and *Montgomery* because Jones's actions were the product of "unfortunate, yet transient immaturity" as outlined in *Montgomery*.[92] Justice Sotomayor presented and emphasized Brett Jones's traumatic history prior to his arrest, as well as his rehabilitative efforts since being sentenced, to argue that "it is hard to see how Jones is one of the rare juvenile offenders 'whose crime reflects irreparable corruption.'"[93]

V. ANALYSIS

A. Judicial Regression

Some criminal justice scholars called the Court's recent juvenile life without parole cases prior to *Jones* (*Roper*, *Graham*, *Miller*, and *Montgomery*) a

85. *Id.* at 1325-27.

86. *Id*. at 1328-29 (Sotomayor, J., dissenting).

87. *Id.* at 1329 (quoting Roper v. Simmons, 543 U.S.551, 569 (2005)).

88. *Id.* at 1328 (quoting Miller v. Alabama, 567 U.S. 460, 479-80 (2012)).

89. *Id.* at 1339.

90. *Id.*

91. *Id.* (quoting Brief for Madge Jones et al. as Amici Curiae Supporting Petitioner at *4, *Id.* (No. 18-1259)).

92. *Id.* at 1339-40 (quoting Miller v. Alabama, 567 U.S. 460, 479 (2012)).

93. *Id.* at 1337 (quoting Miller v. Alabama, 567 U.S. 460, 479-80 (2012)).

"revolution in juvenile justice."[94] The Court seemed to be moving in a distinct direction with this string of decisions: granting juveniles more protection in sentencing and taking youthfulness into consideration. However, the makeup of the Supreme Court changed drastically during the Trump Administration, with three new conservative Justices appointed in just three years. Two of these new conservative Justices, Justice Kavanaugh and Justice Barrett, replaced two of the Court's more liberal Justices in the area of juvenile criminal justice, Justice Kennedy and Justice Ginsburg. With this dramatic change in the makeup of the Court, Justices that once made up the majority in this area of the law became the minority group when the Supreme Court granted certiorari in *Jones v. Mississippi*.

The three new conservative Justices—Justice Gorsuch, Justice Kavanaugh, and Justice Barrett—were key in making up the *Jones* majority.[95] The former *Miller*/*Montgomery* majority group was now the *Jones* minority group. The new minority was not shy in expressing their disappointment in this change of direction, as expressed through Justice Sotomayor's fiery dissent, which Justices Breyer and Kagan joined.[96] The dissent describes the *Jones* decision as "distort[ing] *Miller* and *Montgomery* beyond recognition"[97] and says that the Court "reverses course."[98] The dissent later writes that "the Court's misreading of *Miller* and *Montgomery* is egregious" and "the Court twists precedent."[99] The Court spent more than fifteen years advancing protections for juvenile offenders, most notably with *Roper,* and then continuing through cases like *Graham*, *Miller*, and *Montgomery*. This momentum could have easily continued when the Court granted certiorari for *Jones v. Mississippi*. Instead, the new conservative majority moved in the opposite direction by limiting the rights of juvenile offenders under *Jones v. Mississippi*.

Although *Roper* built the foundation that *Graham*, *Miller*, and *Montgomery* stand on, the latter three are often grouped together because *Roper* was decided under the Rehnquist Court.[100] When *Graham* was decided in 2010, Justice Stevens was still on the Court, later to be replaced by Justice Kagan. *Miller* and *Montgomery* were decided by the exact same Court.

After *Miller*, scholars like Sara Mayeux[101] anticipated that the makeup of the Court would likely change drastically in the next few years considering Justice Kennedy's predicted retirement and Justice Ginsburg's advanced age.[102]

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94. Sara Mayeux, *Youth and Punishment at the Roberts Court*, 21 U. PA. J. CONST. L. 543, 548 (2018).

95. Robert Barnes, *Supreme Court Rules Against Juvenile Sentenced to Life Without Parole*, WASH. POST (Apr. 22, 2021, 1:14 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-life-without-parole/2021/04/22/6a633136-a371-11eb-a774-7b47ceb36ee8_story.html.

96. *Id.*

97. *Jones*, 141 S. Ct. at 1330 (Sotomayor, J., dissenting).

98. *Id.* at 1333.

99. *Id.* at 1334.

100. Mayeux, *supra* note 94, at 546. The "Rehnquist Court" refers to the United States Supreme Court from 1986-2005. During this time, William Rehnquist served as the Court's Chief Justice.

101. Sara Mayeux is an Assistant Professor of Law and History at Vanderbilt Law School.

102. Eli Hager & Beth Schwartzapfel, *How Losing RBG Could Shape Criminal Justice for Years to Come*, MARSHALL PROJECT (Sept. 24, 2020, 6:00 AM), https://www.themarshallproject.org/2020/09/24/how-losing-rbg-could-shape-criminal-justice-for-years-to-come.

Mayeux and others speculated that this would move the Court in a conservative direction on juvenile criminal justice issues, and this new conservative majority would likely seek to limit *Miller* instead of expanding upon it.[103] Shifting to a majority conservative Court could mean regression in the realm of juvenile criminal justice that had seen so much forward movement through *Roper*, *Graham*, *Miller*, and *Montgomery*.[104]

In 2018 Justice Kavanaugh replaced Justice Kennedy and has consistently voted conservatively, just as predicted.[105] Not only was Justice Kennedy replaced by a conservative justice, but Justice Ginsburg died unexpectedly in September 2020 which allowed President Trump to fill another vacancy on the Court with Justice Barrett, another consistently conservative justice.[106]

Mayeux argued that because the *Graham*/*Miller*/*Montgomery* dissenters tend to see mass imprisonment as a "positive good" and a benefit to society, they were likely eager to use *Jones v. Mississippi* to halt some of the movement made by the progressive majority in recent juvenile sentencing cases.[107] This group, primarily Justice Alito, the late Justice Scalia, and Justice Thomas, are viewed as holding tightly to tradition and the original text of the law,[108] and they would likely argue that any reading of the Eighth Amendment's prohibition on cruel and unusual punishment should not disturb the practice and "public benefit" of mass incarceration.[109] This group's views have been described as deferential, understanding that imprisonment serves valid retributive purposes and harsh punishment is necessary to respond to heinous and violent acts.[110] It is therefore crucial to this group that they "avoid readings of the Cruel and Unusual Punishments Clause that might lead, even indirectly, to releasing people from prison."[111] These Justices would likely argue that adolescence is when true character is revealed, and for juvenile offenders, this character often proves to be evil and dangerous.[112] When teenagers commit horrific crimes, it shows "unfixable pathologies that require removal from society."[113] Much of this ideology is left over from the "tough on crime" attitude of the 1960s and the "super-predator" rhetoric of the 1990s.[114]

The Johnson administration declared a "War on Crime" in 1965, which was later adopted by the Nixon and Reagan administrations during the 1970s and

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103. Mayeux, *supra* note 94, at 565, 602; Hager & Schwartzapfel, *supra* note 102. David Shapiro, counsel for Brett Jones, wrote that upon learning of Justice Ginsburg's death, he mourned the passing of a brilliant jurist along with the rest of the nation, but he also feared that her death would narrow the chances of his client prevailing. Shapiro, *supra* note 68, at 68.

104. Mayeux, *supra* note 94, at 565, 602; Hager & Schwartzapfel, *supra* note 102.

105. Barnes, *supra* note 95.

106. *Id.*

107. *See* Mayeux, *supra* note 94, at 566, 571.

108. MILLER & NIVEN, *supra* note 32, at 184, 212.

109. Mayeux, *supra* note 94, at 566, 571.

110. MILLER & NIVEN, *supra* note 32, at 183-84.

111. Mayeux, *supra* note 94, at 567.

112. *Id.* at 566, 587.

113. *Id.* at 587.

114. *Id.* at 597.

1980s.[115] As crime rates rose, public concern rose also; fighting crime and preserving law and order were issues that Americans cared deeply about.[116] The death penalty was a prominent issue during the 1988 and 1992 presidential elections, with both political parties attempting to outdo the other in being "tough on crime."[117] Then the idea of the "super-predator" emerged during the 1990s, advanced primarily by the conservative political media, as a way for Americans to project their fear about crime onto teenagers and black teenage boys in particular.[118] Combined with increased criminal justice funding, these ideals and theories encouraged state governments to increase arrest rates, policing of predominately black communities, and punishment of urban youth.[119] Teenagers, especially black teenagers, were depicted as violent and unpredictable.[120] This "tough on crime" attitude and fear surrounding out-of-control teenagers during the 1990s built the foundation for the mass incarceration that is seen today.[121]

Although these *Graham*/*Miller*/*Montgomery* dissenting Justices certainly are capable of recognizing the distinction between children and adults, they tend to consider juveniles who commit crimes as losing their moral claim to the category of childness.[122] Justice Alito consistently prefers to call juvenile offenders "murderers" instead of "children" or "juveniles" in his writing.[123] Justice Scalia also tends to equate a juvenile's criminal activity with their identity.[124] In his *Montgomery* dissent, Justice Scalia repeatedly referred to Henry Montgomery as a "prisoner," "inmate," and "murderer."[125] Justice Scalia historically advocated for harsh punishments for violent offenders, and argued that the "cruel and unusual punishments" clause should be understood only "to outlaw particular modes of punishment . . . not to require that 'all punishments be proportioned to the offense.'"[126]

Justice Alito has historically valued the protection of public safety as a core function of the state and argued that mass imprisonment promotes public safety, therefore interference with mass imprisonment poses a threat to public safety.[127] He has also consistently reaffirmed death sentences and other harsh sentences for violent offenders.[128] In his *Graham* dissenting opinion, Justice Alito attempted

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115. *Id.* at 598.

116. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century, in* BEYOND REPAIR: AMERICA'S DEATH PENALTY 7, 12-13, 18, 41 (Stephen P. Garvey ed., 2003).

117. *Id.* at 42-43.

118. Mayeux, *supra* note 94, at 597; Brief for Juv. L. Ctr. et al. as Amici Curiae Supporting Petitioner at *22, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

119. Mayeux, *supra* note 94, at 598.

120. *See id.* at 593.

121. *Id.* at 598.

122. *Id.* at 601.

123. *Id.* at 585.

124. *Id.* at 570.

125. *Id.*

126. Ralph A. Rossum, *Text and Tradition: The Originalist Jurisprudence of Antonin Scalia, in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 34, 37 (Earl M. Maltz ed., 2003).

127. Mayeux, *supra* note 94, at 569.

128. MILLER & NIVEN, *supra* note 32, at 209-10.

to advise states on how to "minimize the interference caused by the *Graham* majority opinion."[129] For Justice Alito, criminal activity strips a juvenile of their innocence, and, therefore, should also strip them of the protections typically awarded to children.[130]

Justice Thomas consistently holds the position that because incarceration is a "positive good," violent offenders like Henry Montgomery and Brett Jones should remain incarcerated to serve long or lifetime prison sentences without being released.[131] Justice Thomas would argue that the status quo requires prisoners to remain in prison, and "the key fact about people like Henry Montgomery is that they are 'prisoners,' and thus 'prison' is where they belong."[132] Justice Thomas has rarely voted in favor of accused or convicted criminals and would prefer to defer to the legislature on matters like the death penalty.[133] In his *Graham* dissent, he argued that "the question of what acts are 'deserving' of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution."[134]

Chief Justice Roberts concurred in *Graham* but joined the dissenters in *Miller*.[135] He likely dissented in *Miller* because, at the time of the *Miller* decision, most states permitted and frequently imposed mandatory LWOP.[136] Like Justice Alito, Chief Justice Roberts would argue that punishment and mass incarceration is a "positive good," and states have a duty to continue mass incarceration because it protects the public.[137] In *Miller*, Chief Justice Roberts explained that "a decent society protects the innocent from violence [and a] mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency."[138]

The majority voting bloc in *Graham*, *Miller*, and *Montgomery* was largely driven by Justice Kennedy and Justice Ginsburg, both of whom are no longer on the Court. As evidenced by her dissent in *Jones*, Justice Sotomayor was frustrated that these two Justices, who were so instrumental in expanding rights of juvenile offenders, were replaced by two Justices who sought to use *Jones* to limit the rights of juvenile offenders.[139]

The majority voting bloc from *Graham*, *Miller*, and *Montgomery* (Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) would actually agree that some juvenile offenders are incorrigible and states have a legitimate interest in

129. Mayeux, *supra* note 94, at 566-67.

130. *Id.* at 601.

131. *Id.* at 567.

132. *Id.*

133. Mark A. Graber, *Clarence Thomas and the Perils of Amateur History, in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70, 88 (Earl M. Maltz ed., 2003).

134. Graham v. Florida, 560 U.S. 48, 120 (Thomas, J., dissenting).

135. Mayeux, *supra* note 94, at 575.

136. *Id.*

137. *Id.*

138. Miller v. Alabama, 567 U.S. 460, 495 (2012) (Roberts, CJ., dissenting); Mayeux, *supra* note 94, at 575.

139. *See* Jones v. Mississippi, 141 S. Ct. at 1307, 1328 (2021) (Sotomayor, J., dissenting).

protecting the public by imposing severe sanctions on juvenile offenders who commit violent crimes.[140] Additionally, although these Justices would advocate for the ability of juvenile offenders to change, they remain somewhat skeptical of rehabilitation and its effectiveness.[141] However, this group of Justices understood the importance of youthfulness in sentencing and for them, the idea that "children are different from adults for sentencing purposes" was not just lip service.

B. The Eighth Amendment—Cruel and Unusual Punishment

When the Court evaluates whether something is "cruel and unusual" under the Eighth Amendment, it looks to "evolving standards of decency"[142] and the national consensus on that type of punishment at the time. Part of that consideration looks at how many states are currently still permitting or utilizing the punishment in question. The Court goes through this analysis in *Atkins*, and again in *Roper*. In *Atkins v. Virginia*, the Court held that LWOP is a "cruel and unusual" sentence for individuals who are mentally disabled.[143] The *Atkins* Court used the phrase "evolving standards of decency" from *Trop v. Dulles* to encourage an analysis of the Eighth Amendment where "contemporary law and moral standards . . . determine what constitutes cruel and unusual punishment."[144]

In *Roper*, the Court held that a death penalty sentence cannot be imposed on juvenile offenders for any criminal offense.[145] In 2005 when *Roper* was decided, there were twelve states that had completely abolished the juvenile death penalty.[146] In eighteen more states, the juvenile death penalty was still technically permitted, but the state legislatures and judiciaries used other means to ensure that LWOP sentences were not given to juveniles.[147] Twenty states still allowed the juvenile death penalty, but rarely used it.[148] These numbers helped the *Roper* Court reach its conclusion that societal standards of decency had evolved enough in the past several years to completely prohibit the death penalty for juvenile offenders.[149]

The same rationale that the Court used in *Atkins* and *Roper* should bring the current Court to the conclusion that sentencing a juvenile to LWOP constitutes cruel and unusual punishment. Currently, twenty-seven states plus the District of Columbia have expressly prohibited juvenile LWOP.[150] In nine states that

140. Mayeux, *supra* note 94, at 579-80.

141. *Id.* at 580.

142. Trop v. Dulles, 356 U.S. 86, 101 (1958).

143. Joanna Hall, Note, Atkins v. Virginia*: National Consensus or Six-Person Opinion?*, 12 AM. U. J. GENDER SOC. POL'Y & L. 361, 362-63 (2004).

144. *Id*. at 363 (quoting Atkins v. Virginia, 356 U.S. 304, 312 (2002)).

145. Roper v. Simmons, 543 U.S. 551, 578 (2005).

146. *Id.* at 560.

147. *Id.* at 559-60.

148. *See id*. at app. A § I.

149. *See id.* at 575-79.

150. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (Apr. 7, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

permit juvenile LWOP, there is currently no one serving that sentence.[151] Although these numbers are not as high as the numbers in *Roper*, it is still substantial that half of the states currently prohibit juvenile LWOP, and even more than that are not utilizing it.

When presented with LWOP as an alternative to the death penalty, many people prefer LWOP because it is a step down from the death penalty and its consequences seem less harsh than the death penalty.[152] Some feel LWOP serves an important purpose, satisfying society's desire for retribution and punishment by permanently incapacitating convicted murderers without the state actively taking their life.[153] However, LWOP is still the most severe non-death sentence that the state can impose.[154]

There is an important similarity between a sentence of LWOP and the death penalty that should be considered: in both cases, the offender never gets to be a member of society again. In both *Graham* and *Miller*, the Court acknowledged that a sentence of LWOP is not dissimilar from a death penalty sentence.[155] While LWOP seems far less severe than the death penalty, it has the effect of irrevocably condemning a person to die in prison.[156]

Advocates and prisoners often refer to LWOP as "death by another name."[157] Kenneth E. Hartman is an author, activist, and Executive Director of The Other Death Penalty Project, a nonprofit organization of prisoners opposed to "all forms of the death penalty."[158] He is also currently serving a life without parole sentence.[159] Hartman describes LWOP as a "grinding, hopeless death[,] the sense of being dead while you're still alive, the feeling of being dumped into a deep well struggling to tread water until, some 40 or 50 years later, you drown."[160] LWOP, instead of the death penalty "merely chang[es] the method of execution" and instead of proactively executing the offender, forces them to live out the rest of their days in a miserable, inhumane, extremely dysfunctional prison system.[161] Hartman argues that, although death penalty abolitionists have historically promoted LWOP as a "reasonable alternative" to execution by the gas chamber, electrocution, or lethal injection, LWOP is still a form of the death penalty.[162] "Trading lethal injection executions for lethal terms of imprisonment does not end the death penalty, and this lie needs to be rejected. Life without the possibility of parole is the death penalty, pure and simple."[163]

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151. *Id.*

152. Gross & Ellsworth, *supra* note 116, at 48-49.

153. *Id.* at 35, 49.

154. *Id.* at 49.

155. Miller v. Alabama, 567 U.S. 460, 470 (2012).

156. *Id.* at 474.

157. Kenneth E. Hartman, *Death by Another Name*, MARSHALL PROJECT (Oct. 23, 2016, 10:00 PM), https://themarshallprojet.org/2016/10/23/death-by-another-name.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

Standards of decency have evolved, and society has matured in recognizing that children and teenagers should be treated differently than adults. Because of the vast similarities between the death penalty and LWOP, paired with the number of states who have already prohibited juvenile LWOP, the U.S. Supreme Court should find that juvenile life without parole is a cruel and unusual punishment in violation of the Eighth Amendment.

C. Factors of Youthfulness and How "Children are Constitutionally Different" for Sentencing Purposes

In *Roper*, the Court outlined three factors or principles for why juveniles should not be sentenced to death: (1) their lack of maturity and underdeveloped sense of responsibility leads to "impetuous and ill-considered actions and decisions," (2) juveniles are more vulnerable to negative influences, specifically peer pressure, and (3) a juvenile's character is transitory, not yet formed, and less fixed than those of adults.[164] Justice Kagan used these three "significant gaps between children and adults" again in *Miller* to explain that "children are constitutionally different from adults for purposes of sentencing."[165] However, there are multiple other factors that help us understand why life without parole is such a harsh sentence for juvenile offenders.

The United States Department of Justice (DOJ) Resource Manual outlined six factors to consider before transferring a juvenile to adult court in the interest of justice: (1) age and social background; (2) nature of the alleged offense; (3) extent and nature of the juvenile's prior delinquency records and social background of the juvenile; (4) juvenile's present intellectual development and psychological maturity; (5) juvenile's response to past treatment efforts and the nature of those efforts; and (6) the availability of programs designed to treat the juvenile's behavioral problems.[166] The Court referenced each of these factors throughout its string of juvenile sentencing cases.

The *Graham* Court explained that it is these characteristics of juveniles that make life sentences difficult to justify.[167] Sentencing a juvenile to life without parole requires finding that the juvenile is a permanent danger to society and impossible to rehabilitate, which is made more difficult considering that the characteristics of juveniles are so transient by nature.[168]

Using some combination of the Court's factors from *Roper* and the DOJ's factors for transferring a juvenile to adult court, this section discusses the following four factors in turn and explains why each one should be used in

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164. Roper v. Simmons, 543 U.S. 560, 569-70 (2005).

165. Mayeux, *supra* note 94, at 593; Miller v. Alabama, 567 U.S. 460, 471 (2012).

166. *The Six Factors to Consider and Prove for Transfer*, U.S. DEP'T OF JUST. (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-131-six-factors-consider-and-prove-transfer. Mississippi youth courts use similar factors to determine if a juvenile should be transferred to adult court. These factors include the maturity and educational background of the child, the child's home situation, the child's emotional condition and lifestyle, the history of the child, and whether the child can be retained in the juvenile justice system long enough for effective treatment or rehabilitation. MISS CODE ANN. § 43-21-157(4)-(5) (2009).

167. Graham v. Florida, 560 U.S. 48, 72-73 (2010).

168. *Id.*

juvenile sentencing considerations: (1) maturity, (2) cognitive and frontal lobe development, (3) disability and mental illness, and (4) trauma. Each of these factors has seen new research brought to public attention in the last decade that should be used in the Court's "evolving standards of decency" analysis under the Eighth Amendment as previously discussed. Following the discussions of each factor, this section then analyzes the idea of "permanent incorrigibility" that takes the spotlight in *Miller*, *Montgomery*, and now *Jones*, as well as how rehabilitative efforts play a part in judicial discretion and sentencing.

1. Maturity

The Court in *Roper* addressed maturity as the first of the three factors and explained that juveniles' immaturity and underdeveloped sense of responsibility lead them to engage in risk taking behaviors, namely criminal activity.[169]

Many facets of a juvenile's daily functioning are directly affected by immaturity and lack of life experience, including the ability to form interpersonal relationships, decision-making skills, impulse control, and risk management.[170] Immaturity also causes an imbalance in a juvenile's risk perception and future orientation.[171] Juveniles tend to maximize the potential rewards and short-term benefits of their conduct while minimizing or underestimating the potential risks and long-term consequences of that conduct.[172] Because of their lack of extensive life experience, juveniles tend to think more about the short term than they do about the future, and it may be difficult for juveniles to anticipate the far-reaching future consequences of their actions.[173] Immaturity also makes it difficult for a juvenile to proceed through the legal system and make legal decisions for their own life, like taking a plea deal.[174]

Maturity is one of the more difficult factors to evaluate, and arguably the most important consideration for juvenile sentencing. Instead of a dichotomy with one group being mature and one group being immature, maturity operates as a continuum, making it more fluid than factors like childhood trauma or educational disabilities.[175] But immaturity does not necessarily have to carry a negative connotation. The fact that juveniles are more immature, and their brains are more malleable also means that they have a greater capacity for change and will likely be more responsive to treatment and rehabilitation.[176] Although their immaturity may have driven the conduct that led to their criminal activity and

169. Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV 669, 676 (2018).

170. Joseph P. Allen & Claudia Worrell Allen, *Getting the Elephant Out of the Courtroom: Applying Developmental Perspectives to the Disposition (Not Just the Assessment) of Juvenile Offenders*, 6 VA. J. SOC. POL'Y & L. 419, 420-21 (1999).

171. Jennifer Mayer Cox et al., *The Impact of Juveniles' Ages and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence*, 36 LAW AND HUM. BEHAV. 21, 24 (2012).

172. *Id.*

173. *Id.* at 21.

174. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 127 (2013).

175. Cox, *supra* note 171, at 26.

176. Allen & Allen, *supra* note 170, at 424.

subsequent punishment, it also carries the enormous potential for their change, growth, and success.

2. Frontal Lobe Development and Neuroscience

Incomplete brain development is one of the strongest factors weighing in favor of more lenient sentencing for juvenile offenders, and specifically the prohibition on life sentences for juveniles. It is a well-developed scientific fact that neurological and psychological development, along with the connection between the prefrontal cortex and other brain regions like the limbic system, is not complete until a person is in their mid-twenties.[177] Many sources argue that psychosocial maturity does not peak and level off until age twenty-five.[178] In many ways, the law has drawn a line at age eighteen as the age of maturity, but this distinction comes mostly from "the social meaning of age, not developmental psychology."[179]

Brain development for children and teenagers largely involves the brain's limbic system and the prefrontal cortex, located in the frontal lobe.[180] The prefrontal cortex drives planning capabilities, self-regulation, risk and reward analysis, reasoning, and impulse control, while the limbic system controls instinctual behavior, also commonly known as the "fight or flight" response.[181] Because the limbic system develops faster than the prefrontal cortex, teenagers rely more heavily on the limbic system, whereas adults rely more heavily on the prefrontal cortex.[182] This delay often causes a teenager's desire for pleasure and reward to be much stronger than their ability to self-regulate and self-control.[183] This helps to explain the impulsive behavior and risk taking of teenagers that may lead to criminal activity.[184]

Puberty also comes with many hormonal changes which increase activity in the brain's reward pathways, creating a heightened desire for sensation and reward.[185] Some scholars have described adolescence as "a time when the 'accelerator' is pressed to the floor, but a good 'braking system' is not yet in place.[186]

Additionally, exposure to trauma both chemically and biologically alters neurodevelopment of the human brain.[187] Trauma fundamentally changes the brain's response to stress and "alters the brain's pathways that govern: cognition;

177. Gupta-Kagan, *supra* note 169, at 674; Mayeux, *supra* note 94, at 602-03.

178. Gupta-Kagan, *supra* note 169, at 674, 677.

179. *Id.* at 671.

180. *See* Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 88 FORDHAM L. REV. 641, 651 (2016).

181. *Id.*; *see also* JoNel Newman, *An Argument Against Unlimited Prosecutorial Discretion: Equal Justice for Children, in* CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 215, 227 (Melba V. Pearson ed., 2020).

182. Feld, *supra* note 174, at 118-20.

183. *Id.*

184. *Id.*

185. Scott, Bonnie & Steinberg, *supra* note 180, at 646-47.

186. *Id.*

187. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 12, 15, 20 (2018).

judgment; impulse control; empathetic understanding; regulation of emotions; perception of threat; ability to differentiate past, present, and future; and the filtering of information."[188]

Underdevelopment of the teenage brain may be the most convincing argument for the elimination of juvenile LWOP. The idea that any teenager could be "permanently incorrigible"—or permanently *anything* for that matter—goes against everything we know about psychology and neuroscience.[189] To fully acknowledge that children are constitutionally different from adults for purposes of sentencing, one must first acknowledge the effect that an underdeveloped brain has on a person's decision-making skills.

3. Disabilities and Mental Health

Recent research has shown that disabilities and mental illness are substantially linked to juvenile crime. Two-thirds of male and three-quarters of female juvenile offenders suffer from at least one mental health disorder, and many incarcerated juvenile offenders suffer from multiple mental health conditions.[190] Aggressive behaviors, attention problems, and hyperactivity may facilitate impulsive decision making and risk-taking behaviors that lead to criminal activity.[191]

In *Atkins*, the Supreme Court held that executing a person with "mental retardation" is a cruel and unusual punishment in violation of the Eighth Amendment.[192] In many ways, *Atkins* opened the door for *Roper*, and the *Roper* Court borrowed much of the *Atkins* Court's language and reasoning. The *Roper* Court found a strong parallel between mental disability and youthfulness, emphasizing that the vulnerability of both groups is what reduces their culpability and makes death sentences too harsh a punishment.[193]

But mental illness is only one factor affecting juveniles navigating our criminal justice system. Between thirty and forty percent of juvenile offenders have some type of learning disability.[194] Further, youth in the juvenile justice system often are not functioning at grade level and display lower levels of cognitive and academic performance when compared to their same-age peers who are not involved in the juvenile justice system.[195]

Mental illness may be regarded by some as a relatively weak argument for prohibiting juvenile LWOP because many Americans of all ages suffer from some type of mental illness. But it is difficult to ignore the effects that mental

188. *Id.* at 20.

189. Andreea Matei & Colette Marcellin, *State Bans on Juvenile Life without Parole Can Right the Wrongs of* Jones v. Mississippi, URB. INST. (May 6, 2021) https://www.urban.org/urban-wire/state-bans-juvenile-life-without-parole-can-right-wrongs-jones-v-mississippi.

190. Christopher A. Mallet, *"Homicide: Life on the Street" and Sentenced to Life Behind Bars: Juveniles Without the Possibility of Parole*, 47 No. 5 CRIM. L. BULL. ART 4 (2011).

191. *See id.*

192. Hall, *supra* note 143, at 362.

193. Roper v. Simmons, 543 U.S. 551, 564-66.

194. Mallet, *supra* note 190.

195. Antoinette Kavanaugh, *Juveniles, in* REPRESENTING PEOPLE WITH MENTAL DISABILITIES 125, 131 (Elizabeth Kelley ed., 2018).

illness has on cases like *Jones v. Mississippi*. The outcome may have been very different for Brett Jones if he had had adequate access to his anti-depressant medication and mental health care in general.

4. Childhood Trauma

Trauma is defined as "an experience that threatens a person's life, safety, or well-being, overwhelming the ability to cope."[196] Trauma has also been described as "the imprint that an overwhelming adverse experience leaves on one's mind, brain, and body . . . result[ing] in tangible impairments in how people manage and survive daily life."[197] Trauma can include physical and sexual abuse, neglect, witnessing community or family violence, the loss of a loved one, and substance abuse.[198] Although trauma sometimes consists of a single traumatic event, most juveniles involved in the child-welfare or juvenile justice systems have trauma histories consisting of repetitive exposure to violence, physical and sexual abuse, neglect, and substance abuse.[199] On average, a teenager in the juvenile justice system has experienced fifteen traumatic events in their lifetime.[200]

Trauma can cause developmental delays, insomnia, memory impairment, nightmares, flashbacks, hyper-arousal, dissociation, anxiety, depression, and self-harm.[201] Repeated exposure to trauma increases the risk of poor school performance and makes it difficult to form strong interpersonal relationships.[202] A foundation built by traumatic stress can directly lead to truancy or other difficulties in school, substance abuse, mental health disorders, and domestic violence.[203]

Family and community violence is a large source of trauma for juvenile offenders, especially for youth of color.[204] Violence from parents or caregivers creates distrust and may cause the juvenile to develop anxious attachment styles.[205] Children who consistently witness violence in the home learn to mimic observed behaviors and may build up a tough exterior or get involved in gang activity in an effort to protect themselves or their families.[206] Forty percent of juveniles in the United States have been exposed to some form of family

196. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 649 (2016).

197. Gohara, *supra* note 187, at 14.

198. Erin Komada, *Recognizing the Role of Trauma and Creating Trauma-Informed Systems in Pennsylvania Juvenile Courts*, 28 WIDENER COMMONWEALTH L. REV. 85, 86 (2019); Buckingham, *supra* note 196, at 646.

199. Buckingham, *supra* note 196, at 646.

200. Kavanaugh, *supra* note 195, at 128.

201. Buckingham, *supra* note 196, at 646; Gohara, *supra* note 187, at 13-14, 19-20.

202. Komada, *supra* note 198, at 87.

203. *See* Mallet, *supra* note 190.

204. "African-American youth are nearly three times as likely, and Latino youth are two times as likely, as white children to witness a shooting, bombing, or riot. Black and Latino children are more than seven times more likely to lose a person close to them to murder than are white children." Gohara, *supra* note 187, at 5-6, 16.

205. *Id.* at 19.

206. *Id.*

violence.[207] Many of these children and teenagers experience "years of being frightened to death and fighting for survival in abusive homes and dangerous streets," which forces their brains to operate in a constant state of stress.[208] Community and family violence can also be a good predictor of future violence and incarceration.[209] "For example, boys who witness domestic violence are at a sevenfold increased risk of abusing their own partners."[210] Experiencing sexual abuse as a child is also a strong predictor of sexual violence in adulthood.[211]

Poverty directly affects a juvenile's trauma history because poverty exacerbates things like substandard housing, malnutrition, poor medical care, and inadequate schools.[212] Impoverished neighborhoods are simultaneously "under-protected and over-surveilled [by law enforcement], while being choked of resources to ameliorate the damage wrought by years of violence."[213] Where poverty creates a lack of access to adequate education, housing, nutrition, and medical care, this often has the effect of compounding harm to the juvenile and their family.[214]

Repeated exposure to trauma physically alters neurodevelopment of the human brain and causes what is typically a person's stress response to become their default mode of functioning.[215] This is called "hypervigilance" and forces the brain to operate in "fight or flight" mode almost constantly.[216] Hypervigilance causes the brain to be wired for survival and on high alert for potential threats at all times.[217] Trauma can also have the opposite effect and cause children and teenagers to detach, dissociate, and depersonalize.[218] Detachment and dissociation may provide a way for juveniles to escape the overwhelming experiences of their reality; this is also sometimes referred to as "going numb" to cope with the pain.[219]

Experiences of childhood trauma should largely factor into sentencing of juveniles because juveniles have no ability to control the situations that typically cause them to experience trauma, abuse, and neglect. Out of 1,579 juveniles

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207. *Id.* at 5-6.

208. *Id.* at 20.

209. *Id.* at 6.

210. *Id.* at 19.

211. *Id.*

212. "Proportionate retribution applies to trauma-informed sentencing because trauma in the lives of many defendants results from circumstances intimately tied to economic and social deprivations that raise profound questions about the moral obligations of our social compact with the most vulnerable" *Id*. at 8, 17.

213. *Id.* at 16, 18.

214. *Id.* at 18.

215. "Witnessing assaults, robberies, shootings, and homicides scars children, hampers their social development, and puts them at risk of committing violence themselves. Even children who do not witness violence suffer the detriments of living in violent communities when they cannot play outside, or "when they must sleep on the floor to be out of range of random bullets coming through the windows of their home." Gohara, *supra* note 187, at 12-14, 16, 20.

216. Gohara, *supra* note 187, at 13-14, 20.

217. *Id.* at 20.

218. *Id.* at 21.

219. "Detachment can also cause a traumatized person to lose awareness of his own sensations or surroundings, and to fail to protect himself. Dissociation thus results in high rates of revictimization. In fact, victims of violent crime are four times as likely to experience repeat victimization, which increases the risk of harming others" *Id.*

serving LWOP in 2012, "thirty-two percent had been raised in public housing[,] and almost twenty percent were homeless, living with a friend, in a detention center, or a group home prior to incarceration[.]"[220] Additionally, forty-seven percent were victims of physical abuse, and twenty-one percent were victims of sexual abuse.[221]

Incarceration is a counter-productive response to trauma.[222] Removal from the home and a lack of trauma-informed treatment programs only exacerbate the trauma that juvenile offenders have already suffered.[223] It is critical that child-welfare agencies and the juvenile court system address trauma early and often.[224] Juries, judges, and lawmakers should be informed about the ways trauma affects, influences, and in many ways drives criminal behavior.[225] A juvenile's trauma history should be presented to the judge in a way that connects their trauma with their poor decision-making and encourages the judge to be more lenient in sentencing.[226]

5. "Permanent Incorrigibility" and Rehabilitation

The holding of *Jones* operates under the assumption that it is possible to determine which juvenile offenders are "permanently incorrigible" and which are not. This is a nearly impossible determination to make. It requires the sentencing judge to essentially predict the future and predict whether the juvenile is capable of rehabilitation. Even though this determination is nearly impossible, the Supreme Court still trusted state court judges to make this determination for each juvenile homicide offender that enters their courtrooms.

What does it mean for a juvenile to be "permanently incorrigible?" It makes little sense to say that a juvenile is beyond rehabilitation when rehabilitative efforts have not been made. Allowing a judge to make a distinction between permanent incorrigibility and unfortunate yet transient immaturity gives judges too much discretion, especially when a teenager's life in a correctional facility is on the line. And regardless of the sentence, rehabilitation should be a part of every juvenile offender's sentencing procedure.[227] Without rehabilitative efforts, trauma will only be compounded as juvenile offenders experience the harsh conditions of prison life and constant interaction with the criminal justice system.[228]

Juvenile offenders, because of their age, have a much higher potential to become productive members of society if given the tools to do so during their developmental years.[229] All of the factors previously discussed, but especially

220. Christopher A. Mallet, *From Death to Near-Death: The Fate of Serious Youthful Offenders after* Roper v. Simmons, CLEVELAND STATE UNIV. SOC. WORK FAC. PUBL'NS 22 (2014).

221. *Id.*

222. Buckingham, *supra* note 196, at 647-48.

223. *Id.*

224. Komada, *supra* note 198, at 88.

225. *See* Gohara, *supra* note 187, at 7.

226. *See id.* at 5, 7.

227. *See id.* at 39.

228. *Id.*

229. Scott, Bonnie & Steinberg, *supra* note 180, at 644.

brain underdevelopment and immaturity, make juvenile offenders excellent candidates for rehabilitation.[230] When rehabilitative efforts and treatment programs are employed earlier, it reduces the chances of recidivism.[231] Ideally, rehabilitative and treatment efforts should exist in every stage of a juvenile's involvement with the criminal justice system.[232] Skeptics of rehabilitation would likely argue that *violent* juvenile offenders are beyond repair and nothing will work to rehabilitate them.[233] But even for violent juvenile offenders, recent studies have shown that there are effective treatment programs that work toward preventing initial incarceration and reducing recidivism.[234]

At the heart of *Graham*, *Miller*, and *Montgomery* is the idea that the immaturity, youth, development, and transient nature of juveniles means that they are more capable of rehabilitation than adults.[235] Juveniles, unlike adult offenders, have a huge capacity for change.[236] It is extremely difficult, if not impossible, to determine which juvenile offenders are truly depraved and incorrigible, and which have the potential to be successfully rehabilitated.[237] For these reasons, juvenile LWOP should be prohibited altogether.

D. What Does Justice Require? The Effects of Life Without Parole on Juveniles

The juvenile criminal justice system is largely politicized. Does "doing justice" actually require that juveniles be punished in the same ways as adults? By their nature, juveniles are not yet fully developed and "are not yet who they will later be, so unlike with adults, it is harder to know if they 'deserve' punishments like LWOP."[238] The unfortunate reality for juvenile offenders is that the United States is extraordinarily punitive and employs extensive use of imprisonment as the primary method of punishment.[239]

Even though the Supreme Court has not found juvenile LWOP unconstitutional like it did the juvenile death penalty, the Court has acknowledged the enormous similarity between the two: both are irrevocable and determine how the offender's life will end.[240] Life without parole has been termed an "irreversible forfeiture" because, like a death sentence, it strips the juvenile offender of their basic liberties and any hope of restoration or

230. *Id.* at 641, 647, 651.

231. *See* Gohara, *supra* note 187, at 39.

232. Allen & Allen, *supra* note 170, at 422.

233. *Id.*

234. *Id.* at 422-23. Functional Family Therapy (FFT) and Multisystemic Therapy (MST) are two such programs that are effective for treating youth in the juvenile justice system. These programs specifically target the juvenile's family dynamic and can work preventatively or be implemented once a young person is already incarcerated. Both FFT and MST are supported by large bodies of empirical evidence, and both have been proven to reduce recidivism rates in the communities where they are effectively implemented. Kavanaugh, *supra* note 195, at 138.

235. Rebecca Lowry, *The Constitutionality of Lengthy Term-of-Years Sentences for Juvenile Non-Homicide Offenders*, 88 ST. JOHN'S L. REV. 881, 904 (2014).

236. *See id.* at 894; *see also* Graham v. Florida, 560 U.S. 48 (2010); Newman, *supra* note 181, at 227.

237. Gupta-Kagan, *supra* note 169, at 693, 718; *see also* Mayeux, *supra* note 94, at 587.

238. Mayeux, *supra* note 94, at 596.

239. *Id.* at 563-64.

240. Lowry, *supra* note 235, at 892.

rehabilitation.[241] For juveniles, a life sentence without the possibility of parole denies any hope of restoration. It sends the message that "good behavior and character improvement are immaterial" and the juvenile is constantly reminded that he will remain in prison for the rest of his days, never to reenter society again.[242]

Life without parole strips incarcerated individuals of hope. If juvenile homicide offenders cannot look forward to the possibility of parole, any incentive or motivation to turn their life around during incarceration is gone.[243] Without the hope or possibility of reentering society, a juvenile offender serving LWOP has no incentive to earn an education, train for a career, maintain familial relationships, or develop good moral character.[244] The concepts of reconciliation and hope for the future lie at the core of human existence, but LWOP denies the potential for an offender to make anything of himself. No matter how hard he tries or how much good he does, he will never be able to redeem himself.

The experience of spending their life in a prison facility is a near-death experience for juvenile offenders serving LWOP.[245] Their entire life is marked by hopelessness and despair, with no options for rehabilitation and no opportunities for anything to change.[246] Further, the incarceration itself is detrimental to an inmate's cognitive and social functioning, mental health, and overall attitude.[247] Remaining incarcerated with no hope of parole for their entire life also separates the offender from their family for their entire lifetime, and family members and friends may lose the incentive to keep in contact with the inmate if they know that he will never be released.[248]

Simply put, LWOP is too harsh a sentence for juvenile offenders. Its effects are too similar to those of a death sentence to justify an LWOP sentence for someone who is not yet an adult.

E. The Future of Juvenile Sentencing

To truly follow the spirit of *Roper*, *Graham*, *Miller*, and *Montgomery*, the Supreme Court should categorically prohibit life without parole sentences for all juvenile offenders.[249] This would ensure that no child is denied the opportunity to redeem and rehabilitate himself. Most importantly, it would fully recognize—and provide meaningful enforcement of—the acknowledged reality that juveniles are different from adults for purposes of sentencing.[250]

The *Montgomery* Court had the opportunity to declare juvenile LWOP

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241. *Id.*

242. *Graham*, 560 U.S. at 70.

243. Mallet, *supra* note 190.

244. Lowry, *supra* note 235, at 894.

245. Mallet, *supra* note 220.

246. *Id.*

247. *Id.*

248. *Id.*

249. Haley Van Erem, *State Responses to* Graham *and* Miller*: A Policy Proposal that Recognizes Children are Different*, 50 NO. 4 CRIM. LAW BULL. ART. 6 (2014).

250. *Id.*; Hartman, *supra* note 157.

unconstitutional but declined to do so.[251] Instead, the *Montgomery* Court suggested the elimination of juvenile LWOP without explicitly saying as much, explaining that states could comply with the *Miller* holding by offering all juvenile offenders the opportunity for parole.[252] In his *Jones* majority opinion, Justice Kavanaugh reiterated that states have the power to completely handle this issue on their own by categorically prohibiting juvenile LWOP or requiring judges to give formal explanations of their factual findings.[253]

But deferring to state legislatures has especially dangerous consequences for juvenile offenders in the handful of states that still permit and utilize juvenile LWOP. *Miller* and *Montgomery*, paired with decades of social change created an emerging national consensus that juvenile LWOP should be forbidden or extremely rare.[254] But carved out of this "national" consensus is a handful of states that have ignored the movement away from juvenile LWOP.[255] The attached map[256] shows each state's position on juvenile LWOP as of May 2021.[257] The twenty-three dark purple and three medium purple states have prohibited juvenile LWOP altogether.[258] The nine states in light purple are states that technically still allow juvenile LWOP, but do not utilize it.[259] The sixteen white states are the states that continue to permit and utilize juvenile LWOP.[260] Upon first glance, it is apparent that over half of these white states are southern states: Oklahoma, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Tennessee.[261]

Southern states have historically been the most punitive in the nation.[262] It is no coincidence that the Supreme Court's three most recent cases on the topic of juvenile criminal justice come out of Alabama, Louisiana, and Mississippi.[263] This punitive nature is further evidenced by the fact that the vast majority of executions have taken place in southern states.[264] While the judicial discretion required by *Miller* and *Montgomery* is beneficial for some juvenile offenders, it can be devastating for others depending on what state they live in and which judge they are standing before.[265] It is helpful to remember that most of the

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251. Gupta-Kagan, *supra* note 169, at 694.

252. *Id.* at n.155.

253. Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021). "In sum, after *Jones*, there is reason for despair over the federal Eighth Amendment. But don't count out the state courts just yet. Many have proven willing to go beyond the federal minimums. With new attention from progressive advocates, these courts may pick up where the U.S. Supreme Court has left off." Shapiro, *supra* note 68, at 73*; see also* Barnes, *supra* note 95.

254. Schwartzapfel, *supra* note 61.

255. *See* Aiken, *supra* note 2.

256. Appendix A.

257. Rovner, *supra* note 150.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. This trend is sometimes referred to as the "geography of justice." PAUL E. DOW, DISCRETIONARY JUSTICE 213 (1981).

263. Miller v. Alabama, 567 U.S. at 460, 465 (2012); Montgomery v. Louisiana, 577 U.S. 190, 193 (2016); Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

264. Gross & Ellsworth, *supra* note 116, at 24.

265. *See* Schwartzapfel, *supra* note 61.

judges in these white states are elected trial and appellate judges in traditionally conservative states. If sentencing judges are not required to *show* permanent incorrigibility, this could be seen as an open invitation for white states on this map[266] to abuse their discretion and avoid meaningful review.[267]

The Court's decision in *Jones* exposed juvenile offenders in these southern states to a specific danger: lack of meaningful appellate review. The *Jones* majority held that no magic words are required.[268] The judge is to use his discretion but is not required to show any of his reasoning or factual analysis that led to his sentencing decision. A juvenile offender's only hope after an LWOP sentence is a meaningful review on appeal, but for there to be a meaningful appellate review, sentencing courts must "adequately *explain*" their chosen sentences.[269] If no magic words or formal fact-finding explanation is required at the trial court level to show that the judge considered the child's age and other factors before declaring them permanently incorrigible, there will be nothing for the appellate court to review.[270]

Appellate courts, especially appellate courts in southern states that are more naturally inclined toward extremely punitive sentencing, are likely to affirm these cases repeatedly.[271] We have seen this play out in Mississippi. Mississippi courts have been resentencing juvenile offenders since *Miller* and *Montgomery*, and over a *quarter* of those juveniles resentenced received LWOP again.[272] Southern states like Mississippi have blatantly ignored the heart of *Miller's* holding that LWOP for juveniles should be extremely rare and reserved only for the juvenile who is beyond rehabilitation and redemption.[273] Over a quarter receiving LWOP again at their resentencing is certainly not ensuring that LWOP is "a rarity." For true justice to be guaranteed for juveniles in states like Mississippi, Alabama, and Louisiana, U.S. Supreme Court action prohibiting juvenile LWOP will likely be necessary.

Not only is judicial discretion in sentencing affected by the jurisdiction's political stance on retribution and punishment, but it is also affected by racial bias.[274] Racial stereotypes and implicit biases can lead to judgments that are more reflexive than carefully weighed.[275] Implicit biases may also cause judges and juries to view black children as older, more violent, and less innocent than their white peers.[276] Black children were already more likely than white

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266. Appendix A.

267. *See* Schwartzapfel, *supra* note 61; Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner *supra* note 118, at *25; Mayeux, *supra* note 94.

268. *Jones*, 141 S. Ct. at 1321; *see also* Schwartzapfel, *supra* note 61.

269. Gall v. United States, 552 U.S. 38, 50 (2007) (emphasis added).

270. *See* Schwartzapfel, *supra* note 61; Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner *supra* note 118, at *26; Mayeux, *supra* note 94.

271. *See Id*.; *See* Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner *supra* note 118, at *26; Mayeux, *supra* note 94.

272. *See* Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner, *supra* note 118, at *10.

273. *See* Schwartzapfel, *supra* note 61.

274. Freya Whiting, Note, Miller v. Alabama*: An Empty Promise for Juveniles Facing Life Without Parole?*, 9 VA. J. CRIM. L. 91, 103 (2021); Schwartzapfel, *supra* note 61.

275. Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner, *supra* note 118, at *24.

276. *Id.*

children to be given a longer sentence, but since *Miller*, this disparity has only increased.[277] Before 2012, sixty percent of juvenile offenders sentenced to LWOP were black, and that number increased to seventy-two percent after the *Miller* decision.[278] By refusing to require the sentencing judge to make a finding of permanent incorrigibility, the *Jones* Court opened the door for juvenile sentencing decisions to be potentially influenced by the judge's racial bias.[279]

Although this Note advocates for a categorical prohibition on juvenile LWOP from the Supreme Court, a prohibition on juvenile LWOP is not the only way to increase protection for juvenile offenders. Scholars have made several suggestions for ensuring that youthfulness is considered in juvenile sentencing including a sliding scale for sentencing based on age that uses percentages (called the Youth Discount);[280] a separate sentencing category for young adults;[281] expanding juvenile court jurisdiction to age twenty-one;[282] giving juveniles earlier opportunities to seek parole;[283] and sentence reviews either at age twenty-five, or within five years of incarceration, whichever comes first.[284] A more extreme suggestion is that virtually all violent crime sentences should be capped at twenty years because of the harm that lifelong incarceration causes to family units and the high cost of incarcerating individuals for life.[285] Each of these suggestions bear a common theme: juveniles should be treated differently than adults at every stage in the process, not just during sentencing.[286]

However, categorically banning juvenile LWOP seems like the most obvious next step, especially considering that many of the alternatives would require extensive administrative reform. Calling for the abolition of juvenile LWOP is not a far-fetched idea. Many scholars[287] and other concerned parties[288] have been advocating for such abolition since *Roper* due to the extensive similarities between the death penalty and LWOP, as previously discussed.[289] The Court stated in *Miller* that juvenile LWOP should be "a rarity."[290] If there is reason enough for it to be "a rarity," there is reason enough for it to be prohibited altogether.

277. Whiting, *supra* note 274, at 103; Schwartzapfel, *supra* note 61.

278. Schwartzapfel, *supra* note 61.

279. *See* Brief for Juv. L. Ctr. as Amici Curiae Supporting Petitioner, *supra* note 118, at *25.

280. Feld, *supra* note 174, at 141-47; Gupta-Kagan, *supra* note 169, at 690.

281. *See* Scott, Bonnie & Steinberg, *supra* note 180; Gupta-Kagan, *supra* note 169, at 683.

282. Gupta-Kagan, *supra* note 169, at 689-90.

283. *Id.* at 690-91.

284. Lowry, *supra* note 235, at 911-12.

285. Gupta-Kagan, *supra* note 169, at 708-09.

286. Van Erem, *supra* note 249.

287. The ACLU has firmly stood in opposition of juvenile life without parole for decades. *See* Brief for Am. C.L. Union Found. Et al. as Amici Curiae Supporting Petitioner at *2-3, Jones v. Mississippi, 141 S. Ct. 1307, 1307 (2021) (No. 18-1259).

288. Arthur & Armstrong, *supra* note 2.

289. Mallet, *supra* note, 220.

290. Van Erem, *supra* note 249.

VI. CONCLUSION

At his resentencing hearing, Brett Jones begged for a chance to show the court—and the world—that he had been rehabilitated: "all I can do is ask you . . . please give me just one chance to show the world, man, like, I can be somebody. I've done everything I could over the past ten years to be somebody . . . I can't change what was already done. I can just try to show . . . I've become a grown man."[291] But Brett Jones was not given that chance. The trial court that sentenced him, the Mississippi Court of Appeals, and the United States Supreme Court all sent a clear message: anything Jones does to change or become a better man does not matter. Fifteen years of trauma, abuse, and violence caused a vulnerable fifteen-year-old to respond to confrontation with violence, and our court system, at every level, determined that Brett Jones should pay with his life.

Looking at factors such as maturity, cognitive development, mental health, and childhood trauma support the conclusion that children should be treated differently than adults in all regards for sentencing purposes. Requiring a judge to determine whether the juvenile is permanently incorrigible or transiently immature gives the judge far too much discretion, especially if that judge is not required to explain his determination. Because LWOP sentences have the effect of stripping hope and decreasing quality of life, LWOP sentences should be prohibited for all juvenile offenders. This would allow all juveniles, regardless of their convictions, to rehabilitate themselves and exhibit their capacity for change.

The juvenile criminal justice system comes with a strange sort of tension and heartbreak. Brett Jones's grandfather lost his life that day by getting stabbed to death in his own kitchen. But in a sense, Brett Jones also lost his life that day. No matter how much work he puts in to be a better man, he will never get the chance to show the world that he has changed.

"Youth matters in sentencing" should be more than just lip service. This simple phrase should change everything about the way that our criminal justice system treats juveniles, and it starts with the recognition that no teenager, no matter how violent, deserves to spend their entire life in the hell-on-earth that is the U.S. prison system.

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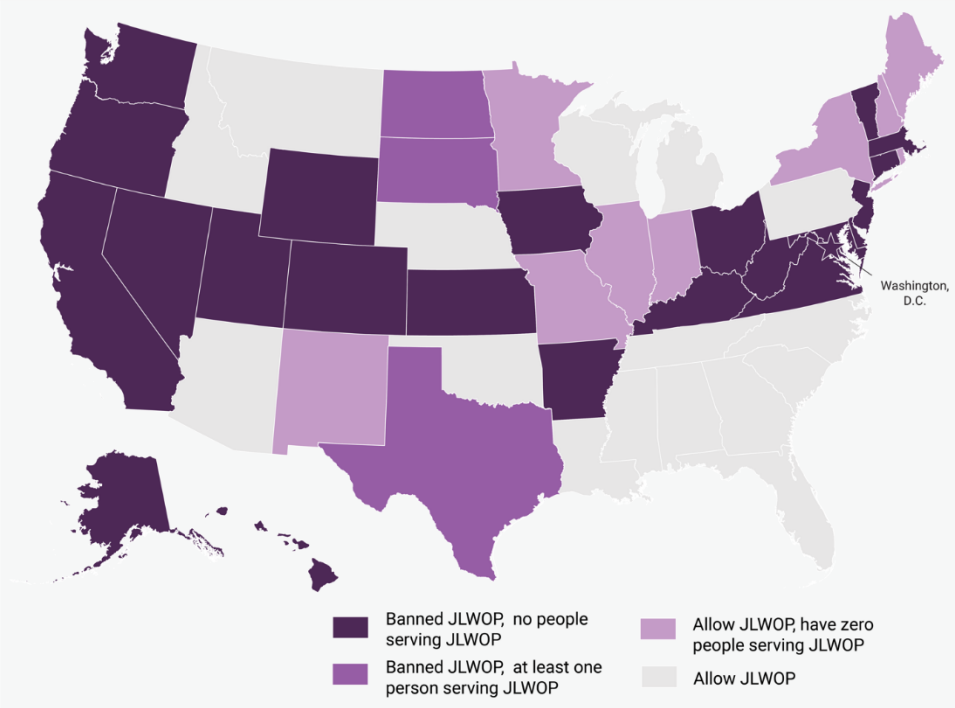
291. *Jones*, 141 S. Ct. at 1341 (Sotomayor, J., dissenting).

VII. APPENDIX



Josh Rovner, Juvenile Life Without Parole: An Overview, The Sentencing Project (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.