

THE END OF “PERMANENTLY INCORRIGIBLE”: PUTTING
JONES V. MISSISSIPPI INTO CONTEXT

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ABSTRACT

This Case Comment argues that The Supreme Court of the United States decided the issues in *Jones v. Mississippi* correctly because the Court properly adhered to its retributionist foundation for sentencing juveniles which underlies the Court’s juvenile jurisprudence. But, present in is a tension between the Court’s earlier decided cases and *Jones*. To resolve that tension, this Case Comment asserts that lawmakers should entirely abolish life without parole sentences for juvenile defendants rather than reverting to what has developed into a flawed constitutional minimum in juvenile jurisprudence. An abolition on such sentences is consistent with developmental psychology and a corrective measure for misconceptions about juvenile development used to justify discriminatory ineffective juvenile sentencing regimes. By examining the evolution of the Court’s juvenile jurisprudence in perspective of developmental psychology, this Case Comment affirms the holding in *Jones* while arguing that state legislature should rely on developmental psychology to craft a legal system that provides all juveniles the opportunity to rehabilitation, without assuring their eventual release. Ultimately, this Case Comment makes a persuasive case for state legislature must move away from the almost undefinable standard of permanently incorrigible and toward eliminating life without parole sentences for all juveniles.

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INTRODUCTION

The Eighth Amendment bars cruel and unusual punishment.¹ Because defining “cruel and unusual” requires moral judgment, the Supreme Court looks beyond the original understanding of the phrase and incorporates evolving societal standards when advancing its jurisprudence.² The prohibition includes a constitutional minimum of proportionality in sentencing.³ Ensuring that only the most culpable of the convicted receive the harshest punishments is a crucial strand of the Court’s proportionality jurisprudence.⁴ To achieve that constitutional requirement, the Court, starting in 2002, began exempting members of inherently less-culpable offender classes from the death penalty, including non-homicide offenders⁵ and those with severe intellectual disabilities.⁶

Juveniles, long regarded as less blameworthy than adults,⁷ present unique difficulties in this proportionality analysis. To justify a categorical ban, all class members, no matter the circumstances, must share a characteristic that makes their conduct less blameworthy when compared to the same conduct committed by a non-class member—otherwise the exceptions will devolve into an unpredictable case-by-case proportionality analysis.⁸ Although age is an objective factor, like an offense classification

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

2. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

3. *Weems v. United States*, 217 U.S. 349, 367 (1910). In reviewing constitutional challenges to noncapital trial court sentences, appellate courts “apply[] the highly deferential ‘narrow proportionality’ analysis.” *Graham v. Florida*, 560 U.S. 48, 87 (2010) (Roberts, C.J., concurring) (citing *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)), unless the defendant falls within a categorically protected class, *see id.* at 88–89. The two-phase review initially places the reviewing court in a gatekeeper role as it performs a subjective comparison between “the gravity of the offense and the harshness of the penalty,” which accounts for the peculiar circumstances of the crime, the victim, and the perpetrator but allows only for rare cases of gross disproportionality to proceed further. *Solem v. Helm*, 462 U.S. 277, 290–97 (1983). However, “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham*, 560 U.S. at 71. The next phase objectively compares the challenged sentence against the average sentence imposed on criminals both inside and outside the trial court’s jurisdiction. *Id.* at 290–91. If the challenged sentence does not conform to either objective standard, it violates the Eighth Amendment.

4. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

5. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

6. *Atkins*, 536 U.S. at 319.

7. *See infra* notes 22–29 and accompanying text.

8. *See, e.g., Graham*, 560 U.S. at 88 (Roberts, C.J., concurring).

or an intellectual disability diagnosis, it is less indicative of offender culpability than either of those class indicators. While society recognizes that a seven-year-old differs mentally from a thirty-year-old, the meaningful difference in blameworthiness for wrongdoing by a seventeen-year-old versus wrongdoing by a twenty-year-old is less clear. Unlike the other exempted categories, juvenile immaturity is temporary. And the gradual process of moving out of the class is impossible to predict, detect, or follow to its precise moment of completion when examining an individual. Consequently, an individual juvenile-aged offender may not have the critical characteristics which would broadly entitle the class to lessened culpability.⁹

Despite these considerations, the Court has ruled that juveniles as a class do belong among these less culpable groups.¹⁰ Relying on advances in modeling the patterns of physical brain growth and development in juveniles and an increasingly sophisticated understanding of how these structural differences from adult brains manifest in cognition and behavior, the Court categorically exempted those under age eighteen from the death penalty.¹¹ The Court further protected juveniles, banning mandatory life-without-parole (“LWOP”) sentences¹² and discretionary LWOP sentences for non-homicide offenders.¹³ These restrictions on LWOP sentences, the harshest available for juveniles, mirror restrictions on the death sentence, the harshest available for adults. From a retributionist perspective,¹⁴ the

9. See *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).

10. *Id.* at 569.

11. *Id.* at 560–61. The Court recognizes that eighteen is an imprecise line but accepts it nonetheless because it is the age most commonly used to define the age of majority in the United States. *Id.* at 574. Additionally, the increased independence individuals receive when they turn eighteen diminish some of the social factors which justify the proportional protections for juveniles. See *infra* note 66 and accompanying text.

12. *Miller v. Alabama*, 567 U.S. 460, 475 (2012).

13. *Graham*, 560 U.S. at 68–69 (2010).

14. The Court recognizes four penological theories which underly sentencing regimes: retribution, deterrence, incapacitation, and rehabilitation. *E.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991). Retribution theory argues for sentencing in proportion to society’s consensus on the severity of the offending conduct. Charis E. Kubrin & Rebecca Tublitz, *How to Think About Criminal Justice Reform: Conceptual and Practical Considerations*, 47 AM. J. CRIM. JUST 1050, 1053. (2022). Incapacitation theory primarily considers the future threat the defendant poses to society, regardless of the crime’s severity. *Id.* Deterrence theory creates harsh punishments to internalize a crime’s societal

Court’s juvenile proportionality jurisprudence creates a parallel sentencing regime for juveniles, where the most punitive sentence constitutionally available for adults is not available for juveniles because the latter group is less deserving of punishment. Death sentences for adults become LWOP for juveniles, and LWOP sentences become life-with-parole (“LWP”) sentences. But a strictly retributionist justification for punishment is backward-looking: it considers the culpability of the defendant’s mind and actions at the time of the offense and does not consider either the future threat posed by the defendant nor the defendant’s rehabilitation prospects. However, throughout its recent pronouncements, the Court has repeatedly and consistently referred to the transience of juvenile immaturity as a crucial factor justifying categorical exclusions for juveniles,¹⁵ culminating in the guidance that the LWOP sentences should be reserved only for those juveniles determined “permanently incurable”—a forward-looking standard.¹⁶ If this theory underlies the Court’s treatment of juveniles, then juveniles should never receive either death or LWOP because both sentences deny juveniles the opportunity to demonstrate their bad behavior stemmed largely from their youth, not their deeper fixed character.

In *Jones v. Mississippi*, the Supreme Court articulated its latest position on juvenile culpability and the Eighth Amendment. The Supreme Court determined juveniles convicted of homicide could properly receive a LWOP sentence without any factual finding of “permanent incurability” as long as the sentencing court recognizes its discretion to issue a lesser sentence.¹⁷ The majority opinion faced accusations from the dissent of overruling recent precedent without proper justification and public outcry from sentencing reformers who had commended the Court’s previous two decades of sentencing restraints.¹⁸ The critics argued that optional factfinding either

harm back on the defendant and discourage others. *Id.* Rehabilitation theory takes into consideration the defendant’s likelihood of positively contributing to the community following the sentence if given the proper tools to recover. *Id.* at 1053–54. The theories are not mutually exclusive and multiple theories may work together to justify a sentencing regime. See *Harmelin*, 501 at 999–1000 (Kennedy, J., concurring).

15. See *infra* notes 63, 72, 82 and accompanying text.

16. *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016).

17. *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021).

18. E.g., Andrew Cohen, *Supreme Court: Let’s Make It Easier for Judges to Send Teenagers to Die in Prison*, BRENNAN CTR. FOR JUST. (Apr. 27, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-lets-make-it-easier-judges-send-teenagers-die-prison>

erased the “permanently incorrigible” standard by eliminating the procedure necessary for determining protected class membership or left it open to arbitrary and unequal application.¹⁹ The majority contended it had followed prior precedent because those cases never explicitly required fact-finding inquiries into incorrigibility.²⁰

The Court technically decided the issue in *Jones* correctly and implicitly confirmed the Court’s adherence to the retributionist parallel-sentencing model for juveniles—a result enabled by the unresolved tension between the Court’s earlier juvenile cases. Despite this accurate determination, state and federal lawmakers should go beyond the constitutional minimum and entirely abolish LWOP sentences for those under age eighteen as a matter of policy. Allowing all juvenile defendants the opportunity to reform is more consistent with the reality of developmental psychology and gives force to the full rationale underlying the Court’s original juvenile jurisprudence. The later shift in the Court’s rationale away from complete categorical protections for juveniles reflects the same misconceptions about juvenile development which justified misguided, discriminatory, counterproductive “tough-on-crime” juvenile sentencing reforms. Furthermore, several states have already abolished juvenile LWOP sentences and all states that have not done so already navigated a similar, more expansive change to juvenile sentencing when the Court barred LWOP sentences for juvenile nonhomicide offenders.

In Part I, this note will review the evolution of the Court’s juvenile jurisprudence against the backdrop of the conflict between society’s increasingly hostile views of juveniles and advances in developmental psychology. It will examine how this conflict influenced the Court’s own decision-making and explore recent developments in developmental psychology which may inform future policy decisions. In Part II, the note

[<https://perma.cc/YZK7-R8JX>] (discussing the Court’s retreat from progress in juvenile sentencing); see discussion *infra* note 112 (discussing *Jones* as signal of the Court’s willingness to overrule past precedent).

19. See, e.g., Cohen, *supra* note 18. The dissent in *Jones* argued discretion without factfinding in sentencing did not sufficiently satisfy the categorical restriction. See *Jones v. Mississippi*, 141 S. Ct. 1307, 1328 (2021) (Sotomayor, J., dissenting) (“Sentencing discretion is ‘necessary to separate those juveniles who may be sentenced to life without parole from those who may not,’ . . . but it is far from sufficient.”).

20. *Jones*, at 1317–18.

will justify the majority’s ruling in *Jones*. It will identify where and why the Court departed from its earlier view on juvenile punishment, explain why the Court and legislatures should rely on developmental psychology in policy determinations regarding juveniles despite the field’s potential for problematic application in other areas. Finally, it will lay out the basic framework for a system that provides all juveniles the opportunity to reform but not the guarantee of release.

I. HISTORY

A. Evolving Treatment of Juvenile Culpability in American Society

Long before the development of psychology as a formalized field of study,²¹ English society recognized children had “less than fully developed moral and cognitive capacities.”²² Even without a sophisticated understanding of the precise stages or mechanisms of juvenile brain development, the courts found these observable differences significant enough to diminish criminal culpability in juveniles. The common law developed the infancy defense to criminal liability: children under age seven never had sufficient capacity to support the mens rea required for intentional crimes, juveniles between seven and fourteen received a rebuttable presumption against intentional mens rea, and those over fourteen were presumed as culpable as any adult.²³ American courts adopted the same set of presumptions from English common law.²⁴ Infancy defense was a rare manifestation of the recognized differences

21. Most historians regard the opening of Wilhelm Wundt’s Institute for Experimental Psychology in 1879 as the beginning of psychology as a rigorous field of academic study. Saul McLeod, *Wilhelm Wundt*, SIMPLY PSYCH. (2008), <https://www.simplypsychology.org/wundt.html> [<https://perma.cc/4PWX-KUE3>].

22. *E.g.*, *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST. (last visited Oct. 21, 2021), <http://www.cjcj.org/education1/juvenile-justice-history.html> [<https://perma.cc/55C8-BP4B>]. As early as the 16th century, English educational reformers advocated for treating children differently from adults because of these differences. *Id.*

23. Karen A. Shiffan, Note, *Replacing the Infancy Doctrine Within the Context of Online Adhesion Contracts*, 34 WHITTIER L. REV. 141, 151 (2012) (summarizing Blackstone’s infancy presumptions, which developed in the mid-18th Century).

24. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (recognizing “the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7”).

between adult and juvenile culpability however. Once the prosecution rebutted a seven-year-old's presumption of infancy, the child went through the same trial process as any adult.²⁵ The child could receive any punishment available to adults, including death,²⁶ and stayed in the same prisons as adults.²⁷

As resources for correctional facilities and court systems became more widely available, juvenile courts and detention facilities separate from adult systems spread throughout the country, focusing primarily on rehabilitation.²⁸ Throughout the early twentieth century, legislatures and courts developed increased substantive and procedural protections for these systems, including making transfer to adult courts more difficult.²⁹

As violent crime rose significantly in the 1980s, the national opinion on juvenile justice shifted. The public feared that the growing prevalence of violent crime perpetrated by older juveniles foreshadowed decades of coming lawlessness. These fears manifested in the “super-predator”³⁰ theory—the belief that juveniles across America³¹ had grown impulsive, amoral, and uncontrollable, would commit brutally violent crimes with little

25. Before the turn of the twentieth century, criminal courts tried both youth and adults. CTR. ON JUV. & CRIM. JUST., *supra* note 22.

26. *Id.*

27. *Id.* (“In the late 18th and early 19th century, courts punished and confined youth in jails and penitentiaries. Since few other options existed, youth of all ages and genders were often indiscriminately confined with hardened adult criminals and the mentally ill in large overcrowded and decrepit institutions.”).

28. *Id.*

29. *Id.*

30. See discussion *infra* note 32. While the super-predator theory described and applied to perceptions of all juveniles, it was most often employed against Black children. Carroll Bogert and Lynell Hancock, *Analysis: How the Media Created a “Superpredator” Myth that Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020, 5:00 AM), <https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101> [<https://perma.cc/Z6D8-R6DK>]. The phrase itself is dehumanizing—portraying youths as animalistic and naturally inclined to seek out and harm more vulnerable members of society without a second thought or any remorse. *Id.*

31. Several studies examining criminal trends across several countries in Asia found no notable adolescent age peak in crimes even though both groups of children show the same pattern of brain development, suggesting a greater focus on pro-social behavior at the expense of individual autonomy in more collectivist cultures make juveniles less likely to act out. Aja Louise Murray et al., *Individual and Developmental Differences in Delinquency: Can They Be Explained by Adolescent Risk-taking Models?*, 62 DEV. REV. 100985 at 2 (2021).

remorse, and had no hope for rehabilitation.³² Politicians of both major political parties³³ sought to avoid this future and pushed for “tough on crime” legislation which created harsher criminal punishments and made transfers to adult court much easier.³⁴ These changes increased the number of juveniles sentenced to death and life-without-parole,³⁵ which necessarily judged the convicted unworthy of reentering society or incapable of reform.³⁶

32. John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), reprinted in WASH. EXAM’R (last visited Oct. 21, 2021) <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [https://perma.cc/CPJ5-RDVF]. DiLulio also expressed concerns about rising “wolf packs,” noting “a 1993 study found that juveniles committed about a third of all homicides against strangers, often murdering their victim in groups of two or more.” *Id.* Psychological studies, including some adopted by the courts, later demonstrated that juveniles more often commit crimes in groups partially because of their inability to respond effectively to peer pressure. See *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005); Murray et al., *supra* note 31 (“In particular, adolescents show a strong tendency to engage in co-offending (i.e., offending with peers) in preference to solo offending. This tendency to co-offend peaks around age 17 and declines in adulthood as offenders increasingly switch to offending alone.”) (citations omitted).

33. “During those days of high crime rates, when fear was widespread in both black and white communities, the superpredator sound bite went as viral as things could go in an era before social media. It was often uttered by politicians from both parties, including 1996 Republican presidential nominee Bob Dole.” James Alan Fox, Editorial, *No Superpredator Apology Necessary from Clinton: James Alan Fox*, USA TODAY (Feb. 29, 2016, 3:02 AM), <https://www.usatoday.com/story/opinion/2016/02/29/hillary-clinton-superpredator-ashley-williams-1990s-crime-policy-column/81077850/> [https://perma.cc/WYY5-WHAE] (arguing the national discourse centered on juvenile incarceration made intervention and rehabilitation policies untenable for any politician).

34. The Editorial Board, Editorial, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), <https://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html> [https://perma.cc/X5CE-PL8U] (“Most destructively, almost every state passed laws making it easier to prosecute juveniles as adults, by increasing the number of crimes or reducing the age that triggered adult prosecution—and in some cases eliminating the minimum age altogether.”).

35. “In 1990, for example, 2,234 children were convicted of murder and 2.9 percent sentenced to life without parole. By 2000, the conviction rate had dropped by nearly 55 percent (1,006), yet the percentage of children receiving LWOP sentences rose by 216 percent (to nine percent).” *United States: Thousands of Children Sentenced to Life Without Parole*, HUM. RTS. WATCH (Oct. 11, 2005), <https://www.hrw.org/news/2005/10/11/united-states-thousands-children-sentenced-life-without-parole#> [https://perma.cc/X3F2-FJQC]. “The rate [of juvenile death sentences] dropped some-what in the late 1980’s . . . In the 1990’s, however, the annual rate returned to a consistent 2-3 percent . . . despite the dramatic increase in juvenile arrests for murder that occurred between 1985 and 1995.” Lynn Cothorn, *Juveniles and the Death Penalty*, OFF. JUST. PROGRAMS, at 4 (2000).

36. See *Graham v. Florida*, 560 U.S. 48, 74 (2010) (“By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.”).

The super-predators never came. Less than a decade after the peak of the “tough on crime” movement, juvenile crime dropped so precipitously that major proponents of the super-predator theory admitted they got their predictions wrong.³⁷ Some commentators argue the reduced crime demonstrated the wisdom and success of targeting violent juvenile offenders, but others argue the drop in crime came too quickly and too drastically to be attributed solely to the new policies.³⁸ Moreover, both juvenile crime and the juvenile prison population dropped together³⁹—the total number of violent juvenile criminals decreased when the super-predator theory predicted a dramatic spike.⁴⁰ Whether attributable to a renewed focus on early intervention and rehabilitation, anti-crime legislation, some combination of the two, or other external factors,⁴¹ juvenile crime has continued falling and driven crime rates to record lows.⁴²

37. N.Y. TIMES, *supra* note 34 (“Of course, the superpredator predictions were completely unfounded, as Mr. DiLulio himself later admitted. ‘Thank God we were wrong,’ he said in 2001[.]”).

38. *E.g.*, John Marc Taylor, *Where Have All the Superpredators Gone?*, 11 J. PRISONERS ON PRISONS 19, 22–24 (2011).

39. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/U2CZ-TWMA>] (“The number of youth confined in juvenile facilities has dropped by over 60% since its peak in 2000, while the adult incarcerated population (which peaked later) has fallen just 10% since 2007. The number of youth held in adult prisons and jails has also dropped dramatically[.]”).

40. DiLulio, *supra* note 32. “Nationally, there are now about 40 million children under the age of 10, the largest number in decades. By simple math, in a decade today’s 4 to 7-year-olds will become 14 to 17-year-olds. By 2005, the number of males in this age group will have risen about 25 percent overall[.]” *Id.* DiLulio—and other criminologists pushing the “super-predator theory”—believed this new larger cohort would also be even more violent proportionally: “But [population is] only half the story. The other half begins with the less well-known but equally important and well-replicated finding that . . . each generation of crime-prone boys . . . has been about three times as dangerous as the one before it.” *Id.*

41. Jennifer L. Doleac, *New Evidence that Lead Exposure Increases Crime*, BROOKINGS (June 1, 2017), <https://www.brookings.edu/blog/up-front/2017/06/01/new-evidence-that-lead-exposure-increases-crime/> [<https://perma.cc/4TKB-ZK2M>] (citing the known negative effects of lead on adolescent brain development, noting recent studies finding strong correlations between lead exposure and later crime trends, and suggesting a causal link between the phasing-out of leaded gasoline and recent reduction of crime in America).

42. Jeffery A. Butts, *Youth Still Leading Violent Crime Drop: 1988-2018*, JOHN JAY RSCH. & EVALUATION CTR. (Nov. 6, 2019), <https://johnjayrec.nyc/2019/11/06/databits201901/> [<https://perma.cc/6K6W-6LXU>]. “Arrest rates for violent offenses reached 30-year lows in 2018[.]” *Id.* “[T]he national violent crime arrest rate declined 38 percent overall, but the steepest declines were observed among youth ages 10 to 14 (-53%) and 15 to 17 (-54%).” *Id.*

B. Removal of the Death Penalty from Certain Offender Classes

As legislatures exposed more juveniles to the adult criminal justice system, the Court faced challenges to the juvenile death penalty under the Eighth Amendment’s “evolving standards of decency” test.⁴³ Challengers argued the long-recognized differences in adult and juvenile culpability justified immunizing them from the death penalty because they could never be reliably regarded as the most culpable offenders.⁴⁴ The Court initially declined creating any categorical exclusions to the death penalty, preferring broad deference to national consensus⁴⁵ and asserting that at least some juveniles might have adult-level culpability.⁴⁶

The Court reversed course just years later and created the first categorical exclusion to the death penalty when it determined those with severe intellectual disabilities could not constitutionally receive the death penalty.⁴⁷ Thirteen years after the Court denied the categorical rule,⁴⁸ the national consensus had shifted considerably as several states ended the

43. *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

44. *See Stanford v. Kentucky*, 492 U.S. 361, 383 (1989) (Brennan, J., dissenting) (“In my view, that inquiry must in these cases go beyond age-based statutory classifications relating to matters other than capital punishment, and must also encompass what Justice Scalia calls, with evident but misplaced disdain, ‘ethicoscience’ evidence.”) (citations omitted).

45. *See Thompson v. Oklahoma*, 487 U.S. 815 (1989). In *Thompson*, the majority holding overturned William Thompson’s death sentence. *Id.* at 838, 848. The four-justice plurality would have established a categorical ban on the death penalty for anyone under age sixteen, citing reduced juvenile culpability. *Id.* at 835–38. The concurrence, however, decided on much narrower grounds of statutory construction and legislative intent. No state set its statutory minimum age for the death sentence below sixteen. *Id.* at 852 (concurring opinion). Oklahoma was one of several states with no minimum. *Id.* at 857. The concurrence refused to infer legislative authorization for the death penalty in this case given the uniformity against it. *Id.* at 857–58 (“I am prepared to conclude that . . . [those] below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age[.]”). The ultimate holding was vulnerable to future legislative enactments. *See id.* at 858–59 (“[T]he approach I take allows the ultimate moral issue at stake . . . to be addressed in the first instance by those best suited to so, the people’s elected representatives.”). Just one year later, the Court rejected reliance on developmental psychology to create categorical exclusions, reaffirming its deferential review: “[w]e have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society’s apparent skepticism.” *Stanford*, 492 U.S. at 378 (plurality opinion).

46. *Stanford*, 492 U.S. at 375 (plurality opinion) (“The application of this particularized system to the petitioners can be declared constitutionally inadequate only if there is a consensus . . . that 17 or 18 is the age before which no one can reasonably be held fully responsible.”).

47. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

48. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

death penalty for the group.⁴⁹ To establish a categorical constitutional principle outlawing the practice for the remaining states that still technically allowed it, the Court needed to determine that no theory of punishment justified imposing the death penalty against the group.⁵⁰ First the Court noted only the most culpable defendants should receive the death penalty.⁵¹ The Court then found those with intellectual disabilities could never be among the most culpable⁵² because they have a higher tendency to act on impulse rather than premeditation, a greater susceptibility to group pressure, and lessened judgment.⁵³ The Court considered a discretionary approach—mandating consideration of the disability as a mitigating factor—but found it constitutionally insufficient because of the trial defense difficulties common to the class and the risk of juries ignoring the mitigating evidence.⁵⁴

The Court then faced another challenge to the death penalty from a class of individuals whose special traits also arguably reduced their culpability: juveniles. Although the Court previously denied creating a categorical rule for juveniles just fifteen years earlier,⁵⁵ the Court reconsidered the issue in *Roper v. Simmons*.⁵⁶ After finding a national consensus against the juvenile death penalty⁵⁷ and determining that juveniles have less culpability than adults,⁵⁸ the majority agreed no theory of punishment justified the

49. *Atkins*, 536 U.S. at 314.

50. “Thus in cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” *Id.* at 313 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

51. *Atkins*, 536 U.S. at 319 (“Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death[.]”).

52. *Id.* at 319–20.

53. *Id.* at 320.

54. Specifically, the Court found that those with severe intellectual disabilities struggle to provide their defense attorneys all legally significant details, more often fall victim to coerced false confessions, and act in atypical ways before juries who consider such behavior evidence of remorselessness. *Id.* at 320–21. Furthermore, some prosecutors argued the permanence of severe intellectual disability in violent offenders presented an increased risk recidivism and an ongoing threat to the community, turning a mitigating factor into an aggravating factor. *Id.*

55. See discussion *supra* note 45.

56. *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

57. *Id.* at 564–65.

58. *Id.* at 569.

sentence.⁵⁹ Three factors led the Court to determine juveniles could never be among the most culpable defendants: immaturity and irresponsibility, susceptibility to outside pressure, and the transience of youth’s character.⁶⁰ The first two factors also appeared in *Atkins*⁶¹ and had sufficiently established that those with intellectual disabilities could not constitutionally receive the death penalty.⁶² But the Court continued its analysis further, noting “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁶³ The Court again considered but decided against a discretionary approach.⁶⁴ Like *Atkins*, the Court believed mere mandatory consideration of the mitigating factor constitutionally insufficient because of inflamed juries and unique difficulties in defending class members.⁶⁵ Rebutting the dissent’s argument that a discretionary rule would allow for juries to find and sentence the most culpable juvenile offenders, the Court cited new advances in juvenile psychology which provided strong evidence of uniform differences between adult and juvenile thinking.⁶⁶

59. *Id.* at 571 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)) (“The same conclusion follows from the lesser culpability of the juvenile.”).

60. *Id.* at 569–71.

61. *See Atkins*, 536 U.S. at 320.

62. *Id.* at 319–21.

63. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

64. *Id.*

65. *Id.* at 573.

66. *Id.* at 572–73. The Court acknowledged the dividing line between an eighteen-year-old and a nineteen-year-old is at the very least imperfect but drew the line nonetheless because “a line must be drawn.” *Id.* at 574. Some commentators have proposed recognizing a category of “emerging adults,” people aged between eighteen and twenty-five. Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1133–35 (2020). Members of this group have more personal autonomy within society and neurodevelopment than true minors but still fall within the recognized window of frontal lobe development, suggesting they have less culpability and greater reform prospects than older adults but not nearly to the degree of minors. Emily Graham, Note, *Emerging Adults in the Federal System: A Case for Implementing the Federal Youth Corrections Act*, 11 HARV. L. & POL’Y REV. 619, 623–24 (2017).

*C. Limitations on Juvenile LWOP Sentences**i. Graham v. Florida*

In *Graham v. Florida*, the Court continued expanding its categorical exclusion jurisprudence.⁶⁷ Following *Roper*, the Court decided in *Kennedy v. Louisiana* that only those convicted of homicide offenses could face the death penalty⁶⁸—the harshest punishment could only follow the worst crimes to fit the retribution theory of punishment.⁶⁹ Because *Roper* abolished the juvenile death penalty, LWOP was the harshest sentence available to juveniles. The Court determined the combination of *Roper* and *Kennedy* required reserving LWOP for the worst juvenile offenders; therefore, juveniles convicted of nonhomicide offenses could not receive a LWOP sentence.⁷⁰ The majority again chose to establish a categorical rule for the same reasons articulated in *Roper*.⁷¹ However, the majority also cited the importance of providing “all juvenile nonhomicide offenders a chance to demonstrate maturity and reform” as a key reason for establishing a categorical bar.⁷² The dissent in *Graham* questioned the majority’s proclaimed adherence to development psychology: if no juvenile should receive a LWOP sentence because all possess the possibility of reform, then even a juvenile homicide offender could not receive a LWOP sentence.⁷³ The majority refused to go that far.

ii. Miller v. Alabama

The *Graham* majority faced the dissent’s challenge when Evan Miller appealed the LWOP sentence he received at age fourteen for murder in the

67. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

68. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

69. *Id.* at 442. When considering whether a sentence is unconstitutionally disproportionate, the Court most carefully evaluates the theory of retribution because it is the most likely theory to justify a harsh punishment. *Id.* at 420.

70. *Graham*, 560 U.S. at 68–69.

71. *Id.* at 76–79.

72. *Id.* at 79.

73. *Id.* at 119 (Thomas, J., dissenting) (“[T]he Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it . . . permit[s] life-without-parole sentences for juveniles who commit homicides.”).

course of arson.⁷⁴ The case presented an additional complication: Alabama law imposed a mandatory LWOP sentence on Miller⁷⁵ while *Atkins*, *Roper*, and *Graham* only addressed discretionary sentences. This distinction raised two potential issues for the Court: the surface issue of mandatory LWOP sentences for juveniles and the broader issue of whether a juvenile could ever constitutionally receive a LWOP sentence.⁷⁶ The Court relied on the intersection between its capital-sentencing-procedure jurisprudence and *Graham* to find mandatory juvenile LWOP sentences unconstitutional.⁷⁷ *Graham* previously analogized the adult death penalty to the juvenile LWOP sentence.⁷⁸ Because individualized fact-finding procedures in capital cases made mandatory death sentences unconstitutional,⁷⁹ the Eighth Amendment also barred the mandatory imposition of juvenile LWOP sentences.⁸⁰ Therefore, the Court required that trial courts “follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty[,]” such as an LWOP sentence.⁸¹ But the Court stopped short of addressing the challenge from the *Graham* dissent. Despite recognizing “none of what [*Graham*] said about children . . . is crime-specific” and that “*Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile,”⁸² the majority refused to “categorically bar a penalty for a class of offenders or type of crime—as, for example, [it] did in *Roper* or *Graham*.”⁸³ Instead of abolishing the juvenile LWOP sentence to guarantee every juvenile a meaningful chance at release, the Court kept the sentence in place for the most culpable juvenile

74. *Miller v. Alabama*, 567 U.S. 460, 468–69 (2012).

75. *Id.* at 469.

76. *Id.* at 479.

77. *Id.* at 470. “And the bar we adopted mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals.” *Id.* at 475 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

78. *Id.* at 470.

79. *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (“In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant[.]”). The Court further noted youth is an important individual mitigating circumstance that must be considered before imposing a death sentence. *Id.* at 476 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

80. *Miller*, 567 U.S. at 475.

81. *Id.* at 483.

82. *Id.* at 473.

83. *Id.* at 483.

defendants,⁸⁴ bringing it in line with the procedural protections for capital cases. But the Court did not rule out the possibility of expanding that ban in the future: it declined the broader ban explicitly because the narrower ground sufficed to resolve Miller's appeal.⁸⁵

iii. *Montgomery v. Louisiana*

Following *Miller*, some states denied juveniles sentenced to mandatory LWOP an automatic individualized sentencing rehearing.⁸⁶ Henry Montgomery, serving a LWOP sentence for a murder he committed at seventeen, sued for his right to have an individualized hearing and argued *Miller* should apply retroactively, guaranteeing a rehearing to any juvenile sentenced mandatorily to LWOP in violation of *Miller*.⁸⁷ The case turned on whether *Miller* created a substantive or procedural protection.⁸⁸ Under the Court's jurisprudence, only substantive and watershed procedural changes to interpretations of criminal constitutional law create a right of retroactive application.⁸⁹ The Court previously held its capital sentencing jurisprudence provided only procedural protections and uniformly denied retroactive application in those cases.⁹⁰ Even though the Court relied on that line of cases in *Miller*,⁹¹ the *Montgomery* majority instead found in favor of Montgomery and held *Miller* must apply retroactively because it announced a new substantive rule.⁹² The Court clarified that substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose" while "procedural rules, in contrast, are designed to enhance the accuracy of

84. *Id.* at 479-80. Rather than "foreclose a sentencer's ability" to impose a juvenile LWOP sentence, the Court merely required trial courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

85. *Id.* at 479.

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

87. *Id.* at 194-95.

88. *Id.* at 206.

89. *Id.* at 197-98.

90. *Id.* at 226 (Scalia, J., dissenting) (citing *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (denying retroactive application of constitutional requirement for courts to weigh all "relevant mitigating factors" before imposing a death sentence)).

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

92. *Montgomery*, 577 U.S. at 213.

conviction or sentence by regulating ‘the *manner of determining* the defendant’s culpability.’”⁹³ Although the *Miller* majority denied making a categorical rule,⁹⁴ the *Montgomery* majority determined *Miller* had actually placed one group beyond the reach of juvenile LWOP sentences: “juvenile offenders whose crimes reflect the transient immaturity of youth.”⁹⁵ The majority did not shy away from its apparent contradiction: “*Miller*, it is true, 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.”⁹⁶ Beyond merely requiring consideration of the mitigating circumstances of youth, the Court required the process referenced in *Miller* to be sufficient to give effect to an underlying substantive, categorical ban. *Roper*, *Graham*, and *Miller* could each be read as the Court attempting to create a dual-system of punishment for juveniles and adults: eliminating the death penalty and making LWOP the juvenile death penalty equivalent. But *Montgomery* potentially signaled something different which would provide broader protection and hewed more closely to *Graham* and *Roper*’s stated belief of increased chance for juvenile reform.⁹⁷ The decision proved difficult to implement at the trial court level.⁹⁸

D. Jones v. Mississippi and its Fallout

After *Montgomery* announced the categorical ban, Brett Jones, sentenced to life in prison at age fifteen for murdering his grandfather, challenged his resentencing under *Montgomery*.⁹⁹ The judge in Jones’s

93. *Id.* at 201.

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

95. *Montgomery*, 577 U.S. at 209.

96. *Id.*

97. Such reform would be meaningless for someone sentenced to live in jail permanently with no hope of ever regaining their freedom as a reward for their reform. See *Graham v. Florida*, 560 U.S. 48, 79 (2010).

98. See David Roper, Note, *Lifers After Montgomery: More SCOTUS Guidance Necessary to Protect the Eighth Amendment Rights of Juveniles*, 79 OHIO ST. L.J. 991, 997–1001 (2018) (noting the uncertainty among states on how to establish a process and collecting the resulting disparities in sentencing procedures between various jurisdictions). The note also details the limitations of trial court determinations on juvenile culpability in compliance with *Miller* because of political pressure, racial bias, and backwards-looking judgment criteria. *Id.* at 1012–14.

99. *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021).

hearing did not claim to find him permanently incorrigible on the record.¹⁰⁰ Instead, he merely acknowledged he had the discretion to issue a lighter sentence—demonstrating Jones’s LWOP sentence was not mandatory—but nonetheless found the original sentence appropriate.¹⁰¹ Jones insisted that *Montgomery*’s characterization of *Miller* required a “separate factual finding of permanent incorrigibility”¹⁰² just as *Atkins*, *Roper*, and *Graham* required a finding that the defendant did not fall within a protected class. The Court, now with three new justices since *Montgomery*, found against Jones and held *Montgomery* did not require any formal fact-finding.¹⁰³ The majority first looked back to *Miller* and identified two differences between it and the previous cases: first, that *Miller* explicitly declined to announce a categorical ban,¹⁰⁴ second, that *Miller* did not identify “permanent incorrigibility” as an eligibility criterion or a perform an analysis of the national consensus on the legality of LWOP for reformable children—a necessary component of the Court’s rationale in *Atkins*, *Roper*, and *Graham*.¹⁰⁵ Further contrasting *Miller* from the group, the majority noted “permanent incorrigibility” is a much more elusive standard than age, a clinical diagnosis, or nonhomicide offender status.¹⁰⁶ The majority then analogized *Miller*’s substantive ban to the mandatory consideration of youth as a mitigating factor in death-penalty sentencing and found that “the Court ha[d] never required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances.”¹⁰⁷ To bolster their argument, the majority quoted *Montgomery* emphatically: “a finding of fact regarding a child’s incorrigibility is not required.”¹⁰⁸ Because *Montgomery* only mandated a hearing that considered youth and other mitigating factors, the majority found that Jones’s rehearing met the constitutional minimum.¹⁰⁹ Effectively, trial judges could now make an implicit finding of

100. *See id.* at 1313.

101. *Id.*

102. *Id.* at 1317.

103. *Id.* at 1313.

104. *Id.* at 1316.

105. *Id.* at 1315.

106. *Id.*

107. *Id.* at 1320 (emphasis in original).

108. *Id.* at 1317 (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)).

109. *Id.* at 1317–18 (citations omitted). The majority also cited *Miller*’s reliance on capital sentencing procedural protections, which did not impose factfinding requirements, and found *Miller*

incurability without any explicit or implicit justification when reaffirming mandatory juvenile LWOP sentences or issuing new ones. The dissent began by flatly accusing the majority of “gut[ting] *Miller v. Alabama* and *Montgomery v. Louisiana*,” and “attempt[ing] to circumvent *stare decisis* principles” by claiming fidelity to *Miller* and *Montgomery*.¹¹⁰ The dissent would have clarified that *Montgomery* did not require formal fact-finding because it left exact procedures to the discretion of the states but still required the procedure made by the states to protect the substantive protections put in place by *Miller*.¹¹¹ Commentators outside the court expressed concern regarding the majority’s apparent disrespect for precedent, arguing not only that *Jones* was improperly decided but also that it overruled *Montgomery* and *Miller* in substance without providing proper justification—forewarning that the Court’s new majority will overturn other contentious precedents.¹¹²

cited to *Graham* and *Roper* solely for the proposition that youth matters in sentencing. *Id.* at 1316. The dissent would later counter that the sentencing cases already demonstrated youth mattered in sentencing, rendering further citation to *Roper* and *Graham* redundant. *Id.* at 1332 (Sotomayor, J., dissenting).

110. *Id.* at 1328 (Sotomayor, J., dissenting).

111. *Id.* at 1331. Mere discretion and consideration of a juvenile’s youthful characteristics did not suffice—some finding of permanent corruption is necessary. *Id.*

112. Erwin Chemerinsky, *Chemerinsky: Precedent Seems to Matter Little in the Roberts Court*, ABA J. (June 3, 2021, 11:37 AM), <https://www.abajournal.com/columns/article/chemerinsky-precedent-seems-to-matter-little-in-the-roberts-court> [<https://perma.cc/RKU6-Q3JV>]. Chemerinsky noted the Court’s sudden shift in its juvenile sentencing jurisprudence coincided with the departures of Justice Kennedy and Justice Ginsburg, who each joined every five-justice majority in *Roper*, *Graham*, *Miller*, and *Montgomery* and the arrival of their successors, Justice Kavanaugh and Justice Barret, who joined the dissenters from *Miller* and *Montgomery* in the majority opinion on *Jones*. *Id.* The same 6-3 majority has also already explicitly overruled longer-established precedent. *Id.* Chemerinsky collected several recent 5-4 decisions (all with the late Justice Ginsburg dissenting prior to Justice Barret’s arrival) demonstrating the Court’s willingness to overrule long-standing precedent. When considering this recent string of decisions, Chemerinsky concluded “[t]he court’s choice to hear *Dobbs v. Jackson Women’s Health Organization* is potentially momentous” for *Roe v. Wade* and women’s access to abortion. *Id.*

The Supreme Court did in fact overrule *Roe* in *Dobbs*. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022). The majority, however, did not include *Jones* in its lengthy citation of cases where the Court previously overruled prior precedent. *Id.* at 2263, n. 48. The majority did not shy away from citing cases they had decided themselves for this proposition. *Id.* at 2264 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–16 (2020)). Furthermore, the Court explicitly overruled *Roe* after engaging in the five-factor *stare decisis* analysis. *Id.* at 2278. The Court did neither in *Jones*. Chemerinsky’s suspicions proved correct regarding *Roe*, but the Court evidently did not consider *Jones* part of its anti-*stare decisis* canon.

E. Additional Developmental Neuroscience Supporting the Graham Majority

Further research in neuroscience has reaffirmed and sharpened the conclusions grounding the Court's original rationale for recognizing diminished juvenile capacity. In *Graham*, several organizations presented their evidence supporting diminished juvenile capacity.¹¹³ The evidence relied on two different developmental processes: myelination and pruning. Before sophisticated neuroimaging became available in the 1990s, scientists understood the basic model of brain functioning.¹¹⁴ First, sensory organs like the eyes, ears, and nerves bring information into certain parts of the brain.¹¹⁵ Information is then transmitted to other parts of the brain which control outputs: thoughts and actions.¹¹⁶ Neurons provide the connections between these different parts of the brain by transmitting information through electric signals.¹¹⁷ Under the old model, the brain initially overloads itself with neurons in the beginning—more than it would ever need—and develops by gradually “pruning” less used connections.¹¹⁸ After *Stanford*, scientists learned the brain does not begin with all its connections.¹¹⁹ Instead, pruning occurs in stages following sudden growth in neurons.¹²⁰ The last stage begins in late adolescence and continues through early adulthood, refining connections in the frontal cortex which controls planning, judgment, and consequence evaluation.¹²¹ By eliminating

113. Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 7412) [hereinafter “AMA Brief”]; Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America As Amici Curiae Supporting Petitions *Graham v. Florida*, 560 U.S. 48 (2010) (No. 7412) [hereinafter “APA Brief”].

114. AMA Brief, *supra* note 113, at 19–20.

115. Adam John Privitera, *Sensation and Perception*, NOBA (2023), <https://nobaproject.com/modules/sensation-and-perception#authors> [https://perma.cc/G525-BGCV].

116. *Id.* (“Physical energy such as light or a sound wave is converted into a form of energy the brain can understand: electrical stimulation.”).

117. APA Brief, *supra* note 113, at 23–26.

118. AMA Brief, *supra* note 113, at 19–20.

119. *Id.* at 20–21.

120. *Id.* at 20.

121. These functions are distinct from information processing and logical reasoning. APA Brief, *supra* note 113, at 12–13. For example, most people reach the peak of their ability to solve math

inefficient neural pathing through pruning, the brain’s transfer of information through electrical impulses becomes more efficient. Myelination further improves on this efficiency by coating neurons in fatty insulating tissues which helps the electricity travel along the neurons’ axons.¹²² But these electric impulses require energy to travel across the brain.¹²³ When energy is insufficient—from inefficient pathing in an underdeveloped brain—the brain will rely on the quick thinking of the limbic system instead of more rational, controlled thought-processing.¹²⁴ The amygdala, part of the emotion-driven limbic system, has been shown to be a dramatically more impactful driver of decision-making in juveniles than adults.¹²⁵

Time since *Graham* has aided psychologists in two ways: allowing for more within-person longitudinal behavioral studies and increasingly targeted neuroimaging analysis—beyond relying on general principles. Developmental psychologists have found, for instance, some evidence that impulse control, one of the key *Roper* and *Graham* factors, develops more quickly than originally thought—reaching its peak around age fifteen instead of around age eighteen.¹²⁶ Another study evaluated how certain

problems or analyze a text by the end of high school, but they are nowhere near their peak ability to process their emotions or fully think through the consequences of their actions. *Id.* at 14–15.

122. *Id.* at 25–26.

123. Nikhil Swaminathan, *Why Does the Brain Need So Much Power*, SCI. AM. (Apr, 29, 2008), <https://www.scientificamerican.com/article/why-does-the-brain-need-s/> [<https://perma.cc/XR8A-6WD7>] (“A new study in Proceedings of the National Academy of Sciences USA indicates that two thirds of the brain’s energy budget is used to help neurons or nerve cells “fire” or send signals.”).

124. Alexandra Sifferlin, *Why Teenage Brains Are So Hard to Understand*, TIME (Sept. 8, 2017, 12:00 PM), <https://time.com/4929170/inside-teen-teenage-brain/> [<https://perma.cc/35X5-CJ62>] (“It’s not that teens don’t have frontal-lobe capabilities but rather that their signals are not getting to the back of the brain fast enough to regulate their emotions.”).

125. Valerie F. Reyna, *Brain Activation Covaries with Reported Criminal Behaviors When Making Risky Choices: A Fuzzy-Trace Theory Approach*, 147 J. EXPERIMENTAL PSYCH.: GEN. 1094, 1103–05 (2018).

126. Whitney D. Fosco et al., *The Development of Inhibitory Control in Adolescence and the Prospective Relations with Delinquency*, 76 J. ADOLESCENCE 37, 42–43 (2019). Previous studies only examine different cross-sections on juveniles (e.g. the average twelve-year-old within a sample versus the average fifteen-year-old within a sample) while this study used a longitudinal approach to evaluate growth (i.e. comparing the same juvenile at age eleven and fifteen by conducting the same test four years later). *Id.* at 43. The study also found significant differences between parent-reported data on their child’s behavior and task-based data of the child. *Id.* On average, parents reported essentially no changes in their child’s impulse control between ages eleven and fifteen while the more objective test

personality traits which tend to predict anti-social behavior progress in youth.¹²⁷ Unlike previous studies, which found these traits consistent and low for most adolescents, this longitudinal study examined a subgroup of adolescent offenders and found that the problematic traits—in the sample examined—stayed relatively consistent from ages thirteen until age sixteen before declining at progressively higher rates.¹²⁸ The resulting model predicted the greatest decreases from ages eighteen to twenty but found no statistically significant difference between offending youths and the general control population.¹²⁹

Despite the Court's past acceptance and reliance on neuroscience, the normative question of what role it should take in criminal law—and the legal field at large—is far from settled.¹³⁰ Opponents of expanding the use of psychology argue reliance on psychology and neuroimaging creates several problems: it provides only general trends—which cannot be imposed on the individual,¹³¹ takes factfinding out of the hands of the

found significant progress. *Id.* at 44. This result demonstrates one potential hurdle to evaluating juvenile maturity—constant monitoring tends to mask the appearance of real progress.

127. James V. Ray et al., *Estimating and Predicting the Course of Callous-Unemotional Traits in First-Time Adolescent Offenders*, 55 DEV. PSYCH. 1709, 1709 (2019). These traits are “[c]allous-unemotional (CU) traits [which] include a lack of empathy and guilt, lack of concern over performance in important activities, and shallow or superficial emotions.” *Id.* “Elevated levels of these traits designate a particularly severe subgroup of antisocial youth” and form the basis of clinically diagnosable Conduct Disorder—a juvenile precursor to the more severe adult psychopathy diagnosis. *Id.*

128. Most studies looked at a general population of adolescents and found low but stable CU trait levels. *Id.* at 1710.

129. *Id.* at 1716. This result may come as a surprise to Graham's judge—and a larger group who believe repeated juvenile offenses demonstrate a lack of respect for the justice system and a future propensity to commit crimes that will escalate in severity—who could not understand why Graham threw his life away at age seventeen after receiving his first second-chance at sixteen and cited Graham's continuing offenses as a primary basis for his decision to impose a LWOP-sentence instead of the five-year sentence suggested by the Florida Department of Corrections or the prosecutor-requested forty-five year sentence. *Graham v. Florida*, 560 U.S. 48, 56 (2012).

130. See, e.g., Bernice B. Donald, *On the Brain: Neuroscience and Its Implications for the Criminal Justice System*, 30 CRIM. JUST. 1, 46 (2015) (noting the importance of critically evaluating the implications of neuroscience in the legal field as it grows more sophisticated, far-reaching, and scientifically accepted). Judge Donald of the Sixth Circuit dedicated a CLE program focusing on neuroscience to address its increased prevalence in criminal cases and potential proliferation in civil cases. *Id.* at 48.

131. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 146 (2009). Not only do juveniles have differences in brain structure within the same group—representing different rates and forms of development—but also the exact same

factfinder,¹³² and presents potential for problematic application.¹³³ Supporters respond that procedural protections and legal standards of proof can prevent overbroad application: brain imaging cannot show a guilty mind or provide evidence to support a conclusion regarding a juvenile’s brain development beyond a reasonable doubt. But it can always place the extent of juvenile’s culpability in some reasonable doubt by raising the possibility that a juvenile is not acting with the same intention as a fully developed adult. The common law already contains both the insanity defense and the infancy defense which provide a complete defense against criminal liability no matter the guilt of a party; neuroscience may just provide a more scientific justification for an already widely accepted doctrine.¹³⁴

II. ANALYSIS & PROPOSAL

A. The Majority Decided Jones Correctly Given the Prior Precedent.

The majority decision in *Jones* is consistent with *Miller* and *Montgomery* and did not overrule either case. As the majority states in *Jones*, *Miller* did not require any factfinding process on the issue of incorrigibility.¹³⁵ Even accepting *Montgomery*’s conclusion that *Miller*

neural activation might not represent the same thoughts, actions, or intent in different individuals. *Id.* at 148–50.

132. *Id.* at 136–40.

133. *Id.* at 157–58 (noting the potential for discriminatory application of laws if neuroscience found chemical or structural differences between age groups, sexes, or some other identifying class which justified a finding of differences in capacity). The same neuroscience could also be used as justification by state legislations to enact discriminatory legislation if not properly guarded. *Id.* at 158–59. The author also recognizes the potential harm of ignoring advances in neuroscience completely, citing the damage caused by the super-predator theory—which developmental neuroscience discredited even as it guided government policy decisions and imbedded itself firmly in the social consciousness. *Id.* at 101–03.

134. See Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 506–07 (2009). “While these age lines predated the field of development psychology . . . , they reflected lawmakers’ rough attempt to capture precisely the same information that social scientists recently set out to study.” *Id.* at 507. Alternatively, the mere fact a juvenile has more difficulty planning ahead or operates more emotionally than fully developed adults does not lessen the negative impact of anti-social behavior; the careful balance of moral and policy considerations surrounding the question of how to treat juvenile offenders in the criminal justice might be a decision that should be made by the legislatures instead of scientists engaged in an ever-evolving field of discovery. *Id.* at 510.

135. *Jones v. Mississippi*, 141 S. Ct. 1307, 1317, 1320 (2021).

created a substantive ban placing all juveniles except the permanently incorrigible beyond the reach of a LWOP sentence for every case, the *Montgomery* majority also expressly found that no specific factfinding inquiry into incorrigibility was necessary.¹³⁶ The original holding of *Miller* only answered the question of whether the courts could impose a mandatory LWOP sentence on juveniles.¹³⁷ *Miller* answered no because that would be akin to issuing mandatory death penalties for adults, an unconstitutional practice.¹³⁸ In *Montgomery*, the Court required only some sort of process to bring effect to this substantive ban: it did not establish that the finding itself or the basis for the finding had to be made on the record. Although a factual finding on the record would make the process more transparent and reviewable, in theory an implicit finding of incorrigibility would provide the same protection as an explicit finding because they would be based on the same justification. Additionally, a skeptical appeals court could always request remand with on-the-record findings if it doubted the trial court's unstated process. Therefore, an on-the-record finding of class membership is not compelled.

Alternatively, the *Jones* majority could have logically overruled *Montgomery* as inconsistent with *Miller*. *Montgomery* was not a case which could have announced a new substantive ban if *Miller* did not create one. It could only determine whether *Miller*, taken as decided, announced a substantive or procedural change to criminal adjudication.¹³⁹ *Miller* disclaimed any categorical ban.¹⁴⁰ Additionally, the authorities *Miller* relied on do not support a finding of a categorical ban. *Miller* relied on the confluence of *Graham* and the Court's mandate of individualized hearings in capital cases.¹⁴¹ The *Miller* majority did not cite to *Graham* and *Roper* for the purpose of creating a substantive, categorical ban but rather to illustrate the authority necessary to justify applying the procedures of adult capital sentencing to juvenile LWOP sentencing. Without citing *Graham*,

136. See *supra* note 111 and accompanying text.

137. *Miller v. Alabama*, 567 U.S. 460, 469, 479 (2012).

138. *Id.* at 470.

139. See *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016) ("This leads to the question whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive.").

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

141. *Id.* at 470.

the *Miller* majority would only have its death-sentence jurisprudence, which would have been inapplicable because Miller did not face a death sentence. In *Miller*, *Graham* did more than stand for the proposition that youthfulness matters in sentencing.¹⁴² If the Court instead wanted to create a substantive ban, it could have relied solely on *Graham* without citing the death sentence cases because *Graham* alone provides sufficient rationale to render all irrevocable punishments invalid against juveniles. The operative prohibition on mandatory sentencing in *Miller* is therefore based on the procedural law of *Eddings*, not the substantive law of *Graham*. *Jones* overruling *Montgomery* would have been more faithful to *Miller* than the alternative of requiring an on-the-record finding of permanent incorrigibility.

Beyond these doctrinal considerations, a contrary decision in *Jones* would have created an unworkable process for the lower courts as a practical matter. The categorical ban envisioned by the dissent would require trial judges to determine their juvenile defendants permanently incorrigible before sentencing them to LWOP. But the dissent provided little guidance on the specific facts or factors which should support a conclusion of “permanent incorrigibility” or any procedural requirements in making the determination.¹⁴³ A prospective evaluation of the juvenile’s capacity to reform would place the sentencing judge in an impossible position because even trained developmental psychologists cannot make that determination accurately; the Court acknowledged that fact in *Roper* and *Graham*.¹⁴⁴ Alternatively, a test based on the severity of the offense—judging the defendant’s capacity to reform from a retrospective analysis of the underlying criminal conduct—both leaves juveniles at the mercy of the sentencing judge’s discretion and fails to acknowledge that past actions of juveniles are poor indicators of future criminality. Concerns about the capacity of judges and juries to remain unaffected by the heinous facts of a

142. *Contra Jones v. Mississippi*, 141 S. Ct. 1307, 1317–18 (2021).

143. *Supra* note 98 and accompanying text. The dissent submits *Miller* did not require formal factfinding procedures original to the states “procedural flexibility” to adopt “different approaches to *Miller*’s inquiry.” *Jones v. Mississippi* 141 S. Ct. 1307, 1331 (2021) (Sotomayor, J., dissenting). But procedural flexibility does not address how factfinder should determine whether a juvenile defendant is “permanently incorrigible” in substance.

144. *Roper v. Simmons*, 543 U.S. 551, 573 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting the same passage from *Roper*).

case and perform a sober analysis of the juvenile defendant's mitigating characteristics compelled the Court to create complete categorical bans in *Roper* and *Graham* to prevent disproportionate punishments.¹⁴⁵

Even if the *Jones* majority ruled the other way, the trial courts would either flail around with an impossible criterion or make summary factual judgments regarding the juvenile's incorrigibility, leaving the current state of the juvenile justice system largely unchanged. While the guidance of a substantive ban with a factfinding component and the caution in *Montgomery's* dicta that the Court expected juvenile LWOP sentences to be rare may have lowered the number juvenile LWOP sentences by changing the perceptions of sentencing judges, those safeguards would create only weak barriers. The judge in *Graham's* case, for instance, believed *Graham* incorrigible at age seventeen because of his repeated offenses and because he "threw away" the second chance he received from his prior lenient sentence.¹⁴⁶ That decision provided some process and factfinding for an incorrigibility judgment, but the rationale supporting it almost certainly did not put *Graham* among the most culpable juveniles—*Graham* did not physically harm anyone himself and his decision to "throw his life away" came at an age where he likely did not have the judgment capacity necessary to fully appreciate the weight of the consequences. If *Graham's* judge found enough support in his actions to render an irrevocable character judgment, *Jones's* judge almost certainly could have too: *Jones* killed his grandfather, a crime more worthy of a severe character judgment and punishment. Merely asking the judge to formally announce a finding of incorrigibility with some factual justification would fit the Court's normal procedure for satisfying substantive criteria and facially give effect to *Miller* but likely would not have prevented LWOP sentences for either *Graham* or *Jones*. Furthermore, the appeals court reviewing such a determination would have little guidance on the issue to hold the trial court judge accountable, forcing it to either adopt a highly deferential standard and let the determination stand or perform its own in-depth analysis second-guessing the trial court.

The dissent does correctly identify that *Jones* represents a shift away from the Court's past precedents. But that shift ended with *Jones*. It began

145. *Roper*, 543 U.S. at 72-73; *Graham*, 560 U.S. at 76-79.

146. *Supra* note 129.

with *Miller*. Prior to the *Miller* line, the Court emphasized the importance of the juvenile capacity for reform when making categorical protections under the Eighth Amendment.¹⁴⁷ When the Court began creating categorical group exceptions to punishments, it relied exclusively on backwards-looking rationales. The class in *Atkins* received categorical protection not because of the possibility they would behave differently in the future but because the Court understood their actions were more likely to be motivated by outside influence, rendering their bad conduct inherently less blameworthy when weighing a proper punishment.¹⁴⁸ In fact, the Court noted the class’s characteristic allowed prosecutors to make credible claims to juries that the defendants would continue behaving the same way because of the permanence of their mental state.¹⁴⁹ The class in *Kennedy* committed crimes which did not amount to the most culpable conduct, so they could not receive the worst punishment.¹⁵⁰ The Court did not consider whether the class was inherently more or less likely to commit future crimes or to reform than other convicted criminals.

The Court shifted its analysis in *Roper*. There, the Court acknowledged that juveniles face considerations similar to the *Atkins* factors, which would have justified categorical protections without additional reasoning.¹⁵¹ But the Court also cited the temporary nature of youth’s judgment impairment as a key factor beyond the *Atkins* factors which justified the categorical protections for the class. If the Court had considered this transience factor legally insignificant, it would not have cited it in either *Roper* or *Graham*.

In *Miller*, the Court further noted that nothing about what *Graham* said about children was crime-specific,¹⁵² establishing that the rationale supporting *Graham*’s requirement of a meaningful chance of release could also apply to homicide offenders. When it came time for the Court to decide *Miller*, the Court could have highlighted this key difference separating juveniles from general nonhomicide offenders and those with intellectual disabilities. After establishing in *Graham* that LWOP sentences could only feasibly apply to juveniles under a retribution theory of punishment, the

147. See *Roper*, 534 U.S. at 573; see also *Graham*, 560 U.S. at 68.

148. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

149. *Id.* at 320-21.

150. See *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008).

151. Compare *Atkins*, 536 U.S. at 320-21, with *Roper*, 534 U.S. at 569-71 (2005).

152. *Miller v. Alabama*, 567 U.S. 460, 473 (2012).

Court could have determined that only adult culpability is severe enough to merit an irrevocable character determination given the *Graham* considerations. Since determining which juveniles act with adult culpability is impossible, the Court would have necessarily imposed a categorical ban on all juvenile LWOP sentences. This reasoning would have given full effect to all of the legally significant factors articulated in *Roper* and *Graham*. In order to demonstrate a national consensus against juvenile LWOP, even in homicide cases, the Court could have noted the majority of jurisdictions which permit juvenile LWOP sentences do so without explicit statutory authorization and rely on charging, trying, and sentencing juvenile as adults to impose LWOP sentences.¹⁵³ The Court previously considered this style of regime evidence of national consensus against a given punishment,¹⁵⁴ which would authorize the Court to make a prohibition under the Eighth Amendment. Instead, the *Miller* Court determined reduced culpability merely makes juveniles not among the worst offenders generally, preventing them from receiving the worst punishment which would be available normally. In doing so, the Court committed itself to creating a parallel system of sentencing where adult procedural and substantive protections on death sentences also apply to juvenile LWOP sentences. The tension between *Miller* and *Montgomery*, one decision claiming only to provide procedure parallel to adult sentencing and the other claiming *Miller* expanded a substantive restriction, reflects a Court attempting to steer itself back from the parallel-system track to the meaningful-release track suggested in *Graham*. But *Jones* firmly established the parallel-system's rationale as the Court's guiding approach—consistent with past precedents but short of accounting for all legally significant considerations.

153. Modern sentencing reform trends only strengthen this point; twenty-seven states and Washington D.C have explicitly eliminated juvenile LWOP sentences, and an additional nine have no LWOP prisoners who were sentenced as juvenile—a de facto ban. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (last visited August 4, 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [https://perma.cc/2UDT-7TU2].

154. *Graham v. Florida*, 560 U.S. 48, 67 (2010) (“[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.”).

B. Nonetheless, the States Should Eliminate Juvenile LWOP by Statute as a Matter of Policy.

i. Eliminating Juvenile LWOP Would Better Reflect the Full Reasoning of the Court’s Juvenile Jurisprudence and the Realities Demonstrated by Studies in Juvenile Psychology.

Jones made clear that the Constitution allows for some juveniles to receive LWOP sentences under the retribution theory of punishment. Therefore, the only way to protect juveniles from receiving an irrevocable judgment on their fitness to remain in society is for legislatures to end juvenile-LWOP sentences in the jurisdictions which have not already done so. Legislatures should end these sentences because the super-predator theory motivating them has proven incorrect,¹⁵⁵ the science surrounding juvenile brain development confirms juvenile brains are generally not fully developed before age eighteen, and the process of making individual determinations on adult culpability in juveniles is impossible given the unpredictability in development. Since the earliest foundations of the common law, society has accepted that juveniles should receive special protections from certain criminal punishments. These protections included a complete ban on any criminal punishment for young children and the creation of an entirely separate juvenile justice system which emphasized rehabilitation instead of permanent punishment.¹⁵⁶ These protections are rooted in an understanding that juvenile wrongdoing is less often the result of pure malice and more often influenced by bad judgment, external pressure, a weaker concept of self and others, and inexperience: their wrongdoing is less serious than adults even though the social impact is the same.

Making certain punishments unavailable for juveniles is not a unique proposition for the American justice system. Societies should revisit and question the validity of creating special rules of punishment for certain groups to ensure the justification serves a worthy policy purpose and does not perpetuate invidious discrimination or arbitrary suffering. But the

155. See *supra* note 40 and accompanying text.

156. See *supra* notes 22–29 and accompanying text.

predominant motivation for revisiting the juvenile justice system in the 1980s—when many jurisdictions loosened protections for juveniles—came from fear of juveniles manufactured by the super-predator theory. The theory reached national prominence, influenced policymaking in a number of jurisdictions to crackdown on dangerous out-of-control juveniles, and drowned out other approaches as soft-on-crime.¹⁵⁷ Even where it did not convince legislatures to impose harsher punishments on juveniles, it almost certainly ousted the considerations of implementing more remedial reforms. Most importantly, the theory and its predictions of massive waves of juvenile crime perpetrated by remorseless super-predators—instead of the older conception of misguided youths—proved incorrect and is now discredited by its own proponents.¹⁵⁸

The super-predator theory did not just lead to destructive, counterproductive laws and an overly securitized perception of juveniles, it ignored significant advances in developmental neuroscience which validated the initial rationale of favorable juvenile treatment in the criminal justice system. At the time the Court decided *Roper* in 2005, the neuroscience surrounding juvenile brain development provided structural backing for the judgment deficits long perceived in juveniles and further instructed that this deficit persists longer than expected—well into early adulthood.¹⁵⁹ More recent findings have confirmed that these structural differences significantly affect juvenile thought and behavior and that these differences recede naturally as the brain develops. Juvenile crime does not indicate deep-rooted depravity and disregard for the laws, morality, and others that will persist throughout adulthood; in fact, the end of the teenage years is the time when the brain is most responsive to long-term behavioral

157. See discussion *supra* note 33.

158. N.Y. TIMES, *supra* note 34.

159. See sources cited *supra* note 66 and accompanying text. The portion of the brain controlling planning and judgment likely does not finish developing until the mid-twenties. That alone raises a compelling argument to treat “emerging adults” differently from juveniles. But this note advocates only for eliminating juvenile LWOP sentences because that is where the Court has drawn its line in its juvenile justice jurisprudence—a line it has shown no sign of expanding. The combination of both development limitations and social restrictions on those under eighteen, which force them to rely more heavily on others, make eighteen an important inflection point in an individual’s character development. The Court’s line-drawing is less arbitrary than it claims.

interventions as it finalizes the neural connections that will define adulthood.¹⁶⁰

Developmental psychology is an evolving field; the new findings could and should have the potential to undermine current models and render policy judgments made on those assumptions outdated. Additionally, any scientific evidence has the potential to be abused when guiding policymaking and adjudication. Psychology presents unique challenges which should make officials hesitant to accept its application to the legal system.¹⁶¹ Despite its significant progress, some areas of psychology, especially interpreting the types of thoughts transmitted by neural networks in the brain, provide ambiguous results which can be inconsistent across individuals. When applied offensively against criminal defendants, neuroscience has the potential to invade the most sacred province of the jury: determining intent and its associated level of culpability beyond a reasonable doubt.¹⁶² The defensive application to juveniles presents a unique case that mitigates these concerns. The juvenile development process is not uniform, and detecting its exact progress is impossible. Because it is impossible to tell if a juvenile has developed fully, developmental psychology necessarily injects some reasonable doubt regarding adult culpability in every case involving a juvenile; the opposite of mandating a finding of guilt. If American society accepts that juveniles should have the opportunity to grow and develop and that only the “permanently incurable” should never be released, then no juveniles should receive LWOP because no one can be sure beyond a reasonable doubt that juveniles are permanently incurable until they have the opportunity to develop. A categorical approach is necessary to ensure that juries do not forget that acts of youth—no matter how violent or reprehensible—do not represent the final actions which should permanently judge an individual. That process necessitates continued reevaluation through a parole system. The Court itself accepted this proposition in *Miller* and *Montgomery* when it extended the rationale of *Graham*, but it failed to execute it properly by allowing juries the final word on individual juvenile

160. Sifferlin, *supra* note 124 (“Advanced brain imaging has revealed that the teenage brain has lots of plasticity, which means it can change, adapt, and respond to its environment.”).

161. *See generally* Maroney, *supra* note 131.

162. *Id.* at 146–51.

culpability. Eliminating juvenile LWOP would conform and remove this vestige of the super-predator, tough-on-crime era of juvenile justice reform.

ii. Eliminating Juvenile LWOP Sentences is a Workable Policy Option.

This policy change would not lead to a dramatic increase in crime or burden on any prison or judicial system. It would only affect a total of 1,465 current prisoners.¹⁶³ Several of these prisoners are likely beyond the age where they can threaten society. Compliance with the change would not require a resentencing hearing: only the guarantee of a future parole hearing. Of those affected, none would be guaranteed release. In the future, juveniles whose continued reassessment with age demonstrates either that they committed their initial crime with adult depravity or that they have not matured will not receive parole and will serve the entirety of their life sentence. The opportunity for parole is only an opportunity. Inevitably, some prisoners sentenced as juveniles released under this change will reoffend; some of the reoffenders will commit serious crimes, potentially resulting in suffering and death for more innocent victims. But assuming the development of a parole system which provides juvenile offenders with the tools and incentives to reform and can accurately assess their growth, the policy change will give effect to the values espoused in *Graham*, recognizing the inherent value of the juveniles as citizens capable of reform rather than dismissing them as lost causes; will release some prisoners who have truly changed as people, allowing them to make positive impacts on others and the community; will marginally decrease the costs of needlessly incarcerating people who no longer threaten the public and have grown past their condemned character defects; and will place America on the long list of countries that have already abolished juvenile LWOP.¹⁶⁴

The formal elimination of juvenile LWOP would only be the first step in the longer process necessary to provide a meaningful chance of release. Fortunately, some states have already begun working on this process since

163. Royner, *supra* note 153. This figure includes those serving de facto LWOP sentences who would also need a parole hearing to give the policy full effect.

164. Brandon L. Garrett, *Life Without Parole for Kids Is Cruelty with No Benefit*, ATLANTIC (Oct. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/life-without-parole-kids-cruelty-no-benefit/616757/> [<https://perma.cc/TV63-FACT>] (“The United States is the only country that allows this practice, and soon the Supreme Court could get rid of it.”).

Graham ended LWOP sentences for the larger class of juvenile nonhomicide offenders.¹⁶⁵ The progress made under the states’ continued mandate to comply with *Graham* will easily extend to homicide offenders. States will need to create and to invest resources in effective parole systems with specific criteria for release which take objective measures of juvenile maturity and development into account while avoiding bias. Additionally, a parole system with unachievable standards for release makes LWP sentences equivalent to LWOP sentences. Opportunities for juveniles to receive mental health treatment, to access education, and to develop employable skills will also be crucial to the success of eliminating LWOP sentences. Locking juveniles in cells for decades before their parole hearings will only stunt their growth, thwarting the purpose of the parole hearings for many and dooming the remainder to fail when they get released. Release without rehabilitation will turn parole into a pathway to recidivism, creating a cycle of incarceration with little meaningful difference from LWOP. Finally, states must also eliminate term sentences and delayed access to parole hearings for juveniles which recreate the substantial conditions of a LWOP sentence. The appropriate limit on term-sentence length and on the proportion of years served before parole-hearing eligibility is a topic for future policy research.¹⁶⁶

However, eliminating juvenile LWOP sentences does not spell the end of all juvenile life sentences. Some individuals do present an extreme danger to society if released, and some juveniles act with undetectable adult maturity. These convicted juveniles should serve the entirety of their life sentences to protect society and to receive a punishment commiserate with their conduct. *Graham* does not suggest or require the constant presence of an opportunity for parole throughout a term sentence. At some point, juveniles sentenced to life will receive a final judgment on their ability to rejoin society and lose their opportunity for parole. But individuals should have the opportunity to develop into the most complete version of

165. See Royner, *supra* note 153.

166. Maryland is one of several states which recently adopted a statute which guarantees anyone sentenced as a juvenile will have a parole hearing within twenty years of incarceration. Gary E. Bair, Editorial, *Let’s Stop Throwing Away Juvenile Lives*, MD. DAILY REC. (Aug. 5, 2021), <https://thedailyrecord.com/2021/08/05/lets-stop-throwing-away-juvenile-lives/> [https://perma.cc/YL56-XRQ4]. Some modern sentencing reform proposals suggest guaranteeing a parole hearing within twenty years for all prisoners. *Id.*

themselves and present their best case for reentry before society makes that final judgment.

CONCLUSION

In *Jones*, the Court determined that juveniles can constitutionally receive a LWOP sentence if the sentencing body finds them “permanently incorrigible” and that the finding does not need to be made on the record nor based on recorded facts.¹⁶⁷ Although this determination procedure likely undermines the broad categorical protection for juvenile defendants announced in *Montgomery*, *Jones* is consistent with the Court’s prior jurisprudence. Neither *Miller* nor *Montgomery* adopted a factfinding requirement. And this departure from the typical procedures used to satisfy categorical sentencing restriction criteria is also reflected in the class created by *Miller* and *Montgomery*. Determining which juveniles are permanently incorrigible is nearly impossible for trained psychologists, let alone for judges and juries; the other substantive bans on capital sentencing criteria, nonhomicide offenders and those with intellectual disabilities, are more easily ascertained.

The perceived inconsistencies between *Jones* and other past precedents are more readily blamed on the tensions between the Court’s older decisions. In *Roper*, the Court confirmed juveniles should be treated as less blameworthy partially because of their capacity to reform, differentiating them from other defense classes exempted from capital punishment. *Graham* further advised that all juveniles should have a meaningful opportunity for release but limited its holding to the nonhomicide offender class before it. But *Miller* rejected the full sweep of these opinions and allowed courts to sentence particularly blameworthy juvenile homicide offenders to LWOP if they followed adult capital-sentencing procedures. *Montgomery* then attempted to reframe *Miller* into the broader sweep of *Graham*, creating tension between all the opinions which *Jones* had to resolve for the lower courts to have any guidance.

From a policy perspective, eliminating juvenile LWOP sentencing fits within the broader common law trend of allowing juveniles to grow and

167. *Jones v. Mississippi*, 141 S. Ct. 1307, 1320 (2021).

develop despite the harm their conduct inflicts on society. Although many jurisdictions reconsidered the value of that norm during 1980s and 1990s, the super-predator theory which motivated these reconsiderations was based on faulty assumptions that juveniles in America had grown more violent, remorseless, and anti-social and would spur a massive crime wave if not treated harshly. These predictions were wrong. And the continuing research in developmental psychology demonstrates not only that juveniles really are different from adults but also that these differences persist longer than previously thought. Giving effect to the traditional view of juveniles in the legal system requires expanding the ban on LWOP sentences to all juveniles, not just those who are not permanently incurable. Because of *Jones*, that can only be done through legislation.

Jones has established a framework which illustrates how the Court might approach future expansions of its categorical proportionality protections. The Court recognized that juveniles as a class present special considerations in permanent sentences that go beyond mere reduced blameworthiness. Despite these additional considerations, the Court still only treats youth as providing one layer of sentencing protection, reducing death sentences to LWOP and LWOP to LWP. Applying this model to other classes the Court recognizes as less culpable than general adult defendants suggests the Court will likely transfer its death-penalty-sentencing procedural protections to other class members facing LWOP sentences. Additionally, if the Court were to identify other vulnerable groups with certain factors diminishing their culpability, they would likely also apply this diminished culpability model as the constitutional minimum—regardless of other policy implications which justify more stringent protections. For future classes whose characteristics present unique considerations, policymakers will not be able to rely on the Court interpreting constitutional minimums to provide the full force of all relevant protections. Instead, policymakers must vigilantly create their own legislative protections, and they should begin by eliminating LWOP sentences for all juveniles.