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The Pendulum Swings Right: How the Roberts Court Rejected Precedent and Mobilized Federalism to the Detriment of American Youth in *Jones v. Mississippi*

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NOTE

THE PENDULUM SWINGS RIGHT: HOW THE ROBERTS COURT REJECTED PRECEDENT AND MOBILIZED FEDERALISM TO THE DETRIMENT OF AMERICAN YOUTH IN *JONES V. MISSISSIPPI*

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In *Jones v. Mississippi*,[1] the Supreme Court evaluated whether a juvenile defendant must be deemed permanently incorrigible before being sentenced to life without parole ("LWOP").[2] Similarly, the Court examined whether a sentencer must provide an on-the-record explanation containing an implicit finding of permanent incorrigibility before sentencing a juvenile defendant to LWOP.[3] The Court held that a sentencer need not determine that a juvenile defendant convicted of murder is permanently incorrigible before sentencing them to LWOP; rather, a sentencer need only consider the defendant's youth and any attendant circumstances.[4] Furthermore, the Court held that an on-the-record sentencing explanation is unnecessary, as a discretionary sentencing procedure ensures that a defendant's youth will be considered and is all that precedent requires.[5]

With this ruling, the Court improperly detached a sentencer's consideration of a juvenile defendant's youth and any attendant circumstances from its principal purpose—to identify whether a juvenile defendant's crimes represent permanent incorrigibility or transient

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1. 141 S. Ct. 1307 (2021).
2. *Id.* at 1310.
3. *Id.*
4. *Id.* at 1319.
5. *Id.* at 1321.

immaturity.[6] In furtherance of this, the Court disregarded the plain meaning of discretion, conflated awareness of a juvenile defendant's youth with meaningfully analyzing its relevance as a mitigating factor, and permitted states to run roughshod over the Constitution under the guise of judicial restraint.[7] This seemingly deferential form of activism effectively licenses disproportionate sentences for juvenile defendants and severely undermines the principle of stare decisis.[8] When cast against the conservative backlash to the due process achievements of the Warren Court,[9] the racially coded rhetoric of "states' rights" and "law and order,"[10] and the long-standing ability of right-wing political strategists to exploit these terms to forge new political coalitions, the Court's decision in *Jones* epitomizes the judiciary's mobilization of state sovereignty for the purposes of heralding a new conservative America.[11]

I. THE CASE

In 2004, Brett Jones ("Jones"), then fifteen years old, relocated to Mississippi to live with his grandparents.[12] In his prior home, Jones suffered severe physical abuse at the hands of his stepfather, who allegedly beat him with belts, switches, and a paddle labeled "The Punisher.[13] Jones also had a history of self-harm and hallucinations, which led to him being prescribed psychiatric medications.[14] Jones moved to Mississippi after his stepfather threatened to evict Jones' mother and brother if he did not immediately leave their home.[15] Unfortunately, after moving to Mississippi, Jones abruptly lost access to his psychiatric medications.[16]

6. *See infra* Section IV.A.
7. *See infra* Section IV.A.
8. *See infra* Section IV.B.
9. *See infra* notes 58–59 and accompanying text.
10. *See infra* notes 63–82 and accompanying text.
11. This strategy resembles, in some respects, the Southern Strategy. The Southern Strategy refers to an electoral scheme originally propagated by Republican political strategists in the mid-twentieth century. This strategy enabled the Republican Party to gain increased support from white voters in the South, who had largely supported the Democratic Party following the end of the Reconstruction era. To mobilize the support of this group of voters, proponents of the Southern Strategy used seemingly race-neutral terms, such as "states' rights," to create a new political majority intent on shielding the South from federal intrusion, a familiar tactic that first arose during the Civil War. *See infra* Section IV.C.
12. Jones v. State, 285 So. 3d 626, 628 (Miss. Ct. App. 2017), *aff'd*, 141 S. Ct. 1307 (2021).
13. Jones v. Mississippi, 141 S. Ct. 1307, 1338 (2021) (Sotomayor, J., dissenting).
14. *Id.*
15. *Id.*
16. *Id.*

On the morning of August 9, 2004, Jones' grandfather discovered a young woman in Jones' bedroom.[17] This young woman, later identified as Jones' girlfriend, had secretly ran away from her family's home in Florida to live with Jones.[18] After Jones' grandfather grasped the extent of their relationship, a violent argument ensued.[19] This argument culminated in Jones stabbing his grandfather,[20] after which he unsuccessfully attempted to administer CPR.[21] According to witness testimony, Jones was seen carrying a knife and trembling after the murder.[22] Jones also remarked to passersby that his grandfather had merely left the property, and that the blood on his hands was fake.[23] Nonetheless, after Jones left the murder scene, he attempted to find his grandmother in order to tell her what happened.[24] Jones was subsequently stopped by police, and agreed to be interviewed by three detectives without invoking his right to remain silent or his right to counsel, and without a parent or guardian present.[25] Shortly thereafter, the body of Jones' grandfather was discovered in a utility room.[26]

After being convicted of murder, and pursuant to Mississippi law,[27] Jones was mandatorily sentenced to LWOP.[28] In response, Jones filed a motion for post-conviction relief in the Circuit Court of Lee County.[29] Specifically, Jones argued that his sentence violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.[30] However, the circuit court rejected Jones' motion, and the Mississippi Court of Appeals affirmed its judgment.[31] Shortly thereafter, the Supreme Court decided *Miller v.*

17. *Jones*, 285 So. 3d at 628.

18. *Jones*, 141 S. Ct. at 1338 (Sotomayor, J., dissenting).

19. *Jones*, 285 So. 3d at 628 (noting that Jones' grandfather "got in [Jones'] face," pushed him, and ultimately swung at him).

20. *Id.* (stating that, prior to the murder, Jones had a steak knife in his hand and had been cornered off in the kitchen by his grandfather, leaving nowhere for him to go).

21. *Id.*

22. *Id.*

23. *Id.*

24. Jones v. Mississippi, 141 S. Ct. 1307, 1339 (2021) (Sotomayor, J., dissenting).

25. *Id.*; *see also* Allison Stillinghagan, Comment, *The Kids Aren't Alright: The Road to Abandoning Deceptive Interrogation Techniques for Juvenile Suspects in Maryland*, 81 MD. L. REV. 1084, 1103 (2022) (noting that juveniles are "more likely to break under the pressure of an interrogation" conducted without parental guidance or oversight).

26. *Jones*, 285 So. 3d at 629.

27. MISS. CODE ANN. § 97-3-21 (2000); MISS. CODE ANN. § 47-7-3(g) (2004), *repealed by* Mississippi Earned Parole Eligibility Act, 2021 Miss. Laws ch. 479, § 2 (the provisions will sunset on July 1, 2024).

28. *Jones*, 285 So. 3d at 629.

29. *Id.*

30. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

31. Jones v. State, 122 So. 3d 725, 727–28 (Miss. Ct. App. 2011), *aff'd in part and rev'd in part*, 122 So. 3d 698 (2013), *aff'd*, 141 S. Ct. 1307 (2021).

Alabama,[32] which held that a mandatory sentence of LWOP for a juvenile defendant convicted of murder is unconstitutional.[33] The Mississippi Supreme Court determined that this rule warranted retroactive application,[34] and a new sentencing hearing was ordered whereby a judge could consider Jones' youth and any attendant circumstances before potentially sentencing him to LWOP.[35]

At the resentencing hearing, Jones' attorney argued that his age and upbringing provided little justification for imposing the harshest sentence available under law.[36] Additionally, Jones testified that he had committed few disciplinary infractions while in prison, that he had started the process to obtain his GED, and that he had cultivated a deep respect for the Bible.[37] Jones' grandmother also offered testimony in support of his character.[38] However, the judge concluded that LWOP remained appropriate.[39] Jones appealed his sentence to the Mississippi Court of Appeals, but the appellate court ruled against him.[40] Jones subsequently filed a petition for certiorari to the U.S. Supreme Court, claiming that in order to discretionarily sentence a juvenile defendant convicted of murder to LWOP, a sentencer must find that the defendant is permanently incorrigible.[41] The Supreme Court granted certiorari to review the Mississippi Court of Appeals' holding and determine whether a discretionary sentencing procedure is all that precedent requires in such circumstances.[42]

II. LEGAL BACKGROUND

The Supreme Court has recognized that children are constitutionally distinct from adults for purposes of sentencing.[43] This belief has influenced the range of punishments prohibited for juveniles convicted of both violent

32. 567 U.S. 460 (2012).

33. *Jones*, 285 So. 3d at 629.

34. Parker v. State, 119 So. 3d 987, 998 (Miss. 2013).

35. *Jones*, 285 So. 3d at 629.

36. Jones v. Mississippi, 141 S. Ct. 1307, 1339 (2021) (Sotomayor, J., dissenting).

37. *Id.*

38. *Id.* (highlighting that Jones' grandmother stated that she "remain[ed] 'steadfast in her belief that [Jones] is not and never was irreparably corrupt,'" that she speaks with Jones on a weekly basis, and that other members of the family remain close to him as well (quoting Brief for Madge Jones et al. at 4, *Jones*, 141 S. Ct. 1307 (No. 18-1259)).

39. *Jones*, 285 So. 3d at 631.

40. *Id.* at 634.

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

42. *Id.*

43. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) (explaining that because a child's character is not "well formed," children are less culpable than the average adult and therefore less deserving of harsh punishment (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005))).

and non-violent offenses.[44] Although the Supreme Court has not categorically barred LWOP for juvenile defendants convicted of murder, it has specified that before such punishment is imposed, sentencers must consider a range of factors in order to distinguish between the rare juvenile offender whose crimes are due to permanent incorrigibility, and the commonplace juvenile offender whose crimes are born from transient immaturity.[45]

Section II.A explores why the purposes of criminal punishment have changed over time, how politicians have characterized these changes, and how this has influenced the range of electoral tactics propagated by Republican political strategists.[46] Section II.B highlights the manner in which evolving standards of decency have influenced these changes as applied to juvenile punishment.[47] Section II.C describes how discretionary sentencing procedures give effect to the belief that only the rare juvenile offender whose crimes reflect permanent incorrigibility should be sentenced to LWOP.[48] Finally, Section II.D reviews how state courts have understood the purpose of discretionary sentencing procedures for juvenile defendants, with a particular focus on Maryland.[49]

A. The Sentencing Reform Movement, the Politicization of Law and Order, and the Birth of the Southern Strategy

During the late nineteenth and early twentieth century, the United States gradually altered its approach to criminal punishment by prioritizing rehabilitation and seeking sentencing guidance from the social sciences.[50] For example, in 1899, the nation's first juvenile court was established in Cook County, Illinois.[51] Additionally, during this period, the probation system was

44. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (holding that a state court must consider all mitigating evidence before sentencing a juvenile offender to death); *Roper*, 543 U.S. at 578 (holding that the Eighth Amendment forbids sentencing a juvenile offender to death); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that the Eighth Amendment forbids sentencing a juvenile defendant convicted of a non-homicide offense to LWOP); *Miller*, 567 U.S. at 489 (holding that a mandatory sentence of LWOP is unconstitutional for all juvenile offenders); Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (noting that even if a child's age is considered before they are sentenced to LWOP, the sentence is still unconstitutional if the child's crimes reflect transient immaturity); Malvo v. Mathena, 893 F.3d 265, 276 (4th Cir. 2018) (explaining that the *Miller* rule must be retroactively applied because many juvenile offenders face a punishment that the law cannot impose); *see infra* Section II.A.

45. *Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting) (citing *Miller*, 567 U.S. at 479–80).

46. *See infra* Section II.A.

47. *See infra* Section II.B.

48. *See infra* Section II.C.

49. *See infra* Section II.D.

50. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 1 (2003).

51. *Id.*

introduced and indeterminate sentences[52] were hailed as vehicles for meaningful penal reform.[53] Although this approach posited a radical revision to criminal law in the United States, its underlying rationale echoed early common law understandings of child development.[54]

To solidify the nation's newfound approach to criminal punishment, the American Law Institute published the Model Penal Code in 1962,[55] which emphasized the importance of rehabilitation and mandated that every penitentiary sentence be for at least one year to accommodate the diagnosis and treatment of offenders prior to release.[56] The Model Penal Code's publication also coincided with the Warren Court's "Due Process Revolution,"[57] which led to the rise of procedural safeguards that constrained prosecutors[58] and preserved the rights of criminal defendants.[59] Interestingly, this revolution also occurred amongst rising youth crime rates, incessant calls for "law and order," and progressive concern regarding the discriminatory impact of discretionary sentences.[60] Despite the underlying structural complexities of the 1960s, these features of the era provided fodder for conservative critics of the Warren Court, who directly attributed rising crime rates to the Court's choice to extend constitutional protections to criminal defendants.[61] Furthermore, this discourse left white voters vulnerable to electoral strategies that exploited their crime-related fears.[62] Consequently, Republican political strategists determined that they could create a new

52. An indeterminate sentence is one that has no set length; instead, a judge is granted the authority to decide how long it should be. *See* Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 3 (2015).

53. *Id.* at 2.

54. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 19 (2009) (noting that as far back as the fourteenth century, children under seven were presumed incapable of forming criminal intent, and by the seventeenth century, children aged seven through ten were rebuttably presumed incapable of forming criminal intent).

55. MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962).

56. A minimum sentence of one year was presumed necessary to ensure that "correctional authorities could adequately diagnose each offender." Alschuler, *supra* note 50, at 6.

57. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash*, 87 MINN. L. REV. 1447, 1477 (2003) (highlighting how the Warren Court used the Fourteenth Amendment and the Bill of Rights to place meaningful constraints on state power, to expand the rights of the disenfranchised, and to reduce disproportionate criminal sentences).

58. Miranda v. Arizona, 384 U.S. 436, 498 (1966) (holding that prosecutors are prevented from introducing statements at trial that were obtained prior to advising a criminal defendant of their Fifth Amendment right against self-incrimination).

59. Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (holding that evidence obtained in violation of a constitutional right cannot be used against someone in a court of law); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (establishing a criminal defendant's right to publicly appointed counsel).

60. Feld, *supra* note 57, at 1479.

61. *Id.* at 1478–79.

62. *Id.* at 1500.

electoral majority using rhetoric that conjured anti-Black sentiment without being explicitly anti-Black—a tactic otherwise known as the "Southern Strategy."[63] By the late 1960s, Republican politicians, such as Alabama Governor George Wallace, had forged this new political coalition, which included working-class white voters and traditionally affluent Republican voters, that was keen on defeating "an elitist Democratic establishment" they viewed as intent on letting criminals run free, eroding states' rights, and destroying American values.[64] As a result, by the 1970s, support for rehabilitative models of punishment had waned,[65] with many Americans preferring more punitive models of punishment.[66]

The economic downturn in the late 1970s and 1980s provided additional fuel for the Republican Party's new base, who viewed their inability to compete in the information economy as the product of federal civil rights laws, affirmative action, and welfare programs.[67] A subsequent increase in crime, which often occurs during periods of extreme economic inequality,[68] enabled Republican strategists to again weaponize criminal justice as a tool for political gain.[69] By contrast, Democratic politicians failed to successfully address rising crime rates and social unrest, leaving this group of constituents even more susceptible to the racially coded rhetoric of the Republican

63. *See supra* note 11; Feld, *supra* note 57, at 1548 ("Republicans courted the new constituencies through use of racially charged 'code words,' such as 'law and order,' that indirectly invoked racial themes without explicitly challenging egalitarian ideals."); Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L. L. REV. 81, 90 (2015) (noting that by the 1980s, the term "states' rights" was not "merely part of some storied and respectable political ideology and discourse, the viability and limits of which reasonable minds might disagree;" instead, the term was "conscripted into service as a covert operative in a war between past and future, a secret courier conveying coded messages of hope to a beleaguered southern culture fighting to dismantle the latest version of northern aggression: America's Second Reconstruction").

64. Feld, *supra* note 57, at 1546–47.

65. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012–13 (1991) (noting that critics challenged the assumption that defendants were "sick and in need of treatment" as well as the unfair nature of parole decisions that were made without meaningful guidance or guidelines).

66. Alschuler, *supra* note 50, at 9 (noting that during the early 1970s, numerous academics published influential articles regarding the fact that the social sciences did not provide "happy answers" and that very few rehabilitative models of punishment met empirical benchmarks).

67. Feld, *supra* note 57, at 1510 (finding that the post-industrial transition to a service and information economy impeded the ability of blue-collar white workers to reach middle-class status, leading to strong resentment toward affirmative action programs that benefited Black Americans).

68. *Id.* at 1507 ("In wealthy and democratic countries, a correlation exists between homicide rates and social and economic inequality—the greater the income and wealth disparities, the higher the rates of killings—and the United States is among the most economically stratified in western society.").

69. *Id.* at 1523.

Party,[70] which reaffirmed their lived experiences as members of the steadily diminishing middle class.[71]

During this period, critics of rehabilitative models of punishment specifically advocated for abandoning indeterminate sentences and parole.[72] This shift in penological thinking ushered in an era of enhanced prosecutorial power and severe criminal penalties, with Richard Nixon's and Ronald Reagan's electoral victories promising a return to the rhetoric of "law and order."[73] The growing number of inmates in state and federal prisons acutely reflected this penological shift, with a nearly six-fold increase occurring across a period of twenty-five years.[74] The nation's growing prison population was subsequently followed by a sharp increase in the number of prisons opened by state and federal governments.[75] As the public began to question whether taxpayer dollars were being inappropriately diverted to correctional services, private prisons were proposed and built.[76]

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70. Interestingly, Lee Atwater, former campaign strategist for Ronald Reagan, directly addressed this tactic in a 1981 interview, admitting that the abstract language of the Southern Strategy helped bury its racist underpinnings and subsequently bolstered the power of the Republican Party:

> You start out in 1954 by saying, "[redacted profanity]." By 1968 you can't say "[redacted profanity]"—that hurts you. Backfires. So you say stuff like forced busing, states' rights and all that stuff. You're getting so abstract now [that] you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is [that] blacks get hurt worse than [w]hites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, "We want to cut this," is much more abstract than even the busing thing, and a hell of a lot more abstract than "[redacted profanity.]"

Cook, *supra* note 63, at 88 (third and fourth alterations in original) (quoting Bob Herbert, *Impossible, Ridiculous, Repugnant*, N.Y. TIMES (Oct. 6, 2005), https://www.nytimes.com/2005/10/06/opinion/impossible-ridiculous-repugnant.html)).

71. Feld, *supra* note 57, at 1523.

72. These efforts succeeded in 1984 when Congress enacted the Sentencing Reform Act, which led to a federal sentencing commission and the establishment of uniform guidelines for criminal punishment. Vitiello, *supra* note 65, at 1013 (citing Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984)); U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

73. Alschuler, *supra* note 50, at 9–10 (noting that this era proved to be less about correcting sentencing disparities that had arisen due to discretionary hearings and more about increasing the severity of criminal punishment); Cook, *supra* note 63, at 82 (explaining how Ronald Reagan's presidency led to the rise of a "law and order" movement that ultimately fueled mass incarceration via strict drug policies and that disproportionately impacted people of color).

74. Alschuler, *supra* note 50, at 14 (noting that the number of inmates in state and federal prisons increased from 196,000 in 1972 to 1,159,000 in 1997).

75. *Id.* (finding that from 1985 to 1995, federal and state governments opened an average of one new prison each week).

76. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/ (explaining that the rationale for private prisons is that government is inherently "wasteful" and "inefficient" and that "the private sector, through competition for contracts," can provide superior

By the 1990s, a rise in violent crime gave way to the development of the "superpredator" theory,[77] later denounced by criminologists, which predicted that a wave of crime-prone young men would wreak havoc upon the nation.[78] This theory was promoted by politicians from both major political parties,[79] and led to more severe sentencing policies for juvenile offenders, including LWOP.[80] Today, the legacy of the "superpredator" era is manifested in the nation's total incarceration rate, which is higher than that of all other industrialized nations.[81] This legacy has had a greater impact on Black youth and is a significant diversion from the rehabilitative model that early twentieth-century legal reformists championed.[82]

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correctional services at a fraction of the cost); Vicky Rivera, *Private Prisons: Change in Policy and Practice*, U.S. DEP'T OF JUST. (Dec. 1, 2016), https://cops.usdoj.gov/html/dispatch/12-2016/private_prisons.asp (noting that private prisons were "virtually nonexistent" before the 1980s and the "War on Drugs"); Erik Larson, *Captive Company*, INC. (June 1, 1988), https://www.inc.com/magazine/19880601/803.html (stating that private prisons were the natural result of a "capitalist world" that "seem[ed] giddy with the idea that private industry [could] surpass government in almost any pursuit").

77. John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators ("On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high."); *see also* C-SPAN, *1996: Hillary Clinton on "superpredators" (C-SPAN)*, YOUTUBE, https://www.youtube.com/watch?v=j0uCrA7ePno (stating in a C-SPAN television broadcast January 28, 1996, that "superpredators" have "no conscience" and "no empathy," and that President Clinton's appointment of a new drug czar would help alleviate the threat they posed to the nation); Carroll Bogert & LynNell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth/ (noting that a Chicago lawyer who defended juveniles in the 1990s stated that "[the superpredator myth] had a profound effect on the way in which judges and prosecutors viewed [his] clients").

78. CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 9 (Dec. 3, 2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf.

79. Feld, *supra* note 57, at 1552 ("Only in the early 1990s, under Bill Clinton, did national Democrats finally respond to the Republican exploitation of the crime issue—and only by capitulating and embracing an equally tough rhetoric and punitive policy. 'Law and order' thus became the policy of both major parties.").

80. CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 78, at 10 (noting that over seventy-five percent of all children ever sentenced to LWOP were sentenced in the 1990s or later).

81. Holly Harris, *The Prisoner Dilemma: Ending America's Incarceration Epidemic*, 96 FOREIGN AFFS., Mar.–Apr. 2017, at 118, 120.

82. KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 247 (2021) (stating that a 2016 survey found that there were twice as many Black youth

B. The Abolition of the Juvenile Death Penalty and the Importance of Evolving Standards of Decency

The Supreme Court's approach to juvenile "justice"[83] began to take shape in 1982.[84] That year, the Court decided *Eddings v. Oklahoma*,[85] which established the importance of considering a range of mitigating factors prior to sentencing a juvenile offender to death.[86] Specifically, the Court noted that the death penalty is radically distinct from all other penalties, and therefore a judge should not be precluded from considering any aspect of the defendant's character or record that might weigh in favor of a different form of punishment.[87] The Court took care to note that evidence of a turbulent upbringing, physical abuse, or severe emotional disturbance can be particularly relevant when determining what form of punishment is appropriate for a juvenile defendant,[88] and that merely considering a defendant's chronological age is insufficient.[89] The Court reinforced its holding by stating that history is replete with legal markers distinguishing children from adults.[90] With this ruling, the Court established the importance

serving LWOP sentences as compared to white youth); Opinion, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), https://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html (explaining how the superpredator era spawned a generation of laws that "treated young people as adults," despite evidence indicating that failing to recognize the distinctions between children and adults leads to increased recidivism); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 853 (2010) (stating that by 1997, nearly one-half of Black youth who made contact with the criminal legal system were transferred to adult court); John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life without Parole in Law and Practice*, 65 AM. U. L. REV. 535, 581–82 (2016) (noting the relationship between the superpredator era and the growing imposition of LWOP for juvenile defendants).

83. This Note uses quotations around justice when discussing the U.S. Supreme Court's treatment of juvenile criminal defendants to highlight the fact that the United Nations Convention on the Rights of the Child, ratified by every country except Somalia and the U.S., expressly prohibits LWOP for children. Furthermore, juvenile LWOP violates a number of other international treaties, notably the International Covenant on Civil and Political Rights. *See* United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1015–16 (2008).

84. *See generally* Eddings v. Oklahoma, 455 U.S. 104 (1982).

85. 455 U.S. 104 (1982).

86. *Id.* at 116.

87. *Id.* at 112 ("[J]ustice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937))).

88. *Id.* at 115.

89. *Id.* at 116 ("[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.").

90. *Id.* at 116 n.12 (noting that every state in the country "makes some separate provision for juvenile offenders").

of thoughtful and informed consideration prior to sentencing a juvenile defendant to the harshest sentence available under law.[91]

Following *Eddings*, the Supreme Court examined the constitutionality of the juvenile death penalty in *Roper v. Simmons*.[92] There, the Court focused on the extent to which a juvenile offender can truly be deemed responsible for their actions.[93] The Court ensured that its understanding of what constitutes cruel and unusual punishment reflected "evolving standards of decency"[94] by weighing how the international community viewed the juvenile death penalty, whether any states had already abolished the juvenile death penalty, and the frequency of its use in states that retained it as a legitimate means of punishment.[95] The implication of such an analysis is that as society changes, the Eighth Amendment necessarily will too.[96] With respect to international standards, the Court acknowledged criticism regarding the relevance of other nations' views, noting that while such views are not constitutionally dispositive, they can provide useful insight into how notions of decency have changed over time.[97] Similarly, the Court undertook an analysis of what rights juveniles are already legally stripped of,[98] noting that while this alone does not support the prohibition of a range of

91. *Id.* at 116.

92. 543 U.S. 551 (2005).

93. *Id.* at 571 (underscoring that a punishment is disproportionate to the committed offense if the law's most severe penalty is imposed upon someone whose culpability is diminished due to age or immaturity).

94. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

95. *Id.* at 574, 577; *see also* Graham v. Florida, 560 U.S. 48, 58 (2010) ("The standard itself remains the same, but its applicability must change as the basic mores of society change.").

96. Although Justice Scalia's dissenting opinion in *Roper* criticized the Court for claiming that the Eighth Amendment should reflect the moral consensus of the American people, *Roper*, 543 U.S. at 616 (Scalia, J., dissenting), the Court has consistently rejected originalist interpretations of the Eighth Amendment. Instead, the Court has repeatedly adopted the belief that "the progress of a maturing society" should be the yardstick by which one measures what constitutes cruel and unusual punishment, not what the ratifying public thought in 1788. *See, e.g.*, *Trop*, 356 U.S. at 101 (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (plurality opinion) ("The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop*, 356 U.S. at 101 (plurality opinion)); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.").

97. *Roper*, 543 U.S. at 578 ("It does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

98. *Id.* at 569 (finding that almost every state prohibits juveniles from voting, serving on juries, or marrying without parental consent).

punishments for juvenile offenders, it does speak to our society's understanding of the stark emotional differences between children and adults.[99] After balancing these considerations, the Court categorically abolished the juvenile death penalty.[100]

In *Graham v. Florida*,[101] the Supreme Court again consulted society's views regarding the appropriateness of a given punishment before categorically abolishing its use for a class of defendants.[102] Specifically, the Court examined the constitutionality of LWOP for a juvenile defendant convicted of armed burglary and attempted armed robbery, and noted that a categorical rule barring LWOP for juvenile defendants convicted of a non-homicide crime could prevent the troubling possibility of a child spending their adult life in prison for a crime born from transient immaturity.[103] The Court likened LWOP to the death penalty, and concluded that by forever denying a defendant the opportunity to obtain release, the government effectively issues a judgment regarding a defendant's inherent value.[104] This view is reinforced by the fact that LWOP is the second harshest sentence available under law for any crime.[105] If a juvenile defendant is sentenced to LWOP despite a reasonable showing of the potential for maturity or rehabilitation, the sentence lacks any legitimate penological justification.[106] Therefore, the punishment is disproportionate to the offense committed.[107] To reflect this line of reasoning, the *Graham* Court categorically abolished LWOP for juvenile defendants convicted of a non-homicide crime.[108]

C. Discretion as a Means for Individualized Sentencing Justifications

In 2012, the Supreme Court addressed a subset of the legacy of the juvenile death penalty—the constitutionality of mandatory sentences of LWOP for juvenile defendants convicted of murder.[109] Specifically, the Court's analysis in *Miller v. Alabama* was centrally grounded in the Eighth

99. *Id.*

100. *Id.* at 578.

101. 560 U.S. 48 (2010).

102. *Id.* at 61 (noting that before using its independent judgment to espouse a categorical rule, the Court must consider evolving standards of decency as contained within legislative enactments and state sentencing documents).

103. *Id.* at 79.

104. *Id.* at 74.

105. *Id.* at 92 (Roberts, C.J., concurring).

106. *Id.* at 71–72 (majority opinion) (stating that even if LWOP has a tenuous connection to a valid penological goal, a juvenile's diminished moral responsibility and fluid character make LWOP largely antithetical to the objectives of retribution, deterrence, incapacitation, and rehabilitation).

107. *Id.*

108. *Id.* at 82.

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

Amendment's prohibition of cruel and unusual punishment, with the latter again understood to reflect "evolving standards of decency."[110] Following a line of precedent, the Court echoed the belief that a child's lack of maturity and capacity for change necessarily implies that they are less culpable for crimes committed before the age of eighteen.[111] As LWOP is inherently anti-rehabilitative, and reflects a finding of permanent incorrigibility, which the Court never defined, the majority held that a sentencer must have the freedom to consider the mitigating qualities of youth prior to imposing LWOP.[112] Otherwise, the sentence is disproportionate to the offense committed and therefore unconstitutional.[113] The Court noted that other attendant circumstances may also prove relevant in determining whether LWOP is appropriate, namely the juvenile's family and home environment that they cannot remove themselves from, the circumstances of the homicide offense, and the possibility of a reduced sentence if not for the defendant's inability to maturely interact with counsel.[114] Ultimately, the purpose of performing such an analysis is not merely to acknowledge the juvenile defendant's youth or the fluidity of their character.[115] Rather, its purpose is to aid a sentencer in evaluating the defendant's possibility for redemption beyond prison walls.[116]

Four years later in *Montgomery v. Louisiana*,[117] the Supreme Court considered whether *Miller* espoused a substantive constitutional rule, and consequently whether *Montgomery* should be retroactively applied to cases on state collateral review.[118] In reaching its decision, the Court consulted *Teague v. Lane*[119] and *Penry v. Lynaugh*,[120] which held, respectively, that new constitutional rules of criminal procedure should generally not be retroactively applied to cases on state collateral review unless they forbid punishment of certain primary conduct[121] or prohibit a certain kind of punishment for a class of defendants.[122] The Court ultimately concluded that *Miller* fell into the latter category because it rendered LWOP an

110. *Id.* at 469 (citations omitted).

111. *Id.* at 471 (citing *Graham*, 560 U.S. at 68).

112. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

113. *Miller*, 567 U.S. at 476 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

114. *Id.* at 477.

115. *Id.* at 480.

116. *Id.*

117. 577 U.S. 190 (2016).

118. *Id.* at 194.

119. 489 U.S. 288 (1989).

120. 492 U.S. 302 (1989).

121. *Teague*, 489 U.S. at 290; Mackey v. United States, 401 U.S. 667, 693 (1971) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.").

122. *Penry*, 492 U.S. at 330; Beard v. Banks, 542 U.S. 406, 416 (2004) (noting that defendants must be prohibited from receiving a certain form of punishment due to their "status or offense").

unconstitutional penalty for all juvenile offenders whose crimes reflect the transient markers of immaturity, as opposed to the immutable qualities of a corrupted criminal.[123] Furthermore, the Court expressly noted that although *Miller* did not impose a formal fact-finding requirement, it did not leave sentencers free to utilize their discretion to sentence a juvenile defendant whose crimes reflect the transient qualities of immaturity to LWOP.[124] As such, *Montgomery* reinforced the majority's conclusion in *Miller*, namely that the purpose of a discretionary sentencing hearing is to ensure that only rare juvenile offenders whose crimes reflect permanent incorrigibility are sentenced to LWOP.[125]

D. The Impact of Miller*'s Holding on State Procedural Requirements*

State courts and legislative bodies have introduced varying procedural requirements to give effect to *Miller*'s substantive holding and the parameters imposed by the Eighth Amendment.[126] The purpose of these procedural requirements is to either categorically bar juvenile defendants from being sentenced to LWOP[127] or to constrain sentencers so they are unable to sentence a juvenile defendant whose crimes do not reflect permanent incorrigibility to LWOP.[128] Accordingly, in states that permit juvenile defendants to be sentenced to LWOP, a sentencer will generally consider the juvenile defendant's age and capacity for rehabilitation prior to sentencing

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

124. *Id.* at 208.

125. *Id.*

126. *See, e.g.*, FLA. STAT. ANN. § 921.1401 (West 2022) (stating that upon conviction of an enumerated offense on or after July 1, 2014, a court may conduct a separate hearing where factors including the nature and circumstances of the offense, the defendant's background and community environment, and the possibility of rehabilitating the defendant can be considered prior to sentencing them to LWOP); LA. CODE CRIM. PROC. ANN. art. 878.1 (2022) (noting that sentences imposed without parole eligibility should be reserved for the "worst offenders" and that introducing mitigating evidence relevant to the juvenile defendant's background can help a sentencer make this determination); ARK. CODE ANN. § 5-4-108 (West 2022) (stating that LWOP is an inappropriate sentence for a juvenile defendant altogether and consequently is categorically abolished). *Compare* Chandler v. State, 242 So. 3d 65, 68 (Miss. 2018) (noting that so long as a sentencing hearing has been held whereby all mitigating factors have been considered, a court has satisfied its obligations under *Miller*), *with* Malvo v. State, 481 Md. 72, 101–02, 281 A.3d 758, 775 (2022) (noting that to be sentenced to LWOP, a juvenile defendant must be deemed permanently incorrigible).

127. *See Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop/ (last visited Jan. 14, 2023) (finding that nineteen states and the District of Columbia have proposed or enacted legislation that bans LWOP for juvenile defendants or that enables juvenile defendants sentenced to LWOP to petition state courts for review).

128. *See, e.g.*, *Chandler*, 242 So. 3d at 69 (emphasizing that the lack of a formal fact-finding requirement under *Miller* does not leave judges free to sentence a child to LWOP if their crimes reflect transient immaturity); People v. Skinner, 917 N.W.2d 292, 323 (Mich. 2018) (explaining that only the rare juvenile defendant should be sentenced to LWOP).

them to LWOP.[129] However, some states, such as Maryland, have held that *Miller* and *Montgomery* require more than a discretionary sentencing hearing whereby youth and any other attendant circumstances are proffered as mitigating factors.[130] For example, in *Malvo v. State*,[131] the Court of Appeals of Maryland[132] reasoned that if a discretionary sentencing hearing was enough to satisfy one's constitutional obligations, there would have been no reason for the Supreme Court to vacate LWOP sentences that were imposed prior to *Miller* and *Montgomery* in states with discretionary sentencing regimes already in place.[133] The Court of Appeals strikingly exemplified the conflicting results that ensue when a discretionary sentencing procedure is permitted to take its course without a determination of permanent incorrigibility. Specifically, it noted that the defendant at issue was simultaneously characterized as "a vulnerable and impressionable youth" who "had changed in the four years since he had committed [the crime]," and a "convicted murderer" who remained ineligible for parole.[134] Consequently, the Court of Appeals clarified that *Miller* espoused both a procedural and substantive rule, and that although a separate factual finding is not necessary to sentence a juvenile defendant to LWOP, a sentencing procedure that is completely ignorant of *Miller*'s substantive holding is unconstitutional.[135]

III. THE COURT'S REASONING

In *Jones v. Mississippi*, the Supreme Court addressed whether *Miller v. Alabama*'s substantive holding *requires* sentencers to determine that juvenile defendants convicted of murder are permanently incorrigible before sentencing them to LWOP.[136] Writing for the majority in a 6-3 decision, Justice Kavanaugh held that the *Miller* Court only mandated that a sentencer have the ability to *consider* a juvenile defendant's youth and any attendant circumstances before sentencing them to LWOP.[137] Consequently, the majority affirmed the judgment of the Mississippi Court of Appeals, noting

129. *Chandler*, 242 So. 3d at 70; *see supra* note 127.

130. *See Malvo*, 481 Md. at 101–02 281 A.3d at 775.

131. 481 Md. 72, 281 A.3d 758 (2022).

132. On December 14, 2022, Maryland Governor Larry Hogan announced that the majority of votes cast in the 2022 General Election were in favor of a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. *See* MD. EXEC. DEP'T, GOVERNOR'S PROCLAMATION DECLARING THE RESULT OF THE ELECTION OF NOVEMBER 8, 2022, FOR CONSTITUTIONAL AMENDMENTS (2022), https://mdcourts.gov/sites/default/files/import/reference/pdfs/proclamation20221213.pdf; *see also* MD. CONST. art. IV, § 14.

133. *Id.* at 97 n.18, 281 A.3d at 772 n.18.

134. *Id.* at 97, 281 A.3d at 772.

135. *Id.* at 97 n.18, 281 A.3d at 772 n.18.

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

137. *Id.* at 1316.

that Jones was nonetheless free to present any moral or policy arguments to state officials regarding the potential impropriety of his sentence in the future.[138]

To support its view, the Court outlined three reasons why a sentencer need not make a separate finding of permanent incorrigibility prior to sentencing a juvenile defendant to LWOP.[139] First, the Court explained that permanent incorrigibility is not an eligibility criterion akin to intellectual disability, as it is often difficult for psychologists to distinguish between the rare juvenile offender whose crimes reflect permanent incorrigibility and the commonplace juvenile offender whose crimes reflect transient immaturity.[140] Moreover, the Court noted that when it espouses a new eligibility criterion, it first consults documents that reflect the "objective indicia of society's standards," such as legislative enactments.[141] As *Miller* did not identify one state that, at the time, characterized permanent incorrigibility as an eligibility criterion, the Court was reluctant to reach a different conclusion.[142] Instead, the Court determined that youth is simply a mitigating factor that a sentencer must have discretion to consider prior to sentencing a juvenile defendant to LWOP.[143]

The Court similarly rejected the notion that because *Montgomery v. Louisiana* held that *Miller* espoused a substantive rule requiring retroactive application, that must mean a separate factual finding of permanent incorrigibility is necessary.[144] Specifically, the Court highlighted *Montgomery*'s explicit statement that "a finding of fact regarding a child's incorrigibility . . . is not required."[145] To bolster this interpretation, the Court reasoned that having the discretion to sentence a juvenile defendant to LWOP necessarily implies that a sentencer will weigh a juvenile defendant's youth and any attendant circumstances prior to issuing such a harsh sentence, particularly when those mitigating factors are presented by the juvenile defendant's attorney.[146] The Court noted that had the majority in *Montgomery* wished to mandate that a sentencer make a separate factual finding of permanent incorrigibility prior to sentencing a juvenile defendant to LWOP, it would have definitively said so.[147]

138. *Id.* at 1323.
139. *Id.* at 1315–18.
140. *Id.* at 1315.
141. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).
142. *Id.*
143. *Id.* at 1316.
144. *Id.* at 1317.
145. *Id.* (citing Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).
146. *Id.* at 1317–18.
147. *Id.* at 1318.

The Court lastly addressed Jones's contention that a separate factual finding of permanent incorrigibility is necessary to achieve the central goal set forth in *Miller* and *Montgomery*, namely that it be incredibly rare to sentence a juvenile defendant convicted of murder to LWOP.[148] In rejecting this argument, the Court claimed that a discretionary sentencing procedure alone is what helps ensure that LWOP is rarely deemed an appropriate punishment for juvenile defendants convicted of murder.[149] The Court referenced statistics regarding states with discretionary sentencing regimes in place, noting that when given the choice, sentencers rarely impose LWOP on juvenile defendants.[150] Consequently, the Court was unwilling to depart from *Montgomery*'s explicit statement regarding the lack of a formal fact-finding requirement.[151]

After concluding that a formal finding of permanent incorrigibility is not required before sentencing a juvenile defendant to LWOP, the Court similarly rejected the notion that a sentencer must include an on-the-record sentencing explanation containing an implicit finding of permanent incorrigibility before sentencing a juvenile defendant to LWOP.[152] To support its view, the Court outlined four reasons why an implicit finding of permanent incorrigibility is not required prior to sentencing a juvenile defendant to LWOP.[153] First, the Court claimed that a sentencer cannot avoid considering a juvenile defendant's youth if they are permitted to weigh it as a mitigating factor.[154] The Court explained that in the unlikely scenario that a sentencer is unaware of the presence of such mitigating factors, the juvenile defendant may have a potential ineffective assistance of counsel claim, not a *Miller* claim.[155]

Second, the Court noted that an implicit finding of permanent incorrigibility is inconsistent with precedent, as *Miller* did not mention it on a single occasion.[156] Instead, *Miller* referenced multiple discretionary sentencing regimes to exemplify what was missing in Alabama.[157] Simply put, according to the Court, had the *Miller* majority believed that something more rigorous was required, they would have explicitly said so.[158]

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 1319.
153. *Id.* at 1319–21.
154. *Id.* at 1319–20.
155. *Id.* at 1319 n.6.
156. *Id.* at 1320.
157. *Id.*
158. *Id.*

Third, the Court highlighted that an implicit finding of permanent incorrigibility is inconsistent with its death penalty cases.[159] Although the Court has required sentencers in such cases to consider mitigating circumstances prior to sentencing a defendant to death, the Court has never required sentencers to include an on-the-record statement that implicitly demonstrates a finding of permanent incorrigibility.[160] According to the Court, the logical extension of such precedent is that a sentencer need not be required to include an on-the-record statement containing an implicit finding of permanent incorrigibility prior to sentencing a juvenile defendant to LWOP.[161]

The Court reinforced its assertions by noting that most states have traditionally not required that a sentencer produce an on-the-record explanation of their reasoning.[162] Although the Court stated that when a judge imposes a lengthy sentence, they typically will explain both the sentence and their evaluation of any mitigating circumstances, it prefaced this point by highlighting that such an explanation is generally not legally required.[163] Furthermore, the Court recognized that even those states that require sentencers to produce an on-the-record explanation of their reasoning do not require a sentencer to consider a formulaic checklist of factors.[164] According to the Court, these state practices are important, as the Court is reluctant to micromanage the administration of substantive rules of constitutional law and intrude upon state sovereignty.[165] Consequently, the Court similarly rejected Jones' alternative argument regarding permanent incorrigibility.[166]

Justice Thomas, concurring in the Court's judgment, drafted a separate opinion in which he echoed the claim that the Eighth Amendment does not require that a juvenile defendant convicted of murder be deemed permanently incorrigible before being sentenced to LWOP.[167] Nonetheless, he criticized the majority for adopting "a strained reading" of *Miller* and *Montgomery* to reach this conclusion.[168] According to Justice Thomas, *Miller* and *Montgomery* are representative of the Court's long-standing attempt to reassemble the Eighth Amendment according to modern conceptions of juvenile justice.[169] Specifically, although *Miller* announced a procedural rule

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 1321.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1323 (Thomas, J., concurring).
168. *Id.*
169. *Id.* at 1324.

mandating that a sentencer conduct an individualized hearing prior to sentencing a juvenile defendant to LWOP, *Montgomery* clearly indicated that this rule transcended mere procedure by barring a class of defendants from being sentenced to LWOP.[170]

After exploring the tensions between *Miller* and *Montgomery*, Justice Thomas concluded that the Court was left with two options—follow the precedent set forth in *Montgomery* and require that the legality of Jones' sentence be inextricably linked to a finding of permanent incorrigibility, or hold that *Montgomery* has no basis in the Constitution.[171] Justice Thomas noted that the Court erroneously chose a third path, specifically to "[o]verrule *Montgomery* in substance but not in name."[172] Ultimately, Justice Thomas appealed to principles of judicial restraint to reinforce this criticism, noting that by failing to correct *Montgomery*'s substantive expansion of *Miller*, the Court further displaced the role of the legislative branch within our system of government.[173]

Writing for the dissent, Justice Sotomayor argued that the Court distorted *Miller*'s substantive holding to reflect what it wished the *Miller* Court had asserted.[174] Specifically, the dissent argued that the Court recast Justice Scalia's dissenting opinion in *Graham v. Florida* as binding precedent and spoke of *Miller* as espousing only a procedural rule requiring the use of discretionary sentencing hearings, while paradoxically admitting that it is substantive for purposes of retroactivity.[175] According to the dissent, a resentencing hearing whereby youth and any attendant circumstances can be meaningfully considered, as opposed to merely recognized, is what gives effect to *Miller*'s substantive holding that only the rare juvenile offender whose crimes are the result of permanent incorrigibility should be sentenced to LWOP.[176]

The dissent also highlighted the circularity of the Court's reasoning, noting that the Court erroneously assumed that a sentencer will meaningfully consider youth and any attendant circumstances so long as they have the ability to.[177] The dissent contextualized this claim by demonstrating that the data post-*Miller* does not suggest that discretionary sentencing procedures have reduced the number of juvenile defendants sentenced to LWOP.[178]

170. *Id.* at 1325.
171. *Id.* at 1326–27.
172. *Id.* at 1327.
173. *Id.*
174. *Id.* at 1335 (Sotomayor, J., dissenting).
175. *Id.*
176. *Id.* at 1330.
177. *Id.*
178. *Id.* at 1333 (noting that more than a quarter of Mississippi's resentencing hearings have culminated in the reimposition of LWOP for individuals who were convicted of crimes as children).

Ultimately, the dissent's view is that a sentencer must not merely have the ability to consider youth and any attendant circumstances—they must actually determine, by the adoption of any number of policy preferences,[179] that a juvenile defendant is permanently incorrigible before sentencing them to LWOP.[180]

IV. ANALYSIS

In *Jones v. Mississippi*, the Supreme Court held that a sentencer need not determine that a juvenile defendant convicted of murder is permanently incorrigible before sentencing them to LWOP.[181] Additionally, the Court held that a sentencer is not required to produce an on-the-record document containing an implicit finding of permanent incorrigibility before sentencing a juvenile defendant convicted of murder to LWOP.[182] The Court's conclusion improperly isolates the consideration of a juvenile defendant's youth and any attendant circumstances from the purpose of performing such an inquiry.[183] By mischaracterizing the meaning of discretion, conflating a sentencer's awareness of a juvenile defendant's youth with a meaningful consideration of how it may have impacted their behavior, and utilizing federalist principles to permit states to disregard the Constitution, the Court has made it substantially easier to sentence juvenile defendants convicted of murder to LWOP.[184] These maneuvers will further erode the importance of stare decisis within our common law tradition.[185] Ultimately, when contextualized with the conservative backlash to the Warren Court's "Due Process Revolution," the historical practice of dog whistle politics, and the well-established ability of right-wing political strategists to exploit racially coded rhetoric for political gain, the Court's decision in *Jones* subtly marshals state sovereignty to make room for a new conservative America.[186]

A. The Court Failed to Appreciate the Definition of Discretion, Improperly Detached the Miller *Inquiry from its Principal Purpose, and Reinforced Racial Disparities in Sentencing*

The Court's holding seeks to isolate consideration of a juvenile defendant's youth from issuing a judgment regarding the juvenile

179. *Id.* at 1331.
180. *Id.* at 1337.
181. *Id.* at 1319 (majority opinion).
182. *Id.* at 1321.
183. *See infra* Section IV.A.
184. *See infra* Section IV.A.
185. *See infra* Section IV.B.
186. *See infra* Section IV.C.

defendant's capacity for change.[187] To facilitate this interpretation of *Miller v. Alabama*, the Court disregarded the plain meaning of discretion[188] and subtly diluted the *Miller* inquiry to suggest that having the *ability* to acknowledge a juvenile defendant's youth and any attendant circumstances is what enables a court to satisfy its constitutional obligations.[189] This is a distortion of *Miller*'s substantive holding that effectively recasts it as a procedural rule as opposed to a substantive rule.[190] Interpreting *Miller* as solely promulgating a procedural rule essentially leaves judges free to sentence a juvenile defendant whose crime reflects transient immaturity to LWOP so long as they have the capacity to acknowledge the juvenile defendant's youth and any attendant circumstances within the context of a discretionary hearing.[191] As the dissent noted, this is not enough, as it is vital that a sentencer actually determine whether a juvenile defendant is one of the rare individuals for whom LWOP is a proportionate sentence.[192] A discretionary sentencing procedure, alone, does not satisfy this requirement.

Interestingly, tacit acknowledgment of this error is contained within the amicus brief submitted by sixteen states on behalf of the Respondent in *Jones*, which reveals that a discretionary sentencing procedure alone is simply what allows a sentencer to consider a juvenile defendant's youth.[193] At oral argument, the Respondent's counsel similarly admitted that even if a sentencer has acknowledged a juvenile's youth, it is unconstitutional to sentence the juvenile to LWOP if a determination regarding permanent

187. *Jones*, 141 S. Ct. at 1316 ("Stated otherwise, the *Miller* Court mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence. In that process, the sentencer will consider the murderer's 'diminished culpability and heightened capacity for change.'" (quoting Miller v. Alabama, 567 U.S. 460, 479, 483 (2012))).

188. If a judge is merely granted the freedom to consider a juvenile defendant's youth and any attendant circumstances, they will necessarily be able to utilize that freedom to ignore those factors, thus flouting the Eighth Amendment's constraints. *See Discretion*, DICTIONARY.COM, https://www.dictionary.com/browse/discretion (last visited Sept. 2, 2022) ("[T]he power or right to decide or act according to one's own judgment; *freedom* of judgment or choice[.]" (emphasis added)).

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

190. *Id.* at 1335; Montgomery v. Louisiana, 577 U.S. 190, 211 (2016) ("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.").

191. *Jones*, 141 S. Ct. at 1320 (noting that Jones' requests are unnecessary to give effect to *Miller*'s substantive holding because a finding of permanent incorrigibility is not imperative for a sentencer to *consider* a juvenile defendant's youth).

192. *Id.* at 1328 (Sotomayor, J., dissenting) (quoting *Miller*, 567 U.S. at 480).

193. Brief of Indiana et al. as Amici Curiae Supporting Respondent at 22, *Jones*, 141 S. Ct. 1307 (No. 18-1259) ("Mandatory sentences prevent sentencers from considering the defendant's youth, while discretionary sentences *allow* sentencers to 'consider[] an offender's youth and attendant characteristics . . . before imposing' a sentence of life without parole." (emphasis added) (quoting *Miller*, 567 U.S. at 483)).

incorrigibility has not been made.[194] Furthermore, even Justice Thomas, who does not believe that a finding of permanent incorrigibility is constitutionally necessary to sentence a juvenile defendant convicted of murder to LWOP, explicitly stated that the only way that one can reconcile the Court's interpretation of discretion with *Montgomery v. Louisiana*'s prohibition against disproportionate sentences for youth is to completely overrule *Montgomery*.[195] Put simply, the Court's reading of *Miller* and *Montgomery* presents a logical quagmire that can only be addressed by a radical departure from plain English, a radical departure from precedent, or a finding of permanent incorrigibility.[196]

In referencing the process that a sentencer *could* decide whether a juvenile defendant is permanently incorrigible, the Court claimed that it is even difficult for psychologists to distinguish between the rare juvenile offender whose crimes reflect permanent corruption and the commonplace juvenile offender whose crimes are born from transient immaturity.[197] Although legal scholars have acknowledged the limitations of the social sciences,[198] willfully ignoring its relevance to criminal law has historically led to a growing prison population.[199] This has ultimately led to more severe

194. Transcript of Oral Argument at 76–77, *Jones*, 141 S. Ct. 1307 (No. 18-1259) [hereinafter Transcript of Oral Argument] ("Let's say that I'm a sentencer and I go through a hearing, and at the end of the hearing, I say: I've considered this defendant's youth and the attendant characteristics of youth. I've done all that consideration. He's given me a lot of argument. I've listened to it all. To be honest, I don't think that he—his crime reflects irreparable corruption. You know, he is not one of the incorrigibles that *Montgomery* and *Miller* talk about. I think, in fact, that it's possible that he could be rehabilitated. But I also don't think that his youth is sufficiently mitigating for this horrible crime that he committed. So I'm sentencing him to life without parole. I think that would be a good punishment and a proportionate punishment. Is that okay on your—on your theory? No, Justice Kagan, it's not okay.").

195. *Jones*, 141 S. Ct. at 1327 (Thomas, J., concurring).

196. *Id.*

197. *Id.* at 1315 (majority opinion).

198. *See, e.g.*, Buss, *supra* note 54, at 37 ("[C]ourts and lawyers have little ability to assess the quality and applicability of social science, particularly when it has not been tested through the adversarial process."); Donald H. Wallace, *Training in Law and Behavioral Sciences: Issues from the Criminal Justice Perspective*, 8 BEHAV. SCI. & L. 249, 255 (1990) (noting that the perceived failure of rehabilitation as a legitimate penological objective has led some to conclude that the premises of the social sciences are erroneous as applied to criminal law); Alschuler, *supra* note 50, at 9 ("The demise of rehabilitation was attributable less to jurisprudential reflection than to apparent empirical failure.").

199. As scholars and judges rejected the concept that individual offenders could ultimately be trained to reenter society, and subsequently shifted to retributivist models of punishment, imprisonment became normalized, rather than a "rare and infrequent event." Alschuler, *supra* note 50, at 14 (quoting David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1–2 (David Garland ed., 2001)). Today, roughly one out of every one hundred adults are in prison or jail, which is significantly higher than that of other Western democracies. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (2014).

sentencing policies for juvenile defendants, including LWOP.[200] The mere difficulty of gleaming insight from a separate field should not persuade the Court to detach the process of considering a juvenile defendant's youth and any attendant circumstances from its principal purpose. This perspective is supported by the fact that eligibility criteria the Court has previously recognized as legitimate do not have neat, workable definitions either.[201] It is further bolstered by the fact that our society has already used the social sciences to draw artificial, legal lines separating childhood from adulthood.[202] Consequently, the Court should have appreciated that considering a juvenile defendant's youth, their family and home environment, the circumstances of the homicide offense, and the possibility for lesser charges if not for the juvenile's inability to maturely cooperate with counsel is what ensures that LWOP is only imposed upon the rare juvenile defendant for whom LWOP is a proportionate sentence.[203] Accordingly, a meaningful consideration of these factors should frequently culminate in a finding of transient immaturity and the possibility for redemption.[204] The record indicates that Jones' background, in particular, necessitated such a finding.[205] Jones' sentencing judge nonetheless failed to meaningfully consider Jones' upbringing and its relationship to the crime he committed, implying that simply holding a discretionary hearing whereby youth and any attendant circumstances are proffered as mitigating factors is not enough to ensure that *Miller*'s prohibition of disproportionate sentences is taken seriously.[206]

200. CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 78, at 9–10.

201. *Jones*, 141 S. Ct. at 1326 (Thomas, J., concurring) ("This notion that [insanity and intellectual disability] are clear cut and predictable might come as news to the States that have spent years chasing the ever-evolving definitions of mental incompetence promulgated by this Court and its preferred experts.").

202. Roper v. Simmons, 543 U.S. 551, 569 (2005) (stating that scientific and sociological studies confirm that children's "lack of maturity" and "underdeveloped sense of responsibility" prevent them from being classified "among the worst offenders" with any reliability, thereby implying that the death penalty is inappropriate for juvenile offenders).

203. *Jones*, 141 S. Ct. at 1333 (Sotomayor, J., dissenting) (explaining that the resentencing hearing gives effect to *Miller*'s substantive holding by enabling a juvenile defendant to show that they fall within the class of persons whom the law is prohibited from punishing via LWOP).

204. *Id.* ("[T]here are very few juveniles for whom 'the 'signature qualities' of youth do not undermine the penological justifications for LWOP." (quoting Miller v. Alabama, 567 U.S. 460, 476 (2012))); Avery Katz, Note, *"Black First, Children Second": Why Juvenile Life without Parole Violates the Equal Protection Clause*, 106 MINN. L. REV. 2693, 2734 (2022) (noting that research in brain science largely undermines any governmental interest in sentencing juvenile defendants to die in prison).

205. *See supra* notes 12–25 and accompanying text.

206. *Jones*, 141 S. Ct. at 1333 (reinforcing that post-*Miller* data does not show that sentencing discretion has led to fewer juvenile defendants being sentenced to LWOP); ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 16 (2021) (finding that nearly 7,000 people across the United States are serving LWOP for crimes committed as juveniles).

The Court's over-reliance on discretionary sentencing procedures that do not require a finding of permanent incorrigibility will have a disparate impact on Black youth.[207] For example, a study from 2012 demonstrated that sixty percent of juveniles sentenced to LWOP were Black,[208] despite the fact that Black youth only constitute fourteen percent of the juvenile population in the United States[209] and have been found less likely to commit major crimes than their white peers.[210] Additionally, research has demonstrated that racial disparities in who is sentenced to LWOP have increased since *Miller* was decided,[211] which some have partially attributed to the Court's failure to define "irreparable corruption" and its preference for synonyms like "permanent incorrigibility" that leave ample room for interpretation, and thus bias.[212] Just as probation officers are significantly more likely to blame the behavior of Black youth on internal characteristics,[213] it is possible that sentencers have utilized their discretion to similarly give effect to their own racial biases, in opposition to *Miller* and *Montgomery*'s substantive holding. This proposition is consistent with research showing that people often perceive Black youth to be older than they are,[214] and thus less deserving of punishment that recognizes both their youth and the fluidity of their

207. *See generally* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 105 (2015) (finding that Black juvenile defendants convicted of homicide are more likely to be sentenced to LWOP than white juvenile defendants); U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf (stating that, on average, Black males receive sentences that are nineteen percent longer than white males).

208. NELLIS, *supra* note 206, at 8.

209. *Child Population by Race and ethnicity in the United States*, KIDS COUNT DATA CTR. (Oct. 2022), https://datacenter.kidscount.org/data/tables/103-child-population-by-race-and-ethnicity#detailed/1/any/false/2048,574,1729,37,871,870,573,869,36,868/68,69,67,12,70,66,71,72/423,424.

210. Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. DAVIS J. JUV. L. & POL'Y 169, 175 (2017).

211. HENNING, *supra* note 82, at 247; CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 78, at 10 ("Of new cases tried since *Miller*, approximately 72 percent of children sentenced to life without parole have been Black—as compared to approximately 61 percent before *Miller*.").

212. Katz, *supra* note 204, at 2704.

213. In 1998, researchers reviewed a collection of narrative reports submitted by probation officers, which demonstrated that when white youth were involved, officers were more likely to attribute crime to external influences, including a dysfunctional home life. However, when Black youth were involved, officers were more likely to attribute crime to internal personality traits, including a lack of remorse. HENNING, *supra* note 82, at 248.

214. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 527 (2014) (explaining that when Black children are viewed as adults, "prohibitions against targeting children for harsh or adult treatment" diminish).

character.[215] This is deeply troubling, as psychologists have also found that juvenile defendants sentenced to LWOP are significantly more likely to have been exposed to severe physical and emotional trauma than their peers, and that such trauma often leads to increased risk-taking behaviors.[216] Consequently, it is highly possible, if not probable, that these individuals' crimes do not reflect permanent incorrigibility.[217] Although Justice Kavanaugh, who authored the Court's opinion in *Jones*, has previously recognized the potential for discretionary sentencing hearings to enable judges to give effect to their personal biases,[218] it now appears that the Court is unwilling to safeguard the protections of the Eighth Amendment. Instead, the Court has chosen to let states administer, and possibly ignore, the Eighth

215. Claire Chiamulera, *Race Affects Perceptions About Sentencing and Culpability of Juvenile Offenders*, AM. BAR ASS'N (Sept. 1, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/september_2012/race_affects_perceptionsaboutsentencingandculpability ofjuvenileo/ (referencing a study where a group of participants appraised a Black juvenile defendant as more blameworthy and deserving of LWOP than a separate group of participants who believed the defendant was white).

216. CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 78, at 8.

217. *See* Ingrid Hofeldt, Note, *Excessive Sanctions & Evolving Standards of Decency: The Mitigating Nature of Sexual Trauma for Juvenile Survivors Who Murder*, 23 MINN. J.L. SCI & TECH. 415, 425–26 (2021) (explaining how children lack the capacity to reason in stressful situations, and that when these gaps in brain function intersect with other neurological vulnerabilities stemming from child abuse, they will "*often* act out their emotional pain through violence" (emphasis added)); Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 PSYCH. PUB. POL'Y & L. 235, 242 (2016) (noting that developmental researchers have accumulated substantial data regarding the lasting emotional consequences of childhood trauma, and that such trauma increases a child's likelihood of making contact with the criminal legal system through no fault of their own); NELLIS, *supra* note 206, at 10 (stating that, of the individuals profiled who were sentenced to LWOP as children, seventy-nine percent witnessed violence in their homes and nearly half experienced physical abuse).

218. At a public hearing before the United States Sentencing Commission, then-Judge Kavanaugh of the United States Court of Appeals for the D.C. Circuit said:

> The other thing that concerns me about advisory-only guidelines is when we become judges, and we go through this process, often difficult process to become judges, the one thing we always say, which is true, is: "When I become a judge, I am going to follow the law, I am going to hear the law. My personal policy views, check those at the door. My personal views, political views on issues, check those at the door."
>
> We all believe that very strongly as judges. We try to apply that on a daily basis.
>
> When sentencing becomes completely unbounded, though, it seems to me that the sentencing judge almost necessarily will be bringing his or her personal views or policy views on certain kinds of sentencing issues right into the courtroom and right into the individual defendant's sentence, and have an effect on that person's liberty. . . . In an advisory-only system, judges not only are going—the disparities are not only going to result, but judges necessarily are going to bring their own personal philosophies, their personal views on particular issues into the courtroom, and that troubles me as well.

Brett M. Kavanaugh, Judge, U.S. Ct. of Appeals for the D.C. Circuit, Statement before the U.S. Sentencing Commission (July 9, 2009), *in* U.S. SENT'G COMM'N, PUBLIC HEARING IN NEW YORK, NY 39–40 (2009), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript_0.pdf.

Amendment's broadest parameters and prohibitions,[219] much to the detriment of Black children across the nation.[220]

B. The Court Undermined the Fidelity of our Common Law Tradition and Practiced Deferential Activism by Permitting States to Ignore the Constitution

In diluting the *Miller* inquiry to reflect the mere acknowledgment of a juvenile defendant's youth and any attendant circumstances, the Court has also diluted the importance of binding precedent within our common law tradition.[221] This is particularly troubling, as the Court admitted in a footnote that *Miller* does in fact hold that it is unconstitutional to sentence a juvenile defendant whose crimes are born from transient immaturity to LWOP.[222] Surprisingly, the Court then claimed that its opinion does not overrule *Miller*, despite severely limiting *Miller*'s purpose and workability.[223] As Chief Justice Roberts has noted, precedent must mean something beyond whether a case was wrongly decided for it to have any lasting effect upon our judicial system.[224] Nonetheless, even Chief Justice Roberts, who noted during oral argument that what Jones was asking for "didn't seem like very much,"[225] ultimately joined the majority in dismantling *Miller* and *Montgomery*.[226] By usurping the principles of stare decisis, the Court has not only shown disregard for the vehicle that gives effect to *Miller*'s substantive holding, and for the racial disparities that persist amongst juvenile defendants sentenced to LWOP, but also for the legacy upon which prior cases have been decided.

The Court's decision to depart from precedent in *Jones* is not an isolated incident. During its 2021 term, the Court overruled *Roe v. Wade*[227] and *Planned Parenthood v. Casey*[228] in *Dobbs v. Jackson Women's Health*

219. David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 69 (2021) ("Indeed, with a flurry of state supreme court litigation and renewed scholarly interest in state constitutions that restrict extreme criminal punishments, the center of innovation is already beginning to shift from the federal courts to their state counterparts—both for juvenile life without parole and for criminal punishment more broadly.").

220. *See* CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 78, at 10.

221. Jones v. Mississippi, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting).

222. *Id.* at 1330–31.

223. *Id.* at 1336.

224. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.").

225. Transcript of Oral Argument, *supra* note 194, at 42.

226. Shapiro & Gonnerman, *supra* note 219, at 69.

227. 410 U.S. 113 (1973).

228. 505 U.S. 833 (1992).

Organization,[229] explicitly ignoring precedent indicating that, while the rule of stare decisis is not an inexorable command, it should only be rejected in highly limited circumstances.[230] The Court also effectively departed from precedent in emptying the Establishment Clause of meaning,[231] holding that Maine must fund theological education as part of its state, taxpayer-funded tuition assistance program.[232] Similarly, the Court stripped individuals of their statutory ability[233] to seek monetary damages for violations of the Fifth Amendment right against self-incrimination protected in *Miranda v. Arizona*[234] via prophylactic measures.[235] What these decisions, and others, have in common is that they masquerade as emblems of judicial restraint while simultaneously eviscerating long-held constitutional rights.[236] Many, like *Jones* and *Dobbs*, specifically laud the importance of leaving "questions of morality" to state legislative bodies,[237] a strategy that will eventually lead to the apportionment of constitutional rights, rather than simply moral preferences, along both geographic and racial lines.[238] This is especially

229. 142 S. Ct. 2228 (2022) (holding that the Constitution does not confer a right to abortion, that abortion is not rooted in American history, and consequently that states should be left to regulate abortion as they see fit).

230. *See Casey*, 505 U.S. at 855 (explaining that when reexamining a prior holding, the Court must ask: (1) whether the relevant rule has proven unworkable; (2) whether the rule's restriction on state power could be terminated without seriously impacting those who have historically relied upon it; (3) whether the law's progression has left the rule doctrinally suspect; and (4) whether the premises of fact relied upon in the governing case have vastly changed, leaving its holding irrelevant or unjustifiable).

231. In *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that a state scholarship program that excluded students enrolled in a theological degree program did not violate the Free Exercise Clause. In reaching this decision, the Court stated that "there are few areas in which a State's antiestablishment interests come more into play," and underscored how the nation's founding was marked with public outrage regarding taxpayer funds being funneled to select church leaders. *Id.* at 713.

232. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987 (2022).

233. *See* 42 U.S.C. § 1983 (enabling citizens to sue government actors and other parties acting "under color of" state law for the deprivation of a constitutional right).

234. 384 U.S. 436 (1966).

235. Vega v. Tekoh, 142 S. Ct. 2095 (2022).

236. Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-Held Constitutional Right*, NEW YORKER (June 24, 2022), https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right.

237. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021) ("Determining the proper sentence in such a case raises profound questions of morality and social policy. The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender."); *Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

238. *See supra* notes 207–216 and accompanying text; *The Disproportionate Harm of Abortion Bans*: *Spotlight on* Dobbs v. Jackson Women's Health, CTR. FOR REPROD. RTS. (Nov. 29, 2021), https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-disproportionate-

troublesome given that the Court has previously recognized the need to refrain from legislative deference when a state statute or practice plainly conflicts with the Constitution or unfairly disadvantages "discrete and insular minorities" who have been closed out of the political process.[239] In these instances, "a more searching judicial inquiry" may be required,[240] which the Court failed to conduct in *Jones*.[241]

Given that the Court's ideological bent has radically shifted in recent years,[242] it is unsurprising that the Court's choice to rebuke precedent has often led it to conclusions which mirror the Justice's' personal beliefs and affiliations.[243] The latter is subtly reinforced by Justice Alito's dissenting

harm/ (finding that the barriers to reproductive services imposed by *Dobbs* will severely impact marginalized communities in Mississippi who lack access to comprehensive health care and sex education, and who already often face poor health outcomes); KATHERINE GALLAGHER ROBBINS & SHAINA GOODMAN, NAT'L P'SHIP FOR WOMEN & FAMS., STATE ABORTION BANS COULD HARM NEARLY 15 MILLION WOMEN OF COLOR 1–2 (2022), https://www.nationalpartnership.org/our-work/resources/economic-justice/state-abortion-bans-harm-woc.pdf (highlighting that nearly fifteen million women of color and nearly three million women with disabilities live in states that have banned abortion or are set to ban abortion).

239. Although the Court originally recognized this principle within the context of economic regulatory legislation, it nevertheless implies that the Court has a general obligation to protect individual liberties when they are threatened by the structural failures of ordinary politics, which may include voter suppression. *See generally* Amanda S. Hawkins, *Our Most Precious Right: Evaluating the Court's Voter Identification Review and its Effect on North Carolina's Franchise*, 94 N.C. L. REV. 208, 242 (2015). The latter is further reinforced by the fact that juvenile defendants are unable to participate in the political process by virtue of their age. *See* United States v. Carolene Products, Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983, 988 (2018) (underscoring how the political process does not always adequately protect the constitutional balance between federal and state governments, and how it is necessary for the Court to intervene in such instances).

240. *Carolene Products*, 304 U.S. at 153 n.4.

241. *See supra* note 235 and accompanying text.

242. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative (finding that there were more 6-to-3 decisions during the Court's 2021 term than at any other time in the Court's modern history, and that every liberal justice dissented more frequently than in prior terms). Some have attributed the Court's rightward swing to the covert activism of conservative non-profit groups like the Federalist Society. *See* Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/?utm_term=.1d2008ed2d75 (noting that long-time Vice President of the Federalist Society, Leonard Leo, remarked to a group of conservative activists that "judicial confirmations these days are more like political campaigns").

243. *See, e.g.*, William D. Araizae, *Samuel Alito*: *Populist*, 103 CORNELL L. REV. ONLINE 14, 18 (2017) (finding that Justice Alito has "never crossed to the other side of the ideological divide in order to create a 5-4 majority" and consequently has emerged as the dominant representative of conservative America); Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions*

opinion in *Tatum v. Arizona*,[244] which considered the issue of permanent incorrigibility years before *Jones*. There, Justice Alito questioned why the petitioner insisted on a resentencing hearing, noting that the record provided ample support for the petitioner's sentence, and that the judge would likely conclude that LWOP remained appropriate.[245] Interestingly, this statement makes a mockery of the majority's own claim in *Jones* that determining the proper sentence for a juvenile defendant encroaches upon the realm of moral policy and is for the states, not the federal courts.[246] Furthermore, it is the job of the Court to preserve the parameters imposed by the Eighth Amendment, and any corresponding precedent, rather than outcomes obtained in violation of those parameters that it finds personally desirable.[247] Unfortunately, Black children will ultimately pay the price for the Court's rightward swing in *Jones*.[248]

of Morality and Merit, 40 HOFSTRA L. REV. 115, 115 (2011) (stating that Justice Alito's First Amendment jurisprudence is tethered to his "personal sense of . . . morality" and its relationship to the merits of the speech at issue); Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 197 (2015) (noting that originalism, judicial restraint, federalism, and respect for the will of Congress often serve as mere "doctrines of convenience" which facilitate outcomes that advance the interests of corporations and the Republican Party); Margaret Talbot, *Justice Alito's Crusade Against Secular America Isn't Over*, NEW YORKER (Aug. 28, 2022), https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over (underscoring that Justice Alito's opinion in *Dobbs* was centrally grounded in his personal conception of the sanctity of life, rather than any defined legal standard); Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game (stating that in 2006, Justice Coney Barrett signed her name to a two-page ad that declared it was "time to put an end to the barbaric legacy of *Roe v. Wade* and restore laws that protect the lives of unborn children").

244. 137 S. Ct. 11 (2016).

245. *Id.* at 13–14 (Alito, J., dissenting).

246. Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021).

247. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) ("[Stare decisis] 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'" (quoting Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986))).

248. *See supra* notes 207–216 and accompanying text.

C. The Court Mobilized State Sovereignty to Facilitate America's Shift to Conservativism and Invoked Political Rhetoric that Has Historically Apportioned Constitutional Rights Along Racial Lines and that Will Further Divide Our Nation

Although *Jones* represents an egregious departure from precedent[249] that will exacerbate racial disparities in our criminal legal system,[250] the Court's reliance on state sovereignty is representative of an all too familiar tactic in American history, a tactic that initially helped create the Southern Strategy for a new electoral majority.[251] For example, the Court noted that its decision was grounded in its desire to "avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems,"[252] that "[t]he States, not the federal courts" are the proper vehicle for making "broad moral and policy judgments . . . when enacting their sentencing laws,"[253] and that the Constitution does not demand particular policy approaches to sentencing, even if they promote proportionality.[254] As the dissent noted, this language loses sight of what is at stake—the Eighth Amendment's prohibition of cruel and unusual punishment—which applies to every citizen regardless of where they live and is not a matter of ordinary politics.[255]

While one may argue that the majority's language is largely innocuous, as criminal law is a traditional police power interest, this argument similarly loses sight of the fact that federalist rhetoric has historically been used as a cover for racism[256] and that the Southern Strategy's original proponents recognized that the Supreme Court could be used to further their ideological interests.[257] For example, President Nixon's first Supreme Court nominee, Judge Clement Haynsworth, was promoted as an antidote to the liberalism of the Warren Court.[258] Although Judge Haynsworth did not explicitly legislate

249. *See supra* Section IV.B.

250. *See supra* Section IV.A.

251. *See supra* note 11.

252. Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021) (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

253. *Id.* at 1322.

254. *Id.* at 1323.

255. *Id.* at 1340 (Sotomayor, J., dissenting).

256. Mark R. Thompson, *When God Collides with Race and Class*: *Working-Class America's Shift to Conservatism*, 68 U. PITT. L. REV. 243, 255 (2006).

257. *See* Jordan Alexander, *Striving for Civil Rights: Senator Edward W. Brooke, President Richard Nixon's "Southern Strategy" and the Supreme Court*, 46 J. SUP. CT. HIST. 206, 213 (2021) ("Haynsworth's narrow, strict interpretation of the Constitution, especially the Fourteenth Amendment, was a larger ploy into President Richard Nixon's strategy of appealing to disillusioned, White southern voters. They felt betrayed by the Democratic Party as the national coalition gradually became more inclusive of Black Americans and adopted a stronger civil rights platform throughout the 1950s and 1960s.").

258. Alexander, *supra* note 257, at 212.

white supremacy from the bench, his opponents feared that, if confirmed, Judge Haynsworth's conservative judicial philosophy would "embolden segregationists to continue defying the federal government while simultaneously punishing working class Americans and ethnic minorities who struggled to assert their civil rights."[259] Judge Haynsworth's unsuccessful confirmation hearing dealt "a historic blow to Nixon's [S]outhern [S]trategy," which evidently was not just about winning votes but was also about ensuring that the judicial branch was working toward its policy goals.[260] Although the Justices in the *Jones* majority were subject to similarly contentious confirmation hearings, where their commitment to precedent was called into question,[261] no blow was dealt to the ambitions of conservative idealogues. Instead, the Court has routinely sung the praises of state sovereignty and deferential activism, despite its disproportionate impact on marginalized communities.[262] This has resulted in a patchwork of state laws governing the permissibility of LWOP for juvenile defendants, with thirty-two states, including Maryland, prohibiting its use outright.[263] Unsurprisingly, more than half of the sixteen states that are currently constrained only by the Supreme Court and allow juvenile defendants to be sentenced to LWOP are located in the Deep South.[264]

The Court's mobilization of state sovereignty for the purposes of fashioning a new conservative America is reinforced by the fact that the social climate that originally facilitated this tactic is woefully apparent in our modern era. Specifically, economic inequality in the United States has reached staggering heights,[265] crime has risen,[266] and extremist political

259. *Id.* at 214.

260. *Id.* at 216.

261. *See, e.g.*, Liz Marlantes, *Alito Grilling Gets Too Intense for Some*, ABC NEWS (Jan. 11, 2005), https://abcnews.go.com/WNT/SupremeCourt/story?id=1495804 (noting that Justice Alito was questioned regarding "inconsistencies" in his testimony and past writings regarding civil rights and abortion); Jeannie Suk Gersen, *Understanding the Partisanship of Brett Kavanaugh's Confirmation Hearings*, NEW YORKER (Sept. 12, 2018), https://www.newyorker.com/news/our-columnists/understanding-the-partisanship-of-brett-kavanaughs-confirmation-hearings (stating that in the wake of Justice Kavanaugh's confirmation hearing, hundreds of protests and outreach campaigns that "fervently oppose[d] [his] nomination" emerged).

262. *See supra* notes 207–216 and accompanying text.

263. JOSHUA ROVNER, SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 2 (May 2021), https://www.sentencingproject.org/app/uploads/2022/08/Juvenile-Life-Without-Parole.pdf.

264. In 2021, research demonstrated that sixteen states that allow juvenile defendants to be sentenced to LWOP do not currently have any juveniles serving such a sentence. *Id.*

265. Anshu Siripurapu, *The U.S. Inequality Debate*, COUNCIL ON FOREIGN RELS. (Apr. 20, 2022, 5:14 PM), https://www.cfr.org/backgrounder/us-inequality-debate (finding that in 2021, the top ten percent of Americans held nearly seventy percent of U.S. wealth and that economic inequality in the U.S. severely outpaces that of other rich nations).

266. Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. FOR JUST. (July 12, 2022), https://www.brennancenter.org/our-

factions have emerged that stoke racial resentment and pit groups against each other.[267] These long-standing features of American society came to a peak during Donald Trump's presidency, which promised a return to the familiar refrain of "law and order"[268] and catalyzed a coalition of working-class white voters who were intent on preventing the America they knew from being seized by progressive elites, seemingly forgetting the ways in which conservative economic policies had routinely thwarted their own middle-class aspirations.[269] Although original proponents of this tactic advocated "[t]alking in code," believing that it would enable politicians to "appeal to cultural archetypes . . . . without explicitly playing the 'race card,'"[270] Donald Trump eschewed this approach, choosing instead to blatantly appeal to his supporters' racial resentment.[271] Furthermore, while enacting seemingly bipartisan criminal reform measures,[272] in 2020, the

work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime (finding that in 2020, the U.S. murder rate rose by nearly thirty percent).

267. Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ (noting that Democrats and Republicans are further apart ideologically than at any other period in the last fifty years).

268. Olivia B. Waxman, *Trump Declared Himself the 'President of Law and Order.' Here's What People Get Wrong About the Origins of That Idea*, TIME (June 2, 2020, 12:27 PM), https://time.com/5846321/nixon-trump-law-and-order-history/.

269. *See* Thompson, *supra* note 256, at 256 (highlighting that despite their efforts to reduce social welfare spending, undermine labor unions, and advance the interests of big business, conservative candidates receive a resounding majority of votes in the nation's poorest regions); Peter Montague, *The GOP's "Southern Strategy" Shows How White Supremacy Fuels Class Exploitation*, TRUTHOUT (July 17, 2020), https://truthout.org/articles/the-gop-southern-strategy-shows-how-white-supremacy-fuels-class-exploitation/ (explaining that the process by which white working-class voters vote against their own financial interests also leads to physical harm, particularly via the refusal of conservative states to expand Medicaid coverage).

270. Feld, *supra* note 57, at 1554.

271. *Compare* David Leonhardt & Ian Prasad Philbrick, Opinion, *Donald Trump's Racism*: *The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html (underscoring that Donald Trump launched his campaign by "describing Mexicans as rapists," advocated for "a total and complete shutdown of Muslims entering the United States," decried the potential for immigrants to "pour into and infest our country," called white supremacists "very fine people," and accepted the endorsement of David Duke, the former leader of the Ku Klux Klan), *with* Cook, *supra* note 63, at 92, 101 (noting that Ronald Reagan opposed the Civil Rights Act of 1964 because it infringed on states' rights and promoted reverse discrimination, cut funding for the Equal Employment Opportunity Commission, and conjured the narrative of the "Black welfare queen" without explicitly mentioning race).

272. *See* 18 U.S.C. § 3621; Ames Grawert, *What Is the First Step Act—And What's Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it (explaining how the First Step Act is aimed at shortening federal prison sentences and giving people greater opportunity to avoid mandatory minimum penalties).

Trump Administration executed more inmates than all states combined.[273] This tough-on-crime approach, while thinly veiled in legislative efforts signaling a desire to curtail mass incarceration, is further contextualized by the fact that there is a correlation between punitiveness and racial hostility.[274] Just as the link between race and rising youth crime provided a powerful incentive for more punitive juvenile "justice" efforts in the twentieth century,[275] Donald Trump's rhetoric similarly mobilized the Supreme Court to act, only with more muted language.[276]

The Court's current role in shaping Republican policy is reinforced by the fact that the composition of the Supreme Court has historically been a campaign talking point for Republican politicians.[277] Accordingly, of the five Justices who joined the *Jones* majority in dismantling precedent and exacerbating existing racial disparities, three were appointed by Donald Trump.[278] By extolling the virtues of moral policymaking at the local level, the *Jones* majority implicitly referenced the ongoing narrative of "an American South victimized by the unconstitutional incursion of the federal government into the internal affairs of a sovereign state."[279] In a manner evocative of the call and response that is American history, these Justices thereby abrogated the federal government's role in safeguarding the limits imposed by the Eighth Amendment, and adduced by binding precedent,[280] choosing to prioritize "states' rights" and "law and order"[281] over the

273. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2020: YEAR END REPORT 1 (2020), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf.

274. Feld, *supra* note 57, at 1558.

275. *Id.*

276. *See supra* note 237 and accompanying text.

277. Adam Liptak & Michael D. Shear, *Republicans Turn Judicial Power into a Campaign Issue*, N.Y. TIMES (Oct. 22, 2011), https://www.nytimes.com/2011/10/24/us/politics/republicans-turn-judicial-power-into-a-campaign-issue.html (highlighting how the 2012 election was marked by conservative concern regarding the power allocated to the federal judiciary); Matt Flegenheimer, *Donald Trump's Docket: A Look at His Supreme Court Wish List*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/trump-scotus-justices.html (noting that Donald Trump's list of prospective Supreme Court nominees was meant to "reassure conservatives that his appointees would reflect a right-leaning philosophy").

278. *See* Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html; Matt Ferner, Nick Visser & Laura Bassett, *Trump Nominates Brett Kavanaugh to the Supreme Court*, HUFFINGTON POST (July 9, 2018, 8:59 PM), https://www.huffpost.com/entry/brett-kavanaugh-supreme-court_n_5b3c1a28e4b05127cced766b; Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html.

279. Cook, *supra* note 63, at 90.

280. *See supra* Section IV.B.

281. Since Donald Trump left office, calls for law and order have continued to be a mainstay of Republican politics. *See, e.g.*, Isiah Holmes, *Republican Candidates Michels and Toney Join Victims to Campaign on Parole Issue*, WIS. EXAM'R (Oct. 10, 2022, 6:32 AM),

constitutional rights of marginalized children across the nation.[282] Without the Court's practice of deferential activism, conservative states would be restricted from advancing reactionary social policies, and, in the case of *Jones*, would be called to recognize a criminal legal system intent on preserving proportionality as opposed to punitiveness. By choosing punitiveness, and not the Constitution, the majority in *Jones* helped fuel the political machine that initially birthed the Southern Strategy.

Despite the originalist judicial philosophy that animates the spirit of these Justices, all seem to have forgotten the words of George Washington. In his farewell address, George Washington spoke of the danger of political factions founded on geographic discrimination, and how such factions would likely lead to the rise of a powerful and single-minded despot, intent on dismantling public liberty.[283] While the Maryland judiciary has chosen to eschew partisan politics, and has safeguarded the Eighth Amendment,[284] the State's political climate necessarily implies that this choice does not lie on stable grounds. For example, the rise of Maryland Republican gubernatorial candidate, Dan Cox, highlights the "baneful effects of the spirit of party."[285] Although Dan Cox was defeated by Democrat Wes Moore in the 2022

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https://wisconsinexaminer.com/2022/10/10/republican-candidates-michels-and-toney-join-victims-to-campaign-on-parole-issue/ ("Michels denounced Gov. Tony Evers for 'coddling criminals' and condemned efforts by the Evers administration to reduce the prison population, with an ultimate goal of eventually cutting it in half."); Andrew Stanton, *Republicans See Big Gains over Inflation, Crime Just Ahead of Midterm: Poll*, NEWSWEEK (Oct. 23, 2022, 12:22 PM), https://www.newsweek.com/republicans-see-big-gains-over-inflation-crime-just-ahead-midterm-poll-1754113 ("Focusing on crime has even allowed the GOP to creep into more solidly Democratic territory . . . . Republicans have blamed rising crime on progressive criminal justice reform policies—including cash bail reform, which they say leads to dangerous criminals being released from jail.").

282. Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021); *see supra* notes 207–216 and accompanying text.

283. In his farewell address, George Washington ominously predicted how "the spirit of party" may ultimately fracture the nation:

> I have already intimated to you the danger of parties in the state, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view and warn you in the most solemn manner against the baneful effects of the spirit of party, generally. . . . The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty.").

GEORGE WASHINGTON, FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. Doc No. 115-5, at 13–14 (Sep. 19, 1796).

284. *See* Malvo v. State, 481 Md. 72, 101–02, 281 A.3d 758, 775 (2022) (noting that to be sentenced to LWOP, a juvenile defendant must be deemed permanently incorrigible).

285. *See supra* note 283 and accompanying text.

General Election, Cox's campaign was propped up by Democratic strategists who believed that he was too extreme to be a competitive candidate.[286] This electoral strategy demonstrates an unwillingness to confront the historical practice of exploiting white voters' crime-related fears for political gain.[287] Ultimately, this practice threatens a return to the rhetoric of "law and order" and the factional politics George Washington warned us of.[288] However, the Supreme Court's exploitation of state sovereignty endangers all of us.

CONCLUSION

In *Jones v. Mississippi*, the Supreme Court held that a sentencer need not find that a juvenile defendant convicted of murder is permanently incorrigible before sentencing them to LWOP.[289] Similarly, the Court found that a sentencer need not provide an on-the-record sentencing explanation containing an implicit finding of permanent incorrigibility before sentencing a juvenile defendant convicted of murder to LWOP.[290] In coming to this conclusion, the Court failed to acknowledge that the purpose of a discretionary sentencing hearing is to use the *Miller* inquiry to determine whether a juvenile defendant is irreparably corrupt.[291] To support this conclusion, the Court erroneously disregarded the plain meaning of discretion, despite previously highlighting the prejudicial impact that unfettered sentencing procedures can have on criminal defendants.[292] Similarly, the Court conflated knowledge of a juvenile defendant's youth with a meaningful consideration of how it may have impacted their behavior, and practiced deferential activism by permitting states to ignore the

286. *See* Reid J. Epstein, *With Democrats' Help, a Far-Right Candidate Rose in Maryland*, N.Y. TIMES (July 20, 2022), https://www.nytimes.com/2022/07/20/us/politics/maryland-governor-dan-cox.html.

287. Specifically, this practice exemplifies a lack of awareness regarding how working-class communities have felt left behind and often latch onto reactionary figures as a byproduct of Republican electoral tactics, including the Southern Strategy and the Supreme Court's mobilization of state sovereignty. *Id.*

288. *See* Seth McLaughlin, *Republican Dan Cox Laser-Focused on the Economy, Crime and Education in Maryland Governor's Race*, WASH. TIMES (Sept. 14, 2022), https://www.washingtontimes.com/news/2022/sep/14/dan-cox-laser-focused-economy-crime-and-education-/ (explaining that Dan Cox made crime, and "quality of life issues" more generally speaking, a focal point of his campaign); *see generally* Paul Gessler, *Republican Dan Cox – Endorsed by Trump – Has Focus on Maryland Governor's Race*, CBS (Oct. 14, 2022, 4:35 PM), https://www.cbsnews.com/baltimore/news/republican-dan-cox-endorsed-by-trump-has-focus-on-maryland-governors-race/ (noting that Dan Cox touted the endorsement of Donald Trump on the campaign trail).

289. 141 S. Ct. 1307, 1319 (2021).

290. *Id.* at 1321.

291. *See supra* Section IV.A.

292. *See supra* note 218.

Constitution.[293] Unfortunately, this choice will disproportionately affect Black children who make contact with our criminal legal system, and live in states that have not passed legislation to advance the type of proportional sentencing that our federal Constitution already guarantees.[294]

To achieve its policy aims, the Court also rewrote precedent in *Jones* and delegitimized the foundations of American law.[295] The Court has consistently chipped away at our common law tradition, as it subsequently employed the interpretative tool of originalism to unravel decades-old precedent during its 2021 term,[296] rejecting the conventional stare decisis analysis in the process.[297] When viewed alongside the conservative backlash to the Warren Court's expansion of individual rights, the racially coded rhetoric of "states' rights" and "law and order," and the means by which right-wing political strategists have historically mobilized such terms in furtherance of forming new political coalitions, these legal maneuvers represent the Supreme Court's exploitation of state sovereignty to forge a new conservative America.[298]

As former Supreme Court Justice Tom C. Clark once said, "nothing can destroy a government more quickly than its disregard of the charter of its own existence."[299] As the final arbiter of the Constitution, the Court will have to reckon with how its ideological objectives have conflicted with its obligation to be impartial, or risk losing the most potent authority it possesses—the confidence of the American people.[300]

293. *See supra* Section IV.A.

294. *See supra* notes 207–216 and accompanying text.

295. *See supra* Section IV.B.

296. *See supra* notes 227–238 and accompanying text.

297. *See supra* note 230.

298. *See supra* Section IV.C.

299. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

300. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) ("As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").