

CITATIONS:

Bluebook 22nd ed.

Courtney Zotaj, *Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi*, 46 *LAW & PSYCHOL. REV.* 311 (2021-2022).

ALWD 7th ed.

Courtney Zotaj, *Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi*, 46 *Law & Psychol. Rev.* 311 (2021-2022).

APA 7th ed.

Zotaj, Courtney. (2021-2022). *Evolving Standards of Decency: Applying "Permanent Incurrigibility" Standard despite Jones v. Mississippi*. *Law & Psychology Review*, 46, 311-332.

Chicago 18th ed.

Zotaj, Courtney. 2021-2022. "Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi." *Law & Psychology Review* 46: 311-332. HeinOnline.

McGill Guide 10th ed.

Courtney Zotaj, "Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi" (2021-2022) 46 *Law & Psychol Rev* 311.

AGLC 4th ed.

Courtney Zotaj, 'Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi' (2021-2022) 46 *Law & Psychology Review* 311

MLA 9th ed.

Zotaj, Courtney. "Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi." *Law & Psychology Review*, 46, 2021-2022, pp. 311-332. HeinOnline.

OSCOLA 5th ed.

Courtney Zotaj, 'Evolving Standards of Decency: Applying a "Permanent Incurrigibility" Standard despite Jones v. Mississippi' (2021-2022) 46 *Law & Psychol Rev* 311 Export To:

Date Downloaded: Thu Jun 18 15:25:48 2026

Source: <https://access.heinonline.com/HOL/Page?handle=hein.journals/psyr46&id=323>

Terms, Conditions & Use of PDF Document:

Please note, citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper formatting. Your use of this HeinOnline PDF indicates your acceptance of William S. Hein & Co., Inc. and HeinOnline's Terms & Conditions: <https://help.heinonline.com/kb/terms-conditions/>. The search text of this PDF is generated from uncorrected OCR text. To obtain permission to use this article beyond the scope of your license, please use: <https://www.copyright.com>.

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

EVOLVING STANDARDS OF DECENCY:
APPLYING A “PERMANENT INCORRIGIBILITY” STANDARD
DESPITE *JONES V. MISSISSIPPI*

*Courtney Zotaj**

TABLE OF CONTENTS

I. INTRODUCTION.....	312
II. PRECEDENT	313
III. JONES V. MISSISSIPPI.....	315
<i>A. Majority</i>	316
<i>B. Concurrence</i>	317
<i>C. Dissent</i>	317
IV. “PERMANENT INCORRIGIBILITY”	318
V. CURRENT LANDSCAPE.....	322
VI. MOVING FORWARD	330

* J.D. Candidate, University of Alabama School of Law 2023; B.A. University of Alabama 2020.

I. INTRODUCTION

Brett Jones recently asked the Supreme Court to restrain states' unbridled discretion and implement a standard that provides greater protection for the individual liberties of juveniles facing life sentences without the possibility of parole.¹ However, the majority rejected the necessity of additional safeguards such as an on-the-record sentencing explanation or an explicit finding of permanent incorrigibility.²

Jones was barely fifteen on the day he got into a fatal argument with his grandfather.³ The dispute began with his grandfather trying to hit him while he was making a sandwich with a steak knife, and it ended with Jones stabbing him.⁴ Jones was sentenced to life in prison without the possibility of parole ("LWOP") in Mississippi.⁵ In light of the Supreme Court's *Miller*⁶ and *Montgomery*⁷ decisions, Jones received LWOP after a superficial resentencing hearing.⁸ He appealed his sentence because the resentencing court did not find he was "permanently incorrigible" or explain why he did not deserve the opportunity to present evidence of his rehabilitation before a parole board.⁹ His family members testified that he was a good person, capable of change, and undeserving of a de facto death sentence.¹⁰ Despite this testimony and other mitigating evidence of his youth, turbulent upbringing, and history of mental illness, the Court upheld Jones's irreversible life sentence.¹¹ The *Jones* Court made two critical rulings. First, states are not required to implement any standard that hampers a sentencer's discretion.¹² Second, "permanent incorrigibility is the dispositive rule" for juvenile LWOP.¹³

This article first offers an overview of Eighth Amendment jurisprudence regarding severe juvenile punishment. Next, this article examines the pertinent psychological perspectives underlying the Court's "permanent incorrigibility" standard. Then, this article provides a brief synopsis of the majority, concurring,

1. See *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

2. *Id.* at 1312–22.

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

4. *Id.* at 1339 (Sotomayor, J., dissenting).

5. *Id.* at 1312.

6. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

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

8. See *Jones*, 141 S. Ct. at 1312–13.

9. *Id.* at 1313.

10. *Id.* at 1339 (Sotomayor, J., dissenting).

11. *Id.*

12. *Id.* at 1331.

13. *Id.*

and dissenting opinions in *Jones v. Mississippi*. It then presents the current sentencing standards of states that still impose LWOP on juvenile homicide offenders. Finally, it analyzes how states have meaningfully implemented a permanent incorrigibility standard despite *Jones's* holding that a discretionary sentencing scheme is constitutionally sufficient.

II. PRECEDENT

Adolescent brain and social science has expanded the boundaries of “cruel and unusual punishment” for juveniles under the Eighth Amendment by virtue of *Trop v. Dulles*.¹⁴ In 1958, *Trop* established that “[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁵ Under this premise, *Thompson v. Oklahoma* declared that sentencing children younger than sixteen to death violated the Constitution.¹⁶ Reciting early precedent, the Court’s premise for prohibiting the punishment was the mitigating effect youth must create:

[Y]outh is more than a chronological fact. . . . Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.¹⁷

The Court therefore determined that penological justifications for such severe punishment were not present when imposed on children.¹⁸

In 2005, *Roper v. Simmons* continued this analysis by finding “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.”¹⁹ Drawing from the categorical ban on executions of the intellectually disabled in *Atkins v. Virginia*, the Court further

14. 356 U.S. 86, 99 (1958).

15. *Id.* at 101.

16. 487 U.S. 815, 838 (1988).

17. *Id.* at 834 (internal citations omitted). The Court in *Thompson* concluded: “Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct, while, at the same time, he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* at 835.

18. *Id.* at 836–38 (explaining that the two social purposes of the death penalty, retribution and deterrence, are inapplicable for child homicide offenders “[g]iven the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children. . .”).

19. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

reasoned that “[o]nce juveniles’ diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders—provides adequate justification for imposing that penalty on juveniles.”²⁰ Thus, the *Roper* Court categorically barred states from executing juveniles because social science proved that “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”²¹

Soon after *Roper*, *Graham v. Florida* soon determined the most severe punishment permitted by law for juveniles—a life sentence that denies offenders any possibility of parole—is unconstitutional for any nonhomicide offense.²² *Graham* equated LWOP with the death penalty because both punishments constituted an irrevocable forfeiture of a juvenile offender’s “most basic liberties.”²³ In an additional parallel to execution, the Court reasoned that “[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.”²⁴ After accepting ways that social science diminishes the justifications for imposing LWOP on juveniles for nonhomicide offenses, *Graham* declared “the State must respect the human attributes even of those who have committed serious crimes.”²⁵

Miller v. Alabama, the historic ruling *Jones* responds to, next struck down sentencing schemes that made LWOP the mandatory sentence for convicted juveniles.²⁶ *Miller* held that states may not automatically impose the most severe punishment available because “children are constitutionally different from adults for purposes of sentencing.”²⁷ Although the *Miller* decision is limited to mandatory sentences, the Court stated it had “already announced that discretionary life without parole for juveniles should be ‘uncommon,’”²⁸ and affirmed that children’s “differences counsel against irrevocably sentencing them to a lifetime in prison.”²⁹

20. *Id.* at 553.

21. *Id.*

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

23. *Id.* at 69–70 (“[T]his sentence ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’”) (quoting *Naovarath v. State*, 105 Nev. 525, 526 (1989)).

24. *Id.* at 72.

25. *Id.* at 59.

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

27. *Id.* at 471.

28. *Id.* at 500–01.

29. *Id.* at 480.

Citing social science underscoring the Court's precedent, *Miller* clarified that children's "transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"³⁰

Although Henry Montgomery was a juvenile, Louisiana law required an automatic life without parole sentence upon his guilty verdict.³¹ After Montgomery spent almost his entire life in prison, *Miller* prohibited states from issuing mandatory life without parole for juvenile offenders.³² In addition to applying *Miller* retroactively, *Montgomery v. Louisiana* clarified the requirements of the Court's precedent. *Montgomery* explained that sentencing courts must "consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison."³³ The *Montgomery* Court further interpreted *Miller* to hold that lifetime sentences violate the Eighth Amendment "for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'"³⁴ To give effect to the rule in *Miller*, the Court declared that "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not."³⁵ To conclude, the Court cautioned states from imposing LWOP: "[t]hat *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."³⁶

III. *JONES V. MISSISSIPPI*

Brett Jones was first sentenced to LWOP under Mississippi's mandatory regime.³⁷ After *Miller* and *Montgomery*, Jones received a hearing and was resentenced to LWOP.³⁸ The question in *Jones* was whether the Court's decisions required sentencers to find, whether implicitly or as a matter of fact, that a juvenile

30. *Id.* at 471–72 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

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

32. *Id.* at 195.

33. *Id.*

34. *Id.*

35. *Id.* at 210 (internal citations omitted).

36. *Id.* at 211. "In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 213.

37. *Jones v. Mississippi*, 141 S. Ct. 1307, 1309 (2021).

38. *Jones v. State*, 285 So. 3d 626, 634 (Miss. Ct. App. 2017), rev'd, No. 2015–CT–008899–SCT, 2018 WL 10700848, at *12 (Miss. Nov. 27, 2018).

is permanently incorrigible before imposing a life sentence without the possibility of parole.³⁹ In absolute terms, the majority answered no.

A. Majority

The majority opinion, penned by Justice Kavanaugh, first held “the Court has unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18.”⁴⁰ Regarding the proposed alternative method of determining whether a juvenile is permanently incorrigible, the majority stated that “[t]he Court’s precedents do not require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility.”⁴¹

To support its first holding, the majority declared “[t]he problem for Jones is that *Miller* and *Montgomery* squarely rejected such a requirement.”⁴² After emphasizing that no formal fact finding requirements were established in *Miller* and *Montgomery*, the Court stated “*Miller* mandated ‘only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing’ a life-without-parole sentence.”⁴³ The majority next rejected requiring an on-the-record sentencing explanation that would provide an implicit finding of permanent incorrigibility.⁴⁴ The majority first characterized an implicit finding of permanent incorrigibility as a method to ensure only that a defendant’s youth is *considered* in sentencing. Therefore, the Court decided a discretionary sentencing scheme was sufficient because “if the sentencer has discretion to consider the defendant’s youth, the sentencer necessarily *will* consider the defendant’s youth . . . it would be all but impossible for a sentencer to avoid considering that mitigating factor.”⁴⁵ After explaining that sentencers could effectively never disregard youth as a constitutionally mandated mitigating factor,⁴⁶

39. Jones, 141 S. Ct. at 1309.

40. *Id.* at 1318–19.

41. *Id.* at 1321.

42. *Id.* at 1314.

43. *Id.*

44. *Id.* at 1315.

45. *Id.* at 1320.

46. Cf. Robert M. Dudek, *A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Offenders Sentenced to Life without Parole Following Aiken v. Byars*, 68 S.C. L. REV. 499, 508 (2017) (explaining that when former foster-child Davon Reed was sentenced to LWOP as a juvenile, “the judge remarked that ‘age is really no consequence, considering the nature of the offense. Society has nothing left to give Reed than to lock him up.’”).

Justice Kavanaugh asserted that the Eighth Amendment did not require further protections.⁴⁷

The majority concluded with frustration that “the dissent now wants more . . . before sentencing a murderer under 18 to life without parole.”⁴⁸ However, the Court assured that its decision allowed Jones to present his arguments as to why he should not die in prison to state officials for years to come.⁴⁹ Additionally, the majority emphasized that states can and have adopted sentencing reforms for juvenile homicide cases.⁵⁰ The Court recognized such reforms may include: categorically prohibiting LWOP, establishing rigorous appellate review of LWOP sentences, requiring sentencers to make extra factual findings, or directing sentencers to formally explain on the record why a LWOP sentence is an appropriate sentence.⁵¹

B. Concurrence

In a short concurrence, Justice Thomas pointed out that the majority’s analysis conflicted with precedent.⁵² While Thomas agreed with the Court’s holding because he disagreed with *Montgomery’s* declaration of a substantive rule, he highlighted that the Court’s precedent declares that the “‘legality’ of Jones’ sentence turned on whether his crime in fact ‘reflect[s] permanent incorrigibility.’”⁵³

C. Dissent

Writing for the dissent, Justice Sotomayor begins by criticizing the majority’s disregard for the Court’s established standards of decency regarding juvenile sentencing and asserts “[t]oday the Court guts *Miller v. Alabama* and *Montgomery v. Louisiana*.”⁵⁴ Further, the dissent reiterates the line previously drawn by the Court demands more than sentencing discretion:

47. See *Jones*, 141 S. Ct. at 1319–20.

48. *Id.* at 1322.

49. *Id.*

50. *Id.* at 1323.

51. *Id.*

52. *Id.* at 1328 (Thomas, J., concurring).

53. *Id.* at 1326–27 (citing *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2019)). Justice Thomas further remarks that “[i]t would be simpler to reject *Montgomery* in both name and substance.” *Id.* at 1328.

54. *Id.* at 1328 (Sotomayor, J., dissenting). The dissent continues throughout its opinion: “This conclusion would come as a shock to the Courts in *Miller* and *Montgomery*,” “[t]oday, the Court distorts *Miller* and *Montgomery* beyond recognition,” and “[h]ow low this Court’s respect for *stare decisis* has sunk.” *Id.* at 1328, 1330, 1336.

On the most fundamental level . . . what we need is a sentencing judge who understands that permanent incorrigibility is the dispositive rule and determines whether the defendant fits within that rule. And there are a number of ways that it could be done.⁵⁵

To be sure, the dissent clarifies that Jones's argument is that those who sentenced him failed "to find in any form whether [he] is permanently incorrigible."⁵⁶

Despite the majority's trivialization of the permanent incorrigibility standard by referring to the phrase as "magic words," the dissent makes clear *Miller* required sentencers to distinguish which juveniles may receive LWOP.⁵⁷ To exemplify the Court's guidelines, Justice Sotomayor explains that "[u]sing this procedural flexibility, States have adopted different approaches to *Miller*'s inquiry. For instance, in some States, the prosecution must prove that a juvenile offender is permanently incorrigible beyond a reasonable doubt; in others, the sentencing judge must make a formal finding of irreparable corruption on the record."⁵⁸ The dissent further warns that if states require only discretion for sentencing, "far too many juvenile offenders will be sentenced to die in prison."⁵⁹ To conclude, the dissent restated that the Constitution protects juveniles' liberties with hope for some life outside prison, and that "the efforts of the almost 1,500 other juvenile offenders like Jones who are serving LWOP" matter.⁶⁰

IV. "PERMANENT INCORRIGIBILITY"

Although other areas of law accommodate general differences between adults and juveniles, psychiatric groups endorsed to the Supreme Court that children's inherent differences carry important ramifications for criminal punishment.⁶¹ Beginning with the states' ability to execute sixteen-year-olds, advocates argued that the Constitution recognizes youth's vulnerability and immaturities and,

55. *Id.* at 1331 (quoting Transcript of Oral Argument at 6, *Jones v. Mississippi*, 141 U.S. 1307 (2021) (No. 18-1259)).

56. *Id.* (quoting Brief for Petitioner at 25, *Jones v. Mississippi*, 141 U.S. 1307 (2021) (No. 18-1259)).

57. *Id.*

58. *Id.*

59. *Id.* at 1334.

60. *Id.* at 1341.

61. *See, e.g.*, Brief of the Am. Soc'y for Adolescent Psychiatry and the Am. Orthopsychiatric Ass'n as Amici Curiae in Support of Petitioner at 3, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169).

therefore, must make distinctions for cruel and unusual punishment.⁶² Advocates turned to the establishment of a separate system to punish youth a century ago as an example, reasoning that:

In addition to [the] humanitarian compassion for offenders who are children, the juvenile court system was predicated on the belief that because of their youth and malleability, children are more likely subjects for successful intervention than older and, presumably, more hardened offenders.⁶³

In recent decades, advancements in the fields of psychology supported such beliefs ingrained in law by expounding on the developing cognitive capacity of adolescents; or the “process of moving from ‘concrete operational thought’ to ‘formal operational thought.’”⁶⁴ This science therefore underscores that children should not be subject to the same standards of maturity used to determine adult sentencing.

The brain and social science presented to the Supreme Court eventually led the Court to determine that a person with impaired mental capacity is viewed as “less culpable than the average criminal.”⁶⁵ Therefore, the distinction between juvenile and adult brain functioning became a relevant measure of culpability.⁶⁶ The Court was presented with psychological evidence revealing that “regions of the adolescent brain do not reach a fully mature state until after the age of 18. These regions are precisely those associated with impulse control, regulation of emotions, risk assessment, and moral reasoning.”⁶⁷ Thus, juveniles are less capable of weighing the risk of consequences than adults and have not fully developed the capacity to limit impulsivity and consider situations from different perspectives.⁶⁸

62. See e.g. Motion for Leave to File Brief Amici Curiae on Behalf of Nat’l Council on Crime and Delinquency, Juv. Law Section of the Nat’l Legal Aid and Defender Ass’n, and the Am. Orthopsychiatric Ass’n at *7, *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (No. 80-5727) (“The execution of a child represents the ultimate abandonment of societal protection of the young that is necessary to compensate for their lack of experience, perspective, and judgment. It also serves as an irrevocable rejection of humanity’s future—which rests with the rehabilitative potential of today’s youth.”).

63. *Id.* at *11.

64. Brief of the Am. Soc’y for Adolescent Psychiatry and the Am. Orthopsychiatric Ass’n as Amici Curiae in Support of Petitioner at *4, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169).

65. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

66. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

67. See Brief of the Am. Med. Ass’n et al. as Amici Curiae in Support of Respondent at *2–3, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

68. *Id.* at *6–7.

Evidence of juveniles' incomplete anatomical and "psychosocial" maturity also means that stress, hormonal fluctuations, and peer pressure have a greater effect, making "adolescents . . . less able than adults to moderate risky behavior or control impulses."⁶⁹ Advancements in technology show that juveniles' behavioral differences can also be explained by the contrasting ways immature brains function.⁷⁰ Brain imaging has proven that "adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment."⁷¹ The blameworthiness of a juvenile, therefore, cannot be equated to that of an adult.

In addition to diminishing culpability, the fact that a juvenile's behavioral differences can be associated with regions of the brain that will develop after adolescence supports the notion that their current behavior is not a reliable marker for their future behavior.⁷² Even when a juvenile's behavior constitutes a serious crime, psychologists cannot reliably predict whether that person will be dangerous in the future.⁷³ Studies were presented to the *Miller* Court showing that there is "no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality such as 'cruelty to people and callous-unemotional behavior.'"⁷⁴ Relying on similar psychological data, the Court accepted early on that supported juveniles are expected to change as their brains mature.⁷⁵ The Court reasoned that states may not execute persons under 18 because "[i]t is difficult for even expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."⁷⁶ Therefore, the *Roper* Court established that juveniles also have greater prospect of reform than adults.⁷⁷

69. *Id.* at *8–9.

70. *Id.*

71. *Id.* at *11.

72. Brief for the Am. Psych. Ass'n et al. as Amici Curiae in Support of Petitioners at *21–22, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

73. *Id.* at *24 ("A recent, major effort to identify risk factors for recidivism among serious adolescent offenders confirmed the 'good news . . . that even within a sample . . . limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small,' while acknowledging the 'bad news' that the ability to predict future criminality remains 'exceedingly limited.'").

74. *Id.* at *22.

75. See *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005).

76. *Id.* at 573.

77. *Id.*

The Court confirmed that children are less culpable and have a greater capacity for change based on three implications of juvenile psychology:

First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking. Second, children ‘are more vulnerable to negative influences and outside pressures,’ including from their family and peers; they have limited ‘control over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’⁷⁸

The Court held these “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”⁷⁹ *Miller* explains that retribution is not a strong justification for sentencing a juvenile to LWOP because minors are less blameworthy, and that deterrence does not justify severe sentences because juveniles’ “immaturity, recklessness, and impetuosity . . . make them less likely to consider potential punishment.”⁸⁰ The Court found that imposing life without parole on a juvenile is never justified by the purpose of rehabilitation because “[i]t reflects ‘an irrevocable judgement about [an offender’s] value and place in society,’ at odds with a child’s capacity for change.”⁸¹ A state may also impose LWOP for the purpose of permanent incapacitation, however “[t]o justify life without parole on the assumption that the juvenile offender will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.”⁸² However, even incapacitation is a weak justification “because ordinary adolescent development diminishes the likelihood that a juvenile offender ‘forever will be a danger to society.’”⁸³

The grave risk that States would unjustly imprison an individual forever compelled the Court to determine whether certain sentencing policies adequately safeguarded juveniles’ liberties.⁸⁴ To communicate to sentencers that juvenile LWOP is most likely an inappropriate punishment for juvenile homicide offenders,

78. *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016) (quoting *Miller*, 567 U.S. at 471).

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

80. *Id.* at 472–73.

81. *Id.* at 473.

82. *Graham v. Florida*, 560 U.S. 48, 72–73 (2010).

83. *Montgomery*, 577 U.S. at 208.

84. *See id.*; *Graham*, 560 U.S. at 77 (prohibiting LWOP for nonhomicide offenders because not even a case-by-case approach could accurately “distinguish the few incorrigible offenders from the many that have the capacity for change”); *Miller*, 567 U.S. at 489 (prohibiting states from imposing LWOP under mandatory schemes).

Miller required the sentencing judge to weigh children's differences.⁸⁵ Nevertheless, "[t]he Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified."⁸⁶

V. CURRENT LANDSCAPE

The Supreme Court's ruling that states may not sentence juvenile homicide offenders to LWOP under mandatory schemes led lower courts to different interpretations of *Miller* and *Montgomery*'s reasoning. Although the social science relied on by the Court appeared to conflict with its mandate that a juvenile's crime "reflect irreparable corruption," most states considered whether their laws kept up with evolving standards of decency. As of 2021, "[t]hirty-one states and the District of Columbia do not have any prisoners serving life without parole for crimes committed as juveniles, either due to laws prohibiting the sentence or because there are not individuals serving the sentence at this time."⁸⁷ For the minority of states that provide LWOP as a sentencing option for juveniles "*Miller* and *Montgomery* have not proved unworkable: To the contrary they have spurred reforms across the country while 'avoid[ing] intruding more than necessary upon the States' sovereign administration of their criminal justice systems."⁸⁸ While some states viewed "permanent incorrigibility" as the necessary standard, others denied the distinction was required to sentence a juvenile to life without parole.

Alabama

After *Miller* struck down the state's mandatory sentencing scheme, Alabama adopted 14 factors from the Court's decision that must be considered to impose juvenile LWOP.⁸⁹ However, the *Jones* decision allows the state to deny relief to

85. See *Montgomery*, 577 U.S. at 208.

86. *Id.*

87. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 4 (May 24, 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>. States that have banned life without parole sentences for children include Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Nevada, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming. In nine additional states—Illinois, Indiana, Maine, Minnesota, Missouri, New Hampshire, New Mexico, New York, and Rhode Island—no people are serving life without parole for offenses committed as a juvenile. *Id.*

88. *Jones v. Mississippi*, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting) (citing *Montgomery*, 577 U.S. at 211).

89. *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013) ("[A] sentencing hearing for a juvenile convicted of a capital offense must now include consideration of: (1) the juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's diminished culpability; (3) the

juvenile offenders even if the factors are not meaningfully considered.⁹⁰ To deny the merits of a juveniles appeal, an Alabama court stated “the Court pointed out no less than 11 times in its opinion that *Miller* requires *only* a discretionary sentencing process for juvenile offenders. As Justice Thomas noted in his opinion concurring in the judgement, the Court ‘[o]verrule[d] *Montgomery* in substance but not in name.’”⁹¹

Arizona

The Arizona Supreme Court interpreted *Miller* as “suggesting that such sentences can only be imposed on the ‘rare juvenile offender whose crime reflects irreparable corruption’ as distinct from ‘transient immaturity.’”⁹² Arizona places the burden on the defendants to establish, by a preponderance of the evidence, that their crimes “did not reflect irreparable corruption but instead transient immaturity.”⁹³ Therefore, a sentence that denies parole eligibility to a juvenile homicide offender that is not permanently incorrigible is unconstitutional.⁹⁴ Arizona’s updated statute also provides juveniles sentenced to LWOP with an avenue to seek parole once the minimum term of their sentence has passed.⁹⁵

Florida

The Florida Supreme Court held that a discretionary sentencing scheme alone is insufficient and sentencers must consider certain factors relating to a juvenile’s youth and its attendant characteristics as described in *Miller*.⁹⁶ The court accepts that “lower courts must instead ask the difficult but essential question whether [juvenile offenders before the court for sentencing] are among the very ‘rarest of

circumstances of the offense; (4) the extent of the juvenile’s participation in the crime; (5) the juvenile’s family, home, and neighborhood environment; (6) the juvenile’s emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile’s past exposure to violence; (9) the juvenile’s drug and alcohol history; (10) the juvenile’s ability to deal with the police; (11) the juvenile’s capacity to assist his or her attorney; (12) the juvenile’s mental-health history; (13) the juvenile’s potential for rehabilitation; and (14) any other relevant factor related to the juvenile’s youth.”); ALA. CODE §13A-6-2 (2021).

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

91. *Id.* at *8–9 (quoting *Jones v. Mississippi*, 141 S. Ct. 1307, 1327 (2021) (Thomas, J., concurring)). *Cf. Wilkerson v. State*, 284 So. 3d 937, 947–48 (Ala. Crim. App. 2018).

92. *State v. Valencia*, 386 P.3d 392, 394–95 (Ariz. 2016) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

93. *Id.* at 396; *accord Montgomery*, 577 U.S. at 213 (noting “prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored”).

94. *E.g., State v. Healer*, 440 P.3d 404, 411 (Ariz. Ct. App. 2019).

95. *See* ARIZ. REV. STAT. ANN. § 13–716 (2022).

96. *Landrum v. State*, 192 So. 3d 459, 460 (Fla. 2016).

juvenile offenders, those whose crimes reflect permanent incorrigibility.”⁹⁷ Florida views the enumerated sentencing factors as necessary to distinguish between offenders, and another statute requires their sentence to be reviewed after 25 years.⁹⁸

Georgia

The Georgia Supreme Court changed course after *Jones* and denied that sentencers must make an on the record finding of permanent incorrigibility to impose juvenile LWOP.⁹⁹ As of 2021, Georgia trial courts “will be deemed to have considered the relevant criteria, such as mitigating circumstances.”¹⁰⁰ The court therefore overruled its previous holding that “suggested a requirement that sentencers provide explicit, on-the-record explanations regarding determinations of permanent incorrigibility and the characteristics of children.”¹⁰¹ This requirement was based on the premise that “LWOP sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murders, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murders.”¹⁰²

Idaho

The Idaho Supreme Court ruled “life-without-parole sentences are barred under *Miller* and its progeny unless the juvenile’s crime reflects irreparable corruption.”¹⁰³ Idaho courts explain that a hearing to determine the nature of the crime is what gives effect to *Miller*’s substantive holding, not a finding of fact of permanent incorrigibility.¹⁰⁴ However, a juvenile LWOP may not be upheld if “the sentencing hearing did not show that evidence was presented regarding the factors required by *Miller*.”¹⁰⁵

97. *Id.* at 466.

98. *Id.* at 467; see also FLA. STAT. § 921.1402(2)(b) (2022).

99. *Holmes v. State*, 859 S.E.2d 475, 480–81 (Ga. 2021).

100. *Id.*

101. *Id.*

102. *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (remanding the case so that the trial court should make “any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murders for whom an LWOP sentence is proportional . . .”). A subsequent case clarified that this determination did not require a fact finding, but the purpose of the standard was fulfilled if a judge makes that determination. *Raines v. State*, 845 S.E.2d 613, 621 (Ga. 2020).

103. *State v. Shanahan*, 445 P.3d 152, 158 (Idaho 2019).

104. *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017).

105. *Windom v. State*, 398 P.3d 150, 157 (Idaho 2017).

Illinois

Illinois courts determine that juvenile LWOP may be imposed only “if the trial court determines that that defendant’s conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation.”¹⁰⁶ To make this determination, enumerated characteristics of the crime and the individual must first be considered.¹⁰⁷ Further, Illinois specifically requires that these factors are mitigating if found, and the court will stringently review the record to uphold the permanent incorrigibility standard.¹⁰⁸

Indiana

The majority in Indiana’s case *Conley v. State* did not adopt the permanent incorrigibility distinction from *Miller*, yet the court views life without parole sentences as equal to the death penalty for sentencing purposes.¹⁰⁹ The state therefore is required to prove the existence of an alleged aggravating factor beyond a reasonable doubt and that any mitigating factors are outweighed.¹¹⁰ In addition, sentencers are required to provide a sentencing statement 1) identifying mitigating and aggravating circumstances found, 2) facts and circumstances supporting why, 3) articulate the balancing of mitigating and aggravating circumstances, and 4) must conclude that the sentence is an appropriate punishment.¹¹¹

Louisiana

After *Montgomery v. Louisiana*, the state provided hearings for juveniles convicted of homicide “[t]o implement *Miller*’s ‘meaningful opportunity to obtain release’ for those juveniles who commit murder but are not found to be irreparably corrupt.”¹¹²

106. *People v. Holman*, 91 N.E.3d 849, 863 (Ill. 2017).

107. *Id.* at 863–64; see also 730 ILL. COMP. STAT. ANN. 5/5-4.5-105 (West 2022).

108. *People v. Royer*, No. 3-17-0794, 2020 WL 8573865 (Ill. App. Ct. Feb. 16, 2021) (“The court thus specifically considered one of the *Miller* factors, the defendant’s family and home environment, as aggravation instead of mitigation. This directly contradicts the edict of *Miller* and its progeny that the court consider these characteristics of youth as mitigation.”).

109. *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012); see *Newton v. State*, 83 N.E.3d 726, 737 (Ind. Ct. App. 2017) (acknowledging the Indiana Supreme Court’s application of *Miller* “when addressing the constitutional implications of LWOP for a seventeen-year-old convicted of murder in *Conley*”).

110. *Conley*, 972 N.E.2d at 877; *Newton*, 83 N.E.3d at 737.

111. See *Newton*, 83 N.E.3d at 739.

112. *State v. Montgomery*, 194 So. 3d 606, 607 (La. 2016). Louisiana also enacted Act 99 for juvenile sentences that effectively imprison them for life, but the act provides parole after 25 only for those convicted of nonhomicide crimes. See Jacqueline DeRobertis, *Louisiana Lawmakers Are Reworking This Law That Abolished Life Without Parole Sentences for Juveniles*, ADVOC. (Oct. 4,

Maine

If a juvenile is prosecuted in adult court, a sentence of life without parole may be imposed in Maine.¹¹³ However, there are no recorded instances of the state imposing the sentence.¹¹⁴

Michigan

The Michigan Supreme Court recognizes that “juveniles who are not ‘irreparably corrupt’ cannot be sentenced to life without parole,” yet held that a factual finding of permanent incorrigibility is not required.¹¹⁵ The court explained that “[w]hether a juvenile is irreparably corrupt is not a factual finding; instead, it is a moral judgment that is made after considering and weighing the *Miller* factors.”¹¹⁶ Additionally, Michigan appellate courts require “thoughtful application” of the *Miller* factors and will rigorously review whether the evidence supported a finding that a juvenile is irreparably corrupt.¹¹⁷

Minnesota

Despite portions of Minnesota’s statute becoming unconstitutional under *Miller* and *Montgomery*, the statute remains effective.¹¹⁸ However, the Minnesota Supreme Court recognized that “[a] fair and meaningful evaluation of a juvenile’s youthful characteristics, including his or her ‘transient immaturity’ versus permanent ‘corruption’” may remedy the constitutionality of new sentences.¹¹⁹

2020, 9:08 PM), https://www.theadvocate.com/baton_rouge/news/courts/article_60ca67bc-0415-11eb-891d-9f98a7c4ecc0.html.

113. *Maine*, NAT’L JUV. DEF. CTR., <https://njdc.info/newengland/states/maine/> (last visited Dec. 29, 2021).

114. *Id.*

115. *People v. Skinner*, 917 N.W.2d 292, 309–10 (Mich. 2018).

116. *Id.* at 310, n.18.

117. *People v. Bennett*, 966 N.W.2d 768, 776, 783 (Mich. Ct. App. 2021) (“The resentencing court clearly erred by ignoring this constitutional mandate. Treated mental illness is not a signal of irreparable corruption, and no evidence even hinted that Bennett’s mental illness created a realistic danger that he would reoffend.”).

118. *Jackson v. State*, 883 N.W.2d 272, 282 (Minn. 2016).

119. *Id.*

Mississippi

Jones v. Mississippi held that provided the state has a discretionary scheme, nothing more is necessary to sentence juvenile to life without the possibility of parole.¹²⁰

Missouri

To comply with *Miller*, Missouri enacted a law that converted all juvenile LWOP sentences into life with the possibility of parole.¹²¹ A juvenile may receive LWOP in Montana only if a unanimous jury finds beyond a reasonable doubt that a defendant is guilty of homicide and that an aggravating factor is present.¹²² However, the Eighth Circuit determined that providing parole remains unconstitutional unless Missouri's parole board enacted policies that provide a meaningful opportunity for release.¹²³ The court reasoned that "the punishment of life without parole is disproportionate and unconstitutional 'for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"¹²⁴

Montana

The Montana legislature requires mandatory life sentences without parole for persons convicted of certain crimes but creates a carve out for juveniles.¹²⁵ The Montana Supreme Court also acknowledged that children's differences counsel against imposing LWOP and held "*Miller*'s substantive rule requires Montana's sentencing judges to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole"¹²⁶

Nebraska

Nebraska amended its mandatory sentencing scheme to comply with *Miller* and required that the sentencing judge "consider mitigating factors which led to the

120. See discussion *supra* Section III.

121. MO. ANN. STAT. § 558.047 (West 2021).

122. MO. ANN. STAT. § 565.034(6)(1)–(2) (West 2021).

123. *Federal Court Holds Missouri's Parole Process for Youth Unconstitutional*, EQUAL JUST. INITIATIVE (Oct. 1, 2021), <https://eji.org/news/federal-court-holds-missouris-parole-process-for-youth-unconstitutional/>.

124. *Off. of Prosecuting Att'y v. Precythe*, 14 F.4th 808 (8th Cir. 2021), *vacated on reh'g en banc* (Nov. 18, 2021).

125. MONT. ANN. STAT. § 46-18-222 (West 2021).

126. *Steilman v. Michael*, 407 P.3d 313, 318–19 (Mont. 2017).

commission of the offense.”¹²⁷ The law also requires parole boards to consider similar factors.¹²⁸

New Hampshire

In 2021, the New Hampshire legislature considered banning life without parole sentences for juvenile homicide offenders.¹²⁹ However, their Supreme Court found *Miller* applied retroactively even before *Montgomery*, and the state currently requires only that juveniles receive an individual sentencing hearing for LWOP.¹³⁰

New Mexico

Although the sentence remains an option for sentencing, no persons were serving a life without parole for crimes they committed as a juvenile in New Mexico as of 2021.¹³¹

New York

No persons are serving juvenile LWOP in New York as of 2021, but at least one appellate court has interpreted *Miller* to hold that “the relevant distinction between a constitutional and unconstitutional life sentence for a juvenile homicide offender—for all but the rare case of an irreparably corrupt juvenile—is that a constitutional sentence guarantees, at some point, a ‘meaningful opportunity to obtain release.’”¹³²

North Carolina

North Carolina’s juvenile LWOP statute was held to be constitutional because:

[The statute] treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options, with the

127. NEB. REV. STAT. ANN. § 28-105.02(2) (West 2021).

128. *Id.* § 28-105.02.

129. Holly Ramer, *New Hampshire Considers Banning Life Without Parole For Kids*, AP NEWS (Mar. 10, 2021), <https://apnews.com/article/sentencing-homicide-legislation-new-hampshire-238728a2d849311835c50cef2c9b2481>.

130. *In re State*, 103 A.3d 227 (N.H. 2014).

131. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 4 (May 24, 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>. A bill to abolish it failed in 2021. See Steve Jansen, *New Mexico Reformers Lose Bid to End Juvenile Life Sentences*, THE CRIME REPORT (May 19, 2021), <https://thecrimereport.org/2021/05/19/1311686/>.

132. *Hawkins v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 30 N.Y.S.3d 397, 399 (N.Y. App. Div. 2016) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

selection between these two options to be made on the basis of an analysis of all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*.¹³³

Oklahoma

In 2021, the Oklahoma courts removed its permanent incorrigibility standard.¹³⁴ Oklahoma previously required sentencers to have pattern jury instructions and an on-the-record sentencing explanation, however “[i]n light of *Jones*, the State no longer had the burden under the federal constitution of proving a juvenile defendant is irreparably corrupt and permanently incorrigible beyond a reasonable doubt.”¹³⁵

Pennsylvania

The Supreme Court of Pennsylvania exercised its authority to create a presumption against sentencing a juvenile to LWOP, and further required the state to rebut such presumption by proving that the juvenile was incapable of rehabilitation beyond a reasonable doubt.¹³⁶ The court reasoned that:

A finding of ‘permanent incorrigibility’ cannot be said to be an element of the crime committed; it is instead an immutable characteristic of the juvenile offender. To render these characteristics crime-specific would contradict the entire premise of the Supreme Court’s decisions, which prohibit a sentencer from finding that a juvenile offender is unable to be rehabilitated based on the crime itself.¹³⁷

South Carolina

The South Carolina courts interpreted *Miller* to require “an individualized hearing where the mitigating hallmark features of youth are fully explored.”¹³⁸ In late 2021, the courts added that a specific finding that a defendant was irreparably corrupt was not required before imposing juvenile LWOP.¹³⁹ Although analogies were drawn to death penalty procedures, who bears the burden of proving

133. *State v. James*, 813 S.E.2d 195, 204 (N.C. 2018); N.C. GEN. STAT. ANN. §15A-1340.19B (West 2021).

134. *White v. State*, 499 P.3d 762 (Okla. Crim. App. 2021).

135. *Id.* at 768–69.

136. *Commonwealth v. Batts*, 163 A.3d 410, 412 (Pa. 2017).

137. *Id.*

138. *Aiken v. Byars*, 765 S.E.2d 572, 578 (S.C. 2014).

139. *State v. Smart*, 861 S.E.2d 383, 388 (S.C. Ct. App. 2021).

mitigating circumstances, such as whether a defendant's actions reflect transient immaturity, had yet to be addressed.¹⁴⁰

Tennessee

In Tennessee, a juvenile may be sentenced to LWOP for homicide crimes if a jury finds that the enumerated aggravating circumstances, determined unanimously by the jury and beyond a reasonable doubt, outweigh the mitigating circumstances.¹⁴¹ Tennessee courts view *Miller* to require “only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”¹⁴²

Wisconsin

Although not binding, courts in Wisconsin have adopted a permanent incorrigibility standard for juvenile LWOP sentences, stating “*Miller* barred the sentence of life without parole for all but the rarest of youth, where the child is so irreparably corrupt that rehabilitation is impossible.”¹⁴³ Wisconsin law permits judges to impose juvenile LWOP at their discretion, but proposed bipartisan legislation would ban LWOP for juveniles and establish mitigating factors for retroactively reviewed sentences.¹⁴⁴

VI. MOVING FORWARD

“Permanent incorrigibility” is not an immediately coherent phrase, and its interpretation has led to varying policies over past decades. A key confusion can be distilled from states’ approaches to Supreme Court guidance. The Court’s decisions resolve the inherent characteristics of juveniles for the states and consequently require states to facilitate sentencers in their determination that a punishment is proportional to an individual’s crime. Without a Supreme Court mandated permanent incorrigibility standard, sentencers are free to impose life without parole even if a juvenile’s crime “reflects transient immaturity,” meaning that the circumstances demonstrate poor judgment, impulsivity, environmental influences,

140. *Id.* at 391.

141. TENN. CODE ANN. § 39-13-204 (West 2021).

142. *Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *5 (Tenn. Crim. App. Apr. 15, 2016).

143. *State v. Walker*, No. 2016AP1058, 2018 WL 3326694, at *4 (Wis. Ct. App. Mar. 6, 2018).

144. WIS. STAT. ANN. § 973.014 (West 2021); Isiah Holmes, *Banning Life Sentences Without Parole For Juveniles in Wisconsin*, WIS. EXAM’R (Dec. 6, 2021), <https://wisconsinexaminer.com/brief/banning-life-sentences-without-parole-for-juveniles-in-wisconsin/>.

and the other behavioral attributes of immaturity that dilute the criminal system's justifications for punishment.

All countries and most American states now prohibit juvenile life without parole, underscoring that imposing the most severe punishment available for children is difficult to justify.¹⁴⁵ Currently, juvenile homicide offenders are exposed to the risk of receiving cruel and unusual punishment only in certain states.¹⁴⁶ *Jones* held that the legal standard required for a sentencing juveniles to LWOP is only "consideration of an offender's youth[,] but not any particular factual finding," and that "[a]n on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth."¹⁴⁷ Sentencing decisions are reviewed under an abuse of discretion, and as *Jones* majority explained: "[u]nless the record affirmatively reflects otherwise, the trial court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules."¹⁴⁸ Therefore, even the opportunity of appeal does not provide any effective measure to ensure that sentencers deliberately weigh a juvenile's lessened culpability and capacity for change when determining that life in prison is justified.¹⁴⁹

The recent *Jones* holding views the ability of sentencers to even make a determination about a juvenile's crime as sufficient to mitigate the risk of excessive punishment. However, states must also communicate to sentencers that LWOP is a proportional punishment for juveniles only under circumstances that demonstrate "irreparable corruption." Despite *Jones*, several states have implemented policies to meaningfully answer the Court's permanent incorrigibility standard. Most fundamentally, states like Idaho, Illinois, Michigan, Missouri, Minnesota, South Carolina, and Nebraska acknowledge that sentencers must make the determination that a juvenile is permanently incorrigible to impose life without parole.

How states help sentencers to calculate this judgment has varied. While some stop at requiring sentencers to balance the factors *Miller* proscribed, other states ensure sentencers understand the equation with additional policies. Some place the burden of proving these factors on either the state or the defendant. States like Idaho and Michigan go further to provide substantive appellate review of mitigating

145. See *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Dec. 3, 2018), <https://cfsy.org/wp-content/uploads/Tipping-Point.pdf>.

146. *Id.*

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

148. *Id.*

149. See *id.* at 1321 ("Our decision allows *Jones* to present those arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor.").

evidence. Like sentencing a person to the death penalty, Indiana requires sentencers to provide an on the record statement explaining how the circumstances of the crime reflect irreparable corruption. Alabama, Georgia, Louisiana, Mississippi, Tennessee, New Hampshire New Mexico, North Carolina, and other legislatures that have yet to implement any permanent incorrigibility standard may look to other state policies as guidance. The implications of the *Jones* holding makes a permanent incorrigibility standard especially necessary to keep up with evolving standards of decency.