Eighth Amendment — Cruel and Unusual Punishment — Juvenile Sentencing — Jones v. Mississippi

Over the past two decades, the Supreme Court has transformed juvenile sentencing. A key line of Eighth Amendment cases[1] broke down the traditional barrier between capital and noncapital punishment review and imposed new Eighth Amendment proportionality limitations on juvenile noncapital punishments.[2] But last Term, in *Jones v. Mississippi*,[3] the Court may have halted this expansive trend: it held that a separate factual finding of permanent incorrigibility[4] is not required before a juvenile can be sentenced to life without parole.[5] The decision, which purports to apply prior precedent, yet divided along ideological lines, may signal that the Court is giving more deference to the democratically elected institutions initially tasked with sentencing decisions. If so, *Jones* would be a welcome return to the Court's traditionally deferential posture in noncapital punishment cases.

At fifteen, Brett Jones murdered his grandfather.[6] Jones had been living with his grandparents in Mississippi at the time to escape an unstable situation at home, where his mother battled mental health issues and his stepfather abused him.[7] On August 9, 2004, Jones's grandfather discovered Jones's girlfriend in Jones's bedroom and forced her to leave the house.[8] This incident upset Jones, and later that day, he and his grandfather got into a physical altercation.[9] Jones stabbed his grandfather with a steak knife he had been using to make a sandwich and then stabbed him again with a nearby filet knife.[10] With his grandfather no

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[1] As will be discussed in more detail below, these cases include *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005).

[2] *See* Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 675 (2016); David Roper, Note, *Lifers After* Montgomery*: More SCOTUS Guidance Is Necessary to Protect the Eighth Amendment Rights of Juveniles*, 79 OHIO ST. L.J. 991, 994–97 (2018).

[3] 141 S. Ct. 1307 (2021).

[4] After the Court stated in *Montgomery* that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, some lower courts had required a finding of incorrigibility. *See, e.g.*, Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018); Raines v. State, 845 S.E.2d 613, 618 n.5 (Ga. 2020). The Court did not define permanent incorrigibility, but the phrase "indicates that juvenile life without parole sentences should be limited to defendants who are incapable of reform, are likely to reoffend, and will never be able to live peacefully in society." Mary Marshall, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1644 (2019).

[5] *Jones*, 141 S. Ct. at 1311.

[6] Jones v. State, 285 So. 3d 626, 627 (Miss. Ct. App. 2017).

[7] *Id.* at 630.

[8] Jones v. State, 938 So. 2d 312, 313 (Miss. Ct. App. 2006).

[9] *Id.* at 314.

[10] *Id.*

longer breathing, Jones dragged him into the laundry room, attempted to clean up the blood, and left the property.[11] Jones was apprehended at a nearby gas station and quickly confessed.[12]

Jones was sentenced to life without parole under a Mississippi law that made the sentence mandatory.[13] After *Miller v. Alabama*[14] prohibited the mandatory imposition of this sentence, the Mississippi Supreme Court granted Jones's petition for postconviction relief and ordered resentencing.[15] At resentencing, Jones offered new details regarding his circumstances at the time of the murder, including evidence of his family's abusive behavior, his own mental health, and his postconviction rehabilitation.[16] Nonetheless, Jones was again sentenced to life without parole.[17] The sentencing judge stated that he had considered each of the *Miller* factors and provided an on-the-record explanation of the sentence.[18]

Jones primarily appealed the resentencing on the ground that the sentencing judge did not discuss each *Miller* factor on the record.[19] The Mississippi Court of Appeals declined to adopt this argument, holding that *Miller* did not require on-the-record discussion of each and every factor. Rather, the sentencing judge held an appropriate *Miller* hearing: he stated that he had considered the applicable factors, made findings of fact that were supported by substantial evidence, and did not act arbitrarily.[20] The Mississippi Supreme Court granted certiorari following *Montgomery v. Louisiana*,[21] which applied *Miller* retroactively.[22] However, in a related decision, the state high court held that *Miller* and *Montgomery* did not impose any specific factfinding requirements on

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[11] *Id.* at 314–15.

[12] *Id.* at 315.

[13] Jones v. State, 122 So. 3d 725, 740 (Miss. Ct. App. 2011).

[14] 567 U.S. 460 (2012).

[15] Jones v. State, 122 So. 3d 698, 703 (Miss. 2013). In 2011, a petition for postconviction relief based on ineffective assistance of counsel under the Sixth Amendment and cruel and unusual punishment under the Eighth Amendment was denied. *Jones*, 122 So. 3d 725 at 730–42.

[16] Jones v. State, 285 So. 3d 626, 629–31 (Miss. Ct. App. 2017).

[17] *Id.* at 631.

[18] *Id.*

[19] *Id.* Jones also made a number of other arguments, including that the judge had failed to apply a presumption against life-without-parole sentences, that Jones had a constitutional right to a jury at his resentencing, that he was not "irretrievably depraved," and that the punishment was categorically prohibited. *Id.* The Mississippi Court of Appeals rejected each of these arguments as being foreclosed by relevant Mississippi precedent. *See id.* at 631–32.

[20] *Id.* at 634.

[21] 136 S. Ct. 718 (2016).

[22] *See id.* at 736; Jones v. State, 250 So. 3d 1269 (Miss. 2018).

lower courts,[23] and, as a result, dismissed the writ of certiorari in Jones's case.[24]

The United States Supreme Court granted certiorari to resolve a split among courts on whether *Miller* and *Montgomery* require a formal finding of permanent incorrigibility.[25] Writing for the Court, Justice Kavanaugh[26] held that a separate factual finding of permanent incorrigibility is not required before a juvenile can be sentenced to life in prison without opportunity for parole.[27] The Court viewed the issue to be already decided by clear language in both *Miller* and *Montgomery*.[28] *Miller* mandated "only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing" a life sentence without opportunity for parole.[29] And *Montgomery* affirmed that "'*Miller* did not impose a formal factfinding requirement' and that 'a finding of fact regarding a child's incorrigibility . . . is not required.'"[30] Mississippi's discretionary sentencing scheme was thus "constitutionally necessary and constitutionally sufficient."[31]

The Court dismissed Jones's arguments to the contrary. First, Justice Kavanaugh distinguished *Jones* from cases "recogniz[ing] certain eligibility criteria, such as sanity or a lack of intellectual disability, that must be met before an offender can be sentenced to death."[32] The Court reasoned that it would be too difficult to differentiate between juvenile offenders whose crimes reflect irreparable corruption from those whose crimes reflect "unfortunate yet transient immaturity," and there were no "objective indicia of society's standards" to support such eligibility criteria.[33] Instead, the Court reasoned that a juvenile defendant's youth is "akin to a mitigating circumstance."[34] *Miller* cited *Roper v. Simmons*[35]

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[23] Chandler v. State, 242 So. 3d 65, 69–70 (Miss. 2018).

[24] Jones v. State, No. 2015-CT-00899, 2018 WL 10700848, at *1 (Miss. Nov. 27, 2018). Four justices dissented, arguing that Jones's sentence was unconstitutional under *Montgomery*. *See id.*

[25] *Jones*, 141 S. Ct. at 1313. The Fourth Circuit and six state high courts previously held that a finding of permanent incorrigibility was required. *See* Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018); Petition for a Writ of Certiorari at 10, 13, *Jones*, 141 S. Ct. 1307 (No. 18-1259). Four state high courts and the Ninth Circuit previously held that a finding of permanent incorrigibility was not required. *See* United States v. Briones, 890 F.3d 811, 818–20 (9th Cir. 2018); Petition for a Writ of Certiorari, *supra*, at 12–13.

[26] Justice Kavanaugh was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett.

[27] *Jones*, 141 S. Ct. at 1311.

[28] *See id.*

[29] *Id.* at 1314 (quoting Miller v. Alabama, 567 U.S. 460, 483 (2012)).

[30] *Id.* at 1314–15 (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016)).

[31] *Id.* at 1313.

[32] *Id.* at 1315 (citing Ford v. Wainwright, 477 U.S. 399 (1986); Atkins v. Virginia, 536 U.S. 304 (2002)).

[33] *Id.*

[34] *Id.*

[35] 543 U.S. 551 (2005).

and *Graham v. Florida*[36] for the proposition that "[y]outh matters in sentencing," but not to create a categorical bar.[37] And, the Court stated, "*Montgomery* did not purport to add to *Miller*'s requirements."[38]

Second, the Court rejected Jones's argument that the *Montgomery* Court must have assumed that a separate factual finding was required when it held *Miller* to be a substantive rule for retroactivity purposes.[39] The Court again heeded the explicit language in *Montgomery* that such a finding "is not required."[40] In a footnote, the Court expressly limited *Montgomery*'s precedential value in future retroactivity cases by declaring that "the Court's retroactivity precedents that both pre-date and post-date *Montgomery* . . . — and not *Montgomery* — must guide the determination of whether rules other than *Miller* are substantive."[41]

Third, the Court rejected Jones's contention that a separate factual finding of incorrigibility was required to achieve *Miller*'s objective of making juvenile life-without-parole sentences relatively rare.[42] Instead, Justice Kavanaugh reasoned that a discretionary sentencing procedure — without a mandated factual finding — can achieve this outcome.[43] And in conclusion, Justice Kavanaugh addressed the dissent's claim that the majority decision implicitly overruled *Miller* and *Montgomery*.[44] He reaffirmed that "*Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18" and that *Montgomery* "held that *Miller* applies retroactively on collateral review."[45] Instead of relying on what *Miller* and *Montgomery* "must have done," as the dissent insisted, the Court asserted that it relied on the explicit language of the opinions.[46]

Justice Thomas concurred in the judgment. He suggested that the Court adopted a "strained reading" of *Montgomery* in order to reach the correct result and would have been better off acknowledging that *Montgomery* is inconsistent with *Miller*.[47] If *Montgomery* were correct in holding that *Miller* was a substantive rule — and thus created a class

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[36] 560 U.S. 48 (2010).

[37] *Jones*, 141 S. Ct. at 1316.

[38] *Id.* The Court also reasoned that the fact that *Miller* and *Montgomery* do not discuss the jury right is further support that a factual finding of permanent incorrigibility is not required. *Id.* at 1316 n.3.

[39] *Id.* at 1316–17.

[40] *Id.* at 1317 (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016)).

[41] *Id.* at 1317 n.4.

[42] *Id.* at 1318.

[43] *Id.* For similar reasons, the Court also rejected Jones's alternative argument — raised in oral argument — that an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility was at least required. *Id.* at 1319–21.

[44] *Id.* at 1321.

[45] *Id.*

[46] *Id.* at 1322.

[47] *Id.* at 1323 (Thomas, J., concurring in the judgment).

of defendants who could not be sentenced to life without opportunity for parole — a determination of whether the defendant fell within that class must be required.[48] Otherwise, Justice Thomas reasoned, the distinction would be "more fanciful than real."[49] Since *Montgomery* is a "demonstrably erroneous" decision, Justice Thomas would have overturned it.[50] Nonetheless, he argued that the Court "[o]verrule[d] *Montgomery* in substance but not in name"[51] and "recognize[d] that *Montgomery*'s analysis is untenable and not to be repeated."[52]

Justice Sotomayor vigorously dissented.[53] She argued that the Court "gut[ted]" *Miller* and *Montgomery*.[54] *Miller*'s "essential holding," she explained, is that "a lifetime in prison is a disproportionate sentence for all but the rarest children, those whose crimes reflect 'irreparable corruption.'"[55] Under this broad reading, sentencing discretion is a necessary but not sufficient condition. In response to the language relied on by the majority, Justice Sotomayor pointed to "equally explicit" language elsewhere: *Montgomery* stated that "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole."[56] And "[e]ven if a court considers a child's age before sentencing him or her to a lifetime of prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[57] Thus more than just a discretionary sentencing procedure is required. Similar to Justice Thomas's reasoning, Justice Sotomayor argued that, if *Montgomery* characterized *Miller* as a substantive holding, some sort of factual determination is required.[58]

Justice Sotomayor criticized the majority for not explaining why stare decisis did not demand a contrary holding.[59] She noted that the Court did not attempt to offer, nor could it have offered, a "special justification"[60] for overturning *Miller* or *Montgomery* because both cases satisfied traditional stare decisis factors.[61] As such, Justice Sotomayor

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[48] *Id.* at 1326.

[49] *Id.*

[50] *Id.* at 1323 (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

[51] *Id.* at 1327.

[52] *Id.* at 1328.

[53] Justice Sotomayor was joined by Justices Breyer and Kagan.

[54] *Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting).

[55] *Id.* (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 726 (2016)).

[56] *Id.* (quoting *Montgomery*, 136 S. Ct. at 734).

[57] *Id.* (quoting *Montgomery*, 136 S. Ct. at 734).

[58] *Id.*

[59] *Id.* at 1335.

[60] *Id.* at 1328 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part)).

[61] *Id.* at 1336. Pointedly, Justice Sotomayor repeatedly cited Justice Kavanaugh's concurring opinion in *Ramos v. Louisiana*, 140 S. Ct. 1390, for these factors, which are "quality of the prece-

chided the majority for urging lower courts to ignore *Montgomery*'s retroactivity analysis[62] and walked through the evidence presented at Jones's resentencing to argue that "it is hard to see how Jones is one the of rare juvenile offenders 'whose crime reflects irreparable corruption.'"[63]

Eighth Amendment jurisprudence has long been defined by the refrain "death is different."[64] And because death is different, the Court's review is generally more demanding in capital cases than in noncapital cases.[65] Over the past two decades, however, this division broke down in juvenile sentencing cases under the guise that "children are different."[66] The Court has been willing to apply the same rigorous review to juvenile sentencing cases as it does to capital cases.[67] The majority's holding and reasoning in *Jones*, however, signal that the Court could be returning to a more deferential posture in its juvenile noncapital punishment cases. This would be a welcome return to the democratic values underlying Eighth Amendment deference and could forestall predictions that the Court's juvenile sentencing cases would be used to effect a dramatic judicial overhaul of criminal sentencing.

The Court's Eighth Amendment jurisprudence has historically been divided between capital and noncapital cases. The Court's review of noncapital sentences consisted only of "narrow proportionality" review conducted on a case-by-case basis.[68] This deferential analysis first tasked courts with comparing "the gravity of the offense and the harshness of the penalty."[69] Only in the rare instance where this threshold comparison led to a finding of "gross disproportionality" would a court engage in rigorous intra- and inter-jurisdictional comparisons central to

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dent's reasoning, its consistency with other decisions, legal and factual developments since the precedent was decided, and its workability." *Jones*, 141 S. Ct. at 1336 (Sotomayor, J.) (citing *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part)); *see, e.g.*, *id.* at 1328, 1336–37.

62 *Id.* at 1336 ("[T]he Court attempts to bury [*Montgomery*'s retroactivity holding]. How low this Court's respect for *stare decisis* has sunk.").

63 *Id.* at 1337 (quoting Miller v. Alabama, 567 U.S. 460, 479–80 (2012)).

64 *See* Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 37 n.1 (2013) (collecting cases containing variants of the "death is different" expression).

65 *See id.* at 37–38.

66 *See* Scott et al., *supra* note 2, at 675.

67 *See* Alison Siegler & Barry Sullivan, *"'Death Is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 327–28.

68 Graham v. Florida, 560 U.S. 48, 87–88 (2010) (Roberts, C.J., concurring in the judgment).

69 *Id.* at 88 (quoting Solem v. Helm, 463 U.S. 277, 290–91 (1983)) (taking into account the defendant's mental state, motive, and prior criminal history, as well as the harm inflicted); *see also* Steiker & Steiker, *supra* note 64, at 38 (discussing how the proportionality analysis pre-*Graham* "precluded any significant examination of state sentencing practices").

capital sentence review.[70] *Harmelin v. Michigan*[71] and *Ewing v. California*[72] demonstrate how light the Court's review of noncapital cases had been. *Harmelin* rejected a requirement of individualized sentencing for nonhomicidal offenses and upheld a life-without-parole sentence for an individual convicted of possessing 672 grams of cocaine.[73] *Ewing* upheld a sentence of twenty-five years to life for a repeat offender convicted of attempting to steal three golf clubs.[74] Neither of these cases led to a finding of gross disproportionality.[75]

The Court's capital punishment jurisprudence diverged significantly. There, the Court embraced rigorous proportionality review.[76] These cases were subject to a two-part test and were examined on a categorical basis, rather than a case-by-case basis.[77] First, "the Court determine[d] whether 'objective indicia of society's standards' demonstrate[d] a national consensus against the death penalty" for that type of crime.[78] Second, the Court made a subjective judgment about whether the crime was proportionate to the capital punishment.[79] At this step of the analysis, judges considered the same factors as at the first stage of the noncapital analysis, often looking to penological justifications and international comparators as well.[80]

The Court's decision in *Graham v. Florida* upended this divide and, for the first time, created a categorical prohibition in a noncapital case. After holding in *Roper* that the imposition of the death penalty on juvenile offenders violated the Eighth Amendment,[81] the Court held in *Graham* that juvenile defendants categorically cannot be sentenced to life without parole for nonhomicidal offenses.[82] Since *Graham*, the Court has continued to tighten restrictions on juvenile criminal sentencing under the Eighth Amendment. *Miller* restricted the state's ability

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[70] *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring in the judgment) (citing *Solem*, 463 U.S. at 291–92).

[71] 501 U.S. 957 (1991).

[72] 538 U.S. 11 (2003).

[73] *Harmelin*, 501 U.S. at 961, 996.

[74] *Ewing*, 538 U.S. at 17–19, 30–31.

[75] *Id.* at 30; *Harmelin*, 501 U.S. at 995–96.

[76] *See* Steiker & Steiker, *supra* note 64, at 38.

[77] *See* Siegler & Sullivan, *supra* note 67, at 334.

[78] *Id.* (footnote omitted) (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)).

[79] *Id.* at 335.

[80] *Id.* at 335–36.

[81] *Roper*, 543 U.S. at 575.

[82] Graham v. Florida, 560 U.S. 48, 82 (2010).

to impose a life-without-parole sentence for juveniles convicted of homicide by prohibiting its mandatory imposition.[83] And *Montgomery* recast *Miller* as a substantive rule in order to apply it retroactively to juvenile offenders whose sentences were final at the time of *Miller*.[84]

Together, these juvenile sentencing cases embody a principle that, for Eighth Amendment purposes, "children are different."[85] They recognize that "juveniles have diminished culpability and greater prospects for reform."[86] The *Miller* Court identified three relevant distinctions between juveniles and adults: (1) children are immature and irresponsible, (2) children are more vulnerable to negative outside pressures and lack full control over their environment, and (3) children lack a fully formed character and are capable of change.[87] Combined, these considerations support a more rigorous Eighth Amendment review for juveniles because the penological justifications are diminished.[88]

The Court abandoned the more deferential review it had applied in noncapital juvenile sentencing cases. In *Graham*, the Court struck down a punishment authorized in thirty-nine jurisdictions[89] and, in *Miller*, twenty-nine jurisdictions.[90] Just as "death is different," the Court relied on the fact that "children are different" to impose more rigorous review on juvenile, noncapital punishments.

The decision in *Jones* may suggest that the Court is reconsidering its dramatic departure from the traditional deference it had shown in noncapital cases. At the end of the opinion, Justice Kavanaugh noted that "[d]etermining the proper sentence . . . raises profound questions of morality and social policy."[91] These profound questions are first to be answered by "[s]tates, not the federal courts."[92] The Supreme Court has the "more limited role" of safeguarding the limits imposed by the Eighth Amendment.[93] Justice Kavanaugh then recognized the variety of options that states have if they do not agree with the Court's opinion, ranging from imposing a factfinding requirement to prohibiting life-without-parole sentences for juveniles altogether.[94] Moreover, this discussion signals that deference to the states in the administration of

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

84 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

85 *Miller*, 567 U.S. at 481.

86 *Id.* at 471.

87 *Id.*

88 In *Miller*, the Court stated only that the penological justifications are "diminish[ed]" for juveniles. *Id.* at 472. By the time of *Montgomery*, the Court stated that the penological justifications had "collapse[d]." *Montgomery*, 136 S. Ct. at 734.

89 Graham v. Florida, 560 U.S. 48 app. at 82–84 (2010).

90 *Miller*, 567 U.S. at 482.

91 *Jones*, 141 S. Ct. at 1322.

92 *Id.*

93 *Id.*

94 *Id.* at 1323.

juvenile sentencing could regain prominence. Justice Kavanaugh subtly recast the juvenile sentencing cases as standing only for the proposition that "[y]outh matters in sentencing"[95] rather than the stronger characterization in *Miller* that "children are different."[96]

A return to a deferential framework would be a welcome shift in the doctrine. Rigorous Eighth Amendment review is inherently antimajoritarian because it requires the Court to overturn a sentence that has been authorized by a democratically elected legislature. The narrow proportionality review for noncapital cases repeatedly emphasizes the "primacy of the legislature in setting sentences, the variety of legitimate penological schemes, [and] the state-by-state diversity protected by our federal system."[97] This deference is particularly important given the fact that how society punishes its criminal offenders is a matter of ongoing moral and policy debate.[98] In 1966, forty-two percent of Americans were in favor of the death penalty for people convicted of murder.[99] By 1994, that number had increased to eighty percent.[100] As of fall 2020, however, support has fallen to fifty-five percent.[101] As Chief Justice Roberts has noted, judges "have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty."[102]

Without a renewed emphasis on judicial deference, these Eighth Amendment cases have "no discernible end point."[103] In *Graham*, the Court made only a minimal effort to justify its adoption of a categorical rule in a noncapital case.[104] And in *Miller*, the Court reasoned that the unique attributes of juveniles are not crime specific, allowing their use in contexts outside of capital punishment.[105] In the wake of these decisions, commentators began predicting massive changes to the criminal

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[95] *Id.* at 1314, 1316.

[96] Miller v. Alabama, 567 U.S. 460, 480–81 (2012).

[97] Graham v. Florida, 560 U.S. 48, 87 (2010) (Roberts, C.J., concurring in the judgment).

[98] *Jones*, 141 S. Ct. at 1322.

[99] *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx [https://perma.cc/6KER-EHRB].

[100] *Id.*

[101] *Id.*

[102] Miller v. Alabama, 567 U.S. 460, 495 (2012) (Roberts, C.J., dissenting); *see also Graham*, 560 U.S. at 97 (Thomas, J., dissenting) ("I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our felllow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority."); Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (opinion of Scalia, J.) ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.").

[103] *Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting).

[104] *See* Siegler & Sullivan, *supra* note 67, at 328 ("Death was different no longer, but the Court [in *Graham*] did nothing to explain why that was the case.").

[105] *Miller*, 567 U.S. at 473.

justice system brought about through the Eighth Amendment. These predictions included more rigorous review of adult life-without-parole sentences,[106] lesser sentences applied to juveniles,[107] and restrictions placed on convicted sex offenders.[108] But by being more deferential to the legislative bodies authorizing these sentences, the Court leaves these difficult questions where they belong: in the hands of the people. The Eighth Amendment's prohibition on "unusual" punishments should not be used to take down a wide range of duly authorized sentencing schemes. The Court's signaled deference in *Jones* indicates that it is seeking an "end point" to the potentially expansive shift in Eighth Amendment doctrine.

It is possible that *Jones* will come to be seen as only a momentary detour on the Court's march toward more rigorous Eighth Amendment review. Though the majority asserted that its decision was commanded by clear language in *Montgomery*, which articulated that a separate factual finding is not required, Justice Thomas noted that when *Montgomery* recast *Miller* into a substantive rule, it created an irreconcilable tension. A rule of criminal procedure is substantive and applies retroactively if it "alters the range of conduct or the class of persons that the law punishes."[109] If *Miller* is substantive, then it necessarily created a class of persons that the law cannot punish with life without parole. This reading seems to imply a factfinding requirement. Both principal opinions in *Jones* had ample support. That the Court chose not to adopt a factfinding requirement suggests that Justice Kavanaugh's discussion of deference to legislative bodies should be considered a significant signal.

Brett Jones's case demonstrates the heartbreaking nature of juvenile crime. On the one hand, his grandfather lost his life as a result of a rather ordinary confrontation. On the other, Jones's freedom has been forever taken away from him because of the actions he took as a child. There is ample room for debate about whether *Jones* is a just outcome or if states should adopt any number of potential reforms to juvenile sentencing. But the Court's role should be limited. The Eighth Amendment should not be used to end this debate or tie the hands of future generations.

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[106] *See* John "Evan" Gibbs, Note, *Jurisprudential Juxtaposition: Application of* Graham v. Florida *to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 968–73 (2011).

[107] *See* Scott et al., *supra* note 2, at 707 (arguing that "the 'children are different' principle should inform policies regulating the sentencing of juveniles whenever they are dealt with in the adult system"); Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller*'s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & CIV. RTS. L. REV. 173, 173 (2013).

[108] *See* Eric J. Buske, Note, *Sex Offenders Are Different: Extending* Graham *to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417, 421 (2011).

[109] *Jones*, 141 S. Ct. at 1317 n.4 (quoting Welch v. United States, 136 S. Ct. 1257, 1264–65 (2016)); *see also* Edwards v. Vannoy, 141 S. Ct. 1547, 1562 (2021) (same).