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Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole

ABSTRACT. The Supreme Court has placed restrictions on courts' ability to impose life-without-parole sentences on juveniles. Most recently, *Jones v. Mississippi* underscored how existing Eighth Amendment protections fail to extend categorical protection to all juveniles. Tracing the history of intrachildhood classifications, this Note argues that *Jones*'s discretionary process forces sentencers to sort children into pseudoscientific categories. An analysis of sentencing transcripts reveals that sentencers routinely rely on unfounded assumptions when sentencing juveniles to life in prison. Highlighting efforts led by formerly incarcerated youth, this Note concludes that an age-based ban is necessary to protect youth from irreversible punishment.

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INTRODUCTION

The United States is the only country in the world that sentences juveniles to life without parole.[1] Over the last decade, the Supreme Court has issued a series of decisions that place some restrictions on sentencers' ability to impose irrevocable punishment on youth[2] under eighteen.[3] However, the Supreme Court has yet to find that all sentences of juvenile life without parole violate the Eighth Amendment.[4] Requiring sentencers to identify and separate children eligible for irrevocable punishment perpetuates pseudoscientific assumptions about a young person's capacity to change.

A summary of the Court's recent decisions provides context for this Note's conclusion that the United States should join other nations and ban sentences of life without parole for all juveniles. In *Miller v. Alabama* and *Montgomery v. Louisiana*, the Supreme Court recognized that a defendant's youth diminishes "'the penological justifications' for imposing life without parole."[5] *Miller* thus required sentencers "to take into account how children are different" before imposing mandatory sentences of life without parole.[6] However, neither *Miller* nor

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1. *Life Goes On: The Historic Rise in Life Sentences in America*, SENT'G PROJECT 11 (2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf [https://perma.cc/H436-6F2U].
2. Although the Supreme Court has recognized the age of eighteen as a relevant demarcation point, the immaturities of adolescence extend well beyond the age of eighteen. *See* Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216 (2009); *see also infra* Section II.B.I (discussing the tension between developmental age and the Court's categorical protections against irreversible punishment). For the purposes of this Note, I use the terms "juvenile," "youth," and "adolescent" interchangeably to refer to individuals under the age of twenty-five. *See* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 5-6 (2014) (referring to adolescence as the period from ten until twenty-five).
3. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (abolishing capital punishment for all youth under eighteen); Graham v. Florida, 560 U.S. 48, 74 (2010) (abolishing life without parole for all youth under eighteen convicted of nonhomicide offenses).
4. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) (abolishing mandatory sentences of juvenile life without parole); Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (holding that *Miller*'s prohibition announced a new substantive rule that must be retroactive on collateral review); Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021) (holding that a sentencer is not required to make a separate factual finding or sentencing explanation before imposing a discretionary sentence of life without parole on a juvenile homicide offender).
5. *Montgomery*, 577 U.S. at 207 (quoting *Miller*, 567 U.S. at 472).
6. *Miller*, 567 U.S. at 480.

Montgomery abolished juvenile life sentences; instead the Court instructed sentencers to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[7] For children whose crimes reflect "permanent incorrigibility," the Court did not bar irrevocable punishment.[8] By making a constitutional distinction between these two groups of children, *Miller* and *Montgomery* encouraged sentencers to draw artificial distinctions among youth eligible for categorical protection.

On April 22, 2021, the Supreme Court retreated even further from *Miller* and *Montgomery*'s constitutional guarantee. Rather than ban all juvenile life sentences, *Jones v. Mississippi* held that sentencers need not make a separate factual finding that a juvenile is permanently incorrigible before imposing irrevocable punishment.[9] In so ruling, the Court clarified that very little was required to uphold *Miller*'s ban on mandatory life-without-parole sentences; *Jones* insisted that mere "consideration of youth" satisfied the Eighth Amendment.[10] But, regardless of whether *Jones* requires a formal fact-finding process, or simply affirmed the vague distinction between "transient immaturity" and "permanent incorrigibility," its deference to judicial discretion permits sentencers to rely on discriminatory and inconsistent criteria to separate "irredeemable youth" from those who may eventually be released from prison.

This Note places *Jones* into context by examining how pseudoscientific definitions of youth evolved from racist theories during the Progressive Era and persist in the Court's incomplete ban on juvenile life-without-parole sentences.[11] Part I describes the history of intrachildhood classifications in the Child Study Movement and the juvenile justice system. It highlights racist assumptions embedded within eighteenth- and nineteenth-century developmental science, which permitted perceptions of deviance to outweigh the relevance of youth.

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7. *Id.* at 479-80 (quoting *Roper*, 543 U.S. at 573); *see also Montgomery*, 577 U.S. at 209 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").

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

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

10. *Id.* at 1317-18, 1320; *see also id.* at 1317-18 ("On the question of what *Miller* required, *Montgomery* was clear: 'A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.'" (quoting *Montgomery*, 577 U.S. at 210)).

11. While this Note focuses on the concept of "permanent incorrigibility," *Miller*, *Montgomery*, and *Jones* use the following phrases interchangeably to describe the same class of juveniles: "irreparable corruption," "permanent incorrigibility," and "irretrievable depravity." *Miller*, 567 U.S. at 479-80; *Montgomery*, 577 U.S. at 208-09; *Jones*, 141 S. Ct. at 1313.

Part II begins by discussing the Supreme Court's recent efforts to provide youth with categorical protection based on a young person's chronological age. Part II then explains how *Miller*, *Montgomery*, and *Jones* broke from this trend by permitting sentencers to separate irredeemable youth from those who are "transient[ly] immatur[e]."[12] Specifically, Part II analyzes records from sentencing and resentencing hearings in which sentencers imposed sentences of life without parole against juveniles in nine states and the Federal District of Arizona.[13] These examples are intended to be illustrative and are not representative.[14] Taken together, they help illuminate legal and scientific fallacies underlying the Court's imposition of extreme sentences on children. As the number of juvenile life-without-parole sentences increases each year, trends across jurisdictions highlight harmful assumptions embedded within the Court's purportedly age-based protections.[15]

Finally, Part III suggests strategies to overcome the inadequacy of existing protections and argues that an age-based ban against life without parole is nec-

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12. *Montgomery*, 577 U.S. at 208-09.

13. I conducted this project in partnership with the Campaign for the Fair Sentencing of Youth (CFSY), a national organization committed to leading campaigns to ban life without parole and other extreme sentences imposed on children. Since the Supreme Court announced *Miller* and *Montgomery*, the CFSY has tracked which youth have been sentenced or resentenced to life without parole. The universe of these cases increases each year; as of March 2021, this number surpassed 170 cases. The CFSY worked with two law firms, Morgan Lewis and Latham & Watkins, to obtain sentencing records from jurisdictions in which state legislatures had not yet banned juvenile life without parole. Morgan Lewis conducted a separate analysis of five additional and randomly selected cases, for which I did not have access to sentencing records. I have included citations to Morgan Lewis's analyses where appropriate.

14. None of the transcripts, sentencing orders, or records I analyzed were reviewed for content before being included in the sample. Some transcripts and sentencing orders were unavailable due to sealed records, court reporter unavailability, unresponsiveness of court clerks (after repeated attempts), or prohibitive expense.

15. I analyzed forty-five randomly selected sentencing records from Pennsylvania, Illinois, Washington, Ohio, Florida, Mississippi, Louisiana, North Carolina, Oklahoma, and the Federal District of Arizona. For forty-one of the cases I reviewed, I consulted sentencing transcripts when available, certificates of appeals, and court records between the years 2012 and 2020. Among these, seventeen were reversed on appeal and remanded for new sentencing. This Note focuses on the twenty-eight remaining cases, which were upheld on appeal. I chose to focus on these twenty-eight cases for two reasons: first, analyzing these cases reveals how the *Miller* factors mislead sentencers and reinforce erroneous assumptions about childhood development, and, second, these cases suggest that appellate review does not provide adequate protection against *Miller*'s pseudoscientific and harmful sorting process. I also discuss several cases in which appellate courts reversed sentences of life without parole to underscore the inconsistent application—and inconsistent review—of the *Miller* factors across jurisdictions.

essary to prevent discrimination from infecting a sentencer's discretion. The Supreme Court's departure from chronological age as the "bright line" barring excessive punishment has made it impossible for sentencers to condemn juveniles to death in prison without violating the Eighth Amendment.[16]

I. INTRACHILDHOOD CLASSIFICATIONS

The Court's pseudoscientific system of classification emerged from eighteenth- and nineteenth-century developmental science. Enlightenment Era thinkers and evolutionary theorists classified children as either innocent or irredeemable based on social status, race, or intellectual ability.[17] These classifications caused particular harm to Black and Native children.[18] Importing scientific

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16. Throughout this Note, I use the phrase "death in prison" and "life without parole" interchangeably. Equating sentences of "life without parole" to "death in prison" is important for two reasons. First, it likens categorical protection against life without parole sentences to categorical protection against the death penalty, thereby invoking other decisions in which the Court placed certain criminal laws and punishment beyond the state's power to impose. Second, it underscores the disproportionality of this sentence when applied against juveniles. As *Graham v. Florida* pointed out: this lengthiest possible incarceration is an "especially harsh punishment for a juvenile" because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." 560 U.S. 48, 70 (2015).

17. Religious and philosophical beliefs in medieval and Enlightenment Era Europe about redemption, faith, and innocence contributed to the invention of childhood as a social category. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1093-94 (1991). Academic and religious institutions also fueled racial classifications in the social sciences, which influenced the development of child psychology and perceptions of criminality. *See, e.g.*, *id.* at 1094; *see also* Thomas Fallace, *The Savage Origins of Child-Centered Pedagogy, 1871-1913*, 52 AM. EDUC. RSCH. J. 82 (2015) (explaining the history and influence of racial taxonomies on child development studies); Andrew S. Winston, *Scientific Racism and North American Psychology*, OXFORD RSCH. ENCYCLOPEDIA PSYCH. (May 29, 2020), https://oxfordre.com/psychology/view/10.1093/acrefore/9780190236557.001.0001/acrefore-9780190236557-e-516 [https://perma.cc/HJK7-33B4] (explaining how Enlightenment Era racial typologies influenced the trajectory of scientific racism in psychology); CHARLES W. MILLS, THE RACIAL CONTRACT 26-27 (1997) (discussing racial hierarchies embedded within European Enlightenment humanism). For additional literature on the relationship between the history of social science and racial classifications, see Jonathan Simon, "*The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, B.U. L. REV. 787, 797, 809 (2020), which examines the widespread belief that "criminality persisted in society as an inheritable trait"; and ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 50-52 (2015), which discusses the "race betterment agenda" in the early 1900s.

18. *See* Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 62-63 (2016) (examining federal policies that distinguished Native youth from white children, seeking "to kill the Indian in him and save the man" by indoctrinating

language to justify social taxonomies, criminologists and social scientists identified a subgroup of children as "subhuman,"[19] "deviant,"[20] and "delinquent."[21] When academic institutions endorsed unfounded theories as empirical science, these "dangerous youth" were detained and punished at disproportionate rates.[22]

By focusing on the history of the Child Study Movement, the development of the juvenile justice system, and the War on Crime's research agenda, Part I explains how and why the Supreme Court's recent efforts to distinguish among groups of adolescents perpetuate discriminatory classifications and depart from developmental science.

Native children and removing them from their homes); *see also* Elizabeth Thornberry, *The Problem of African Girlhood: Raising the Age of Consent in the Cape of Good Hope, 1893-1905*, 38 LAW & HIST. REV. 219, 221 (2020) (discussing European comparisons between "savages" and children). For additional discussion of how Black children are afforded the presumption of innocence to a lesser extent than children of other races, see, for example, Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526 (2014).

19. *See* 2 G. STANLEY HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION 649 (1924) (comparing non-European "savages" who do not "take up the burden of the white man's civilization" to "wild animals"); Thornberry, *supra* note 18, at 222 (noting that "conceptions of indigenous Africans as fundamentally different from Europeans, even subhuman, had long circulated among both English and Dutch-speaking settlers").

20. John DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/H6ZJ-XS9F].

21. *Id.*; *see also* Fallace, *supra* note 17 (explaining that sociologists from the nineteenth and early-twentieth centuries used biological findings to reinforce their views of the differences between white and nonwhite groups); FRANCIS CHAMBERLAIN, THE CHILD: A STUDY IN THE EVOLUTION OF MAN 355-56 (1900) (summarizing the theory published in 1876 by criminal anthropologist Cesare Lombroso, CESARA LOMBROSO, L'UOMO DELINQUENTE (Milan, Hoepli 1876), in which he described analogies between "the criminal and the lunatic, epileptic and other degenerate classes of humans"); Robert A. Nye, *The Rise and Fall of the Eugenics Empire: Recent Perspectives on the Impact of Biomedical Thought in Modern Society*, 36 HIST. J. 687, 687-91 (1993) (discussing efforts to identify "dangerous human pathologies," and describing "eugenical effort" to reduce the reproduction of "inferior stock").

22. *See* David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 16, 39 n.4 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); *see also* Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 34-38 (2007) (describing cumulative racial disproportionalities at every stage of the juvenile justice system).

A. The Child Study Movement

The history of the Child Study Movement provides one example of how racial, religious, and moral beliefs led to distorted perceptions of childhood.[23] In the eighteenth and nineteenth centuries, experimental psychologists treated children's anatomy as a window into the nature of human progress. In an effort to establish developmental "norms," child psychologists in Europe and the United States began measuring children's height, weight, head size, arm length, and growth rate.[24] In addition to measuring children's bodies, social scientists and medical doctors in the late nineteenth century conducted studies of African and Indigenous bodies to prove racial superiority as a biological fact.[25] In so doing, these researchers collapsed the distinctions between scientific classification and racial taxonomy: by comparing nonwhite children to "savage races," childhood studies reinforced the belief that nonwhite children represented a different class of children altogether, which placed them outside the boundaries of "normal" development.[26]

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23. Proponents of the recapitulation theory, in particular, believed that young children could be compared to less evolved races and that their psychological development tracked human evolutionary progress. Jacy L. Young, *G. Stanley Hall, Child Study, and the American Public*, 177 J. GENETIC PSYCH. 195, 201 (2016); *see also* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV. 125, 127 (2007) (discussing how the Child Study Movement emerged from nineteenth-century ideas about the status of children).

24. Jere T. Humphreys, *The Child-Study Movement and Public School Music Education*, 33 J. RSCH. MUSIC EDUC. 79, 81 (1985); *see also* Fallace, *supra* note 17 (discussing how racial taxonomies affected children's development).

25. *See* Fallace, *supra* note 17, at 90, 96-97; *see also* CRAIG STEVEN WILDER, EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES 134-39, 145-46 (2013) (discussing how anatomical dissection helped perpetuate racist beliefs about biological difference).

26. *See* Fallace, *supra* note 17, at 90. As Thomas Fallace explains, studies of childhood established culturally dependent standards for "scientific" definitions of developmental stages. Although early-childhood psychologists described these norms as physical characteristics, they also attempted to argue that a child's social classification corresponded to their cognitive capacity. For example, in cooperation with G. Stanley Hall, anthropologist Alexander Francis Chamberlain published *The Child: A Study in the Evolution of Man* in 1900. In it, Chamberlain advocated for educational and scientific practices that reflected the similarities and differences in religious belief, psychical development, moral and cognitive development, memory, emotional response, language, and imagination between the white child and the nonwhite savage adult. *See* CHAMBERLAIN, *supra* note 21, at 287-354, 430-31.

Several schools of thought contributed to the birth of the Child Study Movement in the late nineteenth century.[27] G. Stanley Hall, one of the founders of this movement, toured the United States to describe his theory of recapitulation and its bearing on child development.[28] Later identified as the "father of adolescence," Hall argued that "the child and the race are each keys to each other," and explained that "degeneration of mind and morals is usually marked by morphological deviations from the normal."[29] Hall analogized child psychological development to the evolution of mankind, which tracked a Darwinian process from the less evolved "savage races" to a fully realized—and civilized—adulthood.[30]

Hall's contributions to child psychology and developmental science influenced subsequent research, and informed public policy. Although later scientists critiqued Hall's methods as deficient, Hall's conclusions about racial classification and its relevance for identifying the "causation of crime" remained entrenched. In the same era that Harvard, Yale, and Princeton established child development programs to research and explain the differences between children and adults, the Illinois legislature passed the Juvenile Court Act and established the first juvenile justice system in 1899.[31] In this way, childhood studies intersected with a burgeoning progressive movement, which sought to "rehabilitate" wayward children by providing a subgroup of juveniles with support, guidance, and intervention from the state.[32]

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27. SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 19-21 (1982); *see also* Fallace, *supra* note 17, at 77-79 (explaining the origins of the "Great Chain of Being" and theory of recapitulation).

28. Hall published *Adolescence: Its Psychology and its Relations to Physiology, Anthropology, Sex, Crime, Religion, and Education* in 1904. *See* Fallace, *supra* note 17, at 85 (citing 1 G. STANLEY HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION (1904)).

29. HALL, *supra* note 28, at viii, 338-39.

30. In *Descent of Man*, Charles Darwin predicted that "the civilized races of man will almost certainly exterminate and replace throughout the world the savage races." Fallace, *supra* note 17, at 78 (quoting CHARLES DARWIN, DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 193 (New York, D. Appleton & Co. 1871)).

31. Ainsworth, *supra* note 17, at 1094-95; *see also* Alexander W. Siegel & Sheldon H. White, *The Child Study Movement; Early Growth and Development of the Symbolized Child*, 17 ADVANCES CHILD DEV. & BEHAV. 233, 262-63 (1982) (explaining the differences between children and adults); Fallace, *supra* note 17 at 97-98 (describing how Hall's theory of recapitulation "fell out of favor by the 1920s" for several reasons, including the rise of behavioral psychology and the growth of Mendelian genetics).

32. *See* Feld, *supra* note 22, at 17-18.

B. The Juvenile Justice System

The motivating impulse of the juvenile justice system was to separate youth from the "corrupting influence" of adults in the criminal justice system.[33] However, not all children were considered amenable to this intervention.[34] Just as the Child Study Movement adopted scientific language to justify racial classification, the juvenile justice system created a distinct class of "incorrigible" children, whose criminal status served as proof of their moral and physical maldevelopment.[35]

The history and practice of transferring certain children into adult custody reveals the long-term consequences of racial classification within the social sciences. To be sure, race did not provide the only metric to guide juvenile transfer practices. Policies varied across jurisdictions, and judges could transfer youth based on any criteria they determined would place other youth at risk or endanger the public at large.[36] However, the status of racial science within the academy—coupled with widespread support for racial segregation in education, housing, and social welfare—resulted in racially motivated decisions regarding whether a young person should be treated as a child or charged as an adult.[37]

In the absence of a uniform standard, therefore, and without equal protection for all children, the juvenile transfer system permitted courts to identify deviant and dangerous youth based on racial stereotypes rather than chronological

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33. Bishop & Farber, *supra* note 23, at 125, 127-28.

34. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 72 (1997) (examining how juvenile courts provided a coercive mechanism to discriminate between "our" children and "other peoples' children"—those from other ethnic backgrounds, cultures, and classes); *see also* Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1614 (2018) ("Race has animated the juvenile court system since its inception.").

35. By 1945, every state and the federal government had enacted a juvenile court system. In almost every state, juvenile courts were permitted to transfer cases into the adult justice system. Tanenhaus, *supra* note 22, at 21, 39 n.4; *see also Automatic Transfer History*, JUV. JUST. INITIATIVE, https://jjustice.org/resources/juvenile-transfer-to-adult-court/automatic-transfer-history [https://perma.cc/NBH3-WXWJ] (detailing the history of transferring children to adult court in Illinois).

36. Tanenhaus, *supra* note 22, at 16.

37. Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 JOHN MARSHALL L.J. 437, 440 (2015).

age. In Tennessee, for example, the juvenile court had the power to transfer "incorrigibles" and "colored girls in any case" into adult custody.[38] Even when sentencers did not announce race-based criteria for transferring children, crime-based transfer statutes permitted courts to rely on a child's criminal record as proof of a child's incorrigibility, without addressing the relationship between a child's racial status and the increased likelihood of their contact with the criminal justice system.[39]

The combined impact of slavery, Black codes, and Jim Crow practices contributed to race-based criminal statutes, implicit racial bias in policing, and racially disparate rates of juvenile transfer.[40] For this reason, crime-based transfer statutes resulted in a disproportionate number of children of color in adult custody.[41] This discriminatory outcome did not contradict the rehabilitative impulse of the Progressive Era reformers. On the contrary, these reformers often considered nonwhite children to be a threat to white children and to the public at large.[42] Responding to these racialized fears, the majority of states raised the

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38. Tanenhaus, *supra* note 22, at 19.

39. *See* Feld, *supra* note 22, at 34-38 (describing how differences in police practices and location of crime contribute to racial disparities in arrest rates and convictions, which contributes to cumulative racial differences in a system that "puts minority youths at a greater risk than white youths of receiving punitive sentences"); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 223-24, 247-49 (2016) (discussing how federal policies that focused on incarcerating the "hard-core offenders, or those youths who had multiple infractions on their criminal records," reflected skewed assumptions about race and crime); *see also* Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1562, 1565-70 (2004) (discussing how "the continued correlation of race with so many other painful and potentially damaging experiences in our society" contributes to risk factors that make criminal-justice involvement more likely for children and adults of color).

40. HUBERT WILLIAMS & PATRICK MURPHY, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW 3 (1990).

41. Crime-based transfer statutes permit a child to be sentenced as an adult based on the crime of conviction and seriousness of the offense. This practice contributes to racial disparities because of the cumulative effects of racist policing, *see* sources cited *supra* note 39, which increase the likelihood that youth of color will be transferred to criminal court and sentenced to prison at a greater rate than white juveniles, *see* Feld, *supra* note 22, at 42; *see also* HINTON, *supra* note 39, at 235 ("Due to the targeted deployment of police patrol, black youth were more likely than their white counterparts to have prior criminal referrals to be charged with violent crimes, to face formal court proceedings, and to be institutionalized in secure, state-run detention facilities.").

42. *See* Tanenhaus, *supra* note 22, at 22.

maximum age of juvenile court jurisdiction and maintained an exception for serious offenses and for crimes punishable by death or life imprisonment.[43]

Movements to end structural racism in juvenile justice informed efforts to reform the practice of transferring juveniles into adult custody.[44] In 1966, the Supreme Court attempted to address these concerns by affording procedural protections to youth facing transfer proceedings.[45] However, these protections did not challenge race-based and crime-based classifications of children. Instead, sentencers and legislatures continued to believe that a child's offense could serve as a more reliable measure of a child's disposition than a child's chronological age.[46]

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43. *Id.* at 25; *see also* Henning, *supra* note 34, at 1617-20 (discussing the race-based response to crime in the twentieth century); HINTON, *supra* note 39, at 219-23 (discussing how "pathological assumptions about African Americans, poverty, and crime," fueled "the develop[ment] of crime war programs and the racial profiling within them").

44. Bishop & Farber, *supra* note 23, at 133.

45. In *Kent v. United States*, the Supreme Court held that, following a full investigation and a hearing, juvenile courts may "waive" jurisdiction and transfer juvenile defendants into adult criminal court for prosecution and punishment. 383 U.S. 541, 551 (1966). *Kent* clarified that "the seriousness of the alleged offense to the community" could serve as a "determinative factor[]" guiding juvenile courts' decisions about whether to waive jurisdiction. *Id.* at 566-67. This practice permitted sentencers and legislatures to rely on the seriousness of the offense to define the boundaries of childhood. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 702 (1991). While many children in juvenile custody could rely on their lack of "sophistication and maturity" as a shield against juvenile transfer, *Kent* permitted racial bias and disproportionate contact with law enforcement to influence judges' decisions to transfer juveniles into adult custody. *Kent*, 383 U.S. at 567; *see, e.g.*, Amanda Burgess-Proctor, Kendal Holtrop & Francisco A. Villarruell, *Youth Transferred to Adult Court: Racial Disparities*, CAMPAIGN FOR YOUTH JUST. (2008), https://www.issuelab.org/resources/423/423.pdf [https://perma.cc/5L64-P2ZC]; *see also* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1566 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*] ("As a result of the successive screening and differential processing of youths by race, the vast majority of juveniles transferred to criminal court and sentenced to prison are minority youths."). A year later, the Supreme Court held that proceedings for children under the age of eighteen must comply with the due-process requirements of the Fourteenth Amendment, *see In re* Gault, 387 U.S. 1 (1967), but these procedural requirements did not eliminate racial disparities in the transfer of juveniles into adult custody, *see* Robin Walker Sterling, *Fundamental Unfairness:* In Re Gault *and the Road Not Taken*, 72 MD. L. REV. 607, 643 (2013) ("The doctrinal foundation of the *Gault* decision circumscribed juvenile justice reform in the Court's due process revolution and perpetuated racial disparity in the juvenile justice system in a number of ways.").

46. *Kent*, 383 U.S. at 552 (citing D.C. CODE § 11-914 (1961)). The D.C. Code reads: "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult . . . the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of

The decades following the "Due Process Revolution" revealed the consequences of these crime-based waiver statutes: between 1985 and 1994, the number of juveniles tried as adults grew by seventy-one percent nationally, with more than 12,000 juvenile cases being waived into adult criminal court.[47] Among youth transferred to adult custody, racial disparities increased. Between 1985 and 1995, Black youth were more likely than their white counterparts to be transferred to adult criminal court for all offense types, all age categories, and all years.[48] Today, despite representing fourteen percent of the total youth population, Black youth make up almost half of the youth transferred into adult custody.[49]

C. The War on Crime's Research Agenda

Backlash to the civil-rights movement and the Warren Court's "Due Process Revolution" influenced the administration of juvenile justice and the development of social science within the academy.[50] Although the first civil-rights-era legislation directed at juvenile justice authorized funding for state and local governments through the Department of Health, Education, and Welfare, subsequent legislation shifted control away from social-welfare agencies to the Department of Justice (DOJ).[51] In 1968, for example, Congress passed the Juvenile Delinquency Prevention and Control Act, which authorized DOJ to support states in the administration of delinquency programs and hire law-enforcement personnel to address social inequalities.[52] By treating juvenile justice as a matter

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such offense if committed by an adult." D.C. CODE § 11-914 (1961), *as amended*, § 11-1553 (Supp. IV 1965).

47. Brenda Gordon, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 195 n.12 (1999). The "Due Process Revolution" refers to a series of decisions that restricted governmental intrusion, reinforced procedural safeguards, and addressed concerns about systemic racial discrimination that were invalidating the legitimacy of state convictions. *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 45, at 1474-94; Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 217 (2003).

48. Burgess-Proctor et al., *supra* note 45, at 9.

49. Jeree Michele Thomas & Mel Wilson, *The Color of Juvenile Transfer: Policy & Practice Recommendations*, NAT'L ASS'N OF SOC. WORKERS 2 (2017), https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0 [https://perma.cc/3369-KYJ8].

50. Feld, *supra* note 34, at 68-71.

51. CONG. RSCH. SERV., RS22070, JUVENILE JUSTICE: OVERVIEW OF LEGISLATIVE HISTORY AND FUNDING TRENDS 1 (2007).

52. Juvenile Delinquency Prevention and Control Act of 1968, Pub. L. No. 90-445, 82 Stat. 462; *see* HINTON, *supra* note 39, at 19-23.

of crime control rather than a response to systemic racial discrimination and economic deprivation, the U.S. government contributed to the false narrative that children and adolescents, particularly Black adolescents, required adult criminal punishment for the sake of public safety.

The War on Crime also created a financial incentive for social scientists to develop a research agenda focused on crime control.[53] However, as with the juvenile-transfer statutes, crime-based rhetoric left racial classifications unchecked. In 1972, University of Pennsylvania law professors Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin published a study that followed a group of 9,945 ten-year-old boys in Philadelphia from 1945 until their eighteenth birthdays in 1963.[54] In reaching the conclusion that "a small group of 'chronic offenders' commit a disproportionate amount of the total crime," the study reinforced the assumption that police contact could be used as a valid instrument to identify and predict criminal behavior.[55] Notwithstanding race-based assumptions driving police arrests in Philadelphia, Wolfgang and his coauthors did not credit Black delinquency to racial discrimination. Instead, Wolfgang simply stated that "more social harm is committed by nonwhites."[56]

Similarly, convinced that "nothing works," several prominent scholars in the mid-1990s warned that criminal characteristics of youth forecasted a permanent and chronic threat to public safety.[57] For example, in 1996, Princeton professor John DiIulio, Jr. popularized the term "super-predator" to describe the "thickening ranks" of "radically impulsive, brutally remorseless youngsters."[58] Focusing on "Black inner-city neighborhoods," DiIulio disguised longstanding fears of "Black urban youth" as objective and scientific realities.[59] Rather than treat

53. *Id*. at 282-86 (discussing the federal investment in the War on Crime, which increased incentives to collect crime-rate statistics).

54. Hannah S. Laqueur, *Incapacitation: Penal Policy and the Lessons of Recent Experience*, 24 BERKELEY J. CRIM. L. 48, 53 (2019).

55. *Id.*

56. Marvin E. Wolfgang, *Seriousness of Crime and a Policy of Juvenile Justice*, *in* DELINQUENCY, CRIME, AND SOCIETY 267, 274 (James F. Short, Jr. ed., 1976).

57. HINTON, *supra* note 39, at 243.

58. WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996).

59. DiIulio, *supra* note 20.

adolescence as a transient period, DiIulio and others characterized Black and Brown juveniles as even more susceptible to crime than adults.[60]

As a result of such research, the federal government and state legislatures adopted reforms designed to incapacitate incorrigible youth.[61] In the 1980s and 1990s, states passed punitive juvenile-justice and criminal-sentencing statutes that resulted in harsher sentences for youth of color.[62] Between 1992 and 1997, nearly every state changed its laws to increase penalties for juvenile offenders and facilitate the automatic transfer of children into adult custody.[63] Mandatory minimums replaced discretionary review and the Supreme Court announced that sentencing guidelines need not include rehabilitation measures of any sort.[64]

Wolfgang, Figlio, Sellin, and DiIulio's research focused on Black delinquency, but other potential avenues to identify positive attributes of Black communities were largely ignored. Instead, universities and federal grants funded empirical studies focused almost exclusively on "unrelenting negative portrayals of [B]lack neighborhoods."[65] For this reason, the War on Crime's research agenda provided sentencing courts with scientific language, grounded in "em-

60. DiIulio's findings departed from the Supreme Court's treatment of youth during the Warren Court's tenure. For DiIulio, children were indeed different than adults; however, unlike proponents of juvenile rehabilitation, DiIulio's findings justified the withholding of protection. *Id.*

61. HINTON, *supra* note 39, at 224-30 (describing how the expansion of research focused on the "problem of [B]lack youth crime" contributed to punitive youth crime-control legislation).

62. Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238-41 (2015); *see also* Feld, *supra* note 34, at 79-81 (describing the "get tough" policies of the 1980s and 1990s); Laqueur, *supra* note 54, at 63 (explaining how the policy changes in the 1980s and 1990s resulted in increased incarceration).

63. *See* Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc., Charles Hamilton Houston Institute for Race & Justice, LatinoJustice PRLDEF, Asian American Legal Defense & Education Fund, and Leadership Conference on Civil & Human Rights in Support of Petitioners at 24, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

64. *See* HINTON, *supra* note 39, at 243; Mistretta v. United States, 488 U.S. 361, 367-68 (1989).

65. In 2016, Marcus Anthony Hunter, Mary Pattillo, Zandria F. Robinson, and Keeanga-Yamahtta Taylor introduced the concept of "Black placemaking" as an analytical tool to describe the "ability of residents to shift otherwise oppressive geographies of a city to provide sites of play, pleasure, celebration, and politics." Marcus Anthony Hunter, Mary Pattillo, Zandria F. Robinson & Keeanga-Yamahtta Taylor, *Black Placemaking: Celebration, Play, and Poetry*, 33 THEORY, CULTURE & SOC'Y 31 (2016). The concept of "Black placemaking" avoids treating Black children and families as "objects of history or of socioeconomic circumstances." *Id.* at 34. Rather than suggest that oppression yields irreparable corruption, Black placemaking "privileges the creative, celebratory, playful, pleasurable, and poetic experiences of being [B]lack and being around other [B]lack people in the city." *Id.* at 32.

pirical proof," to justify extreme sentences for youth, without addressing or correcting entrenched racial assumptions in the justice system and within the academy.[66]

* * *

The history of intrachildhood classifications reveals how children were distinguished from adults based on racial categories and how these bankrupt assumptions influenced the development of the juvenile justice system. Progressive Era reforms and War on Crime criminal justice policies contributed to the belief that contact with the criminal justice system could serve a rehabilitative function for youth, and that state intervention would eliminate "deviant" traits. Negative portrayals of black youth and low-income youth justified federal and state investment in carceral and punitive interventions. As more youth of color became ensnared in the criminal justice system, crime displaced chronological age as the criteria to evaluate a juvenile's culpability and to predict a young person's capacity for change.

II. JUVENILE LIFE WITHOUT PAROLE

In the decades since DiIulio warned that "tens of thousands of severely morally impoverished juvenile superpredators" were on the horizon,[67] the American Medical Association and the American Academy of Child and Adolescent Psychiatry have renounced his theory—and the Supreme Court provided categorical protection for all youth facing irrevocable punishment, notwithstanding a young person's racial identity, social conditions, or criminal record.[68] First, in *Roper v.*

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66. *See* HINTON, *supra* note 39, at 19 (describing how scholars, policymakers and social-welfare reformers analyzed the disparate rates of incarceration of Black people as "empirical 'proof' of the 'criminal nature' of African Americans").

67. DiIulio, *supra* note 20.

68. In 2001, DiIulio conceded that "he wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/6X9W-EUZ7]; *see also* Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 8, 13, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647) (explaining how "the fear of an impending generation of superpredators proved to be unfounded"); Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647) (arguing that "the structural and functional immaturities of the adolescent brain provide a biological basis for the behavioral immaturities exhibited by adolescents"); Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent at 9-10, Roper v. Simmons, 543 U.S.

Simmons, the Supreme Court recognized that "juvenile offenders cannot with reliability be classified among the worst offenders," and therefore held that capital punishment violated their rights under the Eighth Amendment.[69] Five years later, in *Graham v. Florida*, the Court banned life without parole for all juveniles convicted of nonhomicide offenses.[70] In both *Roper* and *Graham*, the Court decided that "mere consideration of youth" risked disproportionate punishment for two reasons: first, the heinousness of the offense would outweigh the mitigating qualities of youth; and second, neither a psychologist nor a sentencer could make a decision about a young person's rehabilitative capacity with sufficient accuracy to justify irrevocable punishment.[71]

Part II considers how *Miller v. Alabama*, *Montgomery v. Louisiana*, and *Jones v. Mississippi* retreated from *Roper* and *Graham*'s age-based bans and perpetuated pseudoscientific classifications of children.[72] Recognizing that "youth matters for purposes of meting out the law's most serious punishments," *Miller* might have overcome the racial biases inherent in previous reforms to the juvenile justice system.[73] But the Court's failure to protect all youth from irrevocable punishment instead reveals why attaching penal consequences to adolescent development continues to result in disproportionate punishment for a subcategory of children. Notwithstanding Progressive Era efforts to rehabilitate "needy"

551 (2005) (No. 03-633) (citing neuropsychological research demonstrating that "the adolescent brain has not reached adult maturity").

69. *Roper*, 543 U.S. at 569.

70. 560 U.S. 48, 74 (2010).

71. *See, e.g.*, *Roper*, 543 U.S. at 573 (discussing the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death"); *Graham*, 560 U.S. at 68 ("[I]t 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. . . . [J]uvenile offenders cannot with reliability be classified among the worst offenders." (quoting *Roper*, 543 U.S. at 569-73)); *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1315 (2021) ("The State responds that permanent incorrigibility is not an eligibility criterion akin to sanity or a lack of intellectual disability. We agree with the State.").

72. *See Miller*, 567 U.S. at 489; Montgomery v. Louisiana, 577 U.S. 190, 212-13 (2016); *Jones*, 141 S. Ct. at 1322.

73. *Miller*, 567 U.S. at 483; *see also* Ainsworth, *supra* note 17, at 1096-1100 (discussing the influence of Progressive Era ideology on the development of the juvenile court). *See generally* sources cited *supra* note 18 (discussing those racial biases).

youth,[74] the expansion of state control over youth who were perceived as "deviant" heightened the risk of excessive punishment for immigrants, low-income, and other "undesirable" children.[75] Additionally, placing these children under the "care of the court" permitted courts and correctional facilities to classify, surveil, and detain some children without the benefit of due process or other procedural safeguards.[76]

By first discussing the flawed assumptions embedded within *Miller*, *Montgomery*, and *Jones*, and then by analyzing how sentencers have interpreted and applied the so-called "*Miller* factors," Part II explains why intrachildhood classifications will continue to expose a subcategory of youth to unconstitutionally disproportionate punishment. This Note concludes by suggesting that a categorical ban on irreversible punishment for all youth will help sentencers avoid "diagnosing" certain children as permanently deviant and provide advocates with consistent and developmentally appropriate guidance.[77]

A. The Doctrinal Dilemma

Seven years after abolishing the death penalty for children, the Supreme Court solidified its position that "youth matters" by reducing the vast majority of life-without-parole sentences for youth convicted of homicide and applying its decision retroactively.[78] However, neither *Miller*, *Montgomery*, nor *Jones* adopted *Roper*'s absolute ban on irrevocable punishment; instead, these decisions excluded a subcategory of youth from the class of protected children. In *Miller*, the Court instructed sentencers to consider five factors, known as the "*Miller* factors," before imposing a sentence of life without parole on a juvenile.[79]

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74. *See* Bishop & Farber, *supra* note 23, at 127-30 (discussing how the founders of the juvenile court conceived of a social-welfare system that would "benefit all needy youth").

75. Ainsworth, *supra* note 17, at 1097; *see also* Feld, *supra* note 34, at 72 ("[J]uvenile courts provided a coercive mechanism to discriminate between 'our' children and 'other peoples' children'—those from other ethnic backgrounds, cultures, and classes.").

76. Bishop & Farber, *supra* note 23, at 129-31.

77. *See* Feld, *supra* note 34, at 115-23 (proposing a "youth discount" as a practical administrative mechanism to consider youthfulness at sentencing).

78. *Miller*, 567 U.S. at 465; Montgomery v. Louisiana, 577 U.S. 190, 205 (2016).

79. In relevant part, the *Miller* factors include: (1) a young person's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) a young person's "family and home environment . . . no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [the young person's] participation in the conduct" and the impact of "familial and peer pressures"; (4) the "incompetencies associated with youth—for example, [the juvenile's] inability

If after applying the *Miller* factors, a sentencing court still found that a child's crime did not reflect "transient immaturity," then a sentencer could impose a sentence of life without parole without violating the Eighth Amendment.[80] Still, *Miller* opined that this "harshest possible penalty" would be "uncommon," in light of the distinctive attributes of youth and the "great difficulty . . . of distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[81]

Then, in *Montgomery v. Louisiana*, the Court held that *Miller*'s rule was a "new substantive rule of constitutional law" that could be applied retroactively.[82] "Substantive rules," according to *Montgomery*, "include[d] 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"[83] Finding that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status,'" *Montgomery* prohibited sentences of life without parole for all members of *Miller*'s protected class, which it defined as "children whose crimes reflect transient immaturity."[84]

Finally, in March 2020, the Court granted certiorari in *Jones v. Mississippi*.[85] Brett Jones, who had turned fifteen years old a few weeks before his crime, argued that because *Miller* restricted sentences of life without parole to "permanently incorrigible juveniles," *Miller* required sentencers to make a finding of "permanent incorrigibility" before imposing irrevocable punishment.[86] Writing for the majority, Justice Kavanaugh held that "*Miller* did not impose a formal fact-finding requirement."[87] *Jones* limited *Miller*'s substantive protection to a "sentencing procedure similar to the procedure that this Court has required for

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to deal with police officers or prosecutors (including on a plea agreement) or the [young person's] incapacity to assist his [or her] own attorneys"; and finally, (5) the "possibility of rehabilitation." *Miller*, 567 U.S. at 477-78; *see infra* Section II.B.

80. *Montgomery*, 577 U.S. at 206-09; *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1315 n.2 (2021) ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." (quoting *Montgomery*, 577 U.S. at 211)).

81. *Miller*, 567 U.S. at 479-80.

82. *Montgomery*, 577 U.S. at 200, 212.

83. *Id.* at 198 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

84. *Id.* at 208-09.

85. 141 S. Ct. 1307 (2021), *cert. granted*, 140 S. Ct. 1293 (2020).

86. Brief for Petitioner at 3, 19-20, 30, *Jones*, 141 S. Ct. 1307 (No. 18-1259).

87. *Jones*, 141 S. Ct. at 1311 (quoting *Montgomery*, 577 U.S. at 211).

the individualized consideration of mitigating circumstances in capital cases such as *Woodson v. North Carolina*, *Lockett v. Ohio*, and *Eddings v. Oklahoma*."[88] Through this discretionary process, sentencers could reliably "separate those juveniles who may be sentenced to life without parole from those who may not."[89]

In contrast to *Roper* and *Graham*, *Jones* permits sentencers to classify children based on individual mitigating factors rather than chronological age.[90]Although *Jones* does not require sentencers to make an explicit finding of "permanent incorrigibility," *Jones* perpetuates *Miller* and *Montgomery*'s "key assumption" that "discretionary sentencing . . . helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age."[91] Attempting to reconcile judicial discretion with age-based protections, *Jones* exacerbates the Court's doctrinal dilemma. In addition, it perpetuates the mistaken belief that sentencers can reliably classify children into pseudoscientific categories and then rely on these categories to impose irrevocable punishment.

As an initial matter, individualized sentencing does not provide sufficient protection to satisfy the Eighth Amendment's "categorical constitutional guarantee[]."[92] *Jones* expressly compared *Miller*'s "new substantive rule" to the procedure required in capital cases.[93] In contrast to *Miller*, however, neither *Woodson v. North Carolina*[94] nor *Lockett v. Ohio*[95] created substantive protections for a class of defendants. In both cases, the Court opened the door to mitigation that might weigh against an individual defendant's culpability.[96] *Woodson* and *Lockett* em-

88. *Id.* at 1315 (citing Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982)).

89. *Id.* at 1317-18 (quoting *Montgomery*, 577 U.S. at 210).

90. *Id.* at 1315-16.

91. *Id.* at 1317-18.

92. *Montgomery*, 577 U.S. at 201.

93. *Jones*, 141 S. Ct. at 1315-16; *see also Montgomery*, 577 U.S. at 212 ("The Court now holds that *Miller* announced a substantive rule of constitutional law.").

94. 428 U.S. 280 (1976).

95. 438 U.S. 586 (1978).

96. *Woodson*, 428 U.S. at 304 ("This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937))); *Lockett*, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from

phasized the "uniqueness of the individual" rather than membership in a protected class.[97] *Miller*, on the other hand, "took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'"[98] Where *Woodson* and *Lockett* required sentencers to distinguish one defendant from another, *Miller* confirmed that a category of defendants shared a common characteristic and that this characteristic demanded uniform protection. Under a discretionary scheme, courts must weigh mitigating evidence to assess a defendant's diminished culpability, while categorical constitutional guarantees require sentencing courts to rely on specific criteria, including age and mental disability, to certify members of a protected class.[99]

Jones collapses these distinctions even further, holding that discretionary sentencing is "both constitutionally necessary and constitutionally sufficient" to satisfy *Miller*'s substantive rule.[100] Indeed, the Court opined that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth."[101] By insisting that "youth matters" categorically, while permitting sentencers to discount the relevance of chronological age, *Jones* diminishes the force of *Miller*'s protections and breaks from existing precedent.[102] When the Court announced *Ford v. Wainwright* and *Atkins v. Virginia*, for example, the Court "categorically excluded" a group of defendants from execution.[103] Even though *Atkins* and *Ford* permitted states to develop their own processes to identify defendants eligible for protection,[104] the Court adopted

considering . . . any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

97. *Lockett*, 438 U.S. at 605.

98. *Montgomery*, 577 U.S. at 206 (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)); *Miller*, 567 U.S. at 483 (holding that "youth matters for purposes of meting out the law's most serious punishments"); *Jones*, 141 S. Ct. at 1316 (noting instead that "*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing").

99. *See* Roper v. Simmons, 543 U.S. 551, 572-73 (2005); Atkins v. Virginia, 536 U.S. 304, 318-21 (2002) (holding that the death penalty is an unconstitutional sentence for the mentally disabled).

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

101. *Id.* at 1319.

102. *Id.* at 1314.

103. *Atkins*, 536 U.S. at 318 (explaining reasons why "the mentally retarded should be categorically excluded from execution"); *see also* Ford v. Wainwright, 477 U.S. 399, 410-11 (1986) (prohibiting the state from imposing the death penalty on a person who is insane and requiring an evidentiary hearing on the question of a defendant's insanity).

104. *Ford*, 477 U.S. at 416-17 (leaving it to the state to "develop[] appropriate ways to enforce the constitutional restriction").

clinical definitions of mental retardation and insanity to ensure that death and death-in-prison sentences did not violate the Eighth Amendment.[105] By introducing a categorical rule without announcing an objective test, *Jones* asserts that some children are not really children for the purposes of the Eighth Amendment.[106]

As a practical matter, these doctrinal inconsistencies force sentencing courts to make an impossible choice. Unable to apply *Miller*'s categorical ban within a discretionary framework, sentencing courts must choose whether to weigh mitigation on a case-by-case basis or rely on the *Miller* factors "to separate those juveniles who may be sentenced to life without parole from those who may not."[107] When sentencers weigh mitigating evidence against aggravating factors, this case-by-case approach undermines *Miller*'s new substantive rule, for "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[108] On the other hand, when sentencers treat the *Miller* factors as constitutive parts of a categorical test, this analysis forces sentencers to disregard the distinctive attribute of youth and instead construct baseless subcategories among groups of juveniles.[109]

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105. *Atkins*, 536 U.S. at 308 (citing the American Association on Mental Retardation's definition of mental retardation).

106. As a result of this doctrinal confusion, *Jones* may increase adult defendants' exposure to capital punishment. Two cases decided in the months following *Jones* clarify this risk. First, in Georgia, the Georgia Supreme Court affirmed Rodney Young's conviction and death sentence despite evidence of his intellectual disability. *See* Young v. State, 860 S.E.2d 746, 790-92 (Ga. 2021). The court cited *Jones* to justify Georgia's procedure for evaluating intellectual disability claims. *Id.* at 774. Then, in Alabama, the Court of Criminal Appeals upheld the death penalty for a defendant, Benjamin Young, who argued that the circuit court failed to find and consider "uncontested nonstatutory mitigating evidence in the penalty phase." Young v. State, No. CR-17-0595, 2021 WL 3464152, at *52 (Ala. Crim. App. Aug. 6, 2021). Citing *Jones*, the Alabama court rejected Young's argument, finding that the court need not list relevant mitigating factors in its sentencing order. *Id.* at *53.

107. Montgomery v. Louisiana, 577 U.S. 190, 210 (2012) ("[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. Those procedural requirements do not, of course, transform substantive rules into procedural ones. The procedure *Miller* prescribes is no different. A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." (citation omitted) (quoting Miller v. Alabama, 567 U.S. 460, 465 (2012))).

108. *Id.* at 208 (quoting *Miller*, 567 U.S. at 479).

109. *See, e.g.*, Corrected Record Excerpts at 17, Shoemake v. State, 323 So. 3d 1093 (Miss. Ct. App. 2019) (No. 2017-CA-01364-COA) [hereinafter Corrected Record Excerpts, *Shoemake*] (showing that the sentencing court, prior to imposing life without parole, stated that the "the main

In either case, permitting sentencers to weigh mitigating and aggravating evidence, without reference to objective and developmental criteria, risks collapsing the distinction between children and adults altogether.[110]

Jones increases the risk of unequal treatment, providing sentencers with wide latitude to treat a young defendant's juvenile record, lack of remorse, or future dangerousness as evidence weighing against categorical protection. Although *Miller* and *Montgomery* exposed all children to potential unconstitutionally disproportionate punishment, these decisions placed Black youth at a particular disadvantage. As was true during the nineteenth and twentieth centuries, permitting sentencers to predict a child's developmental capacity allows racial bias to infect sentencers' fact-finding processes. Indeed, while Black children were already more likely than white children to be sentenced to life without parole, racial disparities have worsened since the Court announced *Miller*.[111] After 2012, over 2,000 individuals serving juvenile life-without-parole sentences became eligible for sentencing review or relief.[112] However, approximately half of these individuals are still serving sentences of life without parole and at least seventy new juvenile life sentences have been imposed.[113] Among youth identified as permanently incorrigible, and sentenced or resentenced to life without parole,

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supporting evidence set forth for a claim of rehabilitation in the future . . . are the very elements of proof that weigh so heavily against him under the other *Miller* factors"); People v. Arrieta, 2021 IL App (2d) 180037-U, ¶ 84 (upholding the trial court's decision to impose a sentence of life without parole and finding that "the trial court carefully weighed both the State's and the defendant's evidence of rehabilitation from the sentencing hearing" and that the trial court "ultimately placed the greatest emphasis on the evidence of defendant's continued misbehavior in prison"), *appeal denied*, 169 N.E.3d 320 (Ill. 2021).

110. *See, e.g.*, State v. Simmonds, No. 16AP-332, 2017 WL 1902015, at *7 (Ohio Ct. App. May 9, 2017) ("It is not unreasonable to find that Simmonds belongs to a class of offenders that the United States Supreme Court has termed 'the rarest of juvenile offenders, whose crimes reflect permanent incorrigibility.' We are not convinced that any amount of mitigation . . . would have stood a reasonable probability of changing Simmonds' sentence." (citation omitted) (quoting *Montgomery*, 577 U.S. at 209)).

111. Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1661 (2019); *see Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children*, CAMPAIGN FOR FAIR SENT'G YOUTH 2, 7 (Dec. 3, 2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/GD4E-VC6G] ("[O]f new cases tried since 2012, approximately 72 percent of children sentenced to life without parole have been Black—as compared to approximately 61 percent before 2012.").

112. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole [https://perma.cc/C867-28AM].

113. Marshall, *supra* note 111, at 1634-35.

Black children are overrepresented.[114] Rather than recognize how racism, poverty, and lack of mental health resources compound age as a mitigating force, sentencing and resentencing courts use their wide discretion to disregard these conditions or treat them as factors weighing against release or parole eligibility.[115]

In *Jones*, the Court again failed to acknowledge how racial discrimination affects sentencing outcomes. By granting sentencers "wide discretion" to determine "the weight to be given relevant mitigating evidence," *Jones* permits sentencers to make erroneous assumptions about adolescent development.[116] Anticipating inconsistencies at sentencing, Justice Kavanaugh conceded that "one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case."[117] But, by excusing racial disparities as benign inconsistencies, Kavanaugh failed to recognize how historic discrimination and structural barriers drive juvenile life sentences and place an unconstitutional burden on a subcategory of youth. As *Miller*'s baseless sorting process exacerbated racial disparities, so too does *Jones*'s discretionary process continue to disadvantage youth of color.

B. The Miller *Factors*

In the months following *Jones*, the *Miller* factors have continued to influence sentencing outcomes. Although *Jones* does not require trial courts to make a finding of fact regarding a child's permanent incorrigibility, Justice Kavanaugh relied

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114. Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 712 (2021) ("Despite Black people comprising only 13% of the United States' total population . . . 63.4% of the people sentenced to life in prison *without* the possibility of parole for juvenile crimes are Black."); *see also National Trends in Sentencing Children to Life Without Parole*, CAMPAIGN FOR FAIR SENT'G YOUTH (Feb. 2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf [https://perma.cc/9XK9-VZKJ].

115. Among all juveniles sentenced to life without parole, nearly half have experienced physical abuse and eighty percent have witnessed violence in their homes. *Facts About Juvenile Life Without Parole*, CAMPAIGN FOR FAIR SENT'G YOUTH (2021), https://cfsy.org/media-resources/facts-infographics [https://perma.cc/LXF2-8Z95]; *see also* Haney, *supra* note 39, at 1569 (connecting racial disparities in youth exposure to violence to subsequent racial disparities in the juvenile justice system).

116. Jones v. Mississippi, 141 S. Ct. 1307, 1316 (2021) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982)).

117. *Id.* at 1319.

on the *Miller* factors as a foundational point of reference to "consider the mitigating qualities of youth."[118] As of October 2021, *Jones* was cited in over ninety cases in twenty-four states, and by federal district courts in six circuits.[119] In the majority of these cases, sentencers discussed the *Miller* factors before imposing a sentence.[120] These citations do not include an additional eighteen cases in which sentencers relied on state legislation and common law that provided additional safeguards prior to *Jones*.[121]

These cases reveal that the *Miller* factors do not guarantee that sentencers will recognize multisystemic barriers facing vulnerable youth or that sentencers will address the complex relationship between adolescent brain development and a young person's traumatic experiences.[122] While *Miller*'s developmental

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118. *Id.* at 1314 (quoting Miller v. Alabama, 567 U.S. 460, 476 (2012)); *see id.* at 1317-19; *id.* at 1330 (Sotomayor, J., dissenting).

119. The CFSY has tracked cases in which appellate courts have cited *Jones v. Mississippi*. Among the ninety-two cases recorded as of October 22, 2021, sixty-three were decided on the merits, involved questions relevant to sentences of life without parole, and involved juvenile defendants. *See infra* Appendix.

120. *See, e.g.*, Manley v. Warden, No. 11-CV-00354, 2021 WL 3177402, at *12 (D. Nev. July 27, 2021) (affirming a sentence of juvenile life without parole after discussing the trial court's review of Manley's age, abusive childhood, and early drug use); People v. Richardson, No. A159828, 2021 WL 1904483, at *7 (Cal. Ct. App. May 12, 2021) (reviewing the trial court's consideration of Richardson's chronological age before denying a petition for rehearing for a sentence of thirty-five years to life in prison), *rev. denied* (Aug. 18, 2021); State v. Rogers, 487 P.3d 177, 182 (Wash. Ct. App. 2021) (explaining that the trial court "must consider mitigating circumstances related to the defendant's youth" and outlining the *Miller* factors); Elliott v. State, No. CR-20-407, 2021 WL 2012632, at *5-9 (Ark. May 20, 2021) (upholding jury instructions citing the *Miller* factors for youth sentenced to life with parole after thirty years); People v. Watson, No. 352638, 2021 WL 2025216, at *6 (Mich. Ct. App. May 20, 2021) (upholding a sentence of juvenile life without parole after finding that the trial court cited each of the five *Miller* factors); People v. Musselman, No. 351700, 2021 WL 2025150, at *3-7 (Mich. Ct. App. May 20, 2021) (affirming a juvenile life-without-parole sentence after finding that the resentencing court applied the *Miller* factors); *see also infra* Appendix (Categories 1 and 2 show that *Miller* was cited in the majority of cases that cited *Jones*).

121. *See, e.g.*, People v. Ruiz, 2021 IL 182401, ¶ 61; People v. Terry, 2021 IL 182084, ¶¶ 16-17; People v. Estrada, 2021 IL 191611, ¶¶ 27-28; Commonwealth v. Aulisio, 253 A.3d 338, 341 & n.3 (Pa. Super. Ct. 2021); Commonwealth v. DeJesus, No. 883 EDA 2018, 2021 WL 4889071, at *1 (Pa. Super. Ct. Oct. 20, 2021); *see also infra* Appendix (Category 3 lists eighteen cases).

122. Following *Jones*, sentencers have continued to misinterpret the *Miller* factors. *See, e.g.*, State v. Tirado, 858 S.E.2d 628, ¶ 19 (N.C. Ct. App. 2021) (stating that a juvenile's "above-average intelligence" supported the imposition of a life-without-parole sentence); People v. Mauricio, 2021 IL 190619, ¶ 35 (affirming the trial court's consideration of the defendant's difficult childhood, despite evidence that the defendant was "raised in what [an expert] terms an urban war zone with an alcoholic mother and with no father or male role model present").

framework was intended to help guide sentencers, *Miller*'s implicit sorting process instead created additional confusion about the relevance of age at sentencing. Applying the *Miller* factors to justify imposing irrevocable punishment reinforces the mistaken belief that a subgroup of children do not possess "diminished culpability," or the "heightened capacity for change."[123] Rather than clarify and correct this confusion, *Jones* maintains *Miller*'s pseudoscientific premise that sentencers can reliably distinguish among categories of youth to identify those incapable of rehabilitation.

Developmental scientists and legal scholars have long concluded that there is no reliable way to identify which youth (if any) are incapable of reform.[124] Creating subcategories within the class of "youth," rather than simply focusing on the age of the defendant, allows sentencing courts to rely on unfounded theories and treat problematic assumptions as if they were science. As a matter of policy, these pseudodevelopmental standards create artificial distinctions between children whose crimes reflect "transient immaturity" and children whose crimes render a death-in-prison sentence constitutional. In practice, the Court's baseless sorting process places an unfair burden on sentencing courts: rather than take into account how a child's age counsels against life without parole, the *Miller* factors permit sentencers to rely on the facts of the offense to reach a conclusion about a child's permanent disposition, erroneously drawing a connection

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123. *Miller*, 567 U.S. at 479.

124. *See, e.g.*, Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners at 21, *Miller*, 567 U.S. 460 (No. 10-9646) ("As this Court has previously observed, moreover, even experts have no reliable way to predict whether a particular juvenile offender will continue to commit crimes as an adult. The positive predictive power of juvenile psychopathy assessments, for instance, remains poor." (citation omitted)); *see also* John F. Edens, Jennifer L. Skeem, Keith R. Cruise & Elizabeth Cauffman, *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 BEHAV. SCI. & L. 53, 59 (2001) (collecting evidence that psychopathy assessments "may tap construct-irrelevant variance . . . associated with relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features"); Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 AM. PSYCH. 797, 799 (2001) ("Assessing adolescents . . . presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 64-65 (2004) (noting discontinuity and disappearance of mental disorders identified in adolescence); Matan Kotler-Berkowitz & Elijah Wiesman, *Inconsistent with Youth: Equal Protection, Cruel and Unusual Punishment, and the Issue of the Incorrigibility Standard*, 55 U.S.F. L. REV. F. 1, 7, 13 (2020) (arguing that the incorrigibility standard is harmful, unscientific, and unconstitutional).

between a single act and a child's capacity for change. Unsurprisingly, jurisdictions vary significantly in how they interpret the *Miller* factors and identify youth eligible for protection.[125]

Sentencers have not adopted a uniform approach when applying the *Miller* factors. In some cases, sentencers weigh each *Miller* factor before imposing a sentence, while in others, judges consider the *Miller* factors holistically and may omit some factors.[126] To clarify my analysis, I discuss each *Miller* factor individually and provide examples to explain how *Miller* leaves judges with a flawed standard to provide youth with categorical protection. By discussing the science supporting each *Miller* factor, and then by examining how the process of identifying "irredeemable youth" contradicts the purpose of *Miller*'s "substantive new rule," this Section argues that the *Miller* factors expose all children to unconstitutional punishment.

This conclusion is supported by examples from state and federal jurisdictions. While the universe of these cases increases each year, Section II.B analyzes forty-five randomly selected sentencing transcripts from nine states and the Federal District of Arizona between 2012 and 2020. Among these, it focuses on twenty-eight cases in which appellate courts upheld sentences of life without parole.[127] The sample is necessarily limited to jurisdictions in which transcripts

125. *National Trends in Sentencing Children to Life Without Parole*, *supra* note 114, at 2.

126. *Compare, e.g.*, Corrected Record Excerpts, *Shoemake*, *supra* note 109, at 11-16 (reviewing each of the *Miller* factors prior to imposing a sentence), *and* Record on Appeal at 150-53, State v. Sims, 818 S.E. 2d 401 (N.C. Ct. App. 2018) (No. COA 17-45) [hereinafter Corrected Record Excerpts, *Sims*] (citing each of the factors identified in the North Carolina Sentencing Guidelines, which adopt the *Miller* factors), *with* Transcript at 5, State v. Roark, No. 13-CRM-092 (Ohio Ct. C.P. Aug. 19, 2014), *aff'd*, No. 10-14-11, 2015 WL 5522050 (Ohio Ct. App. Sept. 21, 2015) [hereinafter, Transcript, *Roark*] (considering the *Miller* factors in the aggregate and concluding that "the court has considered his youth as a mitigating factor since he was under the age of 18 at the time these offenses were committed"), *and* Transcript at 18-19, 34, State v. Chandler, No. 8491 (Miss. Cir. Ct. Jan. 23, 2015), *aff'd*, 242 So. 3d 65 (Miss. 2018) [hereinafter Transcript, *Chandler*] (comparing the facts governing Chandler's case to the facts in *Miller*, without citing each of the factors).

127. Records from these cases include sentencing and resentencing decisions for fifteen Black youth, eleven white youth, one Latinx youth, and one Native youth, all between the ages of fifteen and seventeen. Many, though not all, of these youth have suffered poverty, physical and sexual abuse, and have been diagnosed with mental illness and intellectual disabilities. *See* Transcript, Commonwealth v. Flamer, No. CP-51-CR-0007713-2009 (Pa. Ct. C.P. Mar. 14, 2014), *aff'd*, No. 2299 EDA 2014, 2016 WL 2798907 (Pa. Super. Ct. May 11, 2016) [hereinafter Transcript, *Flamer*]; Transcript, State v. Rivera, No. 48-2015-CF-325-B (Fla. Cir. Ct. Apr. 7, 2017), *aff'd*, 274 So. 3d 537 (Fla. Dist. Ct. App. 2019) [hereinafter Transcript, *Rivera*]; Corrected Records Excerpts, *Shoemake*, *supra* note 109; Transcript, State v. Rafferty, No. 2012-01-169-B (Ohio Ct. C.P. Nov. 9, 2012), *aff'd*, No. 26724, 2015 WL 1932693 (Ohio Ct. App. Apr. 29, 2015) [hereinafter Transcript, *Rafferty*]; Transcript, State v. Brown, No. CR-02015-2648

are available, and where juvenile life without parole is still a constitutional sentence.[128] In claiming that the *Miller* factors expose a subgroup of children to unconstitutionally disproportionate punishment, I do not contend that every judge will adopt the same analysis in each sentencing or resentencing hearing. The examples simply illustrate *Miller*'s inherent flaws.[129]

(Ohio Ct. C.P. July 21, 2016), *aff'd*, No. L-16-1181, 2018 WL 388537 (Ohio Ct. App. Jan. 12, 2018) [hereinafter Transcript, *Brown*]; State v. Simmonds, No. 16AP-332, 2017 WL 190201 (Ohio Ct. App. May 9, 2017); State v. Bass, No. 2014-47 (Miss. Cir. Ct. June 13, 2017), *aff'd*, 273 So. 3d 768 (Miss. Ct. App. 2018); *Juvenile Life Without Parole Analysis: Dexter Allen*, MORGAN LEWIS (on file with author) (analyzing State v. Allen, No. 1504483, 2017 WL 1907851 (La. Dist. Ct. Apr. 21, 2017), *aff'd*, 247 So. 3d 179 (La. Ct. App. 2018)); Transcript, Jones v. State, No. CR04-833 (Miss. Cir. Ct. Feb. 6, 2015), *aff'd*, 285 So. 3d 626 (Miss. Ct. App. 2017) [hereinafter Transcript, *Jones*]; *Juvenile Life Without Parole Analysis: Charles Carter*, MORGAN LEWIS (on file with author) (analyzing State v. Carter, No. 520-023 (La. Dist. Ct. Mar. 16, 2016), *aff'd*, 257 So. 3d 776 (La. Ct. App. 2018)); Transcript, State v. Brooks, No. 279,753 (La. Dist. Ct. Aug. 15, 2013), *aff'd*, 139 So. 3d 571 (La. Ct. App. 2014) [hereinafter Transcript, *Jeremy Brooks*]; Transcript, *Roark*, *supra* note 126; People v. Arrieta, No. 95 CF 573 (Ill. Cir. Ct. Oct. 10, 2017), *aff'd*, 2021 IL App (2d) 180037-U; Transcript, *Chandler*, *supra* note 126; Transcript, Cook v. State, No. 2013-0219-LS (Miss. Cir. Ct. Mar. 30, 2016), *aff'd*, 242 So. 3d 865 (Miss. Ct. App. 2017) [hereinafter Transcript, *Cook*]; Transcript, Davis v. State, No. 2003-10 660(3) (Miss. Cir. Ct. Apr. 15, 2016), *aff'd*, 234 So. 3d 440 (Miss. Ct. App. 2017) [hereinafter Transcript, *Davis*]; Transcript, Commonwealth v. Green, No. CP-25-CR-0000880-1978 (Pa. Ct. C.P. Mar. 4, 2018), *aff'd*, No. 425 WDA 2018, 2019 WL 2559731 (Pa. Super. Ct. June 21, 2019) [hereinafter Transcript, *Green*]; Corrected Record Excerpts, State v. Lovette, No. 08CRS51242 (N.C. Super. Ct. June 4, 2013), *aff'd*, 758 S.E.2d 399 (N.C. Ct. App. 2014); Transcript, State v. Martin, No. 200-10 061(3) (Miss. Cir. Ct. Feb. 24, 2018), *aff'd*, No. 2018-KA-00381-COA, 2020 WL 772730 (Miss. Ct. App. Feb. 18, 2020); Corrected Record Excerpts, State v. McGilberry, No. 1994-10, 614 (Miss. Cir. Ct. Apr. 25, 2017), *aff'd*, 292 So. 3d 199 (Miss. 2020) [hereinafter Corrected Record Excerpts, *McGilberry*]; Appellant's Excerpt of Record, United States v. Orsinger, 698 F. App'x 527 (9th Cir. 2017) (Nos. 15-10412 & 15-10413) [hereinafter Corrected Record Excerpts, *Orsinger*]; Corrected Record Excerpts, *Sims*, *supra* note 126; Transcript, Commonwealth v. Smith, No. 2130-1996 (Pa. Ct. C.P. Oct. 19, 2016), *aff'd*, No. 3599 EDA 2016, 2018 WL 3133669 (Pa. Super. Ct. June 27, 2018) [hereinafter Transcript, *Smith*]; State v. Spader, No. 10-S-240-245 (N.H. Super. Ct. Apr. 26, 2013) (sentencing order); Transcript, Wells v. State, No. 2018-11,329(3) (Miss. Cir. Ct. May 14, 2018), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020) [hereinafter Transcript, *Wells*]; Corrected Record Excerpts, Wharton v. State, No. B2402-1995-00063 (Miss. Cir. Ct. Feb. 21, 2017), *aff'd*, 298 So. 3d 921 (Miss. 2019) [hereinafter Corrected Record Excerpts, *Wharton*]; Transcript, State v. Calloway, No. 672429 (La. Dist. Ct. Feb. 9, 2017) [hereinafter Transcript, *Calloway*]; Transcript, State v. Brooks, No. 311,540 (La. Dist. Ct. Oct. 16, 2013) [hereinafter Transcript, *Joshua Brooks*]; Transcript, State v. Wade, No. 15-CR-6266 (Ohio Ct. C.P. June 28, 2016), *aff'd*, 2020 WL 6888145 (Ohio Ct. App. Nov. 24, 2020) [hereinafter Transcript, *Wade*].

128. Rovner, *supra* note 112.

129. I adopted the following process to identify the cases for my study: the CFSY worked with a law firm, Morgan Lewis, to obtain sentencing records from jurisdictions that have not yet banned juvenile life without parole. The selected transcripts represent geographically and culturally diverse jurisdictions, including the Northeast, Mid-Atlantic, Southeast, Northwest,

In addition to analyzing sentencing transcripts from these hearings, I have also included citations to appellate decisions in which courts relied on the *Miller* factors to affirm or reverse de-facto-life, life-with-parole, or life-without-parole sentences following *Jones*. Records from these cases, though limited to published and unpublished opinions, help explain why judges that apply *Jones*'s legal standard will continue to make inconsistent rulings, exposing a subset of youth to unconstitutionally disproportionate punishment.

1. *Chronological Age and Its Hallmark Features*

The first *Miller* factor requires courts to consider a young person's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[130] This is because, as a general class, adolescents do not possess the neurobiology of adults and are more prone to risk-taking behavior.[131] However, the first *Miller* factor reveals the consequences of erroneous intrachildhood classifications. By requiring sentencing courts to compare one child to another, sentencing courts are given wide latitude to treat a child's relative age as one of several criteria necessary to make a finding of transient immaturity. In this way, sentencers applying this *Miller* factor may treat youth who are under the age of eighteen, but who they regard as more "mature" than their peers, as eligible for life without parole. This problematic assumption places an additional burden on Black youth, who are systematically perceived as older than their white same-age peers.[132]

Developmental scientists agree that comparing one child's age to another does not provide an accurate measure of maturity, nor a child's capacity for change. While adolescence and adulthood reflect distinct developmental stages, this does not mean that a seventeen-year-old possesses fewer "hallmark traits" of youth than a sixteen-year-old. As Laurence Steinberg and Elizabeth Cauffman noted, "[w]ithin any given individual, the developmental timetable of different

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and Midwest. Some transcripts were unavailable due to sealed records, court-reporter unavailability, unresponsiveness of court clerks (after repeated attempts), or prohibitive expense. None of the transcripts were reviewed for content before being included in the sample.

130. Miller v. Alabama, 567 U.S. 460, 477 (2012).

131. Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent, *supra* note 68, at 9-10. This research was cited in *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

132. *See* Goff et al., *supra* note 18, at 528-40; *see also* Harawa, *supra* note 114, at 710-14 (illustrating that courts are more likely to find Black juvenile defendants to be "'permanently incorrigible' . . . because of the negative stereotypes that society has foisted upon them").

aspects of maturation may vary markedly, such that a given teenager may be mature physically but immature emotionally, socially precocious but an intellectual late bloomer."[133] Accordingly, Steinberg and Cauffman caution against "partitioning on the basis of chronological age."[134]

Despite the challenge of reconciling adolescent variation with a bright-line ban on excessive punishment, this Note contends that an age-based ban on life-without-parole sentences for juveniles is the most principled way to enforce a categorical rule within a legal regime that affords a class of defendants substantive protections "because of their status or offense,"[135] and for whom the Supreme Court has determined irreversible punishment is not justified.[136] Absent uniform recognition of a young person's developmental growth, sentencers have reached the opposite conclusion as Steinberg and Cauffman: that chronological age can be used to compare one child's development to another and that an older child's crime is more likely to reflect irreparable corruption.[137]

Examples from sentencing hearings in Illinois, Mississippi, Pennsylvania, New Hampshire, North Carolina, Florida, and Louisiana help explain why *Miller*'s first factor exposes older youth to disproportionate punishment. In these cases, sentencers and resentencers either treated chronological age as a factor weighing against parole eligibility or demanded additional evidence of a juvenile defendant's exceptional immaturity, notwithstanding *Miller*'s instruction that age be treated as mitigation for the general class of youth.

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133. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 22, at 379, 384.

134. *Id.*

135. Montgomery v. Louisiana, 577 U.S. 190, 201 (2016) (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

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

137. By proposing an age-based ban on excessive punishment, I do not suggest that adolescence ends at age eighteen. *See* Johnson et al., *supra* note 2, at 216. Instead, I contend that eliminating death in prison for all juveniles, whether that age is defined at eighteen, twenty-five, or twenty-eight, is consistent with developmental science and will help enforce Eighth Amendment protections for all youth. While my analysis focuses on the *Miller* factors to explain why *Miller*'s pseudoscientific sorting process exposes a subcategory of juveniles to irrevocable and disproportionate punishment, my focus on youth should not dissuade efforts to challenge the equally flawed premise that any person, at any age, is "irredeemable." *See* Ashley Nellis, *No End In Sight: America's Enduring Reliance on Life Imprisonment*, SENT'G PROJECT (Feb. 17, 2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment [https://perma.cc/ZN3Y-YQNQ] (explaining why sentences of life without parole "violate fundamental principles of human dignity").

First, in Mississippi, a sentencing court in DeSoto County calculated Charles Shoemake's developmental maturity based on simple addition, rather than developmental science. Before imposing a sentence of life without parole, the trial court noted that "at the time of the crime, Charles Dalton Shoemake was 17 years, 347 days old. Eighteen (18) days later, and the *Miller* factors would not apply."[138] Although the court recognized that by law it could not "ignore the bright line that has been set by the appellate courts," it still found that Shoemake's older age weighed against a reduced sentence.[139]

As in Mississippi, sentencers in Pennsylvania and Louisiana repeatedly referred to seventeen-year-olds as "near the upper end of the range,"[140] and therefore able to be held "accountable as an adult."[141] In Reynard Green's case, for example, a Pennsylvania judge noted that Green was "very close to being an adult" when the offense occurred.[142] So too in Louisiana, where a judge estimated Jeremy Brooks's maturity based on simple addition, noting that Brooks was "seventeen years, eight months, and twelve days old," which "distinguished [him] from someone who might be fifteen or sixteen."[143]

Sentencing and resentencing courts in these jurisdictions also made explicit comparisons between older and younger teenagers to explain why it was appro-

138. Corrected Record Excerpts, *Shoemake*, *supra* note 109, at 11.

139. *Id.* Likewise, in Tunica County, the trial court sentenced Cortez Bass to life without parole, concluding: "The defendant was born May 21, 1996. The murder occurred March 10, 2014. As such, although the defendant was 17 years of age at the time of the murder, the defendant was just 70 days away from his 18th birthday." State v. Bass, No. 2014-0047, at 2 (Miss. Cir. Ct. June 13, 2017) (sentencing judgment), *aff'd*, 273 So. 3d 768 (Miss. Ct. App. 2018). Age-based partitions continued in Jackson County, where a resentencing court emphasized that fifteen-year-old Darwin Wells was "nine days short of his sixteenth birthday" before resentencing him to life without parole. State v. Wells, No. 2008-11,329(3), at 2 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020). This trend has also continued post-*Jones*. Before resentencing Evan Miller to life without parole, the judge stated that "[i]f the defendant were three and one-half years older . . . there can be little doubt that a jury of this state would have been entirely justified in imposing the ultimate penalty." State v. Miller, No. 42-CC-2006-000068.00, at 63 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law).

140. Transcript, *Flamer*, *supra* note 127, at 19.

141. Transcript, *Roark*, *supra* note 126, at 40.

142. Transcript, *Green*, *supra* note 127, at 71; *see also* Transcript, *Smith*, *supra* note 127, at 59 (emphasizing that Smith was "almost 17 years old," before imposing a life-without-parole sentence).

143. Transcript, *Jeremy Brooks*, *supra* note 127, at 26-27.

priate to impose a sentence of life without parole. In North Carolina, for example, the judge resentencing Antwaun Sims made the following observation before reimposing Sims's initial sentence of life without parole:

> The Court finds that the defendant was 17 and ½ at the time of this murder, and therefore his age is less of a mitigating factor than it would be were he not so close to the age of criminal adult responsibility. Further, considering *Miller v. Alabama* to be so instructive as to this factor, the Court notes that the two defendants in *Miller*, Jackson and Miller, were 14 at the time that each committing the murder for which he was convicted.[144]

In other words, instead of considering the relevance of Sims's chronological age as an absolute measure of his diminished culpability, the court found Sims's age *more* aggravating when compared to a younger defendant's. Given the realities of adolescent development, during which "periods of progress often alternate with periods of regression,"[145] the court's reasoning contradicts developmental science and undermines the purpose of *Miller*'s first factor.

In addition to exposing older youth to disproportionate punishment, courts in other jurisdictions have adopted inconsistent and imprecise developmental measures to impose sentences of life without parole against juveniles. Much as nineteenth-century scientists measured children's bodies to establish developmental norms, sentencers in Mississippi, Pennsylvania, and Florida have treated a defendant's legal competence, academic performance, or subjective moral character as a measure of "irreparable corruption," or "transient immaturity."[146]

The standard for legal competence has no bearing on an adolescent's developmental maturity—an adolescent may have a reasonable degree of rational un-

144. Corrected Record Excerpts, *Sims*, *supra* note 126, at 150-51.

145. Steinberg & Cauffman, *supra* note 133, at 384; *see also* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk Taking*, 28 DEV. REV. 78, 99-100 (2008) (providing additional context regarding adolescent risk-taking).

146. Montgomery v. Louisiana, 577 U.S. 190, 209, 210 (2016); *see also* State v. Wells, No. 2008-11,329(3), at 4 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole) (relying on testimony that Wells possessed "average intelligence" and was "competent under the law" to conclude that Wells was "no inexperienced, immature teenager"), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020); Transcript, *Rivera*, *supra* note 127, at 47 ("[W]hile [the Court] appreciate[s] the position of the defense with regard to the youth of the defendant, the position the defense has taken with regard to difficulties that he may have encountered in his background, as put by the defense, his diminished capacity, the Court would quote a portion of, specifically page 6 of 7 of the forensic competency evaluation performed by Dr. Olander, who did find the defendant to be competent.").

derstanding of the proceedings without benefiting from the developmental characteristics of an adult.[147] In addition, a child may perform well on academic assessments without possessing a fully developed prefrontal cortex. By conflating legal competency and academic performance with evidence of developmental maturity, Mississippi and Pennsylvania sentencers departed from scientific principles to determine whether "the distinctive attributes of youth"[148] justified a reduced sentence.

Finally, sentencers in Mississippi did not properly interpret *Miller*'s first factor, even after the defense offered expert testimony to make a showing of adolescent immaturity. Instead, courts presumed adult maturity unless a juvenile defendant made a showing that his or her development was atypical or somehow exceptional. Again, Shoemake's sentencing transcript provides evidence of this trend. When evaluating Shoemake's "hallmark features," the court cited expert testimony indicating that "impulse control did not mature until the early to middle twenties."[149] However, the court then noted Shoemake's failure to produce evidence showing that he, specifically, exhibited these features. Because Shoemake did not demonstrate that he ever had "the slightest problem with impulse control," the court reasoned that Shoemake "was not a troubled 14 year old" worthy of constitutional protection.[150]

Shoemake's adolescence—with or without evidence of mental impairment or immaturity—should have weighed in favor of his categorical protection. Instead, the Mississippi court's reasoning reveals why *Miller*'s and *Jones*'s intrachildhood classifications expose some youth to unconstitutional punishment. Rather than treat the "hallmark features of youth" as sufficient reason to counsel against Shoemake's irrevocable punishment, judicial discretion empowers sentencers to create subcategories of juveniles based on imprecise and inconsistent measures of adolescent development.[151]

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147. *See* Steinberg, *supra* note 145, at 80; Dusky v. United States, 362 U.S. 402, 402 (1960).

148. *Montgomery*, 577 U.S. at 208 (citing Miller v. Alabama, 567 U.S. 460, 472 (2012)).

149. Corrected Record Excerpts, *Shoemake*, *supra* note 109, at 8, 12.

150. *Id.* at 12. This trend again appeared in the case of Joey Chandler, whose failure to produce evidence of a "mental impairment[]" justified the court's finding that the petitioner did not "suffer[] . . . from lack of maturity . . . ." Transcript, *Chandler*, *supra* note 126, at 32-35.

151. In the months following *Jones*, sentencers have continued to treat a young person's "above-average intelligence" or heightened "street smarts, as evidence supporting excessive punishment. *See* State v. Tirado, No. COA20-213, 2021 WL 2425893, at *4 (N.C. Ct. App. June 15, 2021); *In re* A.K., No. 02-20-00410-CV, 2021 WL 1803774, at *21-22 (Tex. App. May 6, 2021), *rev. denied* (Aug. 13, 2021).

2. *A Child's Family and Home Environment*

The second *Miller* factor requires courts to consider a young person's "family and home environment . . . from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[152] While *Miller*'s second factor may resemble other Supreme Court precedent requiring that "sentencing authorities consider the characteristics of a defendant and the details of his offense," *Montgomery* clarified that the *Miller* factors require more than that a sentencer "consider" an individual juvenile's culpability.[153] By announcing a new substantive rule, *Miller* instructed sentencing courts to conduct a hearing in order to separate those juveniles who may be sentenced to life without parole from those who may not.[154]

Like the first *Miller* factor, the process of sorting children into pseudoscientific categories has eroded the scientific foundation supporting *Miller*'s second factor. To separate those juveniles who may be sentenced to life without parole, sentencing courts are given wide latitude to treat evidence of familial dysfunction as further proof of a child's irreparable corruption. As nineteenth-century child psychologists believed that a child's social circumstances could be used to predict a child's moral character,[155] so too does the concept of irreparable corruption permit sentencers to forge an artificial link between a child's home environment and a child's permanent disposition. Contrary to assumptions perpetuated during the Child Study Movement, variation among adolescent risk-taking cannot be attributed to cultural background or social class.[156] Today, neuroscientists and developmental scientists agree that adolescents, as a group, overvalue short-term

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152. *Miller*, 567 U.S. at 477.

153. *Id.* at 470 (citing Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978)); *Montgomery*, 577 U.S. at 208.

154. *Montgomery*, 577 U.S. at 208-09.

155. *See* Ainsworth, *supra* note 17, at 1097 (explaining that "[j]uvenile misbehavior was seen as merely the overt manifestation of underlying social pathology"); *see also* Fallace, *supra* note 17, at 79-86 (summarizing nineteenth-century psychological, anthropological, and sociological studies of social context and childhood development).

156. *See* James E. Wages III, Sylvia P. Perry, Allison L. Skinner-Dorkenoo & Galen V. Bodenhausen, *Reckless Gambles and Responsible Ventures: Racialized Prototypes of Risk-Taking*, 122 J. PERSONALITY & SOC. PSYCH. 202, 202-21 (2022) (examining how membership in social groups is related to biased expectations and perceptions of risk-taking); *see also* Robert W. Blum, Trisha Beuhring, Marcia L. Shaw, Linda H. Bearinger, Renée E. Sieving & Michael D. Resnick, *The Effects of Race/Ethnicity, Income, and Family Structure on Adolescent Risk Behaviors*, 90 AM. J. PUB. HEALTH 1879, 1883 (2000) ("[K]nowing race/ethnicity, income, and family structure provides little predictive power at the individual level.").

benefits and rewards, rendering them more likely to engage in risk-taking behavior than adults.[157] In light of these neurobiological variations, focusing on a child's home environment does not provide for a sufficiently reliable process to sort youth into developmental categories, nor does it correct against racist stereotypes or biased assumptions.[158]

Even when a child's home environment might mitigate a child's culpability, neither *Miller* nor *Montgomery* provided sentencers with adequate guidance about how to weigh specific circumstances related to a child's upbringing—and *Jones* does not provide any additional clarity for cases going forward. Without a clear standard, sentencing courts have reached inconsistent conclusions about what facts should be treated as evidence weighing in favor of irreparable corruption or transient immaturity. Examples from Ohio, Louisiana, Mississippi, North Carolina, New Hampshire, Pennsylvania, and the federal District of Arizona reveal the extent to which sentencing courts either ignore the relevance of a traumatic home environment or find that a troubled upbringing does not meet this unspecified standard.[159]

First, sentencing courts in Mississippi and Pennsylvania treated childhood adversity as further evidence of irreparable corruption, rather than weighing this evidence in favor of parole eligibility. In Cortez Bass's case, for example, the court cited the absence of a male role model as a factor supporting a life-without-parole sentence, noting that "[t]he defendant's home, his family life and his personal life were in a regular state of chaos."[160] Based on this evidence, the court concluded that seventeen-year-old Bass had "little or no regard for the value of human life or general decency among his fellow man," and demonstrated "little,

157. *Juvenile Justice & the Adolescent Brain*, MASS. GEN. HOSP. CTR. FOR L., BRAIN & BEHAV., https://clbb.mgh.harvard.edu/juvenilejustice [https://perma.cc/MP64-ELMF]; Kimberly Larson, Frank DiCataldo & Robert Kinscherff, Miller v. Alabama*: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 319, 324 (2013).

158. *Deadly Speculation: Misleading Texas Capital Juries With False Predictions of Future Dangerousness*, TEX. DEF. SERV. 40-42 (2004), https://www.prisonlegalnews.org/media/publications/tx_defender_service_subj_deadly_speculation_misleading_tx_capital_juries_with_false_predictions_of_future_dangerousness.pdf [https://perma.cc/V9TY-6RKF]; Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 124, at 4-5, 15.

159. In 2020, the Ohio legislature banned juvenile life sentences without parole and provided review eligibility for all youth. I have included transcripts from years prior to 2020 in my analysis. *See* S.B. 256, 133d Gen. Assemb. (Ohio 2020) (codified as amended in scattered sections of OHIO REV. CODE ANN. (West 2021)).

160. State v. Bass, No. 2014-0047, at 2 (Miss. Cir. Ct. June 13, 2017) (sentencing judgment), *aff'd*, 273 So. 3d 768 (Miss. Ct. App. 2018).

if any, possibility for rehabilitation."[161] In so ruling, the court treated Bass's home environment as proof of his intractable disposition, rather than as evidence of a traumatic and temporary condition.[162]

This pattern continued in the resentencing hearings of Reynard Green and Jeremy Martin. First, in Green's resentencing hearing, the defense presented evidence of Green's abusive and violent upbringing, which included exposure to violence, drugs and alcohol, "abject poverty," and repeated sexual abuse starting at the age of eleven.[163] Based on this evidence, the court concluded that Green's problematic behavior "probably emanat[ed] from his childhood experiences," and that his childhood trauma likely "stunted his emotional growth."[164] But instead of finding that Green's "miserable childhood" justified a reduced sentence, the court imposed a sentence of life without parole, finding that "this offender is entirely unable to change."[165]

Likewise, before resentencing thirty-five-year-old Jeremy Martin to life without parole, the resentencing court in Jackson, Mississippi, focused on Martin's childhood exposure to drug abuse and violence without finding that this evidence weighed in favor of categorical protection. The court observed: "Martin had a history of substance abuse and was the product of an unstable environment who exhibited inappropriate behaviors beginning around age twelve or thirteen."[166] Rather than credit Martin's "inappropriate behaviors" to his childhood experiences and lack of a structured environment, the court concluded that Martin's childhood "demonstrate[d] he was well on his way to, if not having actually attained, incorrigibility, which d[id] not weigh in favor of parole."[167]

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161. *Id.*

162. *See Bass*, 273 So. 3d at 781-82 (recognizing "the apparent lack of discipline in Bass's upbringing[] weighed partially in favor of parole eligibility," but still affirming Bass's sentence and concluding that Bass failed to demonstrate "any real substantial hope of rehabilitation"). This trend continued in the months following *Jones*. Before sentencing sixteen-year-old John Lebo to life without parole, the trial court acknowledged Lebo's history of childhood abuse before stating: "[W]hile we feel great sympathy into what he had experienced and observed in his developmental years . . . we cannot lose fact of what that then created in his development as an individual . . . The incorrigible child turned into an incorrigible young man." Commonwealth v. Lebo, 262 A.3d 555, 556 (Pa. Super. Ct. 2021) (quoting the trial court).

163. Transcript, *Green*, *supra* note 127, at 61-62.

164. *Id.* at 60, 62.

165. *Id.* at 61, 74.

166. State v. Martin, No. 2000-10, 061(3), at 6 (Miss. Cir. Ct. Feb. 14, 2018) (resentencing order).

167. *Id.* at 8. Similarly, in Darwin Wells's resentencing hearing, the court weighed Wells's childhood experiences against his parole eligibility, noting that "in his early teens [Wells] began roaming the streets, selling and using drugs and consuming alcohol." State v. Wells, No. 2008-11,329(3), at 3 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence

Conceding that Martin's "childhood was not without serious dysfunction," the resentencing court observed that a testifying expert was "unable to say with any certainty that Martin would not reoffend as an adult," and thus, that Martin "failed to prove he is entitled to a meaningful opportunity for release."[168]

Second, even when sentencing and resentencing courts considered family dysfunction and childhood trauma as a factor relevant to their sentencing decisions, these courts did not find that this evidence weighed in favor of categorical eligibility. Instead, sentencers in Ohio, Mississippi, and the Federal District of Arizona repeatedly held that a young person could "extricate" from even the most horrific conditions, that access to basic resources outweighed the relevance of abuse, and that, relative to other children, a juvenile's home environment could not "excuse" a young person's conduct.

In Ohio, for example, a sentencing court refused to weigh evidence of Brogan Rafferty's mother's addiction to drugs in favor of parole eligibility. Instead, the court remarked: "I know that you came from a broken home, raised by a single parent. Sadly many children are. . . . You got dealt a lousy hand in life, but none of that is an excuse for murder."[169] The trial court's statements suggest that a sixteen-year-old's "broken home" may serve as mitigation, but the seriousness of the offense permitted the court to discount the relevance of Rafferty's childhood experiences. The court's reasoning in this respect departed from *Miller*'s Eighth Amendment promise, through which Rafferty's childhood experiences—irrespective of the offense—may satisfy the eligibility criteria for categorical protection.[170]

As in Ohio, Mississippi resentencing courts found that an unstable home environment did not qualify a young person for protection if sentencers found that they could "extricate" themselves from their home environment. For this reason, no matter the degree of a defendant's familial dysfunction, resentencing courts

of life with parole), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020). Despite reviewing evidence of Wells's exposure to a drug-addicted father, *id.* at 2, the court characterized Wells's decision to "roam[] the streets" as an inherited and therefore permanent characteristic, rather than a result of familial dysfunction, *see id.* at 5.

168. *Martin*, No. 2000-10, 061(3), at 7-8. During appellate review, the Mississippi Court of Appeals found no error and affirmed Martin's life without parole sentence. *See* Martin v. State, No. 2018-KA-00381-COA, 2020 WL 772730, at *1 (Miss. Ct. App. Feb. 18, 2020).

169. State v. Rafferty, No. 26724, 2015 WL 1932693, at *1, *29 (Ohio Ct. App. Apr. 29, 2015) (quoting the trial court record).

170. *See* Corrected Record Excerpts, *Orsinger*, *supra* note 127, at 116 (finding that no evidence of abuse could outweigh the seriousness of the crimes); *see also* Wharton v. State, 298 So. 3d 921, 929-31 (Miss. 2019) (holding that the trial court did not err in its finding that evidence of a dysfunctional and abusive home did not prevent the defendant from extricating himself from his situation).

gave little weight to childhood adversity or found that it did not serve as evidence of transient immaturity. For example, in Harrison County, Darren Wharton's resentencing court "recognize[d] that Wharton was reared in a dysfunctional and abusive home. However, [the court found that] the testimony [was] clear that he had extricated himself from that situation."[171] The court concluded that "[t]he evidence as to this factor weighs in favor of reinstating Wharton's original sentence of life without parole."[172] Wharton's resentencing court reached this conclusion based on evidence that Wharton had been living with his grandfather since the age of fifteen or sixteen to escape "physical and verbal altercations between Wharton and his step-father."[173] Rather than treat a seventeen-year-old's abusive home environment and need to flee as factors weighing in favor of categorical relief, the court determined that he did not qualify for age-related mitigation.[174]

Finally, resentencing courts in Mississippi and North Carolina ruled that a dysfunctional family environment did not weigh in favor of life without parole where conditions were "not idyllic but . . . not hopeless,"[175] or where a juvenile defendant "was raised in a middle class household."[176] In sixteen-year-old Stephen McGilberry's resentencing hearing, for example, defense counsel presented evidence of McGilberry's abusive and alcoholic biological father, allegations of sexual abuse, and his therapists' speculation that he suffered from fetal alcohol syndrome.[177] Notwithstanding evidence of inescapable adversity, the court concluded: "McGilberry's childhood was not idyllic but it was also not hopeless. He had two parents who gave him what many would call a privileged upbringing. They provided him with, [sic] food, medical care, counseling, name-brand clothes, his own room, a Nintendo, and a car."[178] For the court to rule that factors

171. Corrected Record Excerpts, *Wharton*, *supra* 127, at 238.

172. *Id.*

173. *Id.*

174. Similarly, in Lee County, Mississippi, a court ruled that Brett Jones's home circumstances were "troubled," but not "inescapable." Transcript, *Jones*, *supra* note 127, at 140–141.

175. Corrected Record Excerpts, *McGilberry*, *supra* note 127, at 15.

176. State v. Lovette, 758 S.E.2d 399, 402 (N.C. Ct. App. 2014) ("Though adopted, the defendant's home life and family dynamics were not extremely unusual . . . He was raised in a middle class household and did not lack resources.").

177. Corrected Record Excerpts, *McGilberry*, supra note 127, at 14-15.

178. *Id.* at 15. The sentencing court did not specify which "two parents" provided McGilberry with this "privileged upbringing," but in context the judge was likely referring to McGilberry's mother and the man she remarried, Kenneth McGilberry, who "accepted his role as McGilberry's father figure." McGilberry reported to his therapist that he felt Purifoy was abusive in the way he would discipline him, including one instance when McGilberry "stole a neighbor's

like McGilberry's Nintendo outweighed evidence of his parents' abuse reveals the extent to which it minimized McGilberry's mitigating circumstances and, in so doing, misapplied *Miller*'s second protection.

Again, in Mississippi, a court stated the following about Jerrard Cook's family and home environment:

> The defendant grew up in a broken single parent home. His father was institutionalized for most of his life and he had little, if any, contact with him. However, his mother took care of him in spite of her battles with drug addiction. He always had decent clothing as well as computer games, a go cart and later an automobile.[179]

Cook's sentencer concluded: "While the defendant did not enjoy an ideal childhood, the court does not find his family and home environment was so lacking that he should not be sentenced to life without the possibility of parole."[180] Thus, not only did the court's ruling discount Cook's experience of drug addiction and familial dysfunction, but as in *McGilberry*, the court suggested that Cook's access to computer games and a car could outweigh his exposure to extreme childhood adversity.[181]

3. *Circumstances of the Offense*

The third *Miller* factor stresses that a mandatory life-without-parole sentence "neglects the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him."[182] *Miller*'s third factor suggests that the *Miller* Court understood, at least in part, the relationship between a homicidal act and an adolescent's anatomical and functional immaturity. Although adolescents are

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shoes" and Purifoy "made him return the shoes and held him while the neighbor spit in his face." *Id.*

179. Cook v. State, No. 2013-0219-LS, at 23 (Miss. Cir. Ct. Apr. 1, 2016) (order denying resentencing), *aff'd*, 242 So. 3d 865 (Miss. Ct. App. 2017).

180. *Id.* at 38.

181. Sentencers' tendency to compare one child's abuse to another, and to weigh this evidence against parole eligibility, has persisted after *Jones*. *See, e.g.*, State v. Miller, No. 42-CC-2006-000068.00, at 37 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law) (comparing Evan Miller's experience of physical abuse, which started at age three, to his older brother John's abuse); *id.* at 66 ("Evan was not even the worst abused in his household; he had it better than John.").

182. Miller v. Alabama, 567 U.S. 460, 477 (2012).

more predisposed to risky behavior, this does not mean adolescents are less capable of engaging in sophisticated or heinous conduct. However, developmental scientists agree that because adolescence tends to increase reward- and sensation-seeking behavior, juveniles are less capable of making mature judgments, especially in the social contexts in which criminal behavior is most likely to arise.[183] This is why *Miller*'s third factor requires sentencing courts to consider how the circumstances of an offense weigh in favor of a child's categorical protection.

Miller's instruction that sentencers distinguish among juveniles, rather than between juveniles and adults, has forced sentencers, in some cases, to treat the circumstances of the offense as evidence weighing in favor of irreparable corruption. In these cases, sentencers disregard the purpose of the third *Miller* factor and instead rely on the mere fact of the crime to separate the "transiently immature" from the "permanently incorrigible."[184] In this way, pseudoscientific classifications of youth condone inaccurate assumptions about the relationship between a criminal act and adolescent brain science. Instead of acknowledging why an adolescent may be more predisposed to criminal behavior because of his or her chronological age, sentencing courts impose sentences of life without parole against juveniles without treating an adolescent's impulsive behavior as categorical mitigation.

Indeed, rather than heed *Miller*'s warning, sentencers in Pennsylvania, Louisiana, Ohio, and Mississippi found that a juvenile defendant possessed adult maturity based on the level of sophistication required to commit a particular offense. In Ohio, for example, the court concluded "there was nothing reckless or impetuous about what happened."[185] Instead of treating Brogan Rafferty's involvement in a homicide as evidence of his immaturity, the Ohio court reached the opposite conclusion, finding that the "cold" and "calculated" nature of the violence revealed Rafferty's fully developed mental capacity.[186] In reaching this conclusion, Rafferty's sentencing court departed from the social science underlying the Supreme Court's protections for juvenile defendants, which made clear

183. *See* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 124, at 7-19.

184. *See Miller*, 567 U.S. at 479; *see also* Montgomery v. Louisiana, 577 U.S. 190, 208-09 (2016).

185. Transcript, *Rafferty*, *supra* note 127, at 31.

186. *Id.* As in Brogan Rafferty's sentencing, the court sentencing Devonte Brown to life without parole found that Brown's crimes were "not crimes of passion. These were crimes of rage and control. . . . These were crimes of a nature not previously seen in this community." Transcript, *Brown*, *supra* note 127, at 37. In so ruling, the court concluded that the seriousness of Brown's crime demonstrated his maturity and therefore made an unmitigated sentence appropriate.

that even a sophisticated crime does not reveal a young person's psychological and neurological development.[187]

This pattern continued in a Louisiana parish, where a court made a finding of irreparable corruption based on the severity of the crime. In Caddo Parish, the court at first appeared to consider the relevance of Joshua Brooks's young age. However, the court then decided that Brooks was "not of such a tender age to not know what was going on."[188] Rather than attribute Brooks's inability to appreciate the risks and consequences of his actions to his adolescence, the court relied on evidence of the offense to weigh against Brooks's eligibility for a life sentence with the possibility of parole.[189]

Finally, as in Ohio and Louisiana, resentencing courts in Mississippi attributed adult maturity to juvenile defendants, finding, for example, in the case of Jeremy Martin, that "[s]uch premeditation and deliberation d[id] not translate into[] 'youthful impetuosity and recklessness,'" or that a defendant's actions were "more indicative of entrenched personality traits" than his developmental age.[190] In so doing, resentencers departed from scientific studies that have confirmed that "older adolescents (aged 16-17) often have logical reasoning skills that approximate those of adults, but nonetheless lack the adult capacities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the

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187. Indeed, even the *Roper* Court recognized the difficulty with drawing a conclusion about the moral and mental state of an adolescent based on the crime, concluding that "[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver." Roper v. Simmons, 543 U.S. 551, 573 (2005).

188. Transcript, *Joshua Brooks*, *supra* note 127, at 14.

189. In Pennsylvania, too, the court found that the circumstances of the crime reflected adult responsibility. In sentencing Nafeast Flamer to life without parole, the sentencing court noted: "I think the Commonwealth's evidence certainly proved by a preponderance of the evidence that he was sophisticated enough to attempt to eliminate one of the witnesses to this homicide." Transcript, *Flamer*, *supra* note 127, at 20.

190. State v. Martin, No. 2000-10, 061(3), at 6 (Miss. Cir. Ct. Feb. 14, 2018) (resentencing order); *see also* Transcript, *Davis*, *supra* note 127, at 126–127 (noting the "depravity of this murderous scheme"); State v. Wells, No. 2008-11,329(3), at 3-4 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole) ("He armed himself in advance, intended to use and did use deadly force, and deliberately murdered Michael Porter in cold blood. This is hardly the impulsively committed crime as characterized by Defendant's mitigation specialist. The only impulsive feature involved is the pure senselessness of this killing."), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020); Corrected Record Excerpts, *McGilberry*, *supra* note 127, at 23 ("While one could argue this behavior suggests immaturity, given the totality of the circumstances, the Court finds it is more indicative of the entrenched personality traits described the experts and does not find it to be a 'hallmark' of youth. Impetuosity and recklessness do not translate into such premeditated and deliberate actions.").

future that are just as critical to mature judgment, especially in emotionally charged settings."[191] Rather than credit defendants' premeditation to youthful impetuosity, these sentencers reached unfounded conclusions about whether a young person possessed an intractable disposition.[192]

In addition to treating the circumstances of the offense as mitigation, *Miller*'s third factor requires that sentencers consider the influence of peer pressure or familial pressure as evidence of a juvenile defendant's "diminished culpability and greater prospects for reform."[193] In practice, however, courts have disregarded the influence of peer pressure on a young person's behavior or have treated the presence of codefendants or bystanders as evidence of irreparable corruption.

As an initial matter, in twenty-two of the twenty-eight sentencing and resentencing hearings where an appellate court affirmed a life-without-parole sentence, juveniles were convicted of an offense with at least one codefendant under the age of twenty-five or a family member present.[194] Because of their developmental immaturity, juvenile defendants in these cases were more susceptible than adults to pressure from their peers or family members. Sentencing courts

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191. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 124, at 14 (footnote omitted).

192. *See* State v. Miller, No. 42-CC-2006-000068.00, at 69 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law) (reimposing life without parole based on the judge's conclusion that fourteen-year-old Evan Miller "showed cunning, not clumsy rash thinking, when he concocted his plan to cover up his crime in the most certain and fearful way possible").

193. Montgomery v. Louisiana, 577 U.S. 190, 207 (2016) (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)).

194. State v. Rafferty, No. 26724, 2015 WL 1932693 (Ohio Ct. App. Apr. 29, 2015); Transcript, *Flamer*, *supra* note 127; Transcript, *Rivera*, *supra* note 127; Corrected Record Excerpts, *Shoemake*, *supra* note 109; Transcript *Roark*, *supra* note 126; State v. Simmonds, No. 16AP-332, 2017 WL 1902015 (Ohio Ct. App. May 9, 2017); State v. Bass, No. 2014-47 (Miss. Cir. Ct. June 13, 2017), *aff'd*, 273 So. 3d 768 (Miss. Ct. App. 2018); State v. Allen, 247 So. 3d 179 (La. Ct. App. 2018); State v. Jones, 166 So. 3d 406 (La. Ct. App. 2015); State v. Carter, 257 So. 3d 776 (La. Ct. App. 2018); State v. Brooks, 139 So. 3d 571 (La. Ct. App. 2014); Cook v. State, 242 So. 3d 865 (Miss. Ct. App. 2017); Davis v. State, 234 So. 3d 440 (Miss. Ct. App. 2017); Jones v. State, 285 So. 3d 626 (Miss. Ct. App. 2017); State v. Lovette, 758 S.E.2d 399 (N.C. Ct. App. 2014); Martin v. State, No. 2018-KA-00381-COA, 2020 WL 772730 (Miss. Ct. App. Feb. 18, 2020); McGilberry v. State, 292 So. 3d 199 (Miss. 2020); United States v. Orsinger, 698 F. App'x 527 (9th Cir. 2017); State v. Sims, 820 S.E.2d 809 (N.C. 2018); Commonwealth v. Smith, No. 3599 EDA 2016, 2018 WL 3133669 (Pa. Super. Ct. June 27, 2018); State v. Spader, No. 10-S-240-245 (N.H. Super. Ct. Apr. 26, 2013) (sentencing order); Wells v. State, 328 So. 3d 124 (Miss. Ct. App. 2020); Wharton v. State, 298 So. 3d 921 (Miss. 2019).

in Ohio, Pennsylvania, Florida, Mississippi, and Louisiana, however, did not find that these circumstances weighed in favor of parole eligibility.

Two examples help illustrate the court's failure to treat the presence of multiple codefendants as evidence that a young person "falls within the category of persons whom the law may no longer punish."[195] First, in Mercer County, Ohio, the court sentencing seventeen-year-old Trevin Roark to life without parole did not discuss the relevance of Roark's twenty-year-old codefendant to his age-related susceptibility to peer pressure. Instead, at the conclusion of the sentencing hearing, the court referred to the codefendant's participation as evidence of "organized criminal activity."[196] By treating the codefendant's involvement as further evidence of Roark's criminal tendencies, the court failed to recognize the role that that peer pressure might have played in Roark's impulsivity. Then, in Nafeast Flamer's case, the court in Philadelphia County ignored the involvement of Flamer's uncle in the murder of Flamer's cousin. Rather than discuss the familial pressures underlying the offense, the court concluded that "[i]t was just an outrageous killing of his own cousin over some ridiculous dispute."[197] Because Flamer "was one of the shooters," however, the court attributed to him "the highest degree of culpability shared with his co-defendant."[198]

In some jurisdictions, courts have recognized that codefendant or familial influence might mitigate a juvenile's culpability. But several sentencers did not find that these circumstances weighed in favor of a less extreme sentence. For example, in Brogan Rafferty's case, the court imposed a sentence of life without parole. The court acknowledged:

> I do not discount the fact that Richard Beasley played a significant role in your life. He is about thirty-five years older than you. He came into

195. *Montgomery*, 557 U.S. at 210.

196. Transcript, *Roark*, *supra* note 126, at 4; *see Juvenile Life Without Parole Analysis: Charles Carter*, MORGAN LEWIS (on file with author) (analyzing State v. Carter, No. 520-023 (La. Dist. Ct. Mar. 16, 2016), *aff'd*, 257 So. 3d 776 (La. Ct. App. 2018) and revealing that the court believed Carter was the "leader" of the group and did not mention the influence of peer pressure); *see also Carter*, 257 So. 3d at 796-97 ("I find that you are a leader.").

197. Transcript, *Flamer*, *supra* note 127, at 18–19.

198. *Id.* at 18-19; *see also* People v. Arrieta, No. 95 CF 573, at 15 (Ill. Cir. Ct. Oct. 10, 2017) (finding "some evidence that he had been exposed to negative influences, and his older brother had been a gang member and drug dealer," but that Arrieta did not commit the offenses in question due to familial or peer pressure), *aff'd*, 2021 IL App (2d) 180037-U; *Lovette*, 758 S.E.2d at 402 (affirming the trial court's finding that "[d]efendant appears to have been influenced by his peers but not to an unusual degree"); Corrected Record Excerpts, *Wharton*, *supra* note 127, at 238 (comparing Wharton to *Miller* and *Jackson* and finding Wharton as the "sole perpetrator of this crime," notwithstanding the presence of Wharton's codefendant).

> your life when you were a very young boy. He clearly filled a need for you. Because you were so young and because of the length of time he was in your life, you would have been more susceptible to being influenced by him, whatever that influence may have been.[199]

Despite remarking on Beasley's influence, the court still found that Rafferty "had people in [his] life to whom [he] could have turned to and in whom [he] could have confided."[200] The court, however, did not specify which "people" Rafferty might have turned to, concluding without explanation that Rafferty chose to "embrace[] the evil."[201] By considering, yet ultimately disregarding, the relevance of familial pressure, the court revealed its misunderstanding of *Miller*'s third factor.

Likewise, in Mississippi and New Hampshire, sentencing and resentencing courts associated peer pressure with a heightened degree of criminal sophistication. In Darwin Wells's, Stephen McGilberry's, Jeremy Martin's, and Steven Spader's resentencing hearings, Mississippi and New Hampshire courts characterized each juvenile defendant as a "ringleader."[202] Rather than recognize how the presence of other youth weighed in favor of categorical protection, sentencing courts in these jurisdictions treated evidence of codefendants as further proof of irreparable corruption. These examples help demonstrate why the third *Miller* factor fails to provide all sentencers with an objective and uniform standard, thereby placing certain juveniles at a disadvantage.

4. *Incompetencies Associated with Youth*

The fourth *Miller* factor requires courts to evaluate a young person's "inability to deal with police officers or prosecutors . . . or his incapacity to assist his

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199. Transcript, *Rafferty*, *supra* note 127, at 30.

200. *Id.* at 30-31.

201. *Id.* at 31.

202. Corrected Record Excerpts, *McGilberry*, *supra* note 127, at 20; State v. Wells, No. 2008-11,329(3), at 3 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020); State v. Spader, No. 10-S-240-245, at 14 (N.H. Super. Ct. Apr. 26, 2013) (sentencing order); Martin v. State, No. 2018-KA-00381-COA, 2020 WL 772730, at *7 (Miss. Ct. App. Feb. 18, 2020) ("[I]n contrast to the defendants in *Miller* and [*Jackson*], Martin was at the very least a co-ringleader of the plot and its execution." (internal quotations omitted)); *see also* Transcript, *Calloway*, *supra* note 127, at 21 ("He is not the guy who is subject to societal pressure . . . , he is the societal pressure, he is the ring leader, he is the planner and that all tends to indicate that the sentence in this case should be the harsher sentence that is available to the Court in those rare circumstances where it should be used.").

own attorneys" as "incompetencies associated with youth."[203] In practice, however, sentencers and resentencers in Illinois, Mississippi, Ohio, North Carolina, Pennsylvania, and New Hampshire have treated a young person's inability to deal with law enforcement as a factor weighing against a reduced sentence. Instead of considering the extent to which prior contact with law enforcement may reflect a young person's adolescent infirmity, sentencing and resentencing courts in some jurisdictions treated a young person's juvenile record or prior police contact as justification for imposing a death-in-prison sentence.[204] Not only does this trend contravene the purpose of *Miller*'s fourth protection, but it places youth of color at a disadvantage as a result of racist policing and disproportionate prosecution.[205]

In Illinois and Mississippi, for example, resentencing courts relied on a young person's prior experience with law enforcement or prison record as evidence of their adult development. Before sentencing seventeen-year-old Darren Wharton to life without parole, the court in Harrison County, Mississippi reviewed each of the *Miller* factors, including whether Wharton "might have been charged and convicted of a lesser offense if not for incompetencies associated with you[th]."[206] The resentencing court then stated:

> Wharton had experience with the legal system prior to his arrest for capital murder, and was capable of assisting in his own defense. The record reflects that Wharton was not a neophyte to the judicial system, and had the capacity to interact with law enforcement and assist his counsel. The evidence as to this factor weighs in favor of reinstating Wharton's original sentence of life without parole.[207]

By finding that Wharton possessed the "capability" of interacting with law enforcement, the court revealed its misunderstanding of *Miller*'s fourth factor.

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203. Miller v. Alabama, 567 U.S. 460, 477-78 (2012).

204. *See* Commonwealth v. Flamer, No. 2299 EDA 2014, 2016 WL 2798907 (Pa. Super. Ct. May 11, 2016); Bass v. State, 273 So. 3d 768 (Miss. Ct. App. 2018); State v. Calloway, 276 So. 3d 133 (La. Ct. App. 2019); State v. Brooks, 139 So. 3d 1072 (La. Ct. App. 2014).

205. *See And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, NAT'L COUNCIL ON CRIME & DELINQ. 3 (Jan. 2007), https://www.evidentchange.org/sites/default/files/publication_pdf/justice-for-some.pdf [https://perma.cc/3RVR-ANM5]; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408-15 (2013) (discussing disproportionate arrests and self-report studies).

206. Corrected Record Excerpts, *Wharton*, *supra* note 127, at 239.

207. *Id.*

The court penalized Wharton for his so-called "experience" with the legal system. Instead of recognizing that Wharton's contact with the police reflected his adolescent development,[208] the resentencing court treated this evidence as a factor weighing against parole eligibility.

Just as the court misinterpreted Wharton's youthful encounters with law enforcement, the Mississippi court resentencing Darwin Wells found that the fifteen-year-old's "familiarity with the law from previous exposure in the Youth Court system" revealed his "consequent competency in dealing with law enforcement and in understanding his rights."[209] Furthermore, the court found that his record while in prison demonstrated his "competency" to understand the legal system.[210] This pattern emerged again in Illinois, where the court resentencing Joseph Arrieta cited the seventeen-year-old's juvenile burglary conviction and his conduct while in prison as evidence that, "although the defendant had prior police contact and was involved in serious offenses[,] it had not made an impression on him."[211] For this reason, the court found that *Miller*'s fourth protection did not weigh in favor of a reduced sentence and that Arrieta "should have realized that the commission of crimes carried consequences."[212]

In addition, courts in several states cited a defendant's juvenile record as evidence of his intractable characteristics,[213] concluding in one case that "evidence showed defendant was not unable to extricate himself from negative influences but instead chose to be involved with criminal activity."[214] In Ohio, the court sentencing Trevin Roark to life without parole relied on Roark's prior involvement with the criminal justice system "since he was ten years old" as evidence of

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208. *See Miller*, 567 U.S. at 477-78 (discussing why a young person's inability to "deal with police officers or prosecutors" distinguishes children from adults); *see also* J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) (discussing children's responses to interrogation and noting that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them").

209. State v. Wells, No. 2008-11,329(3), at 4 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020).

210. *Id.*

211. People v. Arrieta, No. 95 CF 573, at 18 (Ill. Cir. Ct. Oct. 10, 2017), *aff'd*, 2021 IL App (2d) 180037-U.

212. *Id.* at 14.

213. Transcript, *Roark*, *supra* note 126, at 40-41; State v. Martin, No. 2000-10, 061(3), at 8 (Miss. Cir. Ct. Feb. 14, 2018) (resentencing order); State v. Lovette, 758 S.E.2d 399, 402, 410 (N.C. Ct. App. 2014); Corrected Record Excerpts, *Sims*, *supra* note 126, at 151.

214. *Arrieta*, at 11.

his deliberate "choice"—and therefore his maturity.[215] Finding that Roark possessed "the ability to be held accountable as an adult," the court ruled that Roark "should have understood at the time of the commission of these offenses the severity of these actions that he chose to commit."[216] In so reasoning, the court contradicted a central premise of *Miller* that "a child's character is not as 'well formed' as an adult's . . . and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[217]

Finally, even when juvenile defendants presented evidence of coercive police practices, sentencers in Mississippi, Pennsylvania, and New Hampshire did not address *Miller*'s fourth factor before imposing a sentence of life without parole. In Mississippi, for example, an expert witness testified during Jeremy Cook's resentencing hearing that Cook experienced pressure to confess and that pressure placed on an adolescent may lead to an involuntary waiver of rights or a situation where the adolescent is not fully aware of the consequences of voluntary waiver.[218] Cook's defense counsel also presented evidence that police officers isolated Cook for several hours prior to his interrogation, which may have "heightened the fear factor."[219] Notwithstanding evidence of coercion, the court did not cite this evidence before issuing the ruling, and instead found that *Miller*'s fourth factor "d[id] not weigh against [Cook's] sentence of life without parole."[220] It is difficult to tell, based on this analysis, what evidence of coercion (if any) would convince a court to weigh this factor in favor of a life sentence with the possibility of parole.

5. *Possibility of Rehabilitation*

The Supreme Court concluded its summary of *Miller*'s protections by finding that "mandatory punishment disregards the possibility of rehabilitation even

215. Transcript, *Roark*, *supra* note 126, at 40.

216. *Id.* at 40-41.

217. Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing Roper v. Simmons, 543 U.S. 551, 570 (2005)).

218. Transcript, *Cook*, *supra* note 127, at 118-19.

219. *Id.*

220. Cook v. State, No. 2013-0219-LS, at 3 (Miss. Cir. Ct. Apr. 1, 2016) (order denying resentencing), *aff'd*, 242 So. 3d 865 (Miss. Ct. App. 2017). In addition to disregarding evidence of police coercion, courts in Pennsylvania treated a defendant's legal competency as evidence that he was capable of interacting with police and with his counsel. Before resentencing Reynard Green to life without parole, the court concluded that he need not consider *Miller*'s fourth protection, for "he is not considered so mentally deficient that he could not assist his counsel in this matter." Transcript, *Green*, *supra* note 127, at 72.

when the circumstances most suggest it."[221] In treating a young person's rehabilitative capacity as evidence of whether they are eligible for categorical protection under the Eighth Amendment, *Miller*'s fifth factor asks sentencing courts to perform an impossible task. Neither developmental scientists nor trained psychiatrists are qualified to make a judgment about a young person's capacity for change; the characteristics of youth make such a prediction impossible.[222] In the absence of a crystal ball, and without guidance from the Supreme Court, sentencing courts rely on inaccurate measures of rehabilitative capacity, including a juvenile defendant's prison record, an expert's predictions, and a subjective finding of remorse. As a result, the fifth *Miller* factor permits courts to rely on preconceived notions, moral conclusions, and racial bias to reach "an irrevocable judgment about [an offender's] value and place in society."[223]

In Mississippi, North Carolina, and Illinois, sentencing and resentencing courts placed juvenile defendants in a lose-lose situation, finding that a young person lacked rehabilitative capacity based on evidence of both misconduct and compliance with prison authorities. For example, in North Carolina, the court resentencing Antwaun Sims found that evidence of his compliant behavior while incarcerated disqualified Sims from categorical protection. Before issuing its order, the court remarked that "in recent years the defendant has seemed to do somewhat better in prison, which includes being moved to medium custody."[224] Rather than attribute Sims's model behavior to his evolving maturity and rehabilitative capacity, the court instead concluded that "the evidence demonstrates that in prison, the defendant is in a rigid, structured environment, which best

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221. *Miller*, 567 U.S. at 478.

222. *See Roper*, 543 U.S. at 573 ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."); Graham v. Florida, 560 U.S. 48, 72 (2010) ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . As one court concluded in a challenge to a life without parole sentence for a 14-year-old, 'incorrigibility is inconsistent with youth.'" (citing Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968))).

223. *Graham*, 560 U.S. at 74; *Miller*, 567 U.S. at 473 ("And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.'" (citing *Graham*, 560 U.S. at 74)).

224. Corrected Record Excerpts, *Sims*, *supra* note 126, at 152.

serves to help him with his mental health issues and serves to protect the public from the defendant."[225]

On the other hand, transcripts from resentencing hearings in other jurisdictions reveal inconsistencies in how sentencers weighed defendants' misconduct while in prison. In Stephen McGilberry's case, for example, the court found that McGilberry's "[i]rreparable corruption is revealed not only by the heinous murders McGilberry committed, but also by his inability to be a model prisoner."[226] The court then concluded: "McGilberry's prison record confirms his unwavering contempt for authority and discipline in even the most restricted environments."[227] As opposed to Sims's resentencing hearing, in which the court treated his compliant behavior as a factor weighing against his rehabilitative capacity, McGilberry's resentencing court cited his misconduct as proof of his irreparable corruption.

In addition to adopting contradictory interpretations of the relevance of a juvenile's behavior in custody, sentencers in Pennsylvania, North Carolina, and Mississippi required evidence from psychological experts to make a finding about a juvenile defendant's rehabilitative capacity. In Pennsylvania, for example, the court concluded that "I just don't believe that there is any hope for rehabilitation," despite noting afterwards that "[w]e don't have that crystal ball."[228]

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225. *Id*. This pattern continued after *Jones*. Despite considering evidence of Richards's participation in prison GED programs and his positive character development, the trial court concluded that Richards's impetuosity was not "merely temporal" and sentenced Richards to life without parole. People v. Richards, No. 353247, 2021 WL 4005680, at *4 (Mich. Ct. App. Sept. 2, 2021). The appellate court affirmed Richards's sentence, noting: "It was entirely appropriate for the trial court to consider whether defendant's purported reformation was a sham, or would collapse when he was no longer in a highly-controlled environment." People v. Richards, No. 353247, 2021 WL 4005680, at *9 (Mich. Ct. App. Sept. 2, 2021); *see also* State v. Martin, No. 2000-10, 061(3), at 68 (Miss. Cir. Ct. Feb. 14, 2018) (resentencing order) ("[T]his court finds that Mr. Miller has thrived in highly structured settings but that success, while commendable is not evidence to give this court comfort that he would pursue a path of rehabilitation if free of constraints.").

226. Corrected Record Excerpts, *McGilberry*, *supra* note 127, at 22.

227. *Id.* at 23. Resentencing courts in Mississippi and Illinois reached the same conclusion when sentencing Jerrard Cook, Shawn Davis, and Joseph Arrieta. *See* Cook v. State, No. 2013-0219-LS, at 24 (Miss. Cir. Ct. Apr. 1, 2016) (order denying resentencing) ("[T]he Court finds that Cook's behavior while incarcerated indicates a failure and/or unwillingness to follow directions even in a structured environment. The Court does not find any significant possibility of rehabilitation in Jerrard Cook."), *aff'd*, 242 So. 3d 865 (Miss. Ct. App. 2017); Transcript, *Davis*, *supra* note 127, at 126; People v. Arrieta, No. 95 CF 573 (Ill. Cir. Ct. Oct. 10, 2017), *aff'd*, 2021 IL App (2d) 180037-U.

228. Transcript, *Green*, *supra* note 127, at 74-75.

In the absence of a crystal ball or, in this case, an expert's guarantee that a defendant possessed rehabilitative capacity, the Court found that *Miller*'s fifth protection did not weigh in favor of categorical protection.[229] This pattern continued in North Carolina, Ohio, and Mississippi, where resentencing courts found that an expert's conclusion that "there exists the possibility of rehabilitation" did not rise to the level of certainty necessary to justify a reduced sentence.[230] Courts in these jurisdictions reached this conclusion without recognizing that diagnostic standards prevent psychological experts from making an absolute prediction about an adolescent under the age of eighteen.[231]

Furthermore, courts failed to consider scientific evidence regarding rehabilitation before reaching a conclusion about a young person's future dangerousness.[232] Instead, judges relied on subjective conclusions about a juvenile defendant's "remorse" or "evil" nature to conclude that a young person lacked

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229. *Id*. at 75 ("And, you know, . . . it's been stated that there's been no record of violence since he's been in prison for forty years, and that may be true, but we don't have a situation in prison like we have out on the streets.").

230. State v. Lovette, 758 S.E.2d 399, 402 (N.C. Ct. App. 2014); *see e.g.*, Corrected Record Excerpts, *Wharton*, *supra* note 127, at 240 ("It is difficult for the Court to predict whether Wharton's future behavior will conform to his behavior while incarcerated. Dr. Simone even testified at the resentencing that there is no guarantee of future behavior."); *Martin*, No. 2000-10, 061(3), at 7 ("Dr. Lott felt Martin's behavior could be reasonably stable in a structured environment with appropriate treatment and medication, however, he was unable to say with any certainty that Martin would not reoffend as an adult. Martin did not testify or present any evidence in support of the possibility of rehabilitation."); State v. Wells, No. 2008-11,329(3), at 5 (Miss. Cir. Ct. May 14, 2018) (order denying motion to impose a sentence of life with parole) ("This court does not possess a crystal ball or the paranormal ability to predict the future. Having already re-offended, while incarcerated, there is zero confidence that Darwin Wells would not do so again if released on parole."), *aff'd*, 328 So. 3d 124 (Miss. Ct. App. 2020); Transcript, *Rafferty*, *supra* note 127, at 31 ("They didn't give me a crystal ball with this black robe. I cannot predict what the future is for you in your heart, in your mind, chances of rehabilitation. All I can do is look at the evidence I heard before me.").

231. The diagnosis of antisocial personality disorder is not given to individuals younger than eighteen as the disorder may become less evident or remit as the individual grows older. *See* Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent, *supra* note 68, at 19; Zachary Crawford-Pechukas, *Sentence for the Damned: Using* Atkins *to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole*, 75 WASH. & LEE L. REV. 2147, 2174 n.192, 2182-83 (2018) (noting that psychiatrists are prohibited by the American Psychiatric Association from diagnosing juveniles under eighteen as having antisocial personality).

232. Expert testimony may not replace a court's determination of the ultimate issue. However, the *Montgomery* Court compared *Miller*'s procedural requirement to *Atkins v. Virginia*, 536 U.S. 304 (2002), whereby a scientific standard governs the class of persons who fall within the Court's prohibition. Montgomery v. Louisiana, 577 U.S. 190, 210 (2016). For this reason, an

rehabilitative capacity.[233] In Cortez Bass's case, for example, the Mississippi Court of Appeals affirmed the trial court's sentence of life without parole after finding that the trial court did not err by denying Bass's request for a mitigation specialist.[234] Instead of citing expert opinion, the court found that Bass demonstrated "little or no regard for the value of human life or general decency" and therefore would not benefit from rehabilitation.[235] Without explaining the relationship between a defendant's "remorse" (a subjective impression of a defendant's state of mind) and a defendant's rehabilitative capacity (an objective standard based on available intervention), courts in both Mississippi and Louisiana found that juveniles lacked rehabilitative capacity.[236]

Even when a defendant apologized for their actions and showed remorse, judges in Pennsylvania, New Hampshire, the Federal District of Arizona, and

expert's statement about a young person's rehabilitative capacity may be necessary to qualify a juvenile defendant for categorical protection under the Eighth Amendment.

233. In Jordyn Wade's case, the court cited what it perceived as Wade's lack of "remorse" as justification for imposing a life sentence without parole, as did the court in Dexter Allen's, Nafeast and Marvin Flamer's, Charles Carter's, and Joshua D. Brook's sentencings. Transcript, *Wade*, *supra* note 127, at 16; *see also* State v. Allen, 247 So. 3d 179, 189 (La. Ct. App. 2018) (citing the sentencing court); Transcript, *Flamer*, *supra* note 127, at 14; State v. Carter, 257 So. 3d 776, 798-96 (La. Ct. App. 2018); *Juvenile Life Without Parole Analysis: Joshua D. Brooks*, MORGAN LEWIS (on file with author) (analyzing State v. Brooks, 139 So. 3d 571, 575 (La. Ct. App. 2014)).

234. Bass v. State, 273 So. 3d 768 (Miss. Ct. App. 2018).

235. *Id.* at 782 (quoting the trial court). Similarly, the judge sentencing Dexter Allen identified himself as an expert and concluded: "The Court has had the opportunity to observe Mr. Allen. At no time has this Court seen Mr. Allen show any emotion other than anger. There has been no remorse. There's been no request to say 'I'm sorry' or request for forgiveness from the family." *Allen*, 247 So. 3d at 189 (quoting the sentencing court).

236. State v. Brooks, 139 So. 3d 571, 575 (La. Ct. App. 2014) (summarizing the trial court's considerations, including "the defendant's lack of remorse [and] that the only regret he seemed to exhibit was that he had been caught"); *see also* Transcript, Davis, *supra* note 127, at 130 ("I see no remorse here because I don't believe you have any."); Transcript, *Brown*, *supra* note 127, at 37 ("I lack the appropriate vernacular to explain with the appropriate strength how much I completely disagree with the conclusion of Dr. Thomas Sherman. These were not crimes of passion. These were crimes of rage and control."). Sentencers' subjective observations continue to affect sentencing outcomes after *Jones*. For example, before resentencing Evan Miller to life without parole, the resentencing judge explained: "The remorseful stop looking out for themselves, throw themselves in humility at the feet of the society they harmed and all the individuals they hurt. They stop speaking as though they deserve mercy or second chances; they know and show that they know that they do not." State v. Miller, No. 42-CC-2006-000068.00, at 67 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law). The court also observed: "While this court has heard from many that the defendant [Miller] is 'remorseful,' it has not seen evidence of that in this court's close observation of the defendant's demeanor during the resentencing hearing." *Id.*

Mississippi still did not treat their apology as sufficient to demonstrate rehabilitative capacity. For example, in Samuel Smith's and Steven Spader's resentencing hearings, the court concluded that the defendants' apologies were either "hollow" or "disingenuous."[237] Likewise, in Johnny Orsinger's and Joey Chandler's hearings, the Federal District Court of Arizona and a Mississippi trial court found that the defendants' showings of remorse were inadequate, either because the apology did not reflect pretrial conduct or because the defendant's allocution did not outweigh the seriousness of the offense.[238]

Finally, racial prejudice and implicit biases have informed courts' perception of a young person's rehabilitative capacity. Deauntay Moye's sentencing hearing provides an example of how courts rely on racial stereotypes to justify unconstitutional punishment.[239] Before sentencing Moye—a Black sixteen-year-old—to life without parole, the court cited evidence of Moye's childhood adversity and absent father as proof that "the community you grew up [in] and your family has failed you," which "causes a lot of the problems especially for young men that they had no stable father figure."[240] In addition to blaming Moye and his father for *their* community's "failure," the court then described Moye's behavior in opposition to *the court's* community values. The sentencing court offered the following explanation to justify imposing a life sentence:

> It was a random crime with extreme violence involving a young woman. Any time that happens, when you have a missing girl. And then when she's found in the back of a car. That always has—it wouldn't matter if, I mean may be [sic] it would have less of an impact on a community in Philadelphia County may be [sic], or Allegheny County. But especially here in the quiet part of the county, especially in the northern part which is much more rural, and we don't have many murders here in Bedford County. So, it does present a good deal of fear given the randomness and the type of victim that was involved here. The threat to, the defendant's threat to public safety is very high.[241]

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237. State v. Spader, No. 10-S-240-245, at 19 (N.H. Super. Ct. Apr. 26, 2013) (sentencing order) ("The Court finds these sentiments self-serving, disingenuous and inconsistent with defendant's true regret . . . ."); *see* Transcript, *Smith*, *supra* note 127, at 66; Commonwealth v. Smith, No. 2130-1996 (Pa. Ct. C.P. Oct. 19, 2016) ("I did not get the impression from his allocution that he was truly remorseful, but rather his statements were hollow and mostly self-pity.").

238. Corrected Record Excerpts, *Orsinger*, *supra* note 127, at 79; Transcript, *Chandler*, *supra* note 126, at 36.

239. *See* Transcript, Commonwealth v. Moye, No. CR-486 for 2015 (Pa. Ct. C.P. Dec. 2, 2016).

240. *Id.* at 60-61.

241. *Id.* at 62-63.

By treating a white "young woman" as the "type" of victim worthy of more vigorous prosecution, and by implying that a rural, "quiet part of the county," required greater protection than Philadelphia, the court reinforced a racist narrative about Moye's "violent and improper decision making."[242] Although the court never discussed the race of the defendant, by focusing on the absence of Moye's father, the murder of a white woman, and the safety of a white community, the court relied on racial stereotypes to reach a conclusion that Moye's "rehabilitative needs are well beyond anything that can be simply provided."[243] In this way, Moye's transcript helps reveal how implicit biases and stereotypes have rendered *Miller*'s constitutional promise incomplete.

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The cases discussed above demonstrate how sentencing courts interpret the *Miller* factors to justify imposing sentences of juvenile life without parole. Absent an objective standard, implicit biases and stereotypes have rendered *Miller*'s and *Montgomery*'s protections incomplete. In *Jones*, the Court maintained *Miller*'s discretionary process, insisting that the *Miller* factors would provide all youth with reliable and consistent protection.[244] However, these flaws persist after *Jones*.

Variations across jurisdictions expose why mere "consideration of youth" will continue to lead to disproportionate outcomes.[245] Part II's analysis focused on twenty-eight sentencing and resentencing transcripts in which appellate courts upheld sentencers' decisions to impose life-without-parole sentences against juveniles. Still, appellate courts have also reversed sentences of life without parole, finding that trial courts failed to comply with *Miller*'s and *Montgomery*'s requirements. These reversals demonstrate the importance of the *Miller* factors for the subgroup of juveniles who receive appellate relief.

However, they also indicate that discretionary sentencing regimes do not provide equal protection for all juveniles. On the contrary, discrepancies across appellate-court jurisdictions reveal confusion about how to interpret the *Miller* factors in practice.[246] In these eight cases, trial courts applied the same analysis,

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242. *Id.* at 66.

243. *Id.* at 70.

244. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1317 n.4, 1340 (2021).

245. *Id.* at 1320.

246. Among the forty-five transcripts I reviewed, twenty-eight appellate courts upheld sentences of life without parole against juveniles. However, in seventeen cases, courts of appeal reversed and remanded for new sentencing. Among these, eight appellate courts found reversible error because of the trial court's failure to correctly interpret and apply the *Miller* factors. In many of these eight cases, the trial courts applied the same analysis as courts in other jurisdictions, where the sentences of juvenile life without parole were upheld on appeal. *See, e.g.*, State v.

but appellate courts reached different conclusions about whether to reverse or uphold each sentence.

In North Carolina, for example, the court of appeals reversed Kamani Ames's sentence of life without parole after finding that the trial court applied the incorrect legal standard and "improperly compared the juvenile Defendant to adult offenders."[247] The appellate court reached this conclusion for two reasons. First, the court found reversible error based on the trial court's focus on the nature of the offense, rather than the age of the defendant.[248] The court emphasized that none of *Miller*'s teachings about children are crime specific and recognized that "'almost all of the cases' subjecting juveniles to the harshest penalties 'arose from heinous and shocking crimes.'"[249] Second, the appellate court ruled that the trial court compared Ames to the entire universe of adult offenders rather than to only juveniles. For this reason, the court held that the trial court "transgress[ed] the central tenet of the juvenile sentencing case law."[250]

Compared to other cases upheld on appeal, the trial court in *Ames* conducted a similar analysis to courts in other jurisdictions. For example, sentencers in North Carolina, Mississippi, Ohio, and the Federal District of Arizona also compared juveniles to adults, focused on the elements of the crimes, and required

May, 804 S.E.2d 584 (N.C. Ct. App. 2017); Luna v. State, 387 P.3d 956 (Okla. Crim. App. 2016); State v. Wade, 108 N.E.3d 744 (Ohio Ct. App. 2018); State v. Santillan, 815 S.E.2d 690 (N.C. Ct. App. 2018); State v. Ames, 836 S.E.2d 296 (N.C. Ct. App. 2019); Bracewell v. State, 329 So. 3d 29 (Ala. Crim. App. 2019); State v. James, 813 S.E.2d 195 (N.C. 2018); United States v. Briones, 929 F.3d 1057 (9th Cir. 2019), *vacated*, 141 S. Ct. 2589 (2021) (mem.). In the nine remaining cases, appellate courts reversed because a state outlawed juvenile life without parole, because a trial court did not make an explicit finding of permanent incorrigibility, or because of procedural error. *See, e.g.*, McGee v. State, No. F-2015-393 (Okla. Crim. App. Dec. 2, 2016); Commonwealth v. Moye, No. 1924 WDA 2016, 2017 WL 4329780 (Pa. Super. Ct. Sept. 29, 2017); Moore v. State, 287 So. 3d 905 (Miss. 2019); State v. Calloway, 276 So. 3d 133 (La. Ct. App. 2019); Booker v. State, 283 So. 3d 250 (Miss. Ct. App. 2019); State v. Nga (NMI) Ngoeung, 6 Wash. App. 2d 1046 (2018); State v. Stevenson, 55 Wash. App. 1001 (1989); Commonwealth v. Bowen, No. 1078 WDA 2017, 2018 WL 4237507 (Pa. Super. Ct. Sept. 5, 2018); State v. Schane, 239 So. 3d 286 (La. 2018).

247. *Ames*, 836 S.E.2d at 300.

248. In so ruling, the appellate court focused on the trial court's statement that "the mitigating factors that have been found . . . are outweighed by the other evidence in this case of the offense and the manner in which it was committed." *Id.* at 304 (quoting the trial court).

249. *Id.* at 302 (quoting State v. May, 804 S.E.2d 584, 591 (N.C. Ct. App. 2017) (Stroud, J., concurring)).

250. *Id.* at 305.

additional evidence of immaturity to countenance a reduced sentence.[251] Discrepancies across these jurisdictions demonstrate that the *Miller* factors lack sufficient clarity to provide all youth with equal protection from unconstitutionally disproportionate punishment. *Jones* increases the risk of unequal protection by relying on "individualized consideration" to sort children into categories.[252]

III. REMEDIES

Dissenting in *Jones*, Justice Sotomayor observed: "Today, the Court distorts *Miller* and *Montgomery* beyond recognition."[253] I disagree. Tracing the evolution of *Miller* and *Montgomery*, Part II showed that *Jones* merely exacerbated the deficiencies of *Miller* and *Montgomery*. While *Jones* increased the risk of inconsistent and discriminatory sentences, it maintained the flawed assertion of *Miller* and *Montgomery* that some children do not possess the capacity for change.

Advocates have proposed several remedies to eliminate *Miller*'s erroneous premise and expand upon the inadequate protections offered in *Miller*, *Montgomery*, and *Jones*. Part III reviews several of these strategies and concludes that an age-based ban on juvenile life-without-parole is necessary to recognize the relevance of chronological age for all youth and prevent pseudoscience from influencing irreversible punishment.

A. Sentencing a Child, Not a Crime

The purpose of *Miller* is to provide every child with categorical protection, even when accused of a violent homicide.[254] In practice, however, sentencers

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251. *See, e.g.*, Cook v. State, 242 S.3d 865, 874 (Miss. Ct. App. 2017) (upholding the circuit court's finding that the defendant was "sufficiently close to his eighteenth birthday that this factor should not weigh against the imposition of a sentence of [life without parole]"); United States v. Orsinger, 698 F. App'x 527, 528 (9th Cir. 2017) (concluding that there was "no error in the district court's considering the heinousness of the crimes"); State v. Sims, 818 S.E.2d 401, 408-09 (N.C. Ct. App. 2018) (affirming the trial court's finding that "there was no evidence of any specific immaturity that mitigates the defendant's conduct in this case").

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

253. *Id.* at 1330 (Sotomayor, J., dissenting).

254. Miller v. Alabama, 567 U.S. 460, 473 (2012) ("To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So

weigh the severity of the crime as proof that a child lacks rehabilitative capacity. For every young person facing a sentence of life without parole, testimony from victims and evidence of the crime threaten to overwhelm the mitigating qualities of youth.[255] The *Miller* factors do little to counteract the emotional weight of this evidence and *Jones* provides sentencers with broad discretion to extrapolate permanent characteristics about a young person based on a single moment in that child's life.[256] In contrast to *Roper* and *Graham*, which emphasize the danger of focusing the sentencing inquiry on the nature of the offense, *Miller*, *Montgomery,* and *Jones* opened the door to irrevocable and disproportionate punishment by permitting sentencers to find that a young person's *crime* reflects "irreparable corruption."[257]

Individual sentencers can and should acknowledge that the "distinctive attributes of youth" not only "diminish," but in fact eliminate, "the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[258] Examples from the sentencing hearings reveal opportunities for sentencers to limit the focus on a "heinous offense,"[259] and institute a "youth discount" within the walls of each courtroom.[260] Learning from past mistakes, judges can educate other members of the court about how evidence of crime and testimony from victims affect sentencing decisions, and weigh chronological age as a disqualifying criteria for all juveniles facing irrevocable punishment.

In the Federal District of Arizona, for example, a federal judge imposed a sentence of life without parole against a Native American sixteen-year-old, Johnny Orsinger because the circumstances of the offense convinced him that this sentence was necessary.[261] Before announcing his decision, the judge noted:

Graham's reasoning implicates any life without parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." (internal citations omitted)).

255. *See generally* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003) (discussing empirical research and psychological literature demonstrating that victim impact testimony influence sentencing decisions).

256. *Jones*, 141 S. Ct. at 1319-20 ("[A] sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor.").

257. *See* Roper v. Simmons, 543 U.S. 551, 570 (2005) ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

258. Miller v. Alabama, 567 U.S. 460, 472 (2012).

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

260. *See generally* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013) (proposing a "Youth Discount" to recognize youth as a mitigating factor).

261. Corrected Record Excerpts, *Orsinger*, *supra* note 127, at 120.

"I have struggled with what the right outcome in this case is. Not because I have any sympathy or lack of feeling about the brutal killings, but because of the fact you were young and abused and troubled and impaired when you committed the killings."[262] Although he considered Orsinger's upbringing, the judge concluded that the circumstances of the offense required a sentence of life without parole, for "[o]nly that sentence . . . reflects the seriousness of these crimes, adequately promotes respect for law, provides a just punishment, and affords adequate deterrence."[263]

The court's reasoning in Orsinger's case suggests that, for certain crimes, the mitigating qualities of youth will never weigh in favor of a reduced sentence. The judge's analysis further underscores why sentencers should avoid drawing artificial categories among children. Even when judges apply the *Miller* factors, distinguishing among groups of children leads sentencers to reach contradictory conclusions based on comparable evidence. In one jurisdiction, a judge may discount evidence of murder, rape, and premeditated violence to find that the hallmark features of youth make a sentence of life without parole disproportionate.[264] Faced with similar facts, another judge may find that evidence of violence reflects a young person's irreparable corruption.[265] By requiring judges to consider evidence of the crime and weigh this evidence against a young person's

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262. *Id.* at 119-20.

263. *Id.* at 120.

264. For example, the Ninth Circuit reversed the district court's decision to resentence Riley Briones to life without parole, finding that the district court improperly focused on the "terrible crime Briones participated in, rather than whether Briones was irredeemable." United States v. Briones, 929 F.3d 1057, 1066 (9th Cir. 2019), *vacated*, 141 S. Ct. 2589 (2021) (mem.). In reversing the district court, the Ninth Circuit reached the opposite conclusion of the court in *Orsinger*. The divergent conclusions in *Briones* and *Orsinger* reveal that some sentencers treat certain crimes as ineligible for categorical protection, irrespective of the defendant's chronological age.

265. Nga Ngoeung's resentencing hearing in Washington provides another example of how victim testimony and evidence of violence risk outweighing the relevance of youth. During the resentencing hearing, the court reviewed victim impact statements written by the victim's family members. *See* Transcript of Record at 4, 50-51, State v. Nga Ngoeung, No. 94-1-03719-8 (Wash. Super. Ct. 2015). The judge made the following statement before reimposing a sentence of life without parole:

> You deserve, in the Court's opinion, to serve every day of the sentence you have been given. . . . [W]hile I'm confident in my analysis of the law, I'm not confident that the application of the law, even under the circumstances, is going to moderate the pain that the Weldens and the Forrest families have endured over the last 20 years and continue to suffer for, even though Mr. Ngoeung will remain in prison for the duration of his life. I can only express my heartfelt condolences and sympathy for the loss that the families have suffered . . . .

chronological age, the *Miller* factors permit subjective criteria to satisfy what should be a consistent and uniform test. Judges must take affirmative steps to avoid sentencing youth based on these baseless eligibility requirements. Deferring to *Miller*'s artificial sorting process misleads other members of the bench, and departs from the Court's general presumption that—irrespective of the crime—"children are constitutionally different from adults for purposes of sentencing."[266]

Jones did not clarify how judges should weigh the severity of the crime, nor did it acknowledge that evidence of a violent offense may prejudice the sentencer or jury against the defendant.[267] Instead, *Jones* placed even more power in the hands of individual judges, predicting that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth."[268] But judgements following *Jones* have revealed the error in this assumption and the need for sentencers to enforce *Montgomery*'s substantive guarantee. Indeed, two months after *Jones* was decided, the Alabama Circuit Court resentenced Evan Miller, the fourteen-year-old whose unconstitutional sentence led to the Supreme Court's decision in *Miller*, to life without parole.[269] Evan was fourteen when he was charged with capital murder for robbing his neighbor, beating him, and burning down his trailer. Evan's codefendant, another teenager in the neighborhood, was sixteen years old at the time of the

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Id. at 55-56. The court's statements underscore why *Miller* imposes an impossible burden on sentencers, who must admit victim testimony and weigh this evidence against scientific literature. For many youth in Ngeoung's position, the irreversible consequences of a homicide offense will continue to outweigh the protections *Miller* intended to provide. Ngeoung's sentence was reversed only after Washington abolished life without parole for all juveniles. *See Washington State Supreme Court Rules Life Without Parole for Children Unconstitutional*, Campaign for Fair Sent'g Youth (Oct. 18, 2018), https://cfsy.org/washington-state-supreme-court-rules-life-without-parole-children-unconstitutional [https://perma.cc/J2CD-NAXE].

266. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016) (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)).

267. Before resentencing sixteen-year-old Shawn LaBarron Davis to life without parole, the trial court considered each of the *Miller* factors and concluded: "The nature of this offense, pitiless, prolonged agony of the victim, the family, caused as a result of your planning convinces me that your release into society through parole would constitute a danger to the public in general and especially to vulnerable citizens in particular." Transcript, *Davis*, *supra* note 127, at 130. The court extrapolated Davis's rehabilitative capacity based on a singular reckless act, rather than consider how Davis's age increased the likelihood of his rehabilitation.

268. Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021) (emphasis in original).

269. State v. Miller, No. 42-CC-2006-000068.00, at 63 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law).

crime.[270] In the years following *Miller* and *Montgomery*, the Alabama Supreme Court adopted a framework, based on the *Miller* factors, to guide sentencers imposing sentences on juveniles convicted of capital murder.[271] Citing the so-called "Henderson" factors, taken from *Ex parte Henderson*,[272] the resentencing judge reviewed evidence of Evan's abusive upbringing. Evan's father was addicted to drugs and alcohol, and he beat Evan starting at the age of three.[273] When Evan was six years old, he attempted suicide for the first time; his subsequent suicide attempts, at the age of thirteen, resulted in his hospitalization.[274] Evan's family was evicted from their home on multiple occasions, and he attended thirteen different schools before he was arrested at age fourteen.

The judge resentenced Evan Miller to death in prison after considering his chronological age, mental health history, and exposure to violence. Although the judge recognized these factors as mitigation, he emphasized: "This court is not sentencing Mr. Miller because Mr. Miller suffered some physical abuse at the hands of his father," for "even a cursory examination of capital case law or juvenile dependency case law yield to the inevitable conclusion that that which Mr. Miller suffered is on the lower end of the spectrum of that seen by too many victims of persistent abuse . . . ."[275] Finally, the court concluded that "the strength of the mitigating is lessened by the lack of evidence of any causal connection between these possible or even likely mental deficits and the choices and events that bring this matter back to the court. What may be scientifically true in a generic sense does not correlate to the crime here and the crime is the catalyst necessitating this resentencing."[276]

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270. *Id.* at 48.

271. *See Ex parte* Henderson, 144 So. 3d 1262, 1284 (Ala. 2013); *see also* ALA. CODE § 13A-5-53(e) (1975) (defining capital offenses and requiring that sentencers consider aggravating and mitigating circumstances).

272. 144 So. 3d 1262 (requiring Alabama courts to consider fourteen factors based on the *Miller* factors before sentencing a juvenile to life without parole).

273. State v. Miller, No. 42-CC-2006-000068.00, at 35-36 (Ala. Cir. Ct. June 26, 2021) (sentencing order following remand for resentencing findings of fact and conclusions of law). Ultimately, Evan's father's violence culminated in his pointing a gun at the head of Evan's mother. He left the family and returned to Indiana. Evan's mother, meanwhile, was also addicted to cocaine. Evan was placed in foster care at the age of ten, but he returned to live with his mother at the age of twelve. *Id.* at 38-44.

274. *Id.* at 45-46.

275. *Id.* at 66.

276. *Id.* at 65.

Evan Miller's age and life experiences, rather than his crime, should have been the "catalyst" necessitating his resentencing. By focusing on the crime rather than the child, the judge relegated the "mere fact of his chronological age" to a peripheral consideration. Searching for a "causal connection" between a criminal act and Evan's youth encouraged the judge to compare Evan to another hypothetical child, whose social history may better "explain" his violent conduct. In order to avoid making these misleading comparisons, sentencers should focus on the qualities of youth that mitigate every child's culpability and educate judges about the flawed assumptions underlying intra-childhood classifications.[277]

B. Challenging the Myth of "Incorrigibility"

Given the limitations of existing doctrine, Eighth Amendment protections must be strengthened to ensure that youth do not receive unconstitutionally disproportionate sentences. Litigants should emphasize why age-based criteria are relevant to all youth rather than divide children into artificial categories. By focusing on chronological age as a distinct form of mitigation, defense attorneys can avoid perpetuating misleading assumptions that deny all children age-related protection.

In the years following *Miller* and *Montgomery*, some states adopted procedural safeguards to enforce *Miller*'s requirements. In Illinois, for example, sentencers must make a finding of "irretrievable depravity, permanent incorrigibility, or irreparable corruption" before imposing life-without-parole sentences on juveniles.[278] These additional procedural requirements do not conflict with *Jones*'s holding, which explained:

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277. By contrast, when sentencers apply the *Miller* factors to all youth, *Miller*'s developmental framework may succeed in shifting the focus from the crime to the child. For example, judges have granted reduction-in-sentence motions, finding that age constitutes an "extraordinary and compelling circumstance" under the First Step Act. *See, e.g.*, United States v. Ramsay, No. 96-CR-1098, 2021 WL 1877963, at *1 (S.D.N.Y. May 11, 2021) (citing the *Miller* factors prior to granting a reduction-in-sentence motion filed by a defendant convicted at the age of eighteen); United States v. Herrera-Genao, No. CR 07-454, 2021 WL 2451820, at *2, *8 (D.N.J. June 16, 2021) (granting a reduction-in-sentence motion for a twenty-two-year-old defendant). And, in Colorado, the state supreme court banned mandatory sex-offender registration for juvenile defendants after citing *Miller*'s holding that "children are constitutionally different from adults for the purposes of sentencing." People in Int. of T.B., 489 P.3d 752, 761 (Colo. 2021) (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)).

278. People v. Ruiz, 2021 IL App (1st) 182401, ¶ 61 (quoting People v. Holman, 2017 IL 120655, ¶ 46) (vacating and remanding de facto life sentence where sentencer failed to make a finding of permanent incorrigibility).

> [L]ike *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States.[279]

Sentencing and resentencing transcripts in states that require sentencers to make an explicit finding of permanent incorrigibility demonstrate why this strategy will not lead to age-based and categorical protection.[280] In *Batts I* and *Batts II*, for example, the Pennsylvania Supreme Court recognized a presumption against the imposition of a sentence of life without parole for a juvenile offender and held that the prosecution must prove beyond a reasonable doubt that the

279. Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021).

280. Among the resentencing transcripts included in this analysis, eight trial courts in the Federal District of Arizona, Illinois, Louisiana, Mississippi, Ohio, and Pennsylvania sentenced juveniles to life without parole after making a finding of permanent incorrigibility or concluding that a young person was "one of the worst." State v. Carter, 257 So. 3d 776, 796-99 (La. Ct. App. 2018) (affirming that a finding that defendant was "one of the worst" was justified by the "defendant's vicious behavior"); *see* People v. Arrieta, 2021 IL App (2d) 180037-U, ¶ 89 ("The trial court's full discussion of all statutory and *Miller* factors, recounted at length in this disposition, is sufficient to infer that it believed defendant was either irretrievably depraved, permanently incorrigible, or beyond rehabilitation."); Commonwealth v. Green, No. 425 WDA 2018, 2019 WL 2559731 (Pa. Super. Ct. June 21, 2019); Reply Brief of the Appellant, McGilberry v. State, 292 So. 3d 199 (Miss. 2020) (No. 2017-KA-0716-COA), 2018 WL 3752677; United States v. Orsinger, 698 F. App'x 527, 528 (9th Cir. 2017) (affirming the punishment and holding that the trial court made a finding that Orsinger did indeed fit within that "uncommon" class of juvenile offenders); Commonwealth v. Smith, No. 3599 EDA 2016, 2018 WL 3133669 (Pa. Super. Ct. June 27, 2018) (holding that the trial court found a lack of rehabilitative capacity that allowed for a finding of irretrievable depravity); State v. Spader, No. 10-S-240-245, at 16 (N.H. Super. Ct. Apr. 26, 2013) (sentencing order) ("There exists here overwhelming evidence of 'irretrievable depravity' as set forth in *Miller* as a consideration."); Wells v. State, 328 So. 3d 124 (Miss. Ct. App. 2020); State v. Simmonds, No. 14AP-1065, 2015 WL 6459903 (Ohio Ct. App. Oct. 27, 2015).

defendant is permanently incorrigible when seeking a life-without-parole sentence.[281] However, resentencing and sentencing decisions in the wake of *Batts II* suggest that this requirement does not fulfill *Miller*'s substantive guarantee.

In Reynard Green's resentencing hearing, for example, a Pennsylvania court cited *Batts II* and made an explicit finding of permanent incorrigibility before condemning Green, a Black defendant with a diagnosed mental illness, to death in prison.[282] The court's ruling, upheld on appeal, clarifies why intrachildhood classifications are inconsistent with categorical protection under the Eighth Amendment. Green was seventeen years old at the time of the crime and received a mandatory sentence of life without parole. When the Supreme Court announced *Montgomery*, Green became eligible for resentencing after serving forty years in prison. Before resentencing Green to life without parole, the sentencing court reviewed evidence of Green's "borderline mental retardation,"[283] his experiences of sexual and physical abuse from age eleven,[284] prior contact with police,[285] his absences from school,[286] notes from correction officers documenting his immaturity,[287] and even observed that "his adjustment was good [while] in prison."[288] Still, the court made a finding of "irretrievable depravity," concluding that Green was "very close to being an adult," and that he was "not considered so mentally deficient that he could not assist his counsel."[289] With respect to Green's potential for rehabilitation, the court stated: "I guess you can always say there's potential, but I haven't seen any progress in any regard."[290] After reviewing the *Miller* factors, the court reimposed Green's original sentence of life without parole, finding that Green "will forever be incorrigible or delinquent."[291]

The court's analysis shows how findings of permanent incorrigibility expose vulnerable youth to unconstitutional sentences. As was true for Green and many others, sentencing courts make findings of incorrigibility based on a young per-

281. *See* Commonwealth v. Batts (*Batts II*), 163 A.3d 410, 452 (Pa. 2017); Commonwealth v. Batts (*Batts I*), 66 A.3d 286, 297 (Pa. 2013).

282. Transcript, *Green*, *supra* note 127, at 56.

283. *Id.* at 59.

284. *Id.* at 61-62.

285. *Id.* at 62-63.

286. *Id.* at 64-65.

287. *Id.* at 67.

288. *Id.* at 68.

289. *Id.* at 71, 72.

290. *Id.*

291. *Id.* at 74.

son's chronological age, intellectual disability, traumatic upbringing, prior justice contact, and the inability to demonstrate—with impossible certainty—rehabilitative capacity. For this reason, litigants should avoid relying on intrachildhood classifications, even though requiring sentencers to make a finding of permanent incorrigibility may initially appear to strengthen the force of *Miller*'s substantive rule.[292]

C. Legislative Advocacy

Jones did not eliminate the permanent incorrigibility exception; instead, it maintained *Miller*'s erroneous premise that certain children do not possess the capacity for rehabilitation.[293] This Note thus concludes that an age-based ban against juvenile life without parole is necessary to protect all juveniles under the Eighth Amendment. This conclusion is based on recent efforts to challenge the myth of permanent incorrigibility through coalitions led by formerly incarcerated youth. Critical scholarship has examined the need for directly impacted individuals to lead advocacy campaigns and legal organizations.[294] However, none

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292. Devonere Simmonds's sentencing hearing provides an additional example of why states should ban juvenile life without parole, rather than require sentencers to make a finding of permanent incorrigibility. Like Green, Simmonds was a Black seventeen-year-old in Ohio who was sentenced to life without parole for a crime he committed with two eighteen-year-old codefendants. *See* State v. Simmonds, No. 16AP-332, 2017 WL 1902015 (Ohio Ct. App. May 9, 2017). In addition to evidence of peer pressure, Simmonds offered proof of his parents' criminal involvement, his early drug use, his limited education, and psychological evidence that his IQ was in the first percentile. *Id.* ¶ 7. Like Green, Simmonds was sentenced to life without parole, after the trial court ruled that "[i]t is not unreasonable to find that Simmonds belongs to a class of offenders that the United States Supreme Court has termed 'the rarest of juvenile offenders, [] whose crimes reflect permanent incorrigibility.'" *Id.* ¶ 27 (alteration in original) (quoting Montgomery v. Louisiana, 577 U.S. 190, 209 (2016)). Under the then-existing statutory scheme, trial courts in Ohio were required to determine that the "crimes reflect permanent incorrigibility" before sentencing a juvenile to life without parole. *Id.* ¶ 29 (quoting *Montgomery*, 577 U.S. at 209). Simmonds's sentence was affirmed on appeal, with the court holding that "his actions were of such a serious nature that he does not appear to have prospects for significant or lasting rehabilitation, and "[h]is crimes could well be described as reflecting permanent incorrigibility." *Id.*

293. It is for this reason that this Note avoids characterizing *Miller* and *Montgomery* as a "revolution" in sentencing. *See, e.g.*, Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787 (2016).

294. *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2746 (2014) (identifying scholarship that raises questions about the emphasis placed on about the emphasis placed on "court-centered social change"); *id.* at 2753-54 (describing scholarship that "contemplates a strategic power-sharing partnership" within the lawyer-client relationship); Amna Akbar, *Toward a Radical Imagina-*

apply the Movement Lawyering model to a juvenile life without parole context.[295] This Section suggests that reform efforts should be led by individuals who have been harmed by historic injustice. In addition to changing public opinion about culpability and the purpose of punishment, this shift requires attorneys to reconsider the traditional representation paradigm.[296]

1. *The Incarcerated Children's Advocacy Network*

To strengthen demands for transformative change, organizations like the Campaign for the Fair Sentencing of Youth (CFSY) have centered the experiences and perspectives of individuals incarcerated as children for serious crimes, victims of crimes committed by children, and the families of both. This strategy is important for two reasons. First, it corrects doctrinal confusion by focusing on the juvenile defendant rather than the criminal act. Second, it redistributes power to individuals with direct experience at the hands of the criminal justice system.[297] Advocacy efforts such as these are necessary to challenge the myth of permanent incorrigibility and provide all children with the rights guaranteed by the Eighth Amendment.

The CFSY's partnership with formerly incarcerated youth provides one example of how directly impacted community members can lead efforts to challenge discriminatory and unconstitutional punishment. In 2014, the CFSY partnered with individuals who had been incarcerated for murder and/or sentenced to life without parole. This national network of formerly incarcerated adults provides peer support for its members, engages with survivors of youth violence and the families of incarcerated people, and contributes to the CFSY's legal and

tion of American Law, 93 N.Y.U. L. REV. 405, 405-16, 460-75 (2018) (explaining how scholarship focused on social movements have "brought important attention to the role of social movements in informing the evolution of constitutional meaning").

295. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1645 (defining "movement lawyering" as an "alternative model of public interest advocacy focused on building the power of nonelite constituencies through integrated legal and political strategies"); *see, e.g.*, Susan Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447 (2018).

296. *See* Guinier & Torres, *supra* note 294, at 2743 (examining how focusing on social movements helps transform the lawyer-client relationship and avoids losing sight of other venues in which "real legal change occurs."); *see also* William H. Simon, *Visions of Practice in Legal Thought,* 36 STAN. L. REV. 469, 469 (1984) (contrasting the conservative vision of law practice with an alternative representation paradigm that "transforms the actors and the system in which they act").

297. *See generally* Cummings, *supra* note 292 (describing the broader phenomenon of movement lawyering); Akbar, *supra* note 292, at 405-16, 460-72 (discussing similar efforts in the context of the Movement for Black Lives).

political efforts to end extreme sentences for children. In recent years, the Incarcerated Children's Advocacy Network (ICAN) has emerged as a powerful organizing platform, playing a key role in abolishing juvenile life-without-parole sentences in more than fifteen states since its inception.

In 2016, Eddie Ellis joined ICAN in 2016 and has codirected ICAN's national- and state-level advocacy efforts since 2018.[298] Ellis was born and raised in Washington, D.C., and faced a seventy-five-year-to-life sentence for a crime he committed when he was sixteen. After serving fifteen years in prison, including ten years in solitary confinement, Ellis was released from prison on parole and has worked on a variety of issues, including supporting reentry programs, advocating on behalf of incarcerated individuals with disabilities, and advancing juvenile justice.[299]

Under Ellis's direction, ICAN has moved the needle on abolishing juvenile life without parole and challenging the myth of permanent incorrigibility.[300] To build diverse coalitions across jurisdictions, Ellis and other ICAN members have developed relationships with formerly incarcerated children, family members, prosecutors, and victims of crimes committed by juveniles. ICAN members also meet with legislators and testify before committees to explain the impact of extreme sentences on juveniles, families, and communities. In order to sustain this model, Ellis emphasizes the importance of self-care and provides opportunities for ICAN members to reflect as a community and seek healing and support from other formerly incarcerated youth.[301] Ellis's focus on leading through the exam-

298. Telephone Interview with Eddie Ellis, Codirector, ICAN (Jan. 6, 2021).

299. *Id.*; *see also* Eddie Ellis, *Staff Biography*, CAMPAIGN FOR FAIR SENT'G YOUTH (Jan. 2018), https://cfsy.org/team/ellis [https://perma.cc/6YE5-RZJN]; Luna Reyna, *No Child Is Irredeemably Corrupt. It's Time to Abolish Life Without Parole Sentences for Juveniles*, DAILY KOS (Apr. 4, 2020, 12:10 PM EDT), https://www.dailykos.com/stories/2020/4/28/1940869/-No-child-is-irredeemably-corrupt-It-s-time-to-abolish-life-without-parole-sentences-for-juveniles [https://perma.cc/PDG5-ADM9] (describing Ellis's work supporting former juvenile lifers as they return to their communities).

300. *See* Jeremy Loudenback, *Prosecutors Push Back on Enduring "Superpredator" Label*, IMPRINT (Aug. 8, 2021, 9:31 PM), https://imprintnews.org/justice/juvenile-justice-2/prosecutors-push-back-on-enduring-superpredator-label/58009 [https://perma.cc/9J39-ES7R] (discussing the impact of Ellis's work on prosecutors who helped advocate for the Maryland Juvenile Restoration Act); Hannah Gaskill, *Juvenile Restoration Act Pushes for Resentencing for Youthful Offenders*, MD. MATTERS (Mar. 1, 2021) https://www.marylandmatters.org/2021/03/01/juvenile-restoration-act-pushes-for-resentencing-for-youthful-offenders [https://perma.cc/V794-RD25] (discussing Ellis's example as further proof that "redemption is possible").

301. Ellis's approach aligns with best practices within the critical disability movement and organizations like the Fireweed Collective, which provides mental health education, mutual aid, and

ple of directly impacted individuals accomplishes two goals: it humanizes individuals condemned as children to serve life in prison without parole and serves as "living proof that each child has the capacity for change."[302]

Ellis's vision for fair sentencing reflects his experience both inside and outside the criminal justice system. To address the shortcomings of the Court's existing protections, Ellis believes that states should pursue three goals. First, legislators must abolish de facto life sentences, life-without-parole sentences, and life-with-parole sentences against juveniles. In Ellis's view, "if children are too young to vote, then they are certainly too young to be sentenced to prison for life."[303] Second, legislators must focus on providing psychological counseling and trauma-informed treatment for children exposed to adversity.[304] In this way, modern-day criminal justice advocates can accomplish the goals of Progressive Era reformers by recognizing the capacity of all juveniles to change if provided with adequate resources. Finally, Ellis supports age-appropriate accountability.[305] No matter the extent to which a child's age impacts a child's decision-

redefines medical intervention. *See, e.g.*, *Our Framework*, FIREWEED COLLECTIVE, https://fireweedcollective.org/our-framework [https://perma.cc/G33W-7BNF]; *see also* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021) (centering disability theory as a lens to reframe criminal justice interventions); *see also* Anne Scott & Carolyn Doughty, *Care, Empowerment and Self-Determination in the Practice of Peer Support*, 27 DISABILITY & SOC'Y 1011 (2012) (discussing the peer support movement in the mental health sector). For additional discussion of peer support in the criminal justice context, see generally Ruben Austria & Julie Peterson, *Credible Messenger Mentoring for Justice-Involved Youth*, PINKERTON PAPERS 2-4 (Jan. 2017), https://www.thepinkertonfoundation.org/wp-content/uploads/2017/02/Pinkerton-Papers-credible-messenger-monitoring.pdf [https://perma.cc/85GZ-N6SB], which discusses youth-justice interventions that relies on mentorship from people who share the same experiences as court-involved young people). *See also* Jeremy Loudenback, *Los Angeles County Supervisors Approve Therapeutic Approaches to Youth Detention*, IMPRINT (Sept. 15, 2021, 8:13 PM), https://imprintnews.org/justice/juvenile-justice-2/los-angeles-county-supervisors-approve-therapeutic-approaches-to-youth-detention/58779 [https://perma.cc/H3JL-S35A] (providing collective examples of peer support interventions for youth entangled in the justice system).

302. Telephone Interview with Eddie Ellis, *supra* note 298.

303. *Id.*; *see also* Feld, *supra* note 260, at 116-17 (describing teenagers' limited judgment and impulse control).

304. *See* Jeff Bouffard, Maisha Cooper & Kathleen Bergseth, *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 465, 469-70, 477-78 (2017).

305. Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 594-98, 609-10 (2015) (collecting studies suggesting that neither incarceration nor waiver to adult court results in reduced offending among juveniles and recommending that age-appropriate interventions, including community-based treatment, guide correctional interventions).

making and impulsive behavior, Ellis believes that fair sentencing should recognize the harm caused by a young person's actions. In Ellis's view, however, accountability does not require irrevocable punishment, nor may it rely on discriminatory classifications. Instead, fair sentencing requires programs to support victims harmed by violent acts and age-appropriate intervention for all youth.[306]

2. *The Juvenile Restoration Act*

The CFSY's most recent campaign provides one example of how ICAN's coalition building can help overcome the Supreme Court's deficient protections. On April 2, 2021, Maryland passed the Juvenile Restoration Act (JRA), which eliminated life sentences without parole for juveniles and permitted courts to reconsider the sentences of juveniles who had spent a minimum of twenty years in prison.[307] Prior to the JRA, Maryland ranked first in the nation with the highest proportion of Black youth sentenced to life without parole.[308]

The JRA, sponsored by a Democratic member of the House and a Republican Senator, represents the culmination of two years of advocacy by the CFSY and other stakeholders.[309] The CFSY developed relationships across an expansive coalition of community members, including prosecutors, family members of incarcerated youth, formerly incarcerated individuals, faith leaders, and business leaders.[310] Recognizing "the mistakes we made in the tough-on-crime era of the 80s and 90s," the State's Attorney's Office for Baltimore City published a letter of support endorsing the JRA and explaining why an opportunity for second chances promotes community safety.[311]

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306. Telephone Interview with Eddie Ellis, *supra* note 298.

307. 2021 Md. Laws ch. 61.

308. *Juvenile Restoration Act (HB 409/SB 494)*, CAMPAIGN FOR FAIR SENT'G YOUTH 2 (2021), https://cfsy.org/wp-content/uploads/HB409_SB494_JuvenileRestorationAct_FACTSHEET-1.pdf [https://perma.cc/KY89-YPFB].

309. *Maryland State Legislature Passes the Juvenile Restoration Act*, OFF. STATE'S ATT'Y FOR BALT. CITY (Apr. 2, 2021), https://www.stattorney.org/media-center/press-releases/2246-maryland-state-legislature-passes-the-juvenile-restoration-act [https://perma.cc/Q5EH-PWDZ].

310. *2021 Legislative Session*, MD. JUV. JUST. COAL. (2021), https://www.mdjjc.org/legislation [https://perma.cc/22TP-8CR7].

311. Marilyn J. Mosby, *Support for HB409—Juveniles Convicted as Adults—Sentencing—Juvenile Restoration Act*, OFF. STATE'S ATT'Y FOR BALT. CITY, https://mgaleg.maryland.gov/cmte_testimony/2021/jud/1UYeo-LlhYsrgPGjiA3ff1Sc2OcEEwbsB.pdf [https://perma.cc/VWC3-AQRE].

Since passing the JRA, Maryland has become the twenty-fifth state in the country to ban juvenile life-without-parole sentences, providing over 400 individuals incarcerated in Maryland an opportunity for release.[312] As explained by Crystal Carpenter, Chief Advocacy & Engagement Manager at the CFSY: "This was the result of a broad coalition working together for justice . . . . It would not have happened without our amazing ICAN members, the loved ones of those serving lengthy sentences, and without the partnerships of organizations . . . ."[313]

By including a diverse range of stakeholders in this campaign, legislation like the JRA helps transform longstanding assumptions about adolescent development, the harmful consequences of custodial punishment, and strategies to improve public safety without incapacitating youth of color.[314] As Ellis emphasized in his testimony to the Maryland Judicial Proceedings Committee, the JRA "balances the needs for age-appropriate accountability and public safety with the fundamental truth that people, especially children, are capable of profound transformation."[315]

ICAN's success in passing the JRA also shifts the paradigm from one focused on individual litigation to movement-based lawyering.[316] By organizing public hearings and building relationships among stakeholders, advocates for the JRA help challenge the flawed assumptions that contributed to *Miller*'s, *Montgomery*'s, and *Jones*'s harmful classifications.[317]

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312. *Maryland Passes Juvenile Restoration Act, Banning Life Without Parole for Children in the State*, CAMPAIGN FOR FAIR SENT'G YOUTH 1 (Apr. 12, 2021), https://cfsy.org/wp-content/uploads/Maryland-bill-press-release-.pdf [https://perma.cc/QQB6-XVPS]; *Maryland Bans Life Without Parole for Children*, EQUAL JUST. INITIATIVE (Apr. 12, 2021), https://eji.org/news/maryland-bans-life-without-parole-for-children [https://perma.cc/86NQ-FK9S].

313. *Maryland Passes Juvenile Restoration Act, Banning Life Without Parole for Children in the State*, *supra* note 312, at 2.

314. *See also* Maddy Troilo, *Locking Up Youth With Adults: An Update*, PRISON POL'Y INITIATIVE (Feb. 27, 2018), https://www.prisonpolicy.org/blog/2018/02/27/youth/ [https://perma.cc/VGM2-P6GR] (providing an overview of harm caused by incarcerating youth and racial disparities in sentencing). *See generally* Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. (2006) https://static.prisonpolicy.org/scans/06-11_rep_dangersofdetention_jj.pdf [https://perma.cc/7N6F-RZXF].

315. Letter from Eddie Ellis to Sen. William C. Smith, Comm. Chair, Jud. Proc. Comm., Md. S. (Feb. 17, 2021), https://mgaleg.maryland.gov/cmte_testimony/2021/jpr/16HkyFETA516PGKDnFl4-CuO8asHwfOFM.pdf [https://perma.cc/SZ72-FJP7].

316. *See* Guinier & Torres, *supra* note 294 (discussing strategies to avoid lawyers taking "center stage").

317. *Id.* at 2758 (noting that "[s]ocial movements may ultimately succeed by changing public opinion"). As Monica Bell points out, this strategy is not limited to the criminal justice system,

But as Ellis has urged, eliminating excessive sentences is not enough; in addition to abolishing life without parole for all youth, state and federal advocacy efforts must recognize the minimal deterrent effect of prison as a public safety intervention and challenge a punishment paradigm in which a subgroup of children are treated as incapable of rehabilitation.[318] For this reason, and particularly in the aftermath of *Jones*, moving away from the so-called "rehabilitative" function of a criminal court may help overcome the limitations of *Miller*'s piecemeal protections. Instead of compensating for social disadvantage by incapacitating "irredeemable" children, state and federal governments can redirect funding to youth through interventions that do not depend on contact with the criminal justice system.[319]

In this way, ICAN's movements to eliminate excessive punishment through legislation can run in parallel with efforts to design nonpunitive interventions that do not discriminate among sub-groups of children.[320] As Lani Guinier and Gerald Torres have emphasized: "To be sustainable and compelling, the declaration of rights needs to be connected to remedies as well as to the lived experience of those on whose behalf they are named by shifting norms of fairness and justice, not just changing the rules governing their conduct or status."[321]

"but with the state writ large." Monica Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV.: SOCIAL SCIENCE RESEARCH ON RACE 197, 208 (2019).

318. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. JUST. (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [https://perma.cc/J8NC-476J] (providing an overview of research documenting the "minimal" effect of incarceration as a deterrent to crime, and proposing noncustodial alternatives that increase public safety); *see also* Haney, *supra* note 39.

319. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161, 1225-26 (2015) (describing institutional alternatives to "strengthen the social arm of the state and improve human welfare"); *see also* James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. AGRIC. ECON. 446, 447 (2007) (finding that spending on early childhood education produces higher returns than interventions that come later in life, such as public-job training and general educational-development programs).

320. Recent investments in diversion programs and decriminalization campaigns disproportionately favor white youth, while preserving the most punitive approaches for youth of color. For example, even though the rate of youth committed to juvenile facilities fell by 47% between 2003-2013, the racial gap between black and white youth increased by 15% during the same time period. *See Racial Disparities in Youth Commitments and Arrests*, SENT'G PROJECT (Apr. 1, 2016), https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests [https://perma.cc/R6S8-JTBU].

321. Guinier & Torres, *supra* note 294, at 2759.

ICAN's legislative advocacy accomplishes more than a "declaration of rights." Developing peer-support groups and advocating for antiracist legislation, ICAN provides an opportunity for advocates and lawyers to imagine alternatives to the existing penal regime and, as Monica Bell suggests, help ease "the negative impact of the criminal legal system on members of marginalized communities."[322] To help catalyze this social and cultural transformation, sentencers and litigants must take affirmative steps to reduce the length of individual sentences and shift the narrative around excessive punishment. In addition, social movements led by individuals with direct experience in the criminal justice system can help overcome mistakes made in the "tough on crime era" and recognize, as Ellis suggests, that "no child is born bad, no child is beyond the hope of redemption, and no child should ever be told that they have no future but to die in prison."[323]

3. *Strengthening Protections for Native American Youth*

In the decade since *Miller* and *Montgomery* were decided, twenty states and the District of Columbia have banned life-without-parole sentences for all juvenile offenders.[324] These categorical and age-based protections give full force to *Miller*'s substantive holding and ensure that many juveniles will not bear the burden of irrevocable punishment. In addition, as discussed above, focusing on the individuals directly impacted by irreversible punishment builds power among groups that have been underrepresented in the judiciary and in legislatures. But advocacy at the state level is insufficient to shield all children from what some critics refer to as "justice by geography," and to protect young people serving sentences in federal custody.[325] The vast majority of life-without-parole

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322. *See* Bell, *supra* note 317, at 208.

323. Letter from Eddie Ellis to Sen. William C. Smith, *supra* note 315.

324. Jones v. Mississippi, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting); Rovner, *supra* note 112.

325. Scholars studying the geographic distribution of juvenile life sentences have observed that the vast majority of sentences of juvenile life without parole have been imposed "in a handful of counties and states." *See* John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 538, 563 (2015). Scholars have also noted "striking" similarities to the imposition of the death penalty. *See* Beth Schwartzapfel, *Supreme Court Conservatives Just Made it Easier to Sentence Kids to Life in Prison*, MARSHALL PROJECT (Apr. 30, 2021), https://www.themarshallproject.org/2021/04/30/supreme-court-conservatives-just-made-it-easier-to-sentence-kids-to-life-in-prison [https://perma.cc/U64H-SHZX].

sentences are imposed in only a handful of counties and states; local advocacy in these states may not convince legislators to adopt a categorical ban on irreversible punishment for children.[326] In addition, state legislation does not prevent Native American children in federal custody from receiving life-without-parole sentences. For this reason, federal legislative reform—in addition to state-based advocacy—is necessary to provide all children with equal protection from unconstitutional punishment.

In particular, a federal ban on life without parole sentences is necessary to protect American Indian and Alaskan Native (Native American) youth from excessive punishment.[327] Even if every state eliminated life-without-parole sentences for juveniles, these reforms would not impact those serving life-without-parole sentences in federal custody, which place Native American youth at a disadvantage. Despite representing 1.6% of the U.S. population, from 2010 to 2016, Native youth comprised on average 18% of federal juvenile inmates.[328] Under current law, the Federal Juvenile and Delinquency Act does not require the Attorney General to defer to tribal prosecution.[329] For all juveniles over sixteen who are alleged to have committed certain crimes of violence or drug-related offenses, and who have records including one such offense, transfer to adult court is mandatory.[330] Federal courts do not have a juvenile system, which means that Native American youth tried in federal court will be "charged under federal laws written with adult criminals in mind."[331] Juveniles face lengthier sentences in federal

326. Schwartzapfel, *supra* note 325.

327. Treating American Indians as foreign nationals would not necessarily eliminate the risk of excessive punishment. In the death-penalty context, for example, the United States had permitted executions of foreign detainees despite protections afforded by the Vienna Convention on Consular Relations. *See Foreign Nationals*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/foreign-nationals [https://perma.cc/HPB5-9HMS].

328. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-591, NATIVE AMERICAN YOUTH: INVOLVEMENT IN JUSTICE SYSTEMS AND INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY 31 (2018).

329. 18 U.S.C. § 5032 (2018); *see* NAT'L CONG. AM. INDIANS, TRIBAL JUV. JUST.: BACKGROUND AND RECOMMENDATIONS 19 (2019) ("Under the Federal Juvenile Delinquency Act . . . federal prosecutors may not file charges against a juvenile in federal court unless the state certifies that either it does not have jurisdiction or that its resources are insufficient to prosecute."). This process exists for states, but not for tribes, which means that tribes have even less power than states in some respects when it comes to control over juvenile prosecutions.

330. Rolnick, *supra* note 18, at 105.

331. NAT'L CONG. AM. INDIANS, *supra* note 329, at 9.

court than in state court, and federal prisons lack culturally appropriate programs that could support Native American children.[332]

As discussed in Part I, the violent removal of Native children from their homes in the nineteenth and twentieth century makes it essential that tribal governments are provided with adequate resources to provide youth with age-appropriate and culturally relevant interventions.[333] Recognizing that federal criminal jurisdiction has subordinated indigenous peoples, advocates may also seek to amend the Federal Death Penalty Act of 1994 (FDPA)[334] to prevent the federal government from sentencing Native juveniles without a tribe's consent.[335] The FDPA requires the federal government to secure a tribe's permission before sentencing certain defendants subject to that tribe's criminal jurisdiction to death for crimes committed under the Major Crimes Act.[336] And since its enactment,

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332. *See* Rolnick, *supra* note 18, at 129; *see also* Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RSCH. J. 55, 58-59 (2016) (discussing harm caused by incarceration of Native American youth).

333. *See* Rolnick, *supra* note 18; *see also* Blackhawk, *supra* note 335, at 1801-02 (describing how "American colonialism transformed from direct violence to structural violence as the national government established the reservation system, forced Native children into boarding schools, and attempted to the break up tribal sovereignty under the auspices of paternalism").

334. 18 U.S.C. §§ 3591-3598 (2018).

335. Given the irreversible harm caused by life-without-parole sentences and the disproportionate consequences facing Native youth, I recommend expanding protections for Native youth by eliminating death-in-prison sentences for all children, and in the absence of uniform protection, deferring to tribal governments before sentencing Native juveniles for any length of time in federal custody. That said, the examination of the relationship between tribal sovereignty and its relationship to criminal punishment is beyond the scope of this Note. For additional discussion about the paradigmatic ramifications of Federal Indian law and its consequences for constitutional protections, see generally Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1764 (2019), which describes the range of public law areas, including criminal law, in which "the Native Nations and colonialism have been central to the development of those doctrines," and emphasizes that "strengthening national power was no panacea for the subordination of Native peoples"; and Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77 (2004), which analyzes questions raised by tribal criminal jurisdiction and jurisdiction-by-identity.

336. *See* 18 U.S.C. § 3598 (2018). In 1885, Congress enacted the Major Crimes Act (MCA), 18 U.S.C. § 1153 (2018), in response to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that the federal government lacked jurisdiction to try a Native American for the murder of another Native American in Native American country. The MCA extended federal-court jurisdiction over certain crimes committed by Native Americans against other Native Americans on reservations, including murder, manslaughter, kidnapping, maiming, and other serious crimes. *See* Rolnick, *supra* note 18, at 102. But, pursuant to Public Law 280, the federal government does not have jurisdiction to prosecute crimes that occur in Indian country in designated states. *See* 18 U.S.C. § 11662 (2018); 28 U.S.C. § 1360

the FDPA has effectively prevented the federal government from imposing capital punishment for crimes that occurred in Indian country, among and between Native Americans.[337]

However, in its current form, the FDPA does not recognize the barriers facing Native youth sentenced as juveniles. As juvenile imprisonment "soared in the 1980s and 1990s" as "part of a nationwide boom in incarceration," so too did Native youth face increasingly draconian sentences.[338] Despite a rhetorical commitment to tribal sovereignty, federal and state governments continue to assert jurisdiction over large components of tribal justice systems, including police and detention services.[339] Few tribes have sufficient resources to seek alternatives to incarceration, and Native children are disproportionately represented in federal custody.[340] Maintaining federal jurisdiction without recognizing tribal sovereignty prevents tribes from playing a more assertive role in juvenile matters and from shaping policies and interventions for Native American teenagers. Furthermore, detaining Native juveniles in adult custody collapses the distinctions between adults and children even further and forecloses age-based interventions Native youth might otherwise receive.[341]

Treating Native American children and adolescents as adult felons relegates tribal courts to an inferior legal status and reinforces erroneous assumptions

(2018). Where the federal government does not have jurisdiction, state-based bans on juvenile life without parole will provide categorical protection for all youth living in that state.

337. *See* Ken Murray & Jon M. Sands, *Race and Reservations: The Federal Death Penalty and Indian Jurisdiction*, 14 FED. SENT'G REP. 28, 28-29 (2001). *But see* Grant Christensen, *The Wrongful Death of an Indian: A Tribe's Right to Object to the Death Penalty*, 68 UCLA L. REV. DISCOURSE 404, 406 (2020) (detailing the execution of a Native American over a tribe's objection).

338. Rolnick, *supra* note 18, at 74; *see also* HINTON, *supra* note 39, at 243, 249-50.

339. Rolnick, *supra* note 18, at 111.

340. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at xxiii-xxv (2013).

341. "Tribal justice systems that incorporate tribal culture and tradition tend to be less focused on adversarial process and individualized punishment and more focused on restorative justice, community well-being, treatment, and healing. In addition to culturally specific beliefs about justice, a tribal system might also be guided by culturally specific beliefs about youth. For many tribes, these include beliefs about the importance of respect and guidance for youth who have gotten into trouble." Rolnick, *Locked Up*, *supra* note 332, at 61 & n.71 (collecting examples of culturally relevant and age-based interventions). But Rolnick also cautions against the "significant financial investment in the incarceration of Native youth under the jurisdiction of tribal systems" and the influence of federal law and policies that limit the practical choices available to tribes. *Id.* at 56. For this reason, this Note advocates for additional investment in social safety-net programs that recognize the impact of historical trauma in Native communities and support Native American juveniles without prolonging criminal justice contact.

about Native Americans and Native American juveniles.[342] For this reason, advocates should give special attention to Native children and adolescents and consider amending the FDPA to require tribal consent before transferring Native youth into federal custody.[343] The influence of racial classifications on the juvenile justice system, and its impact on Native youth in, particular, underscores the need to replace *Miller*'s discriminatory sorting process with an age-based ban on irrevocable punishment.[344]

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To help catalyze this social and cultural transformation, sentencers and litigants can reduce the length of individual sentences and shift the narrative around excessive punishment.

CONCLUSION

Although *Miller v. Alabama* relied on what "any parent knows"—the fundamental differences between children and adults—to humanize young defendants in the eyes of a court, permitting sentencers to draw artificial, inconsistent lines around children has defeated the purpose of *Miller*'s protections.[345] As Johnny

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342. *Cf.* Rolnick, *supra* note 18, at 67-68 (discussing how one mechanism through which the federal government returned sovereignty to Native tribes during the "Self-Determination Era" was by strengthening tribes' control over Native children); Amy Lyon, Note, *Sovereign Injustice: Why Now Is the Time to Grant Tribal Nations True Autonomy in Criminal Prosecutions*, 13 DREXEL L. REV. 191, 201 (2020) (providing an example of an erroneous assumption about Native Americans and their sovereignty, as well as describing the "Self-Determination Era" as one "based on tribal leadership and inherent sovereignty").

343. The Indian Child Welfare Act (ICWA) of 1978 provides an analogue in the civil and family law context. *See* 25 U.S.C. § 1915 (2018). Subject to the ICWA, in any adoptive placement of an Indian child under state law, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* The ICWA was enacted to address the practice of forced removals of Indian children from their families through adoption and Indian boarding schools. *See* Mathew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship,* 95 NEB. L. REV. 885, 890-891 (2017). Since its passage, ICWA has created additional procedural safeguards for Indian parents and custodians. *See* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292, 299-304 (2020). For a greater discussion about efforts to dismantle the ICWA and the potential impact of the Supreme Court's decision in *Brackeen v. Haaland,* 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.), see Gale & McClure, *supra*.

344. *See supra* Part I.

345. 567 U.S. 460, 471 (2012) (noting that the Court's decision "rest[s] not only on common sense—on what 'any parent knows'—but on science and social science as well").

Orsinger stated in his resentencing hearing: "I'm not this monster people create me to look like. I'm not."[346]

This Note places Orsinger's statements into context by examining the origins of a system of punishment that treats certain children as monsters and the influence of that system on the Supreme Court's Eighth Amendment jurisprudence. Adopting the rhetoric of developmental sentencing, *Miller* and *Montgomery* posited that youth matters, but limited the Constitution's protection to a subcategory of juveniles. By relying on pseudoscientific classifications to sort children into categories, *Jones* reinforces *Miller*'s erroneous assumption that sentencers can predict a young person's permanent disposition. In addition to exposing the most marginalized youth to unconstitutionally disproportionate punishment, the Supreme Court's baseless sorting process places an inhumane burden on sentencers, who must condemn "irredeemable" children to death in prison.

The Court's retreat from substantive protections may convince some advocates to abandon the Eighth Amendment and instead focus on the Fourteenth Amendment or other procedural safeguards to challenge excessive punishment. But relying on individualized protections takes for granted the state's power to impose punishment on individuals who have had the opportunity to "proffer" mitigating factors,[347] without eliminating a category of punishment because the "evolving standards of decency"[348] so require. For this reason, the Eighth Amendment still carries the potential to reframe the penological purposes of punishment, by emphasizing the social factors that reduce an individual's "moral culpability."[349] Explaining that "penological theory," including retribution, deterrence, incapacitation, and rehabilitation, "is not adequate to justify life without parole for juvenile nonhomicide offenders," the Supreme Court left open the

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346. Corrected Record Excerpts, *Orsinger*, *supra* note 127, at 102.

347. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that sentencers must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

348. Roper v. Simmons, 543 U.S. 551, 560-61 (2005) ("To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion))).

349. Graham v. Florida, 560 U.S. 48, 69 (2010).

door to substantive rules that recognize *every* juvenile's "insufficient culpability."[350] As state legislatures adopt bans against excessive punishment for all youth under twenty-five,[351] and state supreme courts recognize that the superpredator theory constitutes "materially false and unreliable information,"[352] this Note challenges foundational assumptions about the purposes of punishment and the problem of reducing an individual crime to the permanent disposition of the accused absent social context.

Finally, Orsinger's statements reveal the cost of denying defendants age-appropriate interventions—"[M]aybe some day, maybe ever . . . I would ever go home and know what freedom really is. Because I have not lived that. And to express freedom, there's no words for that."[353] *Miller*, *Montgomery*, and *Jones* have withheld from youth the freedom they deserve. To correct the legacies of historic discrimination and disproportionate sentences, this Note contends that "youth matters" for every young person and that irreversible punishment violates the Eighth Amendment for all juveniles.

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350. *Id.* at 71-75 (discussing penological purposes of punishment); *id.* at 78 (discussing a juvenile's insufficient culpability); *see also Roper*, 543 U.S. at 571 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.").

351. *See* Rovner, *supra* note 112 (discussing Washington State's and D.C.'s extension of *Miller*'s guidance to people under age twenty-five).

352. State v. Belcher, No. SC 20531 (Conn. Jan. 21, 2022) (reversing and remanding an illegal sentence and finding that "[a] review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information").

353. Corrected Record Excerpts, *Orsinger*, *supra* note 127, at 102.

APPENDIX: CASES CITING *JONES* AS OF OCTOBER 22, 2021

Summary:

- Category 1 (applying the *Miller* factors): 32.
- Category 2 (finding that *Jones* limits *Miller*'s protections): 5.
- Category 3 (applying state-based protections): 18.
- Category 4 (*Miller* factors strengthen protections outside of life-without-parole context): 5.
- Category 5 (*Miller* factors reduce protections outside of life-without-parole context): 3.
- Category 6 (finding that *Miller* does not apply, vacated pending *Jones*, or dismissed on jurisdictional grounds): 27.
- Total: 90 (63 decided on the merits).

Category 1: In thirty-two cases, sentencers clarified that *Jones* required no finding of permanent incorrigibility. But sentencers in these cases still considered and cited the *Miller* factors before affirming or reversing the sentence. These cases represent about 50% of the total number of cases in which sentencers reached a decision on the merits, providing the strongest indication that the *Miller* factors will remain relevant (and problematic) in the post-*Jones* world.

1. *Manley v. Warden*, No. 11-cv-00354, 2021 WL 3177402, at *12 (D. Nev. July 27, 2021) (affirming a sentence of juvenile life without parole after discussing the trial court's review of Manley's age, abusive childhood, and early drug use).
2. *People v. Richardson*, No. A159828, 2021 WL 1904483, at *7 (Cal. Ct. App. May 12, 2021) (reviewing the trial court's consideration of Richardson's chronological age before denying a petition for rehearing for a youth sentenced to thirty-five years to life in prison), *rev. denied* (Aug. 18, 2021).
3. *State v. Rogers*, 487 P.3d 177, 182 (Wash. Ct. App. 2021) (explaining that the trial court "must consider mitigating circumstances related to the defendant's youth" and outlining the *Miller* factors).
4. *Elliott v. State*, No. CR-20-407, 2021 WL 2012632, at *7-8 (Ark. May 20, 2021) (upholding jury instructions citing the *Miller* factors for a youth sentenced to life with parole).
5. *People v. Watson*, No. 352638, 2021 WL 2025216, at *6 (Mich. Ct. App. May 20, 2021) (upholding a sentence of juvenile life without parole after finding that the trial court cited each of the five *Miller* factors).

6. *People v. Musselman*, No. 351700, 2021 WL 2025150, at *4-5 (Mich. Ct. App. May 20, 2021) (affirming a sentence of juvenile life without parole after finding that resentencing court applied the *Miller* factors).
7. *Holmes v. State*, 859 S.E.2d 475, 480 (Ga. 2021) (affirming a sentence of life without parole after finding that the trial court considered the "[d]efendant's age and juvenile status").
8. *State v. Tirado*, No. COA20-213, 2021 WL 2425893, at *4, *6 (N.C. Ct. App. June 15, 2021) (affirming a sentence of juvenile life without parole after discussing evidence in the record regarding the defendant's intelligence and cognitive development).
9. *United States v. Friend*, 2 F.4th 369, 375-76 (4th Cir. 2021) (affirming a fifty-two-year sentence based on the trial court's consideration of the defendant's prison record, difficult upbringing, and adolescent development).
10. *State v. Smart*, 861 S.E.2d 383, 387-88, 389 (S.C. Ct. App. 2021), *reh'g denied* (Aug. 10, 2021) (upholding a juvenile life without parole sentence after finding that the trial court properly considered the five *Miller* factors).
11. *People v. Pruitt*, 2021 IL App (4th) 190598-U, ¶¶ 48-49 (upholding a juvenile life sentence after finding that the trial court described "the attendant characteristics of youth").
12. *Harris v. State*, 256 A.3d 292, 318-19 (Md. Ct. Spec. App. 2021) (finding that a sentencer need not apply *Miller*'s protections before imposing life with parole but affirming the sentence after discussing the trial court's consideration of the *Miller* factors).
13. *Criminal Justice Reform Clinic at Lewis & Clark Law School v. Board of Parole & Post-Prison Supervision*, 496 P.3d 688, 691 (Or. Ct. App. 2021) (explaining that under the Eighth Amendment, youth does not "automatically" cause a reduction in the prison term if a sentencer considers youth before imposing the sentence).
14. *State v. Morris*, No. 20-COA-015, 2021 WL 3356863, at *10 (Ohio Ct. App. Aug. 2, 2021) (affirming a sentence of life with parole eligibility after thirty-eight to forty-three years after finding that the trial court had considered the defendant's youth).
15. *Jones v. State*, No. CR-19-0485, 2021 WL 3463937, at *19 (Ala. Crim. App. Aug. 6, 2021) (affirming a sentence of life without parole after finding that the trial court properly considered expert and psychological reports of the defendant's development and citing the *Miller* factors).
16. *People v. Mauricio*, 2021 IL App (2d) 190619, ¶¶ 1, 35 (affirming a fifty-five-year sentence after finding that the trial court considered the twenty-year-old defendant's age at the time of the offense and rehabilitative potential).

17. *State v. McInnis*, 962 N.W.2d 874, 893 (Minn. 2021) (upholding two consecutive sentences of life with parole eligibility after thirty years after finding that the trial court relied on the *Miller* factors).
18. *United States v. Grant*, 9 F.4th 186, 197-98 (3d Cir. 2021) (affirming a de facto life-without-parole sentence of sixty-five years and finding that the defendant received "the required *Miller* procedure").
19. *Commonwealth v. Cobbs*, 256 A.3d 1192, 1211 n.18 (Pa. 2021) (vacating the defendant's juvenile sentence of life without parole after clarifying that *Jones* did not alter "*Montgomery*'s ultimate holding").
20. *State v. Ramsay*, 177 N.E.3d 302, 306 (Ohio Ct. App. 2021) (upholding a sentence of juvenile life without parole after finding that the trial court considered the defendant's age, reckless nature, and "impetuousness of youth").
21. *State v. Wright*, 493 P.3d 1220, 1229 (Wash. Ct. App. 2021) (finding that the twenty-eight-year-old defendant who had not shown himself to be a minor or intellectually disabled was not eligible for *Miller*'s protections).
22. *State v. Fitzpatrick*, No. M2018-02178-CCA-R3-CD, 2021 WL 3876968, at *9 (Tenn. Crim. App. Aug. 31, 2021) (affirming aggregate life sentences because the jury considered requisite mitigating factors).
23. *People v. Richards*, No. 353247, 2021 WL 4005680, at *3-4, *9 (Mich. Ct. App. Sept. 2, 2021) (affirming a sentence of life without parole after finding that the trial court conducted "[a]n in depth review and consideration of the *Miller* case and the factors set forth therein").
24. *McDonald v. Wills*, No. 18-CV-04606, 2021 WL 3930404, at *12 (N.D. Ill. Sept. 2, 2021) (affirming a fifty-year sentence after reviewing the sentencing transcript because the trial court considered the "defendant's youth and its attendant circumstances as sentencing factors").
25. *People v. McFadden*, 2021 IL App (5th) 170139-U, ¶¶ 110, 112 (finding that a fifty-year sentence did not violate *Miller* because the trial court reviewed the *Miller* factors).
26. *People v. See*, No. F079261, 2021 WL 4317279, at *9 (Cal. Ct. App. Sept. 23, 2021) (granting the defendant relief because the trial court was required to consider relevant *Miller* factors beyond the defendant's "mere age").
27. *State v. Miller*, No. WD-20-047, 2021 WL 4350042, at *6-7 (Ohio Ct. App. Sept. 24, 2021) (upholding a juvenile-life-without-parole sentence after finding that the trial court "t[ook] the mitigating factor of the juvenile's age into consideration").
28. *White v. State*, 499 P.3d 762, 767 (Okla. Crim. App. 2021) (upholding a juvenile-life-without-parole sentence because the jury considered a "plethora of evidence . . . relating to his youth and its circumstances,"

including the defendant's background and family history, as well as his "prospects for future dangerousness").

29. *Harned v. Amsberry*, 499 P.3d 825, 827 (Or. Ct. App. 2021) (affirming a juvenile-life-withou- parole sentence because the sentencing hearing that addressed the defendant's age, difficult home life, and sexual abuse satisfied *Miller* as clarified by *Jones*).
30. *Blount v. Sorber*, No. 20-5283, 2021 WL 4818435, at *1 n.1 (E.D. Pa. Oct. 15, 2021) (affirming the sentence of juvenile life without parole after finding that the trial court adequately considered the juvenile's immaturity at the time of the crime).
31. *Stanford v. Commonwealth*, No. 2019-CA-0764-MR, 2021 WL 4805142, at *5 (Ky. Ct. App. Oct. 15, 2021) (finding that the commutation proceeding in which a juvenile received a life-without-parole sentence rather than the death penalty satisfied *Miller* and *Jones* because the jury instructions included an extensive list of mitigating circumstances).
32. *People v. Roberson*, 2021 IL App (1st) 181726-U, ¶ 20, *appeal denied*, 175 N.E.3d 127 (Ill. 2021) (affirming a forty-year sentence and clarifying that *Jones* "does not overrule *Miller* or *Montgomery*").

Category 2: In a more limited number of cases, appellate courts found that *Jones* diminished *Miller*'s and *Montgomery*'s protections.

1. *Wynn v. State*, No. CR-19-0589, 2021 WL 4025149, at *2 (Ala. Crim. App. Sept. 3, 2021) (noting that *Jones* did not overrule *Miller* or *Montgomery*, but acknowledging that *Montgomery*'s application of *Teague* was "in tension with" other precedent).
2. *People v. Nichols*, 2021 IL App (2d) 190659, ¶ 25, *appeal denied*, 175 N.E.3d 111 (Ill. 2021) (suggesting that *Jones* departed, "however slightly, from its position that courts must consider a juvenile's youth before imposing a life sentence").
3. *People v. Brown*, 2021 IL App (1st) 180991, ¶ 46 n.5 (noting that the U.S. Supreme Court "recently limited the scope of *Miller* in *Jones v. Mississippi*").
4. *Washington v. State*, 325 So. 3d 306, 307 (Fla. Dist. Ct. App. 2021) (explaining that *Miller* was "most recently tempered by *Jones*").
5. *People v. Haines*, 2021 IL App (4th) 190612, ¶ 26 (finding that a discretionary sentencing procedure is all that *Miller* requires).

Category 3: In eighteen cases, states had implemented heightened protections by statute or case law in the intervening years between *Miller* and *Jones*. *Jones* thus did not interfere with the sentencing outcomes in those cases.

1. *People v. Ruiz*, 2021 IL App (1st) 182401, ¶ 61 (finding a de facto life unconstitutional).
2. *People v. Terry*, 2021 IL App (1st) 182084-U, ¶ 16 (finding a de facto life sentence unconstitutional).
3. *People v. Estrada*, 2021 IL App (1st) 191611-U, ¶ 27 (vacating and remanding a de facto life sentence).
4. *Commonwealth v. Aulisio*, 253 A.3d 338, 341 (Pa. Super. Ct. 2021) (upholding consecutive sentences of thirty years to life imprisonment).
5. *Commonwealth v. DeJesus*, 266 A.3d 49, 55-56 (Pa. Super. Ct. 2021) (affirming a life-without-parole sentence based on the defendant's waiver of a discretionary appeal).
6. *Commonwealth v. McGrath*, 255 A.3d 581, 587 (Pa. Super. Ct. 2021), *overruled by Commonwealth v. DeJesus*, 266 A.3d 49 (Pa. Super. Ct. 2021).
7. *State v. Miller,* 861 S.E.2d 373, 380 (S.C. Ct. App. 2021), *reh'g denied* (Aug. 12, 2021) (upholding a de facto life sentence).
8. *People v. Garza*, 2021 IL App (1st) 192573-U, ¶ 1 (reversing and remanding a de facto life sentence).
9. *People v. Zumot*, 2021 IL App (1st) 191743, ¶ 23 (reversing and remanding the sentence based on the trial court's failure to consider the *Miller* factors).
10. *Commonwealth v. Saunders*, 260 A.3d 119, 119 (Pa. Super. Ct. 2021) (finding that an aggregate thirty-eight-year sentence is not the functional equivalent of juvenile life without parole).
11. *State v. Smith*, 965 N.W.2d 208 (Iowa Ct. App. 2021) (upholding a thirty-five-year sentence).
12. *People v. Kruger*, 2021 IL App (4th) 190687, ¶ 32 (affirming a natural life sentence for a twenty-one-year-old defendant).
13. *Commonwealth v. Lebo*, No. 1538 MDA 2020, 2021 WL 3743804, at *10 (Pa. Super. Ct. Aug. 24, 2021), *overruled by Commonwealth v. DeJesus*, 266 A.3d 49 (Pa. Super. Ct. 2021).
14. *Commonwealth v. Rodgers*, No. 389 WDA 2020, 2021 WL 3855857, at *4 (Pa. Super. Ct. Aug. 30, 2021) (affirming a forty-year sentence).
15. *State v. Jimenez*, No. 20-1086, 2021 WL 4304978, at *1 n.1 (Iowa Ct. App. Sept. 22, 2021) (noting that "*Jones* did not alter the factors to be considered in sentencing a juvenile" and affirming consecutive sentences).
16. *State v. Haag*, 495 P.3d 241, 245 (Wash. 2021) (reversing a sentence of juvenile life without parole).
17. *People v. Horshaw*, 2021 IL App (1st) 182047, ¶ 2 (reversing and remanding a sentence of juvenile life without parole).

18. *People v. Dorsey*, 2021 IL 123010, ¶ 41, *reh'g denied* (Nov. 22, 2021) (affirming a forty-year sentence).

Category 4: Outside of the juvenile sentencing context, sentencers have continued to cite the *Miller* factors to justify increasing protections for defendants.

1. *United States v. Ramsay*, No. 96-cr-1098, 2021 WL 1877963, at *10 (S.D.N.Y. May 11, 2021) (applying the *Miller* factors to a reduction-in-sentencing motion).
2. *State v. Romero*, No. A-3859-18, 2021 WL 2010651, at *12 (N.J. Super. Ct. App. Div. May 20, 2021) (adopting the *Miller* factors in the compassionate-release context).
3. *United States v. Herrera-Genao*, No. CR 07-454, 2021 WL 2451820, at *8 (D.N.J. June 16, 2021) (granting a reduction in sentence after applying the *Miller* factors).
4. *United States v. Hunter*, 12 F.4th 555, 571-72 (6th Cir. 2021) (denying a reduction-in-sentence motion).
5. *People ex rel. T.B.*, 489 P.3d 752, 764-65 (Colo. 2021) (applying the *Miller* framework to abolish mandatory lifetime sex-offender registry for juveniles).

Category 5: Outside of the juvenile-sentencing context, sentencers have relied on *Jones* to reduce protections for adult defendants.

1. *Young v. State*, No. CR-17-0595, 2021 WL 3464152, at *53-54 (Ala. Crim. App. Aug. 6, 2021) (finding that an on-the-record explanation is not necessary in capital sentencing).
2. *In re A.K.*, No. 02-20-00410-CV, 2021 WL 1803774, at *13 (Tex. Ct. App. May 6, 2021) (reinforcing judicial discretion in the juvenile-transfer context).
3. *Young v. State*, 860 S.E.2d 746, 794-95 (Ga. 2021) (explaining that the Supreme Court left it to the states to decide their own definitions of intellectual disability in the capital context).

Category 6: The remaining cases cite *Jones* but do not reach a decision on the merits, find that *Miller* does not apply to youth over eighteen, or hold that *Miller* does not apply to life-with-parole sentences.

1. *Crespin v. Ryan*, No. 18-15073, 2021 U.S. App. LEXIS 12052, at *1 (9th Cir. Apr. 22, 2021) (ordering the parties to file supplemental briefing in light of *Jones*).

2. *Aguilar v. Ryan*, No. 17-16013, 2021 U.S. App. LEXIS 12051, at *1 (9th Cir. Apr. 22, 2021) (ordering the parties to file supplemental briefing in light of *Jones*).
3. *Rue v. Roberts*, No. 17-17290, 2021 U.S. App. LEXIS 12050, at *1 (9th Cir. Apr. 22, 2021) (ordering the parties to file supplemental briefing in light of *Jones*).
4. *Manley v. Warden*, No. 11-cv-00354, 2021 U.S. Dist. LEXIS 79111, at *1 (D. Nev. Apr. 26, 2021) (lifting a stay entered on proceedings following *Jones* and allowing each party to file supplemental briefing in light of *Jones*).
5. *United States v. Briones*, 141 S. Ct. 2589 (2021) (mem.) (vacating and remanding the case to the Ninth Circuit for further consideration in light of *Jones*).
6. *Oklahoma v. Johnson*, 141 S. Ct. 2588 (2021) (mem.) (vacating and remanding a case to the Court of Criminal Appeals of Oklahoma for further consideration in light of *Jones*).
7. *State v. Tinoco-Camarena*, 489 P.3d 572, 574 (Or. Ct. App. 2021) (deciding on separate grounds).
8. *J.R. v. State*, 624 S.W.3d 851, 854 (Tex. Ct. App. 2021) (mem.) (citing *Jones* in a dissent from a denial of en banc reconsideration).
9. *Bey v. Clark*, No. 21-941, 2021 WL 3478210, at *5-6 (E.D. Pa. May 21, 2021) (recommending to uphold a sentence of life with parole).
10. *People v. Jackson*, 279 Cal. Rptr. 3d 396, 398 (Ct. App. 2021) (deciding the case on equal protection grounds).
11. *Scott v. Pennsylvania Board of Probation & Parole*, 256 A.3d 483, 486 (Pa. Commw. Ct. 2021) (dismissing on jurisdictional grounds).
12. *Ventry v. State*, 622 S.W.3d 630, 634 (Ark. 2021) (affirming a sentence of life with parole).
13. *Dingle v. Inch*, No. 20-CV-25049, 2021 WL 2809557, at *2 (S.D. Fla. July 6, 2021) (affirming a life-with-parole sentence and limiting *Jones*'s holding as not requiring an "on-the-record sentencing explanation with an implicit finding of permanent incorrigibility").
14. *Steilman v. Michael*, 859 F. App'x 123, 125 (9th Cir. 2021) (mem.) (finding that *Jones* simply "reiterated" *Montgomery*'s retroactive application of *Miller*'s holding).
15. *Blount v. Sorber*, No. 20-5283, 2021 WL 4822841, at *3 (E.D. Pa. July 26, 2021) (finding that *Miller* did not apply to a sentence in which a juvenile was eligible for parole).
16. *Smith v. Vannoy*, No. 20-258, 2021 WL 3605195, at *9 (E.D. La. July 27, 2021) (finding that a state court was not required under *Miller* to consider mitigating factors before amending the defendant's sentence of life with parole eligibility).

17. *State v. Ortiz*, 498 P.3d 264, 272-73 (N.M. 2021) (finding that the defendant's non-life-without-parole sentence fell within the constitutional protections).
18. *Bey v. Clark*, No. 21-941, 2021 WL 3474198, at *1 (E.D. Pa. Aug. 5, 2021) (approving a magistrate judge's recommended sentence of life with parole).
19. *People v. Hampton*, No. 5-17-0341, 2021 WL 4075329, at *21 (Ill. App. Ct. Sept. 8, 2021) (citing *Miller* in a case involving an intellectually disabled defendant).
20. *State v. Douglas*, No. W2020-01012-CCA-R3-CD, 2021 WL 4480904, at *24-25 (Tenn. Crim. App. Sept. 30, 2021) (rejecting *Miller*'s application in the life-with-parole context).
21. *Johnson v. Elliott*, 500 P.3d 639, 640 (Okla. Crim. App. 2021) (holding that *Miller* does not require jury sentencing).
22. *State v. Coltherst*, 266 A.3d 838, 846-48 (Conn. 2021) (finding that a youth eligible for parole was not protected by the *Miller* factors).
23. *In re Rosado*, 7 F.4th 152, 159 (3d Cir. 2021) (holding that *Miller* does not extend to defendants who are eighteen years or older).
24. *Commonwealth v. McGrath*, No. 554 EDA 2020, 2021 WL 2394586 (Table) (Pa. Super. Ct. June 10, 2021) (opinion withdrawn).
25. *Steele v. State*, No. 122,754, 2021 WL 2386026, at *8 (Kan. Ct. App. June 11, 2021) (remanding to appoint counsel).
26. *United States v. Briones*, 1 F.4th 1204, 1205 (9th Cir. 2021) (remanding for further consideration in light of *Jones*).
27. *Office of the Prosecuting Attorney v. Precythe*, 14 F.4th 808, 822 (8th Cir. 2021) (vacating the lower court opinion regarding the appointment of counsel pending a rehearing en banc).