
TO THE STATES: REFLECTIONS ON
JONES V. MISSISSIPPI

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The day that ended the Trump Presidency also confirmed its lasting hold on the Eighth Amendment’s future. On November 3, 2020, I argued before the U.S. Supreme Court in *Jones v. Mississippi*¹ on behalf of Brett Jones, who was sentenced to life without parole as a juvenile.² The question presented was: “Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.”³ The answer: no.⁴ The majority behind that answer included all three Trump appointees.⁵

Leading up to *Jones v. Mississippi*, the Court had imposed limits on life-without-parole sentences for juveniles in a trio of cases. *Graham v. Florida*⁶ banned life-without-parole sentences for juveniles guilty of crimes other than homicide.⁷ *Miller v. Alabama*⁸ prohibited mandatory life-without-parole sentences for juveniles convicted of homicide.⁹ And the most recent case, *Montgomery v. Louisiana*,¹⁰ established that *Miller* applied retroactively.¹¹

Critically, *Montgomery* explained that “*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.”¹² The permanent-incorrigibility rule was a crucial part of *Montgomery*’s conclusion that *Miller* applied retroactively. In fact, *Montgomery* repeated the rule in various ways seven

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¹ 141 S. Ct. 1307 (2021).

² *Id.* at 1307, 1311; Transcript of Oral Argument at 1–4, *Jones*, 141 S. Ct. 1307 (No. 18-1259). First-person pronouns in this Article refer to David M. Shapiro.

³ Brief for Petitioner at i, *Jones*, 141 S. Ct. 1307 (No. 18-1259).

⁴ *Jones*, 141 S. Ct. at 1311.

⁵ See Robert Barnes, *Supreme Court Rules Against Juvenile Sentences to Life Without Parole*, WASH. POST (Apr. 22, 2021, 1:14 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-life-without-parole/2021/04/22/6a633136-a371-11eb-a774-7b47ceb36ee8_story.html [<https://perma.cc/Q3ZQ-AUU6>].

⁶ 560 U.S. 48 (2010).

⁷ *Id.* at 74.

⁸ 567 U.S. 460 (2012).

⁹ *Id.* at 465.

¹⁰ 136 S. Ct. 718 (2016).

¹¹ *Id.* at 736.

¹² *Id.* at 734.

times, practically beating the reader over the head with the idea.¹³ Justice Kennedy's majority opinion in *Montgomery* garnered a commanding six votes.¹⁴

To be sure, *Montgomery* also stated: "Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility."¹⁵ The Court continued: "That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee."¹⁶

This passage was a headscratcher. If only permanently incorrigible juveniles can be sentenced to life without parole, then how can a sentencing judge lawfully impose such a sentence without actually deciding if the juvenile before the court is permanently incorrigible? It seemed to me that this confusing passage had to give way for the opinion in *Montgomery* to make sense as a whole: the logic of *Miller* and *Montgomery* clearly required a court to find a juvenile homicide offender permanently incorrigible before imposing life without parole.

This modest extension of *Montgomery* seemed achievable, at least when the Court granted certiorari in *Jones*.¹⁷ But well after the grant, and less than two months before oral argument, Justice Ginsburg passed away.¹⁸ Like others saddened by this national tragedy, I mourned the death of this brilliant and inspiring jurist. I also feared the effect on my client's chances. Justice Ginsburg's death, and the appointment of Justice Barrett,¹⁹ narrowed the path for Mr. Jones.²⁰

Early news reports of the argument accurately heralded a loss.²¹ My colleagues avoided predictions and tried to seem upbeat but probably

¹³ See *id.* at 733–36.

¹⁴ *Id.* at 725.

¹⁵ *Id.* at 735.

¹⁶ *Id.*

¹⁷ *Jones v. Mississippi*, 140 S. Ct. 1293 (2020) (mem.) (granting certiorari on March 9, 2020).

¹⁸ Justice Ginsburg passed away on September 18, 2020. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> [<https://perma.cc/53NB-W3KD>]. Oral arguments were held on November 3, 2020. *Jones v. Mississippi*, 141 S. Ct. 1307, 1307 (2021).

¹⁹ Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/7AJC-9E9T>].

²⁰ See, e.g., Eli Hager & Beth Schwartzapfel, *How Losing RBG Could Shape Criminal Justice for Years to Come*, MARSHALL PROJECT (Sept. 24, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/09/24/how-losing-rbg-could-shape-criminal-justice-for-years-to-come> [<https://perma.cc/F659-7WRX>].

²¹ See, e.g., Robert Barnes, *Supreme Court Debates What Judges Must Find Before Sentencing Juveniles to Life Without Parole*, WASH. POST (Nov. 3, 2020, 4:35 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2020/11/03/supreme-court-debates-what-judges-must-find-before-sentencing-juveniles-to-life-without-parole/>.

knew the score. And on April 22, 2021, the Court issued its ruling.²² The 6-3 breakdown of the votes was *Montgomery*'s true mirror image — identical, except in the completely opposite direction.²³

Justice Kavanaugh wrote for the majority, which included the two other Trump appointees to the Court.²⁴ The majority opinion concluded that the Eighth Amendment did not require a finding of permanent incorrigibility.²⁵ Justice Thomas concurred in the judgment; he would have overruled *Montgomery* outright.²⁶ Justice Sotomayor dissented, joined by Justices Breyer and Kagan.²⁷

If it wasn't clear before the decision, it's clear now: *Montgomery* was the high-water mark of the Supreme Court's "evolving standards of decency" jurisprudence, which limits extreme sentences such as capital punishment and juvenile life without parole.²⁸ The jurisprudential step Mr. Jones needed to win was so minute as to border on tautology. The Court had already said that permanent incorrigibility was the rule, and all it needed to say for my client to win was that a sentencing judge must actually decide whether a given defendant fits within the rule. As Chief Justice Roberts put it at oral argument, what our side was looking for "didn't seem like very much."²⁹ But in the end he joined the majority.³⁰

Asking for very little and receiving even less underscores the need for a strategic realignment, not just for juvenile sentencing cases specifically but for Eighth Amendment cases more generally. Many advocates have already persuaded state courts to limit juvenile life without parole under state constitutional analogues to the Eighth Amendment. 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.

Of course, state supreme courts regularly interpret their state constitutions as exceeding the floor set by the U.S. Constitution. For example, the Delaware Supreme Court has concluded that "from time to

www.washingtonpost.com/politics/courts_law/supreme-court-life-sentences-juveniles/2020/11/03/4adfe1ca-1df6-11eb-90dd-abd0f7086a91_story.html [https://perma.cc/JW6M-QCTQ].

²² *Jones*, 141 S. Ct. at 1307.

²³ *See id.* at 1310.

²⁴ *See id.*; Barnes, *supra* note 5.

²⁵ *See Jones*, 141 S. Ct. at 1311.

²⁶ *Id.* at 1323 (Thomas, J., concurring in the judgment).

²⁷ *Id.* at 1328 (Sotomayor, J., dissenting).

²⁸ *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

²⁹ Transcript of Oral Argument, *supra* note 2, at 42.

³⁰ *Jones*, 141 S. Ct. at 1310.

time, . . . Delaware's citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them."³¹ After all, the court explained, "[i]f we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty."³² To cite just a few more examples, the Iowa Supreme Court has held that "the rulings of the United States Supreme Court create a floor, but not a ceiling, when we are called upon to interpret parallel provisions of the Iowa Constitution,"³³ while the Washington Supreme Court has acknowledged that the state constitution's "cruel punishment clause often provides greater protection than the Eighth Amendment."³⁴

In the specific context of juvenile life without parole, advocates have succeeded in extending state protections beyond the federal minimum. Under the federal Eighth Amendment, a juvenile who does not actually commit an act of violence but is sentenced for felony murder may still be sentenced to life without parole.³⁵ In California, though, the state supreme court held that the sentence of life imprisonment as applied to a juvenile petitioner convicted of first-degree felony murder violated the state's constitutional prohibition against cruel or unusual punishment.³⁶

Some state courts have found juvenile life without parole categorically unconstitutional. In 2016, the Iowa Supreme Court found that all such sentences violate the state constitution's cruel and unusual punishment bar.³⁷ Similarly, the Massachusetts Supreme Judicial Court held that a discretionary life-without-parole sentence imposed on a juvenile violates the state's Eighth Amendment analogue "because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders."³⁸

³¹ Sanders v. State, 585 A.2d 117, 145 (Del. 1990).

³² *Id.*

³³ State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016).

³⁴ State v. Roberts, 14 P.3d 713, 733 (Wash. 2000), *as amended on denial of reconsideration* (Feb. 2, 2001); *see also* Diatchenko v. Dist. Att'y for the Suffolk Dist., 1 N.E.3d 270, 283 (Mass. 2013) ("We often afford criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." (citing Dist. Att'y for the Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1275, 1283 (Mass. 1980))).

³⁵ *See, e.g.,* United States v. Briones, 929 F.3d 1057 (9th Cir. 2019) (en banc), *cert. granted, vacated, and remanded*, No. 19-720, 2021 WL 1725145 (U.S. May 3, 2021) (mem.) (ongoing litigation of the reimposition of a juvenile life-without-parole sentence for felony murder after a *Miller* resentencing).

³⁶ People v. Dillon, 668 P.2d 697, 700 (Cal. 1983).

³⁷ Sweet, 879 N.W.2d at 817, 839.

³⁸ Diatchenko, 1 N.E.3d at 276.

Just this year, the Washington Supreme Court interpreted its Eighth Amendment analogue to prohibit mandatory life-without-parole sentences for young adults, not just juveniles.³⁹ In *Matter of Monschke*,⁴⁰ the nineteen- and twenty-year-old petitioners challenged their mandatory life-without-parole sentences as “unconstitutionally cruel when applied to youthful defendants” like themselves, and the court agreed.⁴¹ The court held that petitioners “were essentially juveniles in all but name at the time of their crimes” and the statute was unconstitutional as applied because it denied judges discretion to consider youth as a mitigating factor.⁴² The court explained: “Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood.”⁴³

In some cases, textual differences between state constitutions and the federal Eighth Amendment may support broader state protections. In a recent article, Professor William W. Berry III argues that “these linguistic differences provide the basis for broader, or at least different, coverage of state punishments.”⁴⁴ For example, Berry notes that many state constitutions contain a disjunctive proscription of cruel *or* unusual punishments, which contrasts with the Eighth Amendment conjunctive ban on cruel *and* unusual punishments.⁴⁵ This is a common variation, but not the only one. For other examples, Berry notes that Alaska’s constitution outlines the purposes of punishments, New Jersey’s contains a rule specific to the death penalty, and Louisiana’s forbids excessive punishments.⁴⁶

Other recent scholarship delves into particular state punishment provisions and argues for protections that exceed the federal floor. Casey Adams analyzes article I, section 11 of the Delaware Constitution, which prohibits “cruel punishments.”⁴⁷ Based on the original meaning of Delaware’s Eighth Amendment analogue, the history of its adoption, and prior Delaware case law, Adams contends that this provision “incorporates the principle that punishments which are excessive or disproportionate in relation to the crime of conviction are ‘cruel,’ and therefore

³⁹ *In re Pers. Restraint of Monschke (Matter of Monschke)*, 482 P.3d 276, 288 (Wash. 2021).

⁴⁰ 482 P.3d 276.

⁴¹ *Id.* at 280; *see id.* at 281.

⁴² *Id.* at 280; *see id.* at 287.

⁴³ *Id.* at 277.

⁴⁴ William W. Berry III, *Cruel and Unusual Non-capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1653 (2021).

⁴⁵ *See id.* at 1636; *see also* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1213–40 (2020).

⁴⁶ Berry, *supra* note 44, at 1636 n.64.

⁴⁷ DEL. CONST. art. I, § 11; *see* Casey Adams, *Banishing the Ghost of Red Hannah: Proportionality, Originalism, and the Living Constitution in Delaware*, 27 WIDENER L. REV. 23, 26 (2021).

constitutionally proscribed.”⁴⁸ Based on recent cases, Adams concludes that “the Delaware Supreme Court is open to finding a proportionality principle in § 11, if the case is properly and persuasively made.”⁴⁹

In another recent article, James Park Taylor explores Montana’s constitution, which both prohibits cruel and unusual punishment under its Eighth Amendment analogue⁵⁰ and recognizes a right to dignity.⁵¹ According to Taylor, “[t]he interplay of these two rights has begun to be developed by the Montana Supreme Court but there is much that still can be done to advance the intersection of those rights with what the courts have called our ‘evolving standards of decency.’”⁵²

Meanwhile, advocates are briefing new arguments under state Eighth Amendment analogues. Indeed, my own organization, the Roderick & Solange MacArthur Justice Center, has been actively involved in such cases and has filed amicus briefs in some of the cases discussed below.

As one example, in *Dewalt v. Hooks*,⁵³ the ACLU of North Carolina and North Carolina Prisoner Legal Services represent clients who are challenging the use of solitary confinement as cruel or unusual punishment under the state constitution.⁵⁴ Based on both the federal Eighth Amendment and North Carolina’s Eighth Amendment analogue,⁵⁵ advocates are pushing for a more protective interpretation of “cruel” and/or “unusual” for conditions-of-confinement cases. Under the Eighth Amendment, the U.S. Supreme Court requires plaintiffs suing prison officials over prison conditions to show that the officials acted with “deliberate indifference,” meaning that the officials subjectively knew of — but disregarded — a substantial risk of serious harm.⁵⁶ Proving the defendants’ subjective knowledge is a major hurdle to prisoners suing over harmful conditions. In *Dewalt*, a group of legal scholars has filed an amicus brief recommending that the North Carolina Supreme Court reject the federal subjective standard.⁵⁷ They contend that the original

⁴⁸ Adams, *supra* note 47, at 26.

⁴⁹ *Id.* at 42.

⁵⁰ See MONT. CONST. art. II, § 22 (prohibiting “cruel and unusual punishments”).

⁵¹ See *id.* art. II, § 4 (“The dignity of the human being is inviolable.”).

⁵² James Park Taylor, *The Cruel and Unusual Punishment Clause Through the Lens of the Right to Dignity*, STATE BAR OF MONT. (Mar. 16, 2021), <https://www.montanabar.org/news/556626/The-Cruel-and-Unusual-Punishment-Clause-through-the-Lens-of-the-Right-to-Dignity.htm> [https://perma.cc/AD69-6GQG].

⁵³ Class Action Complaint, *Dewalt v. Hooks*, No. 19 CVS 14089 (N.C. Super. Ct. Oct. 16, 2019).

⁵⁴ See *id.* at 1–4; *Solitary Confinement*, ACLU OF N.C., <https://www.acluofnorthcarolina.org/en/cases/solitary-confinement> [https://perma.cc/K3QF-R78A].

⁵⁵ N.C. CONST. art. I, § 27 (barring “cruel or unusual punishments”).

⁵⁶ *Wilson v. Seiter*, 501 U.S. 294, 302–03 (1991).

⁵⁷ Brief of Professors Sharon Dolovich et al., as Amici Curiae Supporting Plaintiff-Appellants at 19–20, *Dewalt v. Hooks*, No. 165A21 (N.C. June 30, 2021), 2021 WL 3007629.

meaning of the state provision does not depend on proof of a prison official's subjective intent.⁵⁸

Meanwhile, in Michigan, the State Appellate Defender Office is asking the Michigan Supreme Court to prohibit mandatory life without parole for young adult defendants.⁵⁹ The Michigan Constitution prohibits "cruel or unusual punishment."⁶⁰ The state supreme court has granted discretionary review to decide:

[W]hether the United States Supreme Court's decisions in [*Miller*] and [*Montgomery*] should be applied to defendants who are over 17 years old at the time they commit a crime and who are convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment . . . or [Michigan's Eighth Amendment analogue], or both.⁶¹

And in Pennsylvania, the Abolitionist Law Center and other advocacy groups are challenging the constitutionality of a life-without-the-possibility-of-parole sentence for felony murder under the Pennsylvania Constitution's ban on "cruel punishments."⁶² Petitioners assert that lengthy incarceration for a killing they did not intend does not increase the deterrent effect of the punishment; that their incarceration no longer serves incapacitation purposes because of their old age and rehabilitation; that retribution is not served when felony-murder defendants are punished with the same severity as others with greater culpability in the killing; and that life without parole does not further rehabilitation if there is no meaningful opportunity for release.⁶³ The case was dismissed for jurisdictional reasons and is currently on appeal.⁶⁴

In sum, after *Jones*, there is reason for despair over the federal Eighth Amendment. But don't count out the state courts just yet. Many have proven willing to go beyond the federal minimums. With new attention from progressive advocates, these courts may pick up where the U.S. Supreme Court has left off.

⁵⁸ See *id.* at 9 (citing JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 69 (2d ed. 2013)).

⁵⁹ See *People v. Poole*, 960 N.W.2d 529, 530 (Mich. 2021) (mem.).

⁶⁰ MICH. CONST. art. I, § 16.

⁶¹ *Poole*, 960 N.W.2d at 530 (citations omitted).

⁶² PA. CONST. art. I, § 13; see *Scott v. Pa. Bd. of Probation & Parole*, 256 A.3d 483, 487 (Pa. Commw. Ct. 2021).

⁶³ Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief ¶¶ 96–111, *Scott*, 256 A.3d 483 (No. 397 M.D. 2020).

⁶⁴ *Scott*, 256 A.3d at 496; Press Release, Ctr. for Const. Rts., Pennsylvania Supreme Court to Weigh in on Death-by-Incarceration Lawsuit (Oct. 25, 2021), <https://ccrjustice.org/home/press-center/press-releases/pennsylvania-supreme-court-weigh-death-incarceration-lawsuit> [https://perma.cc/3SEY-6JH0].