PERMANENT INCORRIGIBILITY OR PROCEDURAL POINT: JUVENILE SENTENCING CONSIDERATIONS IN *JONES V. MISSISSIPPI*

INTRODUCTION

Seventeen years and two unsuccessful appeals after the crime in question, the United States Supreme Court affirmed the state of Mississippi's life sentence without parole of Petitioner Brett Jones for the murder of his grandfather.[1] Jones was less than a month removed from his fifteenth birthday at the time of the murder.[2] Before a fiercely worded concurrence and even fiercer dissent, Justice Brett Kavanaugh's majority opinion attempted to calmly state the Court's conclusion, confirming the Mississippi court's interpretation and, thus, Jones's lifetime imprisonment.[3] According to the majority opinion, precedent only required a sentencer to consider a juvenile offender's youth as a factor before imposing a life-without-parole sentence, not to make an explicit or implicit finding of the juvenile's permanent incorrigibility.[4] However, Justice Kavanaugh's soothing words belied heated disagreements over the nature of the cruel and unusual punishment, the proper analysis for the most severe sentencing of youths, and the norms of stare decisis[5] itself.

I. FACTS AND HOLDING: AN ALTERCATION, A SANDWICH, AND A MURDER

Brett Jones's murder of his grandfather, Bertis, in the summer of 2004 set off a quick pursuit of the fleeing teenager from a crime scene and a long debate on the appropriate sentencing for minors. Though Jones had lived with his grandparents previously, he moved to their Mississippi home only two months before the murder of his grandfather.[6] For Jones, Mississippi was an escape

1. *See* Jones v. Mississippi, 141 S. Ct. 1307 (2021) [hereinafter *Jones VI*].

2. *Id.* at 1338 (Sotomayor, J., dissenting).

3. *See id.* at 1311-12.

4. *See id.* at 1311. For purposes of this paper, "permanent incorrigibility" will be synonymous with "permanent depravity" and "irreparable corruption," as each has been used by the United States Supreme Court to reflect the same state, namely the condition of a juvenile offender whose criminal actions do not derive from a state of transient or temporary immaturity.

5. Stare decisis is "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. *See* Jones v. State, 285 So. 3d 626, 630 (Miss. Ct. App. 2017) [hereinafter *Jones IV*] (en banc).

from his mother and stepfather's Florida home, where he had suffered physical and verbal abuse.[7] His mother had been physically abused by Jones's father, an alcoholic who had knocked his wife's teeth out and broken her nose on several occasions.[8] After his parents' separation, Jones had little relations with his father.[9]

Jones's relationship with his stepfather was even more fraught, characterized by bruise-causing blows and verbal threats.[10] The abuse increased as Jones grew older, and finally, in the summer of 2004, the relationship between Jones and his stepfather reached its boiling point when Jones's stepfather forcefully grabbed him by the throat with one hand and attempted to remove his belt in order to whip him.[11] Seeking to free himself from the beating, Jones hit his stepfather in the ear, drawing blood.[12] As a result, Jones was arrested for domestic violence and required to take anger management classes.[13] Shortly after this incident, Jones moved back to his grandparents' Mississippi home.[14]

Jones's girlfriend, Michelle Austin, eventually followed him to Mississippi.[15] Jones and Austin's relationship was riddled with problems, with Austin regularly denigrating Jones and demanding harmful acts as a show of love.[16] Without the knowledge of Jones's grandparents, Austin regularly stayed with Jones in his bedroom.[17]

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7. *See id.* at 630.

8. Jones v. Mississippi, 141 S. Ct. 1307, 1338 (2021) [*Jones VI*] (Sotomayor, J., dissenting).

9. J.A. at 55, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259), 2020 WL 3105867, at *72.

10. *See Jones VI*, 141 S. Ct. at 1338 (Sotomayor, J., dissenting); *Jones IV*, 285 So. 3d at 630.

11. Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848, at *5 (Miss. Nov. 27, 2018) [hereinafter *Jones V*] (en banc) (Kitchens, J., dissenting).

12. *Id*.

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

14. *Id.*

15. *Jones V*, 2018 WL 10700848, at *5 (Kitchens, J., dissenting).

16. *See id.*

17. *See* Jones v. State, 938 So. 2d 312, 313 (Miss. Ct. App. 2006) [hereinafter *Jones I*].

On the morning of August 9, 2004, Jones's grandfather discovered Austin in Jones's bedroom.[18] Austin fled the house, with Jones later joining her.[19] Austin demanded of Jones, "What are you going to do? Kill him?"[20] Though Jones did not reply to her questions, Austin testified that Jones planned "to hurt his granddaddy."[21]

Later that day, having returned to his grandparents' house, Jones was confronted by his grandfather while Jones was eating in the kitchen.[22] Investigators later found a half-eaten sandwich on a kitchen table.[23] After a flippant comment by Jones, his grandfather aggressively approached him.[24] Believing his grandfather intended to strike him, Jones took a steak knife that he had used to make his sandwich and threw it forward.[25] Stabbed but not disabled, Jones's grandfather soon advanced again.[26] Jones grabbed a filet knife, stabbing his grandfather a total of eight times and causing him to stumble out the house.[27] "I was afraid," Jones testified. "He's not really a big looking man until he gets in your face with his hands up . . . he turns into a giant."[28]

Jones soon became aware of the gravity of his actions.[29] He performed CPR on his grandfather in an attempt to save his life.[30] Failing that, Jones attempted to drag his grandfather's dying body back into the house.[31] Around this time, a house guest of a neighbor saw Jones covered in blood and carrying a knife.[32] Trembling, Jones muttered to the house guest, "Kill, kill."[33]

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18. *Jones I*, 938 So. 2d at 313.
19. *Id.* at 313-14.
20. *Id.* at 314 (internal quotations omitted).
21. *Id.* (internal quotations omitted).
22. *See id.*
23. Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848, at *11 n.1 (Miss. Nov. 27, 2018) [*Jones V*] (en banc) (Kitchens, J., dissenting).
24. *See* Jones v. State, 938 So. 2d 312, 314 (Miss. Ct. App. 2006) [*Jones I*].
25. *Id.*
26. *Id.*
27. *See id.*
28. *Id.* (internal quotations omitted).
29. *See id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* (internal quotations omitted).

After inept attempts to clear the scene and clean his clothes, Jones left the house with Austin.[34] Jones intended to travel to the Tupelo, Mississippi Walmart to tell his grandmother what had happened.[35] While en route, Jones and Austin were apprehended.[36] When a pocketknife was discovered on Jones's person, the arresting officer asked if it was the knife he "did it with."[37] Jones replied, "No, I already got rid of it."[38] Jones participated in an interview with police "without invoking his right to silence or his right to counsel and without a parent or guardian present."[39]

A. PROCEDURAL HISTORY: THE INTERSECTION OF MISSISSIPPI APPEALS AND FEDERAL EIGHTH AMENDMENT OPINIONS

Jones was convicted of murder and mandatorily sentenced to life imprisonment without parole in the Circuit Court of Lee County, Mississippi.[40] However, he appealed, eventually arguing that the Eighth Amendment prohibited his sentence.[41] Bouncing between the Court of Appeals and Supreme Court of Mississippi over the course of seven years, Jones's challenge picked up steam from intervening caselaw.

1. AN EIGHTH AMENDMENT OPENING FROM *MILLER V. ALABAMA*

In his eleventh error asserted—and seemingly at the eleventh hour of his appeal—Jones invoked the Eighth Amendment, raising the argument of the cruel and unusual nature of his punishment after ten allegations of ineffective counsel.[42] Specifically, Jones asserted that his sentence was disproportionate.[43] Jones cited

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34. *See* Jones v. State, 938 So. 2d 312, 314-15 (Miss. Ct. App. 2006) [*Jones I*].

35. *See id.* at 315.

36. *Id.*

37. *Id.*

38. *Id.*

39. Jones v. Mississippi, 141 S. Ct. 1307, 1339 (2021) [*Jones VI*] (Sotomayor, J., dissenting) (internal quotations omitted) (quoting *Jones V*, 2018 WL 10700848, at *11 (Kitchens, J., dissenting)).

40. Jones v. State, 938 So. 2d 312, 315 (Miss. Ct. App. 2006) [*Jones I*].

41. *See* Jones v. State, 122 So. 3d 725, 740 (Miss. Ct. App. 2011) [hereinafter *Jones II*].

42. *See id.* at 729-30, 740.

43. *See id.* at 740-41. Similar to sentences that are cruel and unusual, disproportionate sentences fail to properly connect crime to offender, making them

Graham v. Florida, in which the Supreme Court had held that life-without-parole sentences for nonhomicide juvenile offenders are so disproportionate as to be unconstitutional.[44] However, the Mississippi Court of Appeals was unmoved. The court of appeals refused to extend a categorical ban to Jones, noting that *Graham* was inapplicable in this case because Jones was convicted of murder.[45] The court also failed to find "any inference" from precedent of disproportionality in life sentences rendered to juvenile offenders convicted of murder.[46]

However, Jones's avenues for appeal were not closed. Two years after his court of appeals denial, Jones presented a more focused argument to the Supreme Court of Mississippi, citing the recently decided case of *Miller v. Alabama*.[47] Finding *Miller* to provide a substantive rule, the Supreme Court of Mississippi extended the prohibition of mandatory life-in-prison regimes for youth to cases on collateral review, remanding Jones's case for resentencing.[48] Though *Miller* did not forbid Jones's sentence, the *Miller* Court held that a sentence of life without parole to a juvenile offender would be constitutional only *after* consideration of certain "characteristics and circumstances."[49]

Mississippi courts made efforts to note these applicable characteristics and circumstances. Shortly before taking up Jones's collateral review question, the Supreme Court of Mississippi remanded the direct appeal of *Parker v. State*, directing the trial court to consider mitigating youth factors for proper sentencing.[50] Later Mississippi opinions relied on *Parker*'s analysis when applying the so-called *Miller* factors.[51] Factors to be considered in assessing juvenile offenders include their "immaturity, impetuosity, [] failure to appreciate risks and consequences," dysfunctional home and family life, an inability to

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unconstitutional. Penological schemes must preserve proportionality. *See* Graham v. Florida, 560 U.S. 48, 72 (2010).

44. *See Jones II*, 122 So. 3d at 740 (citing *Graham*, 560 U.S. at 59). For a fuller discussion of *Graham*, *see infra* Part II.A.2.

45. *See Jones II*, 122 So. 3d at 741.

46. *Id.*

47. *See* Jones v. State, 122 So. 3d 698 (Miss. 2013) [hereinafter *Jones III*].

48. *Id.* at 703.

49. *Id.* at 702.

50. *See* Parker v. State, 119 So. 3d 987 (2013).

51. *See Jones III*, 122 So. 3d at 700-01; Jones v. State, 285 So. 3d 626, 629 (Miss. Ct. App. 2017) [*Jones IV*] (en banc); Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848, at *9 (Miss. Nov. 27, 2018) [*Jones V*] (en banc) (Kitchens, J., dissenting).

remove themselves from such dysfunctional environments, family and peer pressure, lack of legal sophistication, and the possibility of rehabilitation.[52]

2. *JONES IV*: *MILLER* FACTORS NEED ONLY BE CONSIDERED, NOT STATED

With the United States Supreme Court's decision in *Miller v. Alabama* fresh and *Montgomery v. Louisiana*[53] fresher still, the Court of Appeals of Mississippi refused to overturn another lower court sentence of life in prison without the benefit of parole for Jones.[54] Sitting en banc,[55] the court's majority dismissed each of Jones's four Eighth Amendment arguments, reasoning that the sentencing judge properly considered mitigating youth factors in light of *Miller*, even if only implicitly showing his work.[56] Reviewing for abuse of discretion, the court of appeals found the sentencing judge's statement to have "considered each of the *Miller* factors" sufficient.[57]

In a thoughtful dissent, Justice Westbrooks arrived at the heart of the matter: are the *Miller* factors planks that must be sufficiently joined to hold up a defendant as irreparably corrupt—and thus, liable for the strictest possible penalty—or are they merely circumstances for a judge to consider in a discretionary sentence?[58] Reasoning for the former and failing to note such a finding in Jones's case, Justice Westbrooks deemed the affirmed sentence to be an abuse of discretion that should be overturned.[59]

Ultimately refusing to grant certiorari, the Mississippi Supreme Court still offered one last salvo for a permanent incorrigibility finding. After an initial grant of certiorari and a presentation of oral arguments, the Supreme Court of Mississippi

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52. *Parker*, 119 So. 3d at 995-96 (internal quotations omitted) (quoting Miller v. Alabama, 567 U.S. 460, 465, 478 (2012)).

53. *See infra* Part II.B.

54. *Jones IV*, 285 So. 3d at 627.

55. Sitting en banc is the process through which the entire panel of appellate justices review a particular case. *See En banc*, BLACK'S LAW DICTIONARY (11th ed. 2019).

56. *See Jones IV*, 285 So. 3d at 634.

57. *Id.* at 631, 634 (internal quotations omitted) (citation omitted in original).

58. *See id.* at 631, 634-39 (Westbrooks, J., dissenting).

59. *See id.* at 636.

sitting en banc reversed course, dismissing the petition.[60] Before giving a lower court the final word on the matter, however, Presiding Justice Kitchens offered a dissent to the order.[61] Echoing the appellate court dissent, Justice Kitchens reasoned, "Because the record does not reflect Jones's permanent incorrigibility, the circuit court's ruling was an abuse of discretion."[62] Rather, Jones's actions "dramatically epitomize[d] immaturity, impetuosity, and failure to appreciate risks or consequences."[63]

B. *JONES V. MISSISSIPPI*: NO EXPLICIT OR IMPLICIT INCORRIGIBILITY FINDING REQUIRED

Taking up what the Supreme Court of Mississippi refused to consider, the United States Supreme Court brought Jones's case to Washington but offered him no relief.[64] In *Jones v. Mississippi*, the Court held that a sentencer is not required to make a separate fact-finding of a defendant's permanent incorrigibility nor an on-the-record explanation of such an implicit finding in order to render a life-without-parole sentence to a youth under the age of eighteen.[65]

II. BACKGROUND: THE SUPREME COURT'S EXPANDING CONSIDERATION OF LIFE-WITHOUT-PAROLE FOR JUVENILES

A. *MILLER V. ALABAMA*: MANDATORY LIFE-WITHOUT-PAROLE IS CRUEL, UNUSUAL, AND A BIT MORE

In order to arrive at Brett Jones's final, failing appeal, the Supreme Court's ruling in *Miller v. Alabama* must first be untangled. Outlawing sentencing regimes that make life without parole mandatory for juveniles, *Miller* extended the notion of cruel and unusual punishment.[66] However, the ramifications of *Miller*'s holding and reasoning immediately brought questions and challenges as to its scope.

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60. *See* Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848, at *1 (Miss. Nov. 27, 2018) [*Jones V*] (en banc) (Kitchens, J., dissenting).

61. *See id.*

62. *Id.*

63. *Id.* at *11.

64. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021) [*Jones VI*] (affirming the Mississippi Court of Appeals).

65. *See id.*

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

Prohibiting mandatory life-without-parole sentences for juveniles, *Miller* did not eliminate all such life-without-parole sentences.[67] The *Miller* opinion did not "categorically bar a penalty for a class of offenders or type of crime . . . ."[68] However, it did mandate a process through which a sentencer had to proportionally weigh attendant youth characteristics before "meting out the law's most serious punishments."[69] To make this assessment, the Court distinguished "unfortunate yet transient immaturity" from "the rare juvenile offender whose crime reflects irreparable corruption."[70] Justice Kagan's majority opinion allowed for state procedural flexibility in differentiating between the two groups, while requiring an evaluation of the differences youth makes in proportionate sentencing.[71]

In its Eighth Amendment analysis, the Court drew on "two strands of precedent reflecting [its] concern with proportionate punishment[]": categorical protections "based on mismatches between the culpability of a class of offenders and the severity of a penalty," and the logic of individualized sentencing.[72] Both strands concluded that "children are constitutionally different from adults for purposes of sentencing."[73] As such, *Miller*'s analysis concluded that youth matters both as a class protection and as a mitigating factor.[74] In certain decisions, the United States Supreme Court has considered children as a substantive class and in others on an individualized, procedural basis.[75] The degree of difference between youth as a substantive class and as an individual mitigating factor—and the Court's logic that undergirds it—became central to understanding *Miller*'s holding.

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67. *Miller*, 567 U.S. at 483.

68. *Id.*

69. *Id.*

70. *Id.* at 479-80 (internal quotations omitted) (first quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); and then citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

71. *See id.* at 479-80.

72. *See id.* at 470 (citations omitted).

73. *Id.* at 471; *see also id.* at 476 ("Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions.").

74. *See id.* at 471-75.

75. *See* discussion *infra* Parts II.A.1-2.

1. YOUTH AS A PROCEDURAL FACTOR: INDIVIDUALIZED SENTENCING MIRRORING THE DEATH PENALTY

As one line of cases indicates, youth matters as an individualized sentencing factor.[76] Youth as a mitigating factor finds its precedential precursors in the individualized sentencing regimes demanded by death penalty decisions.[77] The *Miller* Court followed the individualized line from the generally applicable *Woodson v. North Carolina* to a later, more specific application to juveniles.[78] In *Woodson*, the Court struck down mandatory death penalty sentences in 1976.[79] The Court's Eighth Amendment justification for its holding invoked "indicia of societal values"—signs manifested by "history and traditional usage, legislative enactments, and jury determinations"[80]—and a broader recognition of evolving societal standards.[81] Instead of binding a sentencer to the most severe sentence, a death penalty regime requires "particularized consideration," the assessment of each offender in light of the crime committed.[82]

As states began to apply *Woodson*'s holding, the Court clarified its implications in *Lockett v. Ohio*[83] and *Eddings v. Oklahoma*.[84] Determining Ohio sentencing requirements to be overly restrictive, the *Lockett* Court widened the list of mitigating circumstances for consideration.[85] Chief Justice Burger's opinion deepened the reasoning of *Woodson*, emphasizing "that the imposition of death by public authority is so profoundly different

76. *See* Miller v. Alabama, 567 U.S. 460, 465, 475-76 (2012) (first citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976); then citing Sumner v. Shuman, 483 U.S. 66, 74-76 (1987); then citing Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); and then citing Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)).

77. *See id.* at 471-75.

78. *See id.* at 475-76.

79. *Woodson*, 428 U.S. at 305 (1976).

80. *Id.* at 288 (citing Gregg v. Georgia, 428 U.S. 153, 176-82 (1976)).

81. *See id.* at 301 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

82. *See id.* at 303.

83. *See Lockett*, 438 U.S. 586.

84. *See Eddings*, 455 U.S. 104.

85. *See Lockett*, 438 U.S. at 604 (emphasis added) (concluding "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."[86]

What *Lockett* did for mitigating factors generally, *Eddings v. Oklahoma* did for youth specifically. The Court held that a sentencer must consider all relevant factors of a juvenile's history.[87] Reversing the death penalty imposition of a state court judge who had considered the juvenile offender's youth but not his violent upbringing, the Court cautioned sentencers against promoting a false consistency by picking and choosing only certain circumstances for analysis.[88] The *Eddings* Court noted the juvenile offender "was not a normal 16-year-old[,]" and instead experienced deprivation of parental care, violence in his family life, and stunted mental and emotional development.[89] In the Court's view, these facts did not necessarily remove the juvenile's responsibility, but they demanded evaluation for his sentencing.[90] As Justice Powell concluded, "[Y]outh is more than a chronological fact."[91] Instead, as the *Miller* Court established from this line of precedent, youth often presents transient characteristics, such as "immaturity, irresponsibility, impetuousness[,] and recklessness," requiring an individualized evaluation.[92]

2. YOUTH AS A SUBSTANTIVE CLASS: CONSTITUTIONALLY DIFFERENT, CONSTITUTIONALLY PROTECTED

In a line of more recent cases, the youthfulness of an offender is the primary lens through which the offender is observed.[93] Developing the Court's awareness that juveniles have "diminished culpability and greater prospects for reform," the *Miller* Court found greater categorical protections through its second strand of precedent: class-based protections for youth.[94]

Miller's analysis of applicable case law began with a discussion of Justice Kennedy's majority opinion in *Roper v.*

86. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

87. *See* Eddings v. Oklahoma, 455 U.S. 104, 112-14 (1982).

88. *See id.* at 112-17.

89. *Id.* at 116.

90. *See id.*

91. *See id.* at 115-16.

92. Miller v. Alabama, 567 U.S. 460, 465, 476 (2012) (alteration in original) (citing Johnson v. Texas, 509 U.S. 350, 386 (1993)).

93. *See id.* at 475-76 (first citing Graham v. Florida, 560 U.S. 48, 68 (2010); and then citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

94. *See id.* at 471 (2012) (citing *Graham*, 560 U.S. at 68).

Simmons.[95] In *Roper*, the Court prohibited the death penalty for those under eighteen at the time of the offense, holding that juveniles as a class are ineligible for the death penalty.[96] Grouping juveniles among "the insane and the mentally [disabled]," the *Roper* Court found classes of people for whom the death penalty would serve as cruel and unusual punishment, thus falling outside of the "narrow category of crimes and offenders[]" for which the death penalty is reserved.[97]

Before being considered within the individualized sentencing schema, juveniles forced a sentencer to pause. As Justice Kennedy described the hesitation, "[J]uvenile offenders cannot with reliability be classified among the worst offenders."[98] To arrive at this conclusion, Justice Kennedy moved beyond a mere individualized evaluation, naming three distinguishing characteristics of all youth: juveniles possess heightened immaturity and irresponsibility, are more vulnerable to negative influences, and have personality traits that "are more transitory, less fixed."[99] Cautioning sentencers, Justice Kennedy also cited the inability of psychiatrists to diagnose antisocial personality disorders in patients younger than eighteen.[100]

The prohibition of death penalty sentences for juveniles was further established by a classic Eighth Amendment measure: "objective indicia of society's standards . . . ."[101] This standard can give rise to different, seemingly subjective interpretations of the evidence, as Justice Scalia's strongly worded dissent in *Roper* argued.[102] Objective indicia of society's standards align most closely with legislative enactments.[103] More than a majority polling, the standard demands consensus, a hurdle Justice Kennedy believed surmounted by "the rejection of the juvenile

95. *Miller*, 567 U.S. at 471.

96. *See Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

97. *Id.* at 568-69.

98. *See id.* at 569.

99. *See id.* at 569-70.

100. *See id.* at 573.

101. *Id.* at 564.

102. *See id.* at 608 (Scalia, J., dissenting) ("The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures.").

103. *See id.* at 564 (majority opinion).

death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice . . . ."[104] This reasoning drew objective indicia close to "the evolving standards of decency that mark the progress of a maturing society."[105]

Five years after *Roper*, the Court found evidence of another evolutionary step in societal standards, abandoning the sentence of life-without-parole for juveniles who did not commit homicide.[106] In *Graham v. Florida*, another majority opinion authored by Justice Kennedy, the Court found the rarity of the sentence sufficient to satisfy the objective indicia standard.[107] Weighing the culpability of the offender against the severity of the punishment, the Court applied a proportionality measure, continuing the practice of reviewing punishments "not as inherently barbaric but as disproportionate to the crime."[108]

To reach its conclusion, the *Graham* Court examined the ends of the criminal justice system, identifying sentencing goals as retribution, deterrence, rehabilitation, and incapacitation.[109] Naming the stakes, the Court noted: "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[110] As retribution failed to convince the *Roper* Court, the *Graham* Court similarly doubted that juvenile nonhomicide defenders could truly deserve life-without-parole.[111] Deterrence also failed to make life-without-parole sentences proportionate, with juveniles less likely than adults to consider sentencing, especially rarely rendered sentences, before committing crimes.[112]

At the two extremes of penological goals, neither rehabilitation nor incapacitation could connect the class of persons to the sentence in question.[113] As Justice Kennedy flatly stated,

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104. Roper v. Simmons, 543 U.S. 551, 567 (2005).

105. *Id.* at 561 (internal quotations omitted) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

106. Graham v. Florida, 560 U.S. 48, 74 (2010).

107. *See id.* at 62-63 ("According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses.").

108. *See id.* at 60-62.

109. *See id.* at 71-75.

110. *Id.* at 71.

111. *See id.*

112. *See id.* at 72.

113. *See id.* at 72-74.

"The penalty forswears altogether the rehabilitative ideal."[114] An irrevocable judgment "denies the juvenile offender a chance to demonstrate growth and maturity."[115] The Court also rejected the logic of incapacitation, which would be workable only "on the assumption that the juvenile offender forever will be a danger to society[,] requir[ing] . . . a judgment that the juvenile is incorrigible."[116]

By establishing nonhomicide juvenile offenders as a class protected from life-without-parole sentences, the Court sought to eliminate the nettlesome task of "distinguish[ing] the few incorrigible juvenile offenders from the many that have the capacity for change."[117] The Court created this groundbreaking class protection by extending Eighth Amendment precedent, reasoning that the shared characteristics between the death penalty and life-without-parole were particularly pronounced when applied to juvenile offenders.[118] This commonality, however, left Justice Thomas unconvinced, alerting in his dissent, "Death is different no longer."[119] The *Miller* Court further extended class protections for minors, basing its reasoning on the differences between children and adults discussed in this line of precedent cases.[120] Contrasting transiently immature offenders with those irreparably corrupt, *Miller* cautioned against disproportionate sentencing from discretionary regimes.[121]

3. YOUTH AS PROTECTED: INCORRIGIBILITY SUPPORTING A HOLDING.

Though the *Miller* Court stopped short of a categorical ban on life without parole sentences for juveniles, it came very close. A categorical ban was unnecessary to resolve the issue before the Court, with the prohibition of mandatory sentences of life-without-parole for juveniles sufficient.[122] However, the Court's reasoning had broader implications. Its introduction of the Eighth Amendment revealed what was missing: objective indicia of

114. Graham v. Florida, 560 U.S. 48, 74 (2010).
115. *Id.* at 73.
116. *Id.* at 72.
117. *Id.* at 77.
118. *See id.* at 69.
119. *Id.* at 103 (Thomas, J., dissenting) (internal quotations omitted).
120. *See* Miller v. Alabama, 567 U.S. 460, 479-80 (2012).
121. *See id.*
122. *See id.* at 479.

society's standards.[123] Instead, proportionality of punishment and evolving standards of decency served as evaluative lenses.[124] Rather than determine an Eighth Amendment prohibition of the punishment based on its absence in state penal codes, Justice Kagan reasoned in reverse, noting the rare outcomes an application of precedent logic would present.[125] When proportionally measuring "children's diminished culpability and heightened capacity for change," against a life-without-parole punishment, the Court predicted that "this harshest possible penalty will be uncommon."[126]

To make this assertion, Justice Kagan relied on the distinction between transient immaturity and permanent incorrigibility found in the caselaw of juveniles as a protected class.[127] The *Miller* Court tied together *Roper*'s "rare juvenile offender whose crime reflects irreparable corruption," with the severest possible sentence.[128] In order to make this connection, Justice Kagan drew more heavily on the categorical strand of precedents.[129] Due to the class-based differences of youth, the Court required a sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[130]

B. *MONTGOMERY V. LOUISIANA*: *MILLER* MOVES BACK IN TIME BUT WITH FUTURE PROBLEMS

Clarifying *Miller*'s meaning, the Court in *Montgomery v. Louisiana* created precise distinctions between procedural and substantive rules—an indication of the trouble to come. Holding that *Miller* "announced a substantive rule of constitutional law," the *Montgomery* Court gave retroactive effect to the prohibition of

123. *See Miller*, 567 U.S. at 469-70.

124. *Id.* at 469.

125. *Compare id.* at 479, *with id.* at 493-94 (Roberts, C.J., dissenting) (citations omitted) ("Today, the Court invokes th[e] [Eighth] Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. . . . The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18.").

126. *Id.* at 479 (majority opinion).

127. *See id.* at 479-80 (first citing Roper v. Simmons, 543 U.S. 551, 573 (2005); and then citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

128. *See id.*

129. *See id.*

130. *Id.* at 480.

mandatory life-without-parole sentences to juveniles.[131] As Justice Kennedy reasoned in the majority opinion, a rule is substantive when it "has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment."[132] *Miller* offered a procedural framework with a substantive core, allowing states to develop their own sentencing mechanisms but prohibiting disproportionate juvenile sentences.[133] The *Montgomery* Court identified the impact of such a prohibition: "*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution."[134]

Seeking collateral review of his conviction for the 1963 murder of a deputy sheriff, Petitioner Montgomery filed an application for postconviction relief for an illegal sentence.[135] Montgomery was seventeen years old at the time of the murder and received a mandatory sentence of life-without-parole for his conviction.[136] Applying the framework established in *Teague v. Lane*, the Court analyzed whether *Miller* fit within one of two exceptions for retroactivity.[137] *Miller*'s bar on mandatory life without parole sentences for juveniles would either need to be to a new substantive rule of constitutional law or a "watershed rule of criminal procedure[138] implicating the fundamental fairness and accuracy of the criminal proceeding."[139] Focusing on the first exception, the Court held that state collateral review courts were required to apply substantive rules of constitutional law retroactively.[140] The Court then turned to *Miller*'s place within that framework.

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

132. *Id.* at 201.

133. *See id.* at 208-210.

134. *Id.* at 212.

135. *See id.* at 194-95.

136. *Id.* at 194.

137. *Id.* at 198 (citing Teague v. Lane, 489 U.S. 288 (1989)).

138. As addressed in *Whorton v. Bockting*, a watershed rule of criminal procedure is an exception to the general rule that new procedural rules do not apply retroactively. Such watershed exceptions qualify by "implicating the fundamental fairness and accuracy of the criminal proceeding." Further, they "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton v. Bockting, 549 U.S. 406, 417-18 (2007) (internal quotations and citations omitted).

139. Montgomery v. Louisiana, 577 U.S. 190, 198 (2016).

140. *Id.* at 200.

Though containing procedural elements, *Miller* created a substantive rule.[141] As such, it established a constitutionally protected class, namely juveniles whose crimes reflected transient immaturity and not permanent incorrigibility.[142] The sentencer's procedural analysis must precede the determination of substantive protection.[143] In other words, if a judge determines through a procedural process that an offender is within a protected class, certain punishments are prohibited—as with the death penalty for the mentally disabled.[144] As Justice Kennedy cautioned, "[P]rocedural requirements do not, of course, transform substantive rules into procedural ones."[145] Rather, the procedural determination of a juvenile's presence within the protected class "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[146]

With *Miller*'s establishment of a substantive rule and a protected class clarified, the Court then assessed the composition of that class.[147] Simply put, the Court envisioned many more juveniles within the protected class than outside of it.[148] Repeatedly, Justice Kennedy's opinion described juveniles eligible for life-without-parole sentences as "the rarest of children,"[149] "the rare juvenile offender[,]"[150] "the rare juvenile offender whose crime reflects irreparable corruption,"[151] and "the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility."[152] Instead, the Court observed that "the vast majority of juvenile offenders[]" act out of "transient immaturity."[153] Therefore, "the vast majority of juvenile offenders—'face[] a punishment that the law cannot impose upon [them].'"[154] A court's sentence that merely

141. *See Montgomery*, 577 U.S. at 206.
142. *See id.* at 208.
143. *See id.* at 210.
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.* at 211-12.
148. *See id.* at 208-09.
149. *Id.* at 195.
150. *Id.* at 208.
151. *Id.* (quoting Miller v. Alabama, 567 U.S. 460 (2012)).
152. *Id.* at 209.
153. *See id.*
154. *Id.* (internal quotations omitted) (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

considers youth as a mitigating factor "still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[155] However, neither *Miller* nor *Montgomery* prohibited the sentence of life without parole for juvenile offenders.[156] Rather, they merely required a substantive determination that "children whose crimes reflect transient immaturity[]" were ineligible for life without parole.[157] The procedure through which states would arrive at their substantive determination was purposefully absent in the Court's decisions.[158]

In his dissent, Justice Scalia colorfully imagined the ramifications retroactivity would present, pondering "the knotty 'legal' question: whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incorrigible.'"[159] Justice Scalia narrowed his Eighth Amendment analysis to the strictly procedural, preferring to distinguish sentences inappropriate and disproportionate from those "unconstitutionally void."[160] Grasping *Montgomery*'s holding, reasoning, and implications, the dissent could only conclude: "What silliness."[161] No matter the dissent, however, *Montgomery* served to more deeply embed *Miller*'s prohibition of mandatory life-without-parole sentences for juveniles, both by determining it to be a substantive and retroactive rule and by further extending class protection for transiently immature youth.[162]

III. THE COURT'S DECISION

Adopting a narrow precedent reading, the Court in *Jones v. Mississippi* resisted formalizing sentencing requirements.[163] Five times in his thirteen-page majority opinion, Justice Kavanaugh returned to quote the same statement in *Montgomery*: "a finding of fact regarding a child's incorrigibility . . . is not required."[164] Rather, *Miller*'s holding had a primarily procedural purpose,

155. Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (citing *Miller*, 567 U.S. 460).
156. *See id.* at 209, 212.
157. *See id.* at 210.
158. *See id.* at 211.
159. *Id.* at 226 (Scalia, J., dissenting).
160. *Id.* at 225.
161. *See id.* at 226.
162. *See id.* at 210 (majority opinion).
163. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021) [*Jones VI*].
164. *See id. passim* (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

demanding only that youth be considered in sentencing.[165] Any substantive component in the holdings of *Miller* or *Montgomery* was limited to its prohibition of *mandatory* life-without-parole sentences for adolescents.[166]

Based on the narrow application of *Miller*, the majority opinion found convincing the Mississippi sentencing judge's general acknowledgement of Jones's youth and his discretion to sentence Jones to less than life-without-parole.[167] Within those parameters, the Court was unconcerned with the actual sentencing decision.[168] Precedent required neither an explicit nor implicit finding of permanent incorrigibility in the juvenile offender to justify a life-without-parole sentence.[169]

The majority opinion simply observed no need for an explicit permanent incorrigibility finding in the precedent text.[170] With *Miller* only providing for a discretionary sentencing regime and *Montgomery* "unsurprisingly declin[ing] to impose new requirements,"[171] the Court likewise held that sentencers were not required to make an implicit finding of permanent incorrigibility.[172] Justice Kavanaugh understood the implicit argument to "rest[] on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth."[173] Youth necessarily would be considered, making an implicit finding unnecessary.[174] Youth, thus, was merely "a sentencing factor akin to a mitigating circumstance."[175] For the sentencing of a juvenile

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165. *See Jones VI*, 141 S. Ct at 1317-18 (citations omitted).

166. *See id.* at 1317.

167. *See id.* at 1312-13.

168. *See id.* at 1322 ("To be clear, our ruling on the legal issue presented here should not be construed as agreement or disagreement with the sentence imposed against Jones. . . . The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth.").

169. *See id.* at 1318-19.

170. *See id.* at 1318 ("If the *Miller* or *Montgomery* Court wanted to require sentencers to also make a factual finding of permanent incorrigibility, the Court easily could have said so—and surely would have said so. But the Court did not say that, or anything like it.").

171. *Id.* at 1317.

172. *Id.* at 1319.

173. *Id.* at 1319.

174. *See id.* at 1319-20.

175. *Id.* at 1315.

homicide offender, "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[176]

Notwithstanding its narrow precedent interpretation, the majority refused to limit *Miller* and *Montgomery* further by overruling them.[177] Justice Kavanaugh left footnotes to reconcile the clear language of the opinion with other elements in *Miller* and *Montgomery*.[178] Observing that *Miller* and *Montgomery* required neither explicit nor implicit findings of permanent incorrigibility, the *Jones* Court still acknowledged a limit to the sentencer's discretion. Quoting the *Montgomery* opinion, Justice Kavanaugh acknowledged in a footnote, "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."[179] In summary, a permanent incorrigibility finding need not be made, but a life-without-parole sentence for an offender whose crime reflected transient immaturity would be unconstitutional.[180]

Concluding his opinion by mentioning the protests in the concurrence and dissent to follow, Justice Kavanaugh minimized the debate on the bench, characterizing it as "a good-faith disagreement" over the extent of precedent holdings.[181] Such disagreements, Justice Kavanaugh asserted, were "commonplace," with the majority merely choosing to abide by the explicit text of *Miller* and *Montgomery*.[182]

The concurrence and dissent were unable to follow Justice Kavanaugh's lead.[183] Calling the majority reasoning "strained," Justice Thomas's concurrence observed the majority "labor[ing] mightily to avoid confronting the tension between *Miller* and *Montgomery*."[184] Justice Thomas favored overruling *Montgomery*, desiring "to be patently clear that *Montgomery* was a

176. Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2021) [*Jones VI*].

177. *See id.* at 1321.

178. *See id.* at 1315 n.2, 1317 n.4.

179. *Id.* at 1315 n.2 (internal quotations omitted) (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

180. *See id.* at 1315, 1315 n.2.

181. *See id.* at 1321.

182. *See id.* at 1321-22.

183. *See id.* at 1323 (Thomas, J., concurring); *id.* at 1328 (Sotomayor, J., dissenting).

184. *Id.* at 1323, 1328 (Thomas, J., concurring).

'demonstrably erroneous' decision worthy of outright rejection."[185] Finding *Montgomery*'s holding to improperly expand *Miller* into a substantive rule, Justice Thomas argued that *Miller* had "announced a purely procedural rule: A State may not automatically sentence a juvenile to life without parole, but must instead provide an individualized sentencing process."[186] Instead, Justice Thomas believed the *Montgomery* Court "reimagined" the rule as substantive with a procedural component.[187] In the view of Justice Thomas:

> Through a feat of legerdemain, *Montgomery* began by acknowledging that *Miller* did "not categorically bar a penalty for a class of offenders or type of crime," yet just three sentences later concluded that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." In a similar Janus-faced demonstration, *Montgomery* reiterated *Miller*'s assurance that "trial courts [need not] make a finding of fact regarding a child's incorrigibility," yet decided that "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[188]

For Justice Thomas, "*Montgomery* could not have been clearer that its rule transcended procedure[,]" leaving the court with "two obvious options": make permanent incorrigibility the sentencing rule, or overturn *Montgomery*.[189] In its third-way approach, the majority failed "to fully own up to *Montgomery*'s sins."[190]

Justice Thomas also questioned the majority's reasoning that a finding of permanent incorrigibility would be a fool's errand.[191] Comparing permanent incorrigibility to expert-supported findings of insanity or intellectual disability, Justice Thomas observed no notable distinction: "I doubt that a majority of this Court would tolerate the execution of an offender who alleges insanity or

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185. Jones v. Mississipi, 141 S. Ct. 1307, 1323 (2021) [*Jones VI*] (internal citation omitted).

186. *Id.* at 1324.

187. *Id.* at 1325.

188. *Id.* (alterations in original) (internal citation omitted) (quoting Montgomery v. Louisiana, 577 U.S. 190, 209-11 (2016)).

189. *See id.* at 1325, 1326-27.

190. *See id.* at 1327.

191. *See id.* at 1326.

intellectual disability absent a satisfactory finding to the contrary."[192]

In her dissent, Justice Sotomayor arrived at a different conclusion but traveled the common road of trampling the majority reasoning. Justice Sotomayor claimed that, simply put, "[t]oday, the Court distorts *Miller* and *Montgomery* beyond recognition."[193] Justice Sotomayor began by restating the "substantive nature" of *Miller*'s holding, creating youth who fall short of permanent incorrigibility as a protected class from life-without-parole sentences.[194] The procedural component of *Miller*'s holding emphasized the discretionary sentencing regime, but from Justice Sotomayor's reading, mitigating factors were not the sole focus.[195] The two lines of cases presented in *Miller* demonstrated a co-existence of substantive, categorical bans in *Roper* and *Graham*, and procedural, individualized schemes in *Woodson*, *Lockett*, and *Eddings*.[196] By emphasizing only the latter, the *Jones* majority failed to note the "substantive limit on the imposition of [life-without-parole] on juvenile offenders," that *Miller* established.[197] Youth matters, but in two different ways in *Miller*.[198] When both ways are held together, Justice Sotomayor asserted, quoting *Miller*: "No set of discretionary sentencing procedures can render a sentence of [life-without-parole] constitutional for a juvenile whose crime reflects 'unfortunate yet transient immaturity.'"[199] Failing to accurately capture the two ways youth matters in *Miller* and limiting *Miller* to individualized youth considerations, the *Jones* majority opinion left Justice Sotomayor lamenting, "[h]ow low this Court's respect for *stare decisis* has sunk."[200]

Justice Sotomayor did not have to travel far to demonstrate the impact of the majority opinion: "Unbound by *Miller*'s essential holding, more than a quarter of Mississippi's resentencings have resulted in the reimposition of [life-without-parole sentences]."[201] Noting Pennsylvania's two percent resentencing rate as a

192. *See* Jones v. Mississipi, 141 S. Ct. 1307, 1326 (2021) [*Jones VI*].
193. *Id.* at 1330 (Sotomayor, J., dissenting).
194. *See id.*
195. *See id.*
196. *See id.* at 1331-32.
197. *Id.* at 1333.
198. *See id.* at 1332.
199. *Id.* (quoting *Miller*, 567 U.S. at 479).
200. *See id.* at 1336.
201. *Id.* at 1333.

counterpoint to Mississippi's, Justice Sotomayor observed that "juvenile [life-without-parole] sentences will not be rare simply by virtue of sentencing discretion."[202]

Calling the majority opinion an attempt to "rewrite[],"[203] "paper over,"[204] and "bury" precedent,[205] Justice Sotomayor argued that *Miller* and *Montgomery* had precedential value that could not be ignored.[206] Detailing the many mitigating factors in Jones's youth, Justice Sotomayor concluded that "there is a strong likelihood that Jones is constitutionally ineligible for [life-without-parole]."[207] Further, Justice Sotomayor contended the majority opinion did not change precedent.[208] As Justice Sotomayor summarized, "For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law."[209]

IV. ANALYSIS

A. *JONES*: A DISCONNECTED HOLDING

Absent the reasoning of precedential decisions, the *Jones* majority opinion effectively muted what came before it. Though *Jones* technically did "not overrule *Miller* or *Montgomery*,"[210] it shrunk precedent to an inoperable size, narrowing its holdings to a mere procedural framework. In the light of *Jones*, *Miller* simply disallowed mandatory sentencing regimes[211] and *Montgomery* had all but run its procedural course.[212] Praising both while preparing for their burial, Justice Kavanaugh channeled his best Mark Antony, insisting for all to hear that *Miller* and *Montgomery* were honorable decisions.[213]

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202. *See* Jones v. Mississipi, 141 S. Ct. 1307, 1334 (2021) [*Jones VI*].

203. *See id.* at 1335 ("[T]he Court rewrites *Miller* into a procedural rule and, paradoxically, maintains that *Miller* was nevertheless 'substantive for retroactivity purposes.'").

204. *See id.* at 1331 ("The Court attempts to paper over its mischaracterization of Miller and Montgomery in several ways.").

205. *See id.* at 1336 (alterations in original) ("Instead of 'disturb[ing]' *Montgomery*'s retroactivity holding, . . . the Court attempts to bury it.").

206. *See id.*

207. *See id.* at 1339-40.

208. *See id.* at 1337.

209. *See id.* (footnote omitted).

210. *Id.* at 1321.

211. *See id.*

212. *See id.* at 1317 n.4.

213. *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2, ll. 82-94.

The concurrence and dissent, however, understood the opinion for the disingenuous soliloquy it was. Where Justice Thomas cried for intellectual integrity,[214] Justice Sotomayor sought precedential consistency.[215] No matter the state-determined procedural vehicle, certain youthful characteristics come together to establish a substantive class, protected from the most severe life-without-parole sentence. Even if the *Jones* Court chose to ignore precedential dicta about the rarity of an offender outside the class protection, the majority cannot avoid the clear words of *Montgomery*: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole."[216] *Miller* and *Montgomery* did not merely demand discretionary regimes but instead demanded a weighing of the juvenile's transient immaturity in the commission of a crime.

Despite his insistence on a limited precedent reading, Justice Kavanaugh knew the locations of the tripwires. For *Montgomery* to hold *Miller* to be retroactive, a procedural analysis could not be the end of the decision. Indeed, *Montgomery* held that *Miller* was retroactive precisely on the grounds that the latter's change to the law was substantive and not merely procedural.[217] Avoiding a direct confrontation with the established framework, Justice Kavanaugh instead inserted *Montgomery*'s transient immaturity admonishment into a footnote, quietly continuing to forbid life-without-parole sentences to those acting with transient immaturity.[218] Such textual gymnastics pointed to a stunted engagement with the precedent, but they also proved effective.

In a final, dissenting plea, Justice Sotomayor advocated that, "[f]or present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law."[219] Recent

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214. *See* Jones v. Mississipi, 141 S. Ct. 1307, 1326-27 (2021) [*Jones VI*] (Thomas, J., concurring).

215. *See id*.

216. *See* Montgomery v. Louisiana, 577 U.S. 190, 211 (2016).

217. *See id.* at 206.

218. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1315 n.2 (2021) [*Jones VI*] (internal quotations omitted) (quoting *Montgomery*, 577 U.S. at 211) ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.").

219. *Id.* at 1336 (footnote omitted) (Sotomayor, J., dissenting).

caselaw has already revealed *Jones*'s chilling effect. In a decision a month after *Jones*, the Court of Criminal Appeals of Alabama channeled the mindset of many courts, refusing to overturn a discretionary sentence of life without parole unless the lower court's abuse of discretion was established.[220] Citing heavily from *Jones*, the court of criminal appeals underscored what it viewed as essential: namely, that "[t]he resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth."[221] When assessing a juvenile offender, Alabama courts merely had to examine the juvenile offender in general light of *Miller* and then render a discretionary sentence.[222]

Other appellate courts have made determinations similar to that of the Court of Criminal Appeals of Alabama, with the United States Third Circuit Court of Appeals,[223] the Supreme Court of Georgia,[224] and the Supreme Court of Illinois[225] all adopting the narrow discretionary language. On the other hand, a single decision from a state court has been decided with the broader approach for which the *Jones* dissent advocated: *People v. Ruiz*, decided by the Appellate Court of Illinois.[226] Citing state precedent, the appellate court vacated a discretionary fifty-year-without-parole sentence of a sixteen-year-old, finding it to be a de facto life sentence and observing no finding of permanent

220. *See* Wynn v. State, No. CR-19-0589, 2021 WL 2177656, at *13-14 (Ala. Crim. App. May 28, 2021).

221. *Id.* at *8 (internal quotations omitted) (quoting Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021) [*Jones VI*]).

222. *See id.* at *6-7.

223. *See* United States v. Grant, No. 16-3820, 2021 WL 3611764, at *7 (3d Cir. Aug. 16, 2021) (en banc) (emphasis in original) ("The Court has *not* guaranteed particular outcomes for either corrigible or incorrigible juvenile homicide offenders.").

224. *See* Holmes v. State, 859 S.E.2d 475, 481 (Ga. 2021) (emphasis in original) ("In short, *Jones* clarified that although the Eighth Amendment requires that, before sentencing a juvenile murderer to [life-without-parole], a trial court must hold a sentencing hearing where the defendant's age and characteristics of children are *considered*, neither *Miller* nor *Montgomery* requires a sentencer to say anything on the record about youth and its attendant characteristics before imposing a [life-without-parole] sentence.").

225. *See* People v. Dorsey, No. 123010, 2021 WL 3204034, at *14 (Ill. July 29, 2021) (affirming a seventy-six-year sentence to a fourteen-year-old convicted of two counts of attempted first-degree murder, as its good-conduct credit made it discretionary and compliant with *Miller* and *Jones*).

226. *See* People v. Ruiz, No. 1-18-2401, 2021 WL 2102850, at *12 (Ill. App. Ct. May 25, 2021).

incorrigibility.[227] However, the *Ruiz* opinion also acknowledged *Jones*'s encroaching shadow, continuing the requirement of a finding of permanent incorrigibility "until our supreme court tells us otherwise . . . ."[228] Only a month later, the Illinois Supreme Court decision in *People v. Dorsey* called into question the caselaw underlying *Ruiz*, quoting *Jones* to note that a permanent incorrigibility finding "is inconsistent with the Court's precedents."[229]

If early returns indicate final victory, Justice Kavanaugh's narrow opinion has won the day. Sentencers simply need to avoid mandatory life-without-parole sentences and acknowledge youth as a general factor to be in line with *Miller* and *Montgomery*, with little threat of a later appellate overruling. However, reduced to a discretionary procedure, *Miller*'s holding is disconnected from the reasoning that informed it and the substantive caselaw it predominantly cited. Through *Jones*, judicial efficiency is achieved, with stare decisis an unfortunate casualty.

B. TRANSIENT IMMATURITY AS THE PATH TO JUSTICE

The impact of *Miller* and *Montgomery* did not need shrink to a footnote in *Jones*. Read together, *Miller* and *Montgomery* prohibited life-without-parole sentences to all but incorrigibly corrupt juveniles.[230] In *Miller*, Justice Kagan traced pertinent caselaw of both individualized and categorical juvenile regimes not simply to show the disproportionality of mandatory life-without-parole sentences for juveniles, but also to detail the type of juvenile offender for whom a life-without-parole sentence would be proportionate to the offense.[231] Directly following its holding, the *Miller* Court reiterated the reasoning of *Roper*, differentiating between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[232] Elsewhere in the opinion, transient qualities were said to include "immaturity,

227. *See* Ruiz, 2021 WL 2102850, at *12.

228. *See id.*

229. *See Dorsey*, 2021 WL 3204034, at *7 (internal quotations omitted) (quoting Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021) [*Jones VI*]).

230. *See* Miller v. Alabama, 567 U.S. 460, 479-80 (2012); Montgomery v. Louisiana, 577 U.S. 190, 208 (2016).

231. *See Miller*, 567 U.S. at 479-80.

232. *Id.* (internal quotations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

irresponsibility, 'impetuousness[,] and recklessness.'"[233] While *Miller* stopped short of offering to "categorically bar a penalty for a class of offenders or type of crime[,]"[234] its reasoning was more than mere dicta. Justice Kagan stressed as much: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[235] A juvenile offense characterized by immaturity, irresponsibility, impetuousness, and recklessness is an offense ineligible for a life-without-parole punishment. To understand *Miller* otherwise is a distortion.

Further, *Montgomery* understood *Miller* in this manner.[236] As the author of *Roper* and *Graham* decisions, Justice Kennedy grasped the caselaw from which *Miller* predominantly drew.[237] His majority opinion in *Montgomery* followed in the precedent line of class protections for juveniles.[238] As Justice Kennedy put plainly in *Montgomery*, "*Miller* . . . did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[239] By determining the rule of *Miller* to be substantive and, thus, retroactively applicable, the *Montgomery* Court left no ambiguity: states are free to choose a procedural sentencing vehicle, but that "does not leave [s]tates free to sentence a child whose crime reflects transient immaturity to life without parole."[240]

By refusing to reinforce the Eighth Amendment protection described in *Miller* and *Montgomery*, the *Jones* Court kept the caselaw on the books in name only. The Court incoherently held that juveniles who are not irreparably corrupt are constitutionally

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233. *Miller*, 567 U.S. at 476 (alterations in original) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

234. *Id.* at 483.

235. *Id.* at 480 (footnote omitted).

236. *See Montgomery*, 577 U.S. at 209 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").

237. *See id.* at 206 (citation omitted) ("The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles.").

238. *See id.* at 210.

239. *See id.* at 209.

240. *See id.* at 211.

protected from life-without-parole sentences, but that sentencers need not determine whether the juvenile before them is irreparably corrupt. In this tenuous position, transiently immature juveniles are a protected class searching for actual judicial protection.

To reach a more just and consistent decision, the *Jones* Court could have required sentencers to make an on-the-record determination that the crime in question did not reflect transient immaturity. A focus on transient immaturity—the other side of the assessment coin from permanent incorrigibility—would aid sentencers in their discretionary decisions. Justice Kavanaugh quietly allowed for that much, with his footnote acknowledging the inescapability of transient immaturity: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."[241]

Further, a crime committed out of transient immaturity collapses the penological justifications for a life-without-parole sentence of a juvenile. As detailed in *Graham* with regard to nonhomicide juvenile offenders, the sentencing goals of retribution, deterrence, rehabilitation, and incapacitation are unachievable in the case of a crime committed by a transiently immature youth.[242] *Graham*'s logic is applicable to juveniles who have committed homicides as well.

The social sciences have supported this assessment. Both *Roper* and *Miller* cite the seminal work of Laurence Steinberg and Elizabeth S. Scott on the topic juvenile culpability.[243] Steinberg and Scott distinguish the cognitive functioning of juveniles from their decision-making capabilities, the latter presenting a more pronounced difference from those of adults when studied in a real-world environment.[244] Comparing the decision-making of juveniles to that of those with mental-developmental ailments, Steinberg and Scott conclude that the antisocial behavior of

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241. Jones v. Mississippi, 141 S. Ct. 1307, 1315 n.2 (2021) [*Jones VI*] (internal quotations omitted) (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

242. *See* Graham v. Florida, 560 U.S. 48, 71-75 (2010).

243. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005); Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

244. *See* Steinberg & Scott, *supra* note 243, at 1012.

juveniles diminishes and usually ceases as identity development occurs.[245] However, until that happens, the risk of improperly sentencing a juvenile is great, thus recommending a categorical approach.[246]

While recognizing the quandary a culpability assessment presents, Peter Ash substantially reiterated the evaluation of Steinberg and Scott a decade later.[247] Written in light of *Graham*, Ash notes that neurocircuitry studies reveal similarities in adolescents and adults, whereas behavioral studies do not.[248] Ash also observes the Court's belief that less culpable offenders are more capable of rehabilitation.[249] Offering culpability factors that previewed those in *Miller*, Ash emphasizes the need for a more robust rehabilitation system to allow less culpable juveniles to mature into more than their crimes.[250] Indeed, social science research indicates that transient immaturity is a real phenomenon that militates against imposing a permanent sentence.[251]

Courts would benefit from following that lead, assessing transient immaturity rather than diagnosing permanent incorrigibility. An assessment of the transient immaturity of a juvenile offender provides a more confined measurement than the permanent assessment of psychopathy in an individual. Allowing defendants to present a transient immaturity defense would avoid stone-etched titles and allow for better-united precedents. Better still, it would approach the ideal of justice, creating a proportional relationship between the offender and the crime.

CONCLUSION

Barely fifteen years old, Brett Jones looked up from his half-eaten sandwich to see his grandfather attacking his relationship choices and then his very person. With the argument escalating, Jones impulsively grabbed a nearby knife and responded with violence, as he had been raised to do. The tragedy of that 2004 afternoon is only worsened by the Justice Kavanaugh-authored

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245. *See* Steinberg & Scott *supra,* note 243, at 1014.

246. *See id.* at 1016.

247. *See generally* Peter Ash, *But He Knew it was Wrong: Evaluating Adolescent Culpability*, J. AM. ACAD. PSYCH. L. 21 (2012).

248. *See id.* at 29.

249. *See id.* at 28.

250. *See id.* at 30.

251. *See* Steinberg & Scott, *supra* note 243, at 1017.

opinion, which circumvented stare decisis and limited relief for juveniles like Jones. Instead, the Court should have required sentencers to assess the transient immaturity of the juvenile and, thus, the juvenile offender's place within a constitutionally protected class. Such an on-the-record finding would promote consistency in juvenile sentencing and Supreme Court precedent. In the wake of *Jones*, juvenile offenders are left with an incoherent punishment regime: one that recognizes protections but refuses to make them uniformly available. Correctly interpreting precedent to prohibit life-without-parole sentences for transiently immature juvenile offenders offers courts a way forward and juveniles a path to justice.

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