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Resurrecting Arbitrariness

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RESURRECTING ARBITRARINESS

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What allows judges to sentence a child to die in prison? For years, they did so without constitutional restriction. That all changed in 2012's Miller v. Alabama, *which banned mandatory sentences of life without parole for children convicted of homicide crimes.* Miller *held that this extreme sentence was constitutional only for the worst offenders—the "permanently incorrigible." By embracing individualized sentencing,* Miller *and its progeny portended a sea change in the way juveniles would be sentenced for serious crimes. But if* Miller *opened the door to sentencing reform, the Court's recent decision in* Jones v. Mississippi *appeared to slam it shut.*

Rather than restrict the discretion of a judge to throw away the key in sentencing child defendants, the Court in Jones *increased that discretion. It recast* Miller *as a purely procedural decision that only required a barebones "consideration" of a defendant's "youth and attendant characteristics" to fulfill its mandate of individualized sentencing.* Jones *further held that judges need not engage in any formal factfinding before sentencing a child to die in prison, which renders these sentences nearly unreviewable. This Article argues that, through these two jurisprudential moves,* Jones *created conditions that will maximize arbitrary and racially discriminatory sentencing outcomes nationwide, resembling the unconstitutional death sentences of the mid-twentieth century.*

This Article is the first to comprehensively analyze Jones, *contending that the decision represents an embrace of unfettered discretion in the sentencing of children facing life without parole. Given the Supreme Court's gutting of the Eighth Amendment, I contend that state solutions are the way forward. I propose that states join the national trend of abandoning life without parole sentences for children. Short of abolishing the sentence, I offer three procedural interventions.*

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First, states should enact "genuine narrowing" requirements that establish criteria designed to limit eligibility for life without parole sentences for children to the theoretical "worst of the worst." While inspired by the narrowing requirement in capital sentencing, "genuine narrowing" relies on meaningful and concrete criteria that seek to achieve the mandate of Miller *that such sentences be uncommon. Second, states should require jury sentencing, which ensures that sentences will be imposed by multiple, and typically more diverse, voices than what currently occurs with judicial sentencing. Third, states should go beyond merely telling sentencers to take youth into account in their sentencing decisions, but should instead inform them that the characteristics of youth are "mitigating as a matter of law," and when present, must weigh against an imposition of life without parole.*

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INTRODUCTION

"The crime is why we are here. We're not here because Mr. Miller suffered abuse at the hands of his father," proclaimed Alabama Circuit Judge Mark Craig on April 27, 2021, as he resentenced Evan Miller to life without parole for a homicide that Mr. Miller had committed as a fourteen-year-old.[1] The sentencing judge reached this conclusion despite the fact that this very crime was the basis for the Supreme Court's landmark ruling in *Miller v. Alabama*—where Mr. Miller was the titular defendant, and where the Court invalidated mandatory sentences of life without parole for children due, in part, to

[1] Kent Faulk, *Evan Miller, Youngest Person Ever Sentenced to Life Without Parole in Alabama, Must Remain in Prison*, ADVANCE LOCAL (Apr. 27, 2021), https://www.al.com/news/2021/04/evan-miller-youngest-child-ever-sentenced-to-life-without-parole-in-alabama-must-remain-in-prison.html [https://perma.cc/X85G-YK4J].

their reduced culpability.[2] The *Miller* Court also mandated individualized sentencing, which required sentencers to consider the characteristics of youth, broadly defined as evidence of a defendant's immaturity, vulnerability, and ability to change, but more explicitly including the "family and home environment that surrounds [a young defendant] . . . from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[3] Indeed, the Court seemed to linger on Mr. Miller's family environment, observing "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here."[4]

Importantly, Mr. Miller's 2021 resentencing to life without parole occurred just five days after the decision in another critical Supreme Court case, *Jones v. Mississippi*, where a newly constituted Court rejected the argument that sentencers must find child defendants to be "permanently incorrigible" before imposing life without parole.[5] In so holding, the Court went further than the question immediately before it, announcing that sentencing judges had no burden to make any factual findings whatsoever before sentencing a child to life without parole, provided they agreed to "*consider*[ ] an offender's youth and attendant characteristics."[6] *Jones v. Mississippi* constituted an embrace of unfettered discretion for the *Miller* cohort and signaled to sentencing judges—like Mr. Miller's—that their decisions would be effectively unreviewable. By doing so, *Jones* paved the way for the reimposition of life without parole on Mr. Miller and others like him. This Article argues that the danger of *Jones* goes beyond the harm suffered by these individuals. The decision creates conditions that will likely maximize arbitrary and racially discriminatory[7] sentencing outcomes nationwide, resembling the unconstitutional death sentences of the mid-twentieth century.

The Supreme Court has repeatedly compared the fates of children sentenced to die in prison with those of adults sentenced to die by execution. For decades, the Court recognized

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2 567 U.S. 460, 467–69, 478–79 (2012).

3 *Id.* at 477.

4 *Id.* at 478–79.

5 141 S. Ct. 1307, 1311 (2021).

6 *Id.* (emphasis added). Mr. Miller's resentencing judge made clear that he "considered" the mitigating evidence presented by defense counsel. *See* Faulk, *supra* note 1.

7 Throughout this Article, I use "racially discriminatory" sentencing outcomes to refer to those resulting from intentional racial animus, unconscious racial bias, and structural discrimination.

that the Eighth Amendment confers special procedural protections on individuals facing the death penalty. Because these protections were initially available only to those charged capitally, they inspired the phrase "death is different" as an encapsulation of the Supreme Court's Eighth Amendment jurisprudence.[8] Beginning with 2005's *Roper v. Simmons*,[9] and solidified in 2012's *Miller v. Alabama*,[10] the Court recognized that the Eighth Amendment also provided special consideration for children in the criminal legal system—at least those facing extreme sentences of death or life without parole—inspiring the parallel phrase "children are different."

In the death penalty context, these protections arose in response to *Furman v. Georgia*,[11] wherein the Court found that the death penalty was unconstitutional because it was arbitrarily applied, with Justice Stewart famously declaring, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[12] As states addressed the Court's concern with newly enacted death penalty statutes, the Court recognized that the constitutional imposition of a death sentence required the incorporation of two principles often in tension: consistency and individualized sentencing. States could achieve consistency through a "narrowing requirement" which limited the class of individuals eligible for the death penalty—presumably to the "worst of the worst."[13] Typically, states fulfilled the narrowing requirement by requiring jurors to find the existence of a statutorily enumerated aggravating factor in order for a defendant charged with homicide to be deemed death-eligible.[14]

The Court recognized that perfect consistency,[15] though addressing the arbitrariness concern, came with costs of its

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8 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.").

9 543 U.S. 551 (2005).

10 567 U.S. 460 (2012).

11 408 U.S. 238 (1972) (per curiam).

12 *Id.* at 309 (Stewart, J., concurring).

13 *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (referencing "our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death").

14 *See* Gregg v. Georgia, 428 U.S. 153, 165–66 (1976).

15 James S. Liebman has argued that this "perfect consistency" was only theoretical because jurors could nullify mandatory sentencing laws by acquitting defendants of capital charges and convicting them of lesser charges to circumvent a death sentence. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 10 (2007).

own.[16] In striking down mandatory death sentences, the Court rejected perfect consistency as antithetical to a second necessary principle: individualized sentencing.[17] To achieve individualized sentencing, states had to enable the sentencer to consider mitigating factors along with the aggravating ones. Ultimately, states had to permit sentencing juries to consider and give effect to evidence amounting to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[18]

Miller v. Alabama solidified the Court's "children are different" jurisprudence by invalidating mandatory life without parole sentences for juveniles charged with homicide crimes.[19] *Miller* held that the Eighth Amendment imposed a substantive constraint on sentencers, permitting life without parole only for "the rare juvenile offender whose crime reflects irreparable corruption."[20] For such sentences to be constitutional, the Court found, they must be imposed using individualized sentencing, which meant that the sentencer must take into account aspects of the particular crime and of the particular defendant that exemplified the characteristics of youth, and presumably, of reduced culpability.[21] In applying individualized sentencing to children facing life without parole, *Miller* rendered them analogous to capital defendants for Eighth Amendment purposes, raising hopes that additional protections might follow. But unlike in capital jurisprudence, neither *Miller* nor its progeny *Montgomery v. Louisiana*[22] ever explicitly adopted the counterbalancing "narrowing requirement" designed to limit the class of individuals eligible for this most extreme punishment. This omission left open the possibility that sentencer discretion in the *Miller* context would be unfettered.

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16 *See* Woodson v. North Carolina, 428 U.S. 280, 286–87, 287 n.6 (1976); Roberts v. Louisiana, 428 U.S. 325, 333–34 (1976).

17 *Woodson*, 428 U.S. at 304.

18 Lockett v. Ohio, 438 U.S. 586, 604 (1978).

19 567 U.S. 460, 471 (2012) ("To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" (citing Graham v. Florida, 560 U.S. 48, 68 (2010))).

20 *Id.* at 479–80.

21 *Id.* at 465, 475–77.

22 577 U.S. 190, 209 (2016) (holding that *Miller* applied retroactively because it constituted a substantive prohibition of life without parole sentences for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility").

2021's *Jones v. Mississippi*[23] presented an opportunity for the Court to place limits on sentencer discretion by requiring a finding of the defendant's "permanent incorrigibility" before the imposition of a life without parole sentence. In rejecting this argument, the Court went several steps further than required. It recast *Miller* as a purely procedural decision—notwithstanding *Montgomery*'s contrary holding—that required only that the sentencer consider "an offender's youth and attendant characteristics" and held that no "formal factfinding" was necessary before sentencing a child defendant to die in prison.[24]

This Article argues, that in so holding, the *Jones* Court maximized sentencer discretion to an extent resembling that of the pre-*Furman* death penalty era. As a consequence, the individualized sentencing mandate will in all likelihood lead to the same arbitrary and racially discriminatory outcomes that have occurred in the capital context. In a previous article,[25] I argued that, without proper guidance as to what evidence constitutes mitigation, modern capital sentencing juries employing individualized sentencing have run amok, sentencing defendants in arbitrary and racially discriminatory ways that resemble pre-*Furman* outcomes. Not only do *Miller* sentencers lack this same guidance, but the *Jones* decision also ensures that their discretion is effectively limitless. This is particularly worrisome given that, unlike with capital defendants, judges, not juries, are typically imposing sentences in *Miller* cases.[26] While the average capital jury may be far from representative due to institutional practices such as death qualification and the racially biased use of peremptory strikes, it still likely contains at least one member who has more in common with a criminal defendant than does the average sentencing judge.[27]

Without efforts to formally curb sentencer discretion, the results are likely to be harmful. This Article proposes that states join the national trend of abandoning life without parole sentences for children. For reluctant states, I present three interventions. First, states should enact genuine narrowing

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23 141 S. Ct. 1307 (2021).

24 *Id.* at 1311.

25 Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 837–48 (2020) [hereinafter Miller, *Power to Discriminate*].

26 *See, e.g.*, White v. State, 2021 OK CR 29, ¶ 20, 499 P.3d 762, 769 (finding the constitution does not require jury resentencing in *Miller* cases); Martin v. State, 329 So. 3d 451, 458 (Miss. Ct. App. 2020), *reh'g denied* (Sept. 14, 2021), *cert. denied*, 329 So. 3d 1201 (Miss. 2021) (finding statutory right to a jury trial does not apply to *Miller* resentencings).

27 *See infra* Part IV.

requirements that attempt to limit eligibility for life without parole sentences for children. Second, states should require jury sentencing for *Miller* defendants. Third, states should go beyond merely telling sentencers to take youth into account in their sentencing decisions but should instead recognize and inform jurors that the characteristics of youth as delineated in *Miller* are mitigating as a matter of law, and when present, must weigh against an imposition of life without parole. While support for each of these interventions may be found in the Supreme Court's Eighth Amendment jurisprudence, the *Jones* decision reveals state legislatures are likely a better avenue for these reforms, given the Court's current composition.

This Article proceeds in four parts. In Part I, I recount the Supreme Court's "death is different" jurisprudence and explain the rise of the twin Eighth Amendment aims of consistency and individualization in the capital context. In Part II, I explore the parallel development of the Court's "children are different" jurisprudence and its abrupt halt in *Jones v. Mississippi*. In Part III, I argue that the *Jones* decision enshrined a version of individualized sentencing that rendered sentencer discretion nearly limitless and, in doing so, is destined to usher in a new era of pre-*Furman* sentencing outcomes in the *Miller* context. Finally, in Part IV, I argue for these sentences to be abandoned before proposing three intermediate interventions—consistent with the Eighth Amendment—designed to curb sentencer discretion and minimize arbitrary and racially discriminatory outcomes. I also address possible objections to and limitations of these interventions.

I
DEATH IS DIFFERENT

In a previous work, *The Eighth Amendment Power to Discriminate*,[28] I recounted the rise of the opposing aims of consistency and individualization in death penalty cases in response to *Furman v. Georgia*. In that piece, I focused on the development and evolution of the individualized sentencing requirement.[29] In this Part, I briefly revisit that history to provide the necessary context for the Court's "death is different" jurisprudence; however, here, I emphasize the consistency aim, manifested in recognition of the "narrowing requirement."

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28 Miller, *Power to Discriminate*, *supra* note 25, at 817–36.

29 *Id.*

A. The Narrowing Requirement

1972's *Furman v. Georgia*, the Court's decision finding the death penalty unconstitutional, consisted of a 5-4 per curiam opinion with each Justice writing separately.[30] With only around 600 people on death row in the late 1960s, and less than five executions in a given year, each of the Justices focused on sentencing outcomes, with some finding death sentences the result of racial discrimination and others the result of arbitrariness.[31] Justice Brennan emphasized arbitrary outcomes, opining, "When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment."[32] Brennan posited that state sentencing procedures "actually sanction an arbitrary selection," and complained that "[n]o one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."[33] Justice Marshall observed that the "untrammeled discretion" of juries amounted to an "open invitation" to engage in racial discrimination.[34] Justice Douglas agreed that unfettered discretion led to arbitrary and racist results, but also noted the death sentences were likely to be imposed against the powerless generally, including the poor, racial minorities, the young, the ignorant, and the politically unpopular.[35]

While these justices would have found that the death penalty was unconstitutional per se, Justice White and Justice Stewart separately wrote that the Georgia capital sentencing scheme was unconstitutional only as applied, emphasizing arbitrary outcomes.[36] In declaring Georgia's death sentences "wantonly and . . . freakishly imposed," Justice Stewart likened receiving a death sentence to being struck by lightning.[37] Jus-

30 408 U.S. 238 (1972).

31 *Id.* at 291–93 (Brennan, J., concurring).

32 *Id.* at 294.

33 *Id.* at 294–95.

34 *Id.* at 365 (Marshall, J., concurring).

35 *Id.* at 248–57 (Douglas, J., concurring).

36 *Id.* at 306, 309–10 (Stewart, J., concurring); *id.* at 310–12 (White, J., concurring) ("In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided."). The decision also applied to the Texas capital sentencing scheme challenged in the consolidated case, *Branch v. Texas*.

37 *Id.* at 309–10 (Stewart, J., concurring). Justice Stewart dismissed as unproven the argument that the death penalty's application was racially discriminatory, instead of arbitrary: "My concurring Brothers have demonstrated that, if any

tice White blamed the arbitrary outcomes on the death penalty's infrequent imposition, explaining that even for "the most atrocious crimes . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[38] As the narrowest opinions, Justices Stewart and White's reasoning became law, and the holding of *Furman* thus came to stand for the proposition that the death penalty was unconstitutional because it was arbitrarily applied.[39]

States responded to *Furman* with a flurry of legislation aimed at curing the Court's arbitrariness concerns, with thirty-five states and the federal government enacting new capital sentencing schemes in the years immediately following the decision.[40] The new sentencing schemes primarily followed two models.[41] One model, enacted by states like Georgia and Florida, sought to limit discretion by imposing eligibility requirements and enumerating statutory aggravating and mitigating factors, designed to help sentencers identify the "death worthy."[42] In finding these sentencing schemes constitutional, the Court emphasized that these procedural mechanisms adequately addressed the "basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily."[43] These mechanisms provided the ba-

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basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side." *Id.* at 310 (internal citation and footnote omitted).

38 *Id.* at 313 (White, J., concurring).

39 *See* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) ("Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White."). James Liebman has argued that these two opinions are inconsistent, with Justice White urging a more frequent imposition of death sentences, and Justice Stewart advocating for standards that limited its application to those most worthy of death. Liebman, *supra* note 15, at 6. Liebman further argues that the Court's subsequent jurisprudence can best be understood as a toggle between these positions. *Id.* at 11–12.

40 *Gregg*, 428 U.S. at 179–80 nn.23–24.

41 The Texas capital sentencing scheme charted a third path. Jurek v. Texas, 428 U.S. 262, 268–69 (1976). It contained no reference to aggravating or mitigating circumstances, but also did not make death sentences mandatory. *Id.* Instead, it sought to achieve consistency both by limiting the crimes eligible for capital punishment to five specific types of murder and by requiring jurors to determine the deliberate nature of the crime, the likelihood the defendant would be dangerous in the future, and the existence of provocation by the victim. *Id.*

42 *Gregg*, 428 U.S. at 164, 196–97; Proffitt v. Florida, 428 U.S. 242, 250 (1976).

43 *Gregg*, 428 U.S. at 206.

sis for the Eighth Amendment's narrowing requirement, along with its requirements of proportionality and mandatory appellate review.[44]

The second model, followed by North Carolina and Louisiana, sought to achieve perfect consistency by making the death penalty mandatory for certain crimes.[45] In striking down these capital sentencing schemes, the Court explained that the process offended human dignity because it sentenced capital defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass":

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[46]

The invalidation of mandatory sentencing schemes birthed the Eighth Amendment's second requirement for capital cases: individualized sentencing.[47]

Only state capital sentencing statutes with mechanisms designed to ensure the twin values of consistency and individualized sentencing comported with the Eighth Amendment. Subsequent cases fleshed out the possible procedural manifestations of these values. The Court first refined the individualized sentencing requirement to prohibit any mechanism—whether it be a statute or jury instruction—that precluded the sentencing jury from considering "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[48] It later clarified that the

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44 *See* Kansas v. Marsh, 548 U.S. 163, 173–74 (2006) ("Together, our decisions in *Furman v. Georgia*, and *Gregg v. Georgia*, establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." (internal citations omitted)). *But see* Pulley v. Harris, 465 U.S. 37, 45 (1984) (holding that comparative proportionality review was "an additional safeguard against arbitrary or capricious sentencing" but was not constitutionally required).

45 Woodson v. North Carolina, 428 U.S. 280, 286, 287 n.6 (1976); Roberts v. Louisiana, 428 U.S. 325, 333–34 (1976).

46 *Woodson*, 428 U.S. at 304 (citation omitted).

47 *Marsh*, 548 U.S. at 173–74.

48 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (invalidating a death penalty statute that limited sentencer consideration to specifically enumerated mitigators); Eddings v. Oklahoma, 455 U.S. 104, 105, 109 (1982) (invalidating death sentence where the judge believed he could not consider certain mitigating evi-

sentencer's consideration must be meaningful; capital jurors must be instructed in such a way that allows them to "give effect to" the defendant's mitigation evidence.[49]

In defining what it called the "narrowing requirement," the Court explained that to be constitutional, capital sentencing statutes must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[50] The purpose of this narrowing requirement was to identify the most culpable offenders for whom the penological justifications for death—including incapacitation and retribution—are greatest. The Court focused its analysis on state legislation that narrowed eligibility for death based on attributes of the offense. For example, a state could not decree all murders death-eligible; instead, it had to articulate statutory factors that distinguished those that were eligible for a death sentence from those that were ineligible.[51] These statutory factors became known alternately as aggravating factors, or eligibility factors.[52] The Court held that states could satisfy the narrowing requirement in one of two ways.[53] First, states could simply narrow the definition of capital murder to exclude certain types of murder.[54] In this instance, a jury performed the narrowing function by finding the defendant guilty beyond a reasonable doubt of all of the elements of murder that rendered the crime capital.[55] Alternatively, states could broadly define capital murder but then require the sentencing

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dence in sentencing decision); Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 328 (1989) (holding that Texas special issues—"yes or no" questions a Texas jury must answer in every capital sentencing that determine whether a defendant will be sentenced to death—did not allow jurors to give effect to mitigating evidence of mental retardation); Penry v. Johnson (*Penry II*), 532 U.S. 782, 800 (2001) (holding that a supplemental mitigation instruction did not allow jurors to give effect to mitigating evidence of mental retardation); Abdul-Kabir v. Quarterman, 550 U.S. 233, 264–65 (2007) (finding that the Texas special issues precluded meaningful consideration of mitigating evidence); Brewer v. Quarterman, 550 U.S. 286, 289 (2007) (same).

49 *Penry I*, 492 U.S. at 328; *Abdul-Kabir*, 550 U.S. at 362; *Brewer*, 550 U.S. at 293–94.

50 Zant v. Stephens, 462 U.S. 862, 877 (1983).

51 Brown v. Sanders, 546 U.S. 212, 216 (2006). To date, the Court has failed to uphold the constitutionality of a death sentence resulting from a non-homicide crime. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977) (finding the death penalty unconstitutional as a punishment for the rape of an adult woman); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (finding the death penalty unconstitutional for the rape of a child).

52 *Brown*, 546 U.S. at 216 n.2.

53 Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

54 *Id.*

55 *Id.* at 245–46.

jury to find the existence of certain statutory aggravating factors to render a particular defendant death-eligible.[56]

The Court made clear that "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries" did not satisfy the narrowing requirement because "a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."[57] In *Godfrey v. Georgia*, the Court struck down an aggravating factor that failed to genuinely narrow the class of death-eligible murders because the factor was vague enough to apply to most murders.[58] The Georgia capital sentencing scheme permitted jurors to impose death after finding that the murder was "outrageously or wantonly vile, horrible and inhuman."[59] This factor failed the narrowing requirement because such a description could apply to "almost every murder," and thus its existence provided no restraint on the arbitrary imposition of death.[60] The Court concluded, "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."[61] Several years later, in *Maynard v. Cartwright*, the Court similarly invalidated the aggravating factor "that the murder was especially heinous, atrocious, or cruel" because its vagueness allowed jurors open-ended discretion.[62] The factor thus violated the narrowing requirement because it gave jurors "no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language."[63]

The takeaways from the Court's narrowing jurisprudence have been summed up best by Professors Steven Shatz and Nina Rivkind, who have noted that the *Furman* mandate has

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56 *Id.* at 246.

57 446 U.S. 420, 428 (1980) (internal quotation omitted).

58 *Id.* at 428–29.

59 *Id.* at 428.

60 *Id.* at 428–29.

61 *Id.* at 433.

62 486 U.S. 356, 361–64 (1988).

63 *Id.* at 364. The Court allowed for the possibility that the aggravator could be constitutional if the terms were defined to require torture or serious physical abuse. *Id.* at 365. *But see* Bell v. Cone, 543 U.S. 447, 453, 459 (2005) (upholding death sentence despite resting on "especially heinous, atrocious, or cruel" aggravator because the Tennessee Supreme Court had employed a "narrowing construction" to limit the application of the aggravator); Walton v. Arizona, 497 U.S. 639, 653–54 (1990) (upholding death sentence resting on "especially heinous, cruel, or depraved" aggravator where sentencing judge was presumed to have applied narrowing construction determined by the Arizona Supreme Court), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002); Lewis v. Jeffers, 497 U.S. 764, 783–84 (1990) (finding Arizona's "especially heinous, cruel, or depraved" aggravator constitutional as applied to the petitioner's case).

both a quantitative and a qualitative component: "(1) the death-eligible class of convicted murderers must be small enough that a substantial percentage are in fact sentenced to death; and (2) the states, through their legislatures, must decide the composition of the death-eligible class."[64] Only when both prongs have been satisfied has "genuine narrowing" occurred.[65]

A second form of narrowing has restricted death-eligibility based on offender attributes. Unlike traditional narrowing, where the Court imposed the basic requirement but left the details to the states to determine, narrowing based on offender attributes has been substantively defined via the Court's application of the Eighth Amendment's proportionality doctrine.[66] In these cases, the Court has created categorical constitutional exclusions from capital punishment for groups deemed less culpable by finding that the punishment of these groups violated the evolving standards of decency. These have included children, those suffering from insanity, and those with an intellectual disability.[67] The Court has occasionally engaged in this "judicial narrowing" with respect to offense attributes as well, holding that death was not a constitutional punishment for crimes of rape that did not accompany a homicide.[68] Typically, following an act of judicial narrowing, states enact legislation that codifies the Court's exemption, along with attendant procedural statutes that determine membership in the relevant category.[69]

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64 Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1295 (1997).

65 *Id.* Many scholars have contended that *Furman*'s commitment to "genuine narrowing" is not reflected in contemporary Supreme Court doctrine, particularly with respect to the requirement that state narrowing statutes meaningfully shrink the class of death-eligible crimes. *See infra* notes 250–259 and accompanying text.

66 CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 163 (2016) [hereinafter STEIKER & STEIKER, COURTING DEATH].

67 Ford v. Wainwright, 477 U.S. 399, 401 (1986) (finding execution unconstitutional for those suffering from insanity); Thompson v. Oklahoma, 487 U.S. 815, 823, 838 (1988) (finding death sentences unconstitutional for those under 16); Atkins v. Virginia, 536 U.S. 304, 306–07 (2002) (finding death sentences unconstitutional for those with intellectual disabilities); Roper v. Simmons, 543 U.S. 551, 578 (2005) (finding death sentences unconstitutional for those under 18).

68 Coker v. Georgia, 433 U.S. 584, 600 (1977) (finding the death penalty unconstitutional as a punishment for the rape of an adult woman); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (finding the death penalty unconstitutional for the rape of a child).

69 *See, e.g.*, ALA. CODE §§ 15-24-1–7 (codifying procedures concerning a defendant's assessment for intellectual disability).

B. Paradox or Counterbalance?

Scholars have long observed the tension in the narrowing and individualized sentencing requirements and have debated whether they can be reconciled.[70] Scott Sundby has coined this tension "the *Lockett* paradox."[71] In their comprehensive book about the Supreme Court's death penalty jurisprudence, Professors Carol and Jordan Steiker described this question as the "central tension in American death penalty law."[72] Vivian Berger has likened the two values to conjoined twins—"locked at the hip but straining uncomfortably in opposite directions."[73]

This tension was not lost on the Justices, several of whom had commented on it as early as *Lockett*, where Justice Rehnquist lamented that the Court's conception of the individualized sentencing requirement undermined the goals of the narrowing requirement:

> [T]he new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a "mitigating circumstance," it will not guide sentencing discretion but will totally unleash it.[74]

Justice Scalia later lamented the "simultaneous pursuit of contradictory objectives" and likened the tension between the two principles as that "between the Allies and the Axis Powers in World War II."[75]

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70 *See, e.g.*, Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RSRV. L. REV. 1067, 1080 (1991) (discussing the tension between objectivity and subjectivity in sentencing); Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 325 (1992) (arguing that due to tension between ensuring individualized sentencing and limiting arbitrariness, the Court has not resolved whether a sentence should concern a defendant's culpability or general deserts); Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1206 (1991) (discussing the tension between controlled discretion and individualized consideration in sentencing); STEIKER & STEIKER, COURTING DEATH, *supra* note 66, at 164–65 (discussing the tensions between the discretion to impose and the discretion to withhold the death penalty); *see also* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 995–1002 (1996) (discussing the "paradox" created by the dual aims of consistency and individualized sentencing).

71 *See* Sundby, *supra* note 70, at 1206.

72 STEIKER & STEIKER, COURTING DEATH, *supra* note 66, at 165.

73 Berger, *supra* note 70, at 1080.

74 Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting).

75 Walton v. Arizona, 497 U.S. 639, 664, 667 (1990) (Scalia, J., concurring).

On the other hand, Justice Stevens maintained that the two requirements were not only reconcilable, but they were also both critical to achieving constitutionally reliable sentencing outcomes.[76] Adopting a metaphor from the Georgia Supreme Court, Justice Stevens contended that tension between the two principles dissipated if one conceived of the law as applied to all homicide crimes as a pyramid divided into three planes, where the possible punishment for each crime increased as one moved up the pyramid.[77] The plane at the base of the pyramid separated homicides from killings generally; the middle plane consisted of death-eligible homicides; and the plane at the top consisted of cases where death was actually imposed.[78] If the sentencer's discretion was inversely proportional to the degree of punishment, the twin objectives of nonarbitrariness and individualized sentencing were both achievable.[79] Stevens explained that Scalia's conclusions were flawed:

> Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.[80]

To Justice Stevens, the disparate treatment made death sentences less arbitrary but more reliable because narrowing discretion on the front end minimized the number of death sentences, and increasing the juror's discretion on the back end allowed them to impose death only on the most "worthy."[81] In this way, the constraints of a narrowing requirement served as a counterbalance to the increased discretion inherent in individualized sentencing.

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76 *Id.* at 716–18 (Stevens, J., dissenting).

77 *Id.* at 716 (Stevens, J., dissenting). Justice Stevens borrowed the pyramid model from the Georgia Supreme Court, as quoted by the Court in *Zant v. Stephens*. *Id.* at 716–18 (quoting Zant v. Stephens, 462 U.S. 862, 870–72 (1983)).

78 *Id.* at 716–17. James Liebman conceives of the principles as a circle, with the border of the circle excluding death-eligible crimes and dots within the circle indicating death sentences. Liebman, *supra* note 15, at 8–13 (Figures 1 and 2). More aggravated murders are illustrated by dots closer to the center of the circle, while a wedge is carved out to capture racially biased death sentences. *Id.*

79 *Walton*, 497 U.S. at 717–18.

80 *Id.* at 718.

81 *Id.* at 718–19.

II
CHILDREN ARE DIFFERENT

In this Part, I examine the rise of the Supreme Court's "children are different" jurisprudence and discuss how it evolved out of the Court's death penalty jurisprudence. I discuss the similarities and differences in the two lines of cases.

The Court's "children are different" jurisprudence began as a subsection of death penalty proportionality jurisprudence that outlawed the execution of juveniles in recognition of their reduced culpability. In *Thompson v. Oklahoma*, the Court exempted children under 16 from the death penalty in recognition that they are "less mature and responsible," and cited Justice Powell's conclusion in a previous opinion that they are "more vulnerable, more impulsive, and less self-disciplined than adults."[82] The Court also noted that "[i]nexperience, 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."[83] This reduced culpability meant that the death penalty rationale of retribution was not served by sentencing children to death; nor was that of deterrence, where the Court concluded that "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis" when undertaking a capital crime "is so remote as to be virtually nonexistent."[84]

Seventeen years later, in *Roper v. Simmons*, the Court expanded the prohibition against execution to children who were under 18 at the time of their crime.[85] Drawing on the majority opinion in *Thompson*, along with contemporary scientific findings, *Roper* identified three areas in which children differed from adults, rendering them less culpable.[86] The first was their immaturity and "an underdeveloped sense of responsibility," which the Court stated often resulted in impetuous behavior.[87] The second was their vulnerability to negative influences and

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82 Thompson v. Oklahoma, 487 U.S. 815, 823, 834 (1988) (citing Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982) (internal quotation omitted)). An additional basis for the holding was the rarity with which sentences of death had been imposed on children of this age. *Id.* at 826–29.

83 *Id.* at 835.

84 *Id.* at 836–37.

85 Roper v. Simmons, 543 U.S. 551, 560 (2005). *Roper* overturned the intervening case *Stanford v. Kentucky*, which found 16- and 17-year-olds eligible for execution. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

86 *Roper*, 543 U.S. at 569–70.

87 *Id.* at 569.

peer pressure.[88] The third was their capacity for change, resulting from personality traits that are not yet fixed.[89] In light of these three traits, the Court concluded that it was "suspect" that a child could "fall[ ] among the worst offenders" for whom the death penalty was intended.[90] While granting the theoretical point that a child could exist who displayed adequate maturity and depravity to warrant a death sentence—a child who exhibited "irreparable corruption" instead of "transient immaturity"—the Court noted that, in reality, these qualities would be nearly impossible to prove.[91] The Court also raised the concern that jurors might erroneously consider the characteristics of youth to be aggravating, instead of mitigating, just as the prosecutor in *Roper* had urged them to do during the sentencing phase of the defendant's capital trial.[92] Ultimately, the Court found a categorical bar was necessary to prevent any undeserving children from suffering this fate: "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[93]

The "children are different" jurisprudence sloughed off its death penalty cloak when the Court next invoked it in the context of children sentenced to life imprisonment without the possibility of parole. 2010's *Graham v. Florida* applied the proportionality analysis previously reserved for death penalty cases to categorically ban life without parole for children under the age of 18 who had committed non-homicide crimes.[94] *Graham* adopted much of *Roper*'s reasoning, focusing on the reduced culpability of children in light of their three areas of difference: immaturity, vulnerability, and changeability.[95] While acknowledging the uniqueness of the death penalty, the Court found that life without parole had much in common with death sentences: both sentences involved an irrevocable and permanent loss of liberty that render rehabilitation immate-

88 *Id.*

89 *Id.* at 570.

90 *Id.*

91 *Id.* at 573.

92 *Id.* at 558, 573 (discussing the prosecutor's rebuttal argument, "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."). Elizabeth Emens has argued that this concern served as significant motivation for Justice Kennedy's decision in *Roper*. *See* Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 72–81.

93 *Roper*, 543 U.S. at 572–73.

94 560 U.S. 48, 82 (2010).

95 *Id.* at 68.

rial.[96] When applied to children, life without parole took on a uniquely severe quality: "Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[97]

Characterizing the culpability of the *Graham* cohort as "twice diminished," the Court found that the penological justifications for sentences of life without parole were not served when applied to children who did not kill or intend to kill.[98] The Court borrowed analysis that originated in *Thompson* in finding that reduced culpability negated the need for retribution, while the impulsivity of youth made deterrence unlikely.[99] It then addressed the two additional justifications and found that changeability reduced the need for incapacitation and increased the likelihood of rehabilitation—an aim not incentivized by permanent imprisonment.[100] As it had in the capital context, the Court concluded that a categorical bar was necessary to avoid the risk that a child undeserving of life without parole would nevertheless receive it.[101] The Court explained that the "discretionary, subjective judgment" of a sentencing judge or jury was "insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability."[102] It rejected the State's call for a case-by-case approach, citing the need for boundaries, and expressing skepticism that sentencers could accurately distinguish between the few children who were permanently incorrigible and the many who had the capacity for change.[103] The Court also warned that sentencers were likely to become fixated on the facts of the crime to the exclusion of mitigating evidence: "[A]n 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.'"[104] The

96 *Id.* at 69–70.
97 *Id.* at 70.
98 *Id.* at 69, 71–74.
99 *Id.* at 71–72; Thompson v. Oklahoma, 487 U.S. 815, 836–37 (1988).
100 *Graham*, 560 U.S. at 72–74.
101 *Id.* at 74.
102 *Id.* at 77.
103 *Id.*
104 *Id.* at 78 (quoting Roper v Simmons, 543 U.S. 551, 573 (2005)).

Court concluded that the *Graham* cohort was entitled to a "meaningful opportunity" for release that would enable each individual to demonstrate maturity and reform.[105]

To this point, the "children are different" jurisprudence was synonymous with exempting children from the most severe punishments, but in 2012's *Miller v. Alabama*,[106] the Court began to adopt some of the requirements previously reserved for capital cases. In *Miller*, the Court invalidated mandatory sentences of life without parole for children under the age of 18 who were convicted of homicide crimes.[107] The Court held that such sentences violated the Eighth Amendment for two reasons: first, they failed to account for young people's diminished culpability and greater capacity for change; and second, they "r[an] afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."[108] Of course, before *Miller*, the "most serious penalties" had only included death sentences.[109] In support of the reduced culpability conclusion, the Court revisited *Roper*'s three categories of differences between children and adults and underscored the conclusions of neurological studies that indicated developing brains were more like to display "transient rashness, proclivity for risk, and inability to assess consequences."[110] The Court emphasized that none of these qualities were crime specific: they existed whether the child in question had committed a misdemeanor or a capital murder.[111]

To justify invoking the individualized sentencing doctrine, the Court reinvigorated the analogy *Graham* drew between life imprisonment without parole for juveniles and capital punishment, pronouncing the former "akin to the death penalty," and observing that *Graham*'s exemption of non-homicide crimes from a particular punishment paralleled similar holdings in death penalty cases.[112] Because of these similarities, the

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105 *Id.* at 79.

106 567 U.S. 460, 465 (2012).

107 *Id.*

108 *Id.*

109 Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (affirming mandatory life without parole sentence for possession of 650 grams of cocaine and finding that the individualized sentencing requirement may not be extended outside the capital context). *But see* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 16 (2019) (arguing that *Miller* creates a foothold for extending the individualized sentencing requirement to other serious felony cases).

110 *Miller*, 567 U.S. at 472, 472 n.5 (alteration in original).

111 *Id.* at 473.

112 *Id.* at 470, 474–75 (citing Kennedy v. Louisiana, 554 U.S. 407, 407 (2008) (rendering rape of a child ineligible for capital punishment)); Coker v. Georgia, 433

Court concluded, its death penalty jurisprudence was applicable in the juvenile life without parole context.[113] The Court then focused its analysis on the death penalty's individualized sentencing requirement, emphasizing that mandatory sentencing schemes prevented consideration of "the mitigating qualities of youth," as *Graham* and *Roper* had compelled.[114] The Court discussed the type of evidence that mandatory sentencing precluded assessment of, including "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment"; the circumstances of the crime, including the degree of participation and extent of peer pressure; "incompetencies associated with youth," including difficulties interacting with police or assisting attorneys; and capacity for rehabilitation—before holding that sentencers must have the ability to consider these "mitigating circumstances" before imposing life without parole.[115]

While the Court adopted the death penalty's individualized sentencing requirement for the *Miller* cohort, it made no mention of its counterweight, the narrowing requirement. Indeed, the aim of *Miller* was to expand sentencer discretion, which was nonexistent so long as life without parole was mandatory.[116] While the Court compelled sentencers to "consider mitigating circumstances" and suggested in dicta what some of these mitigating circumstances might include,[117] it neglected to require states to limit the eligibility for life without parole to particularly egregious homicides or to require a finding of aggravating circumstances before imposing this sentence on children. As a consequence of failing to explicitly require formal guidelines of any kind, *Miller* arguably left the discretion of sentencers unfet-

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U.S. 584, 584 (1977) (rendering rape of an adult ineligible for capital punishment).

113 *Miller*, 567 U.S. at 470, 475.

114 *Id.* at 474–76 (internal quotations omitted).

115 *Id.* at 474, 477–78, 489.

116 *See id.* at 477–78, 489 ("Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate."). The Court rejected the State's argument that the discretion some judges retain when deciding whether to transfer children to adult court was constitutionally adequate because transfer hearings involve a different question than sentencing and often take place early in a case when little information is known about the defendant's circumstances. *Id.* at 489.

117 *Id.* at 477–78, 489.

tered, provided they "considered" the defendant's youthfulness.[118]

While the Court was silent concerning any formal state narrowing requirement, there is reason to believe that the *Miller* Court did intend some limitations. Although not binding, Justice Breyer's concurrence performs a modest offense-based narrowing function by finding that the Eighth Amendment explicitly limits life without parole sentences to intentional homicides and specifically excludes felony murder.[119] Moreover, the majority opinion concluded that, in light of children's reduced culpability and capacity for change, sentences of life without parole would be "uncommon."[120] The Court clarified that this was particularly so because of the difficulty sentencers were likely to have "distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[121] In doing so, the Court appeared to fashion two substantive guidelines for sentencers: (1) life without imprisonment should be imposed rarely; and (2) it is an appropriate punishment only for defendants whose corruption is irreparable.

These sentencer guidelines received reinforcement in *Montgomery v. Louisiana*, a decision exploring the retroactivity of *Miller*.[122] To find *Miller* retroactive, the Court had to determine whether its holding amounted to a new substantive rule of constitutional law or merely found that new criminal procedures are constitutionally required to impose life without parole on children convicted of homicides.[123] The Court defined substantive rules as those that limit the state's power to punish: "Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments

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118 The failure to explicitly require guidelines in *Miller* opened the door to the success of this very argument in *Jones v. Mississippi*. 141 S. Ct. 1307, 1311 (2021) ("In *Miller*, the Court mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence.").

119 *Miller*, 567 U.S. at 490–92 (Breyer, J., concurring).

120 *Id.* at 479 (majority opinion).

121 *Id.* at 479–80.

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

123 *Id.* at 198 (discussing retroactivity analysis under *Teague v. Lane*, 498 U.S. 288 (1989)). *Teague* also held that watershed rules of procedural law were retroactive; however, the Court eliminated this possibility in *Edwards v. Vannoy*. 141 S. Ct. 1547, 1560 (2021) ("It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must 'be regarded as retaining no vitality.'").

altogether beyond the State's power to impose."[124] By contrast, procedural rules control only the "*manner of determining* the defendant's culpability."[125] When a procedural error occurs, the defendant's confinement may nevertheless be lawful; however, such is not the case with a violation of substantive law.[126] As a consequence, new substantive rules are retroactive, while new procedural rules are not.[127]

In holding that *Miller* was retroactive, the Court found that it substantively limited the state's power to impose life without parole on most children, whose homicide crimes reflect "the transient immaturity of youth," while permitting the power to impose the punishment on "the rare juvenile offender whose crime reflects irreparable corruption."[128] Thus, for the "vast majority" of children, life without parole is a sentence that the state lacks the power to impose.[129] While granting that *Miller* had a procedural component in its requirement of an individualized sentencing hearing, the Court found that this procedure simply gave defendants a mechanism to show that they were members of the substantive category of people exempt from punishment: here, those whose crimes indicated transient immaturity, as opposed to irreparable corruption.[130] The hearing thus did not supplant *Miller*'s substantive holding; rather, it enforced it.[131]

While not explicitly discussed as imposing a formal narrowing requirement on states, the substantive limits that the *Montgomery* Court held *Miller* placed on sentencers served to theoretically function as such—albeit one judicially determined and focused on attributes of the offender instead of the offense.[132] By shrinking the class of children eligible for life without parole sentences to those whose crimes exhibited

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

125 *Id.*

126 *Id.*

127 *Id.* at 202.

128 *Id.* at 206–08 (internal quotations and citations omitted). In this way, *Miller*'s application of the proportionality doctrine may be read as an example of judicial narrowing based on offender attributes. *See supra* notes 66–68 and accompanying text.

129 *Montgomery*, 577 U.S. at 209 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.").

130 *Id.* at 209–10.

131 *Id.* at 210 ("The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.").

132 *See supra* notes 66–68 and accompanying text.

"irreparable corruption," *Miller* and *Montgomery* appeared to place a limitation on the discretion of sentencers, portending a sea change in the way juveniles would be sentenced for serious crimes. Their full-throated embrace of the analogy between the adult death penalty and children sentenced to life without parole raised hopes that additional Eighth Amendment protections might follow. However, 2021's *Jones v. Mississippi*, the product of a more conservative Court, would abruptly reverse this trend, upending any pretense of fettered discretion.

III
THE EMBRACE OF UNFETTERED DISCRETION

In this Part, I argue that the 2021 decision in *Jones v. Mississippi* fundamentally altered the Court's "children are different" jurisprudence by embracing unfettered discretion in sentencing children convicted of homicide. In embracing individualized sentencing without the counterweight of the narrowing requirement, the Court has created conditions likely to result in the arbitrary and racially discriminatory sentencing outcomes that it eschewed when it found capital sentencing unconstitutional in *Furman*.[133] By cherry-picking safeguards from its death penalty jurisprudence, the Court has ensured that future life without parole sentences for children will have the unintended result of violating the Eighth Amendment.

A. *Jones* and Unfettered Discretion

Following its decisions in *Miller* and *Montgomery*, the Court had explicitly embraced the death penalty's individualized sentencing requirement in the juvenile life without parole context.[134] While it never explicitly mentioned a narrowing requirement, aspects of *Miller* and *Montgomery* appeared to place at least some limitations on sentencer discretion by mandating that life without parole sentences be "uncommon" and reserved only for those children whose crimes indicated "permanent incorrigibility."[135]

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133 Contrary to what the Justices concluded in *Furman*, subsequent studies revealed that the racial effects of death sentences were driven more by the identity of the victim than that of the offender. In a famous example, the "Baldus study," which consisted of two statistical studies by Professors David C. Baldus, Charles Pulaski, and George Woodworth, analyzed over 2,000 Georgia murder cases before concluding that capital defendants who killed white victims were 4.3 times as likely to receive a death sentence as those who killed Black victims. *See* McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

134 Miller v. Alabama, 567 U.S. 460, 465 (2012); *Montgomery*, 577 U.S. at 208.

135 *Miller*, 567 U.S. at 479–80; *Montgomery*, 577 U.S. at 208–09.

The state of Virginia originally challenged *Montgomery*'s interpretation of *Miller*, when it sought certiorari in response to the Fourth Circuit's reversal of the life without parole sentence of Lee Boyd Malvo, the teenage participant in the infamous D.C. Sniper case.[136] The state contended that *Montgomery* had inappropriately expanded *Miller*'s holding, primarily by suggesting that the ruling barred *non-mandatory* sentences of life without parole where the sentencer failed to determine whether a defendant's crimes were consistent with permanent incorrigibility.[137] The Court granted certiorari, and while the oral argument focused on the non-mandatory question, multiple justices made clear that they viewed *Miller* as having held that life without parole was only appropriate for "the irretrievably corrupt."[138] In particular, Justice Kavanaugh and Justice Kagan agreed on this point:

> JUSTICE KAGAN: That's –that's just to say you wish *Montgomery* was a different opinion. It's not a different opinion. It -it —it creates the test that it creates based on the language in *Miller*, which, you're right, was based on the language in *Roper*, . . . but there's a clear rule that comes out of it, which is this distinction between the irretrievably corrupt and all others.
>
> MR. FEIGIN: Well, Your Honor, I don't think it's an especially clear rule, in part because it kind of —if I may use the word fudges a little bit the way this Court's described substantive rules by describing it in procedural terms. Usually, you describe a class by reference to some objective fact, like –
> . . .
> JUSTICE KAVANAUGH: Sorry. The objective fact is the incorrigible.

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136 Petition for Writ of Certiorari at 1–3, Mathena v. Malvo, 140 S. Ct. 919 (2020) (No. 18-217), 2018 WL 3993386. The "D.C. Sniper" case refers to the 2002 sniper shootings of more than twelve random people in the D.C. metro area, including parts of Maryland and Virginia. Malvo v. Mathena, 893 F.3d 265, 267 (4th Cir. 2018), *abrogated by* Jones v. Mississippi, 141 S. Ct. 1307 (2021). John Allen Muhammed and then 17-year-old Lee Boyd Malvo were convicted of the murders. Amy Howe, *Justices Grant Four New Cases (Corrected)*, SCOTUSBLOG, (Mar. 18, 2019), https://www.scotusblog.com/2019/03/justices-grant-four-new-cases-2/ [https://perma.cc/BG8T-Y924]. Muhammad was sentenced to death and was executed in 2009, while the teenaged Malvo received multiple life without parole sentences. *Id.*

137 Petition for Writ of Certiorari, *supra* note 136 at 16; Brief for Petitioner at 6, Mathena v. Malvo, 140 S. Ct. 1919 (2020) (No. 18-217), 2019 WL 2500424.

138 Transcript of Oral Argument at 30–32, Mathena v. Malvo, 140 S. Ct. 919 (2020) (No. 18-217), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-217_5hdk.pdf [https://perma.cc/5N5Z-M5CZ] [hereinafter Transcript of *Malvo* Oral Argument].

> . . .
> JUSTICE KAGAN: Those are the people who can't —you cannot sentence in a certain kind of way.
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> JUSTICE KAVANAUGH: Right.
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> MR. FEIGIN: Well, Your Honor, I think, and Justice Kavanaugh was just getting at this, it's not really an objective fact. It's a judgment that someone's going to have to make. As the Court –
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> JUSTICE KAVANAUGH: But that's the category –that's –I'm done.[139]

The Court never reached a conclusion in *Malvo* because Virginia subsequently enacted legislation that rendered all children sentenced to life imprisonment parole eligible after twenty years of incarceration.[140] Because the issue was now moot as to Mr. Malvo, the parties filed an agreement asking the Court to dismiss the petition, and the Court complied.[141]

Two weeks later, the Court granted certiorari in *Jones v. Mississippi*.[142] In that case, Brett Jones had initially been sentenced to mandatory life without parole in 2004 for killing his grandfather.[143] Following *Miller*, he was granted a new sentencing hearing, where he was again sentenced to life without parole, despite having introduced evidence of his rehabilitation while in prison.[144] In explaining his decision, the resentencing judge failed to determine whether Jones was permanently incorrigible but instead indicated his understanding that "*Miller* requires that the sentencing authority consider both mitigating and the aggravating circumstances."[145] The court further explained its decision by noting the brutality of the murder and the lack of any evidence that then-15-year-old Jones had "inescapable home circumstances."[146]

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139 *Id.* at 30–31. Eric C. Feigin was the assistant solicitor general for the United States who argued the case as amicus curiae in support of the Virginia warden.

140 *U.S. Supreme Court Dismisses Juvenile Life Without Parole Case Following New Virginia Legislation*, A.B.A. (Mar. 10, 2020) https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/us-supreme-court-juvenile-life-without-parole/ [https://perma.cc/C9CM-689S].

141 Mathena v. Malvo, 140 S. Ct. 919 (2020).

142 140 S. Ct. 1293 (2020).

143 Jones v. State, 285 So. 3d 626, 628–29 (Miss. Ct. App. 2017).

144 *Id.* at 630–31.

145 Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848, at *6 (Miss. Nov. 27, 2018) (en banc) (quoting state appellate court judge).

146 *Id.* at *7.

The U.S. Supreme Court granted certiorari on the question of whether sentencing judges must determine that a child is permanently incorrigible before imposing a sentence of life without parole. Although not explicitly framed as such, the case proceeded as a contest concerning sentencer discretion. The petitioner argued for a limit placed on discretion: because *Miller* banned life without parole sentences for all but the permanently incorrigible, the sentencing court must first determine that a defendant is permanently incorrigible before imposing a sentence of life without parole.[147] In doing so, the petitioner harkened to the judicially determined narrowing of the Court's proportionality jurisprudence.[148] He characterized the permanent incorrigibility standard as an "eligibility rule" and compared the requested determination to the required finding that a defendant lacked intellectual disability before the death penalty could be imposed:

> [W]hen it is an eligibility rule like we have here, . . . it is like the *Atkins* eligibility rule based on intellectual disability or the *Ford* eligibility rule based on . . . insanity.
>
> In those cases, the Court requires a determination. It may not be a formal finding, and, again, that is not what we are saying is required here, but the judge has to determine whether the defendant fits within the class that can be subjected to the punishment . . . .[149]

Without the permanent incorrigibility standard as a gatekeeper, the petitioner argued, *Miller* sentencing would become a "free-for-all."[150]

The State eschewed this interpretation and argued that *Miller* only required discretionary sentencing: sentencers must merely consider a defendant's "youth and its attendant characteristics before exercising discretion to impose a life-without-parole sentence."[151] Appearing as amicus curiae in support of Mississippi, the Solicitor General's Office argued that the very act of sentencing a child to life without parole rendered the

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147 Transcript of Oral Argument at 84–85, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/18-1259_e2p3.pdf [https://perma.cc/HWM6-3E88] [hereinafter Transcript of *Jones* Oral Argument].

148 *See supra* notes 66–68 and accompanying text.

149 Transcript of *Jones* Oral Argument, *supra* note 147, at 22, 33–34; *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1315 (2021) ("Jones analogizes to cases where the Court has recognized certain eligibility criteria, such as sanity or a lack of intellectual disability, that must be met before an offender can be sentenced to death.").

150 Transcript of *Jones* Oral Argument, *supra* note 147, at 86.

151 *Id.* at 40–41.

child "permanently incorrigible" because it constituted the judge's determination that the "the distinctive attributes of youth have [not] diminished the penological justifications for life without parole."[152]

In a 6-3 decision along ideological lines, Justice Kavanaugh's majority opinion sided with the State, holding that, despite *Montgomery*'s ruling that *Miller* put forth a substantive rule, "[i]n *Miller*, the Court mandated 'only that a sentencer follow a *certain process*—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence."[153] Had the Court treated permanent incorrigibility as an eligibility factor, as the petitioner urged, it would have functioned as a de facto narrowing requirement, requiring the Court to exempt from life without parole sentences certain offenders—children who put forth credible evidence that they were capable of rehabilitation. By narrowing the class of offenders to the theoretical "worst of the worst," this requirement would have functioned to fulfill *Miller*'s mandate that such sentences be "uncommon." By instead relegating *Miller*'s requirement to mere consideration of youth, the Court rejected any meaningful, substantive limits on sentencer discretion.

But the opinion did not stop there. The Court concluded not only that sentencers need not determine whether a defendant is "permanently incorrigible" but also that the Constitution did not require them to engage in fact finding *of any kind* before imposing a life without parole sentence.[154] Justice Kavanaugh made clear that judges need not ever explain their reasoning before sentencing a child to life without parole.[155] Instead, just as they are in the adult federal sentencing context, judges are presumed to follow the law:

> [A]n on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. . . . [I]f the sentencer has discretion to consider the defendant's

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152 *Id.* at 67–68.

153 *Jones*, 141 S. Ct. at 1311 (emphasis added). Justice Thomas concurred in the judgment but wrote separately that the Court should have held that *Montgomery* was wrongly decided. *Id.* at 1323 (Thomas, J., concurring) ("[T]he majority adopts a strained reading of *Montgomery v. Louisiana*, instead of outright admitting that it is irreconcilable with *Miller v. Alabama*—and the Constitution. The better approach is to be patently clear that *Montgomery* was a 'demonstrably erroneous' decision worthy of outright rejection." (internal citations omitted)).

154 *Id.* at 1311, 1323 (holding that the constitution does not demand "policy approaches" such as requiring sentencers to engage in fact finding or directing them to "explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth").

155 *Id.* at 1323.

> youth, the sentencer *necessarily will consider* the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid *considering* that mitigating factor.[156]

By reducing the requirement of "considering" to a pro forma act, the Court rendered sentencer discretion nearly limitless. Moreover, in this regime, the only way a life without parole sentence could be deemed unconstitutional under *Miller* would be in the unlikely event that the sentencing judge was to "expressly refuse[ ] as a matter of law to consider the defendant's youth."[157]

The Court's opinion thus leaves these sentencing decisions practically unreviewable. While Justice Kavanaugh ostensibly left the door open for individuals like Jones to raise an as-applied Eighth Amendment claim based on disproportionate sentencing,[158] this avenue provides no realistic hope of relief. The Court has made clear—even in the death penalty context—that the Eighth Amendment does not require comparative proportionality review, where courts would assess a defendant's sentence in the context of others who received life without parole sentences to determine if the defendant is an outlier.[159] This leaves traditional proportionality review, where the reviewing court determines if the defendant's individual sentence is disproportionate to the offense in light of the penological goals served by the sentence.[160] Because sentencing is a factual determination, the standard of review in these cases is highly deferential,[161] with appellate courts typically affirming unless

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156 *Id.* 1319 (emphasis added).

157 *Id.* at 1320 n.7.

158 What exactly this claim would entail is up for debate. William Berry has argued that individual as-applied challenges in the *Miller* context should receive heightened scrutiny. *See* William W. Berry III, *The Evolving Standards, As-Applied* (July 15, 2021) (unpublished manuscript) (on file with author) [hereinafter Berry, *Evolving Standards*].

159 Pulley v. Harris, 465 U.S. 37, 45 (1984).

160 *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 72–73, 92 (2011) (discussing individual proportionality analysis of death sentences); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 833 (1999) (referencing "traditional" proportionality review where a reviewing court determines the sentence is "disproportionate to the offense").

161 *See* Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 608 (2009) ("[B]ecause of the factual nature of criminal cases, trial courts have considerable influence on case-by-case outcomes.").

the sentencing decision amounts to an abuse of discretion. In discussing the as-applied challenge, the Court cited to *Harmelin v. Michigan*,[162] a case where it upheld the constitutionality of a life without parole sentence for an adult convicted of possessing 672 grams of cocaine.[163] Should reviewing courts apply *Harmelin*,[164] it is hard to imagine them reversing the same sentence when it was imposed for a homicide crime.

That this level of discretion might result in arbitrary sentencing outcomes was not lost on the Court, nor was it a concern. The Court seemed to take as given the fact that sentencer identity alone would determine some outcomes: "Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth."[165] This concession may have been an attempt to divorce the Court's child sentencing jurisprudence from its death penalty jurisprudence so that advocates would be less likely to demand the same procedural protections. Justice Kavanaugh summed up the Court's "children are different" jurisprudence in this limited way: "Youth matters in sentencing."[166] By so stating, he sent a message to sentencing judges, like the judge who reimposed life without parole on Evan Miller: the Court would not interfere in these decisions.

B. The Dangers of Unfettered Discretion

The *Jones* Court's conferral of discretion on sentencing judges to impose life without parole sentences on children—fettered only by a nearly unreviewable command to "consider" the defendant's youth—is a recipe for arbitrary and racially discriminatory sentencing outcomes. The problem of discretion in the criminal legal system has long been a topic of debate

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162 501 U.S. 957 (1991).

163 Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021) (citing *Harmelin*, 501 U.S. at 996–1009 (Kennedy, J., concurring)).

164 In her dissenting opinion in *Jones*, Justice Sotomayor noted that because *Harmelin* applied to adults, it was an inappropriate lens with which to view an as-applied Eighth Amendment proportionality claim concerning a child. *Id.* at 1337 n.6 (Sotomayor, J., dissenting). Instead, she urged reviewing courts to apply the *Miller* and *Montgomery* proportionality analysis, i.e., that a sentence of life without parole is unconstitutional for a child displaying "transient immaturity." *Id.* In so stating, she emphasized that the majority opinion makes clear that *Miller* and *Montgomery* are binding authority: "For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law." *Id.* at 1337.

165 *Id.* at 1319 (majority opinion).

166 *Id.* at 1316.

in the legal literature. Scholars have criticized unfettered discretion in the context of prosecutorial power,[167] federal sentencing,[168] and capital juries.[169] Empirical evidence has established that, without guidance, human actors rely on intuition, which factors their own personal prejudices and biases into decision-making.[170]

Unfettered discretion can have particularly negative effects on Black defendants and on defendants accused of harming white victims.[171] Stereotype activation, where unconscious

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167 *See, e.g.*, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012) (finding that prosecutors, who "enjoy more unreviewable discretion than any other actor in the criminal justice system," are susceptible to unconscious bias in decision-making); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981) ("The risk of unequal treatment created by standardless discretion is troubling not only as a threat to due process but in its own right as well. Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community – racial and ethnic minorities, social outcasts, the poor – will be treated most harshly.").

168 *See, e.g.*, Kreiner Ramirez, *supra* note 161 (arguing judges no longer bound by federal sentencing guidelines will fall prey to unconscious biases unless they take affirmative steps to become culturally competent).

169 *See* Miller, *Power to Discriminate*, *supra* note 25, at 837–48 (arguing that capital juries, which are disproportionately white, have the "power to discriminate" because of the lack of guidelines about what constitutes mitigating factors in individualized sentencing procedures).

170 Kreiner Ramirez, *supra* note 161, at 592; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3, 5, 31 (2007) (concluding after empirical study that "judges generally make intuitive decisions but sometimes override their intuition with deliberation" and that their "intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system"); Smith & Levinson, *supra* note 167, at 797 (arguing that "implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways"); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998) (suggesting unconscious biases in prosecutors result from their similarities with victims).

171 *See, e.g.*, Miller, *Power to Discriminate*, *supra* note 25, at 838–40 (discussing empirical studies indicating that the death penalty is disproportionately imposed on Black defendants and those convicted of killing white victims); Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 844 (2019) (study of 500 potential jurors finding that "participants more strongly associated Black faces with the concepts of retribution, payback, and revenge, and White faces with the concepts of rehabilitation, treatment, and redemption"); M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 329 (2018) ("Whether because of language and demeanor that differs from the court's cultural expectations or through a priori biased character assessments, sentencing authorities are likely to view African American defendants' expressions of remorse as insincere."); Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck & Jennifer L. Eberhardt, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE, e36680 (2012) (study of 735 white Americans indicating that, when

bias fueled by white supremacy infiltrates decision-making, explains much of this behavior.[172] Social psychologists have concluded that people subconsciously construct positive or negative associations based on group membership in, among other things, a particular race.[173] Americans tend to associate Blackness with negative traits, such as criminality, deviance, and retribution, and whiteness with positive traits, such as good citizenship, rehabilitation, and a propensity for victimhood.[174] A series of four studies found that people tend to view Black children as older and less innocent than white children.[175] Decision makers can fall prey to these associations when environmental cues activate these stereotypes, often unconsciously.[176] Stereotype activation can also lead to confir-

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presented a scenario involving a rape by a Black juvenile defendant, participants viewed juveniles as having culpability more similar to adults and indicated more support for harsh sentencing than they did when the same scenario involved a white juvenile defendant); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCH. REV. 242, 242 (2002) (discussing over 100 studies that demonstrate that White people have "automatic negative associations" with Black or other non-white groups); *see also* Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1, 20 (2013) ("[T]he kinds of vague instructions about the jury's deliberative task that are used in capital cases, combined with the absence of instructions designed to promote empathy for the offender, can further enable the jury's emotional distancing from a black capital defendant.").

172 Jamie L. Flexon, *Addressing Contradictions with the Social Psychology of Capital Juries and Racial Bias*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP*, 113–19 (David P. Keys & R. J. Maratea eds., 2016) (discussing stereotype activation); Blair, *supra* note 171 ("[E]ven subliminally presented cues [can] activate stereotypes, and furthermore, those activated stereotypes could influence interpersonal judgments."). *See generally* CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014, http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf [https://perma.cc/79MU-MKPJ] (cataloguing thirty years of social science research on unconscious racial bias); Gordon B. Moskowitz, Peter M. Gollwitzer, Wolfgang Wasel & Bernd Schaal, *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCH. 167 (1999).

173 Kreiner Ramirez, *supra* note 161, at 592. *See generally* STAATS, *supra* note 172.

174 Levinson, Smith & Hioki, *supra* note 171, at 844; William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Compositions*, 3 U. PA. J. CONST. L. 171, 219 (2001) ("[C]ulturally rooted racial stereotypes may tend to demonize and dehumanize blacks accused of lethal violence by portraying them as especially dangerous.") [hereinafter Bowers, Steiner & Sandys, *Death Sentencing*]; Flexon, *supra* note 172, at 113.

175 Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 540 (2014).

176 Flexon, *supra* note 172, at 114.

mation bias, where people discount evidence that conflicts with their preconceived notions.[177]

A decision maker's identity is also critical, because research indicates that people tend to favor members of their own group.[178] Studies have consistently demonstrated that people tend to associate members of out-groups with non-human animals at a greater rate than they do members of their in-group, contributing to the dehumanization of out-group members.[179] Decision maker identity has been studied extensively in the capital sentencing context.[180] All-white juries are the most likely to impose death sentences.[181] Juries with five or more white male members significantly increased the likelihood of a death sentence in cases involving Black defendants and white victims.[182] Conversely, the presence of even a single Black man on the jury is significant: when at least one juror was an African-American male, the juries imposed death sentences in only 42.9% of cases, compared to 71.9% when none of the jurors were African Americans.[183]

Studies have shown that judges possess the same implicit biases as lay people and that these biases impact their judgment.[184] Moreover, nearly 90% of judges must stand for popular election at some point.[185] While it is debatable whether judges as a whole impose harsher sentences than juries,[186] in the capital context, elected judges frequently overrode the life verdicts rendered by juries to impose a death sentence, but

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177 JON A. KROSNICK & RICHARD E. PETTY, ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 8 (Richard E. Petty & Jon A. Krosnick eds., 1995).

178 Kreiner Ramirez, *supra* note 161, at 592.

179 Goff, Jackson, Di Leone, Culotta & DiTomasso, *supra* note 175, at 527.

180 I have argued in a previous article that the modern death penalty fails to meaningfully guide juror discretion at the sentencing stage. Miller, *Power to Discriminate*, *supra* note 25.

181 *See* Bowers, Steiner & Sandys, *Death Sentencing*, *supra* note 174, at 193 n.104.

182 *Id.* at 192–93.

183 *Id.* at 193–94.

184 Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

185 Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 392 (2010) [hereinafter Steiker & Steiker, *ALI Report*].

186 Taslitz, *supra* note 171, at 23 ("Empirical research has also failed to definitely determine whether noncapital juries are harsher or more lenient than judges."); Brent L. Smith & Edward H. Stevens, *Sentence Disparity and the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States*, 9 CRIM. JUST. REV. 1, 6 (1984) (study of sentencing from 1957 to 1982 that concluded that judge sentencing was beginning to become as arbitrary as jury sentencing, and both types of sentences were increasing in severity).

rarely did the opposite.[187] There is also evidence that judicial sentencing can be racially discriminatory. In Alabama, before the practice of judicial override was outlawed in 2017,[188] 55% of those sentenced to death via judicial override were African American, and 75% of the crimes involved white victims.[189] A study of 216 people sentenced by Florida judges from 1998 to 2002 concluded that defendants with stronger Afrocentric features received longer sentences than other defendants.[190] A study finding that attitudes about sentencing vary significantly across racial, gender, and educational strata, but are remarkably consistent within strata, has inspired one scholar to argue for jury sentencing on the grounds that a judge's single perspective is inherently inferior to the multiple perspectives brought by jurors of different backgrounds.[191] Moreover, judges "come from fairly uniform racial and class backgrounds."[192] As of 2019, 80% of federal judges were white and over 73% were male.[193] Similarly, a 2017 study of state court judges revealed that 80% were white and nearly 70% were

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187 Steiker & Steiker, *ALI Report*, *supra* note 185, at 393 n.90 ("Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life. In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life."). The practice of judicial override ended in 2017, when Alabama, the lone remaining state allowing override, passed legislation to outlaw it. Kent Faulk, *Alabama Gov. Kay Ivey Signs Bill: Judges Can No Longer Override Juries in Death Penalty Cases*, ADVANCE LOCAL (Mar. 6, 2019), https://www.al.com/news/birmingham/2017/04/post_317.html [https://perma.cc/T65C-YUPC] [hereinafter Faulk, *Alabama Governor*].

188 Falk, *Alabama Governor*, *supra* note 187.

189 O.H. Eaton, Jr., *Supreme Court Must Eradicate Judicial Override in Death Penalty Cases*, BL NEWS (Nov. 17, 2020), https://news.bloomberglaw.com/us-law-week/supreme-court-must-eradicate-judicial-override-in-death-penalty-cases [https://perma.cc/L2HW-W6NL].

190 William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 345–52 (2005).

191 Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 986–87 (2003) (citing Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's Views*, 14 LAW & SOC'Y REV. 223 (1980)).

192 Taslitz, *supra* note 171, at 23.

193 DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, CTR. FOR AMERICAN PROGRESS, BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY 1 (2019), https://americanprogress.org/wp-content/uploads/2019/10/JudicialDiversity-report-3.pdf?_ga=2.124532684.739342235.1658104696-1510815157.1658104696 [https://perma.cc/Q78N-NLQR].

male, leaving the authors to conclude that "[w]hite men dominate state courts."[194]

Unfettered discretion exacerbates these problems, as evinced by the arbitrary and racially discriminatory outcomes of the pre-*Furman* death penalty. Prior to 1972, sentencers had unlimited discretion to impose death for capital crimes. Juries were instructed that the decision to impose death should be "made according to their conscience, or in their sole discretion, without any further elaboration."[195] As a result, death sentences were levied on those convicted of burglary, armed robbery, and kidnapping.[196] At the same time, the Justices on the *Furman* Court noted that less than 20% of those convicted for murder were actually sentenced to death.[197] In Georgia, home to the specific capital sentencing scheme under review in *Furman*, and where all levels of homicide were death-eligible, the number was closer to 15%.[198]

Geography was often a determining factor, as southern states were disproportionately responsible for executions. Of the 3,859 persons executed between 1930 and 1967, 2,306 of them—nearly 60%—were convicted and sentenced in southern states.[199] The NAACP Legal Defense Fund noted that, for this time period, "[s]entences of death and executions for other crimes than murder [were] virtually exclusively a southern phenomenon."[200] Evidence also suggested that racial discrimination factored into death sentences. Nearly half of those

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194 Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1903–08 (concluding also that "[w]hite men account for roughly equal numbers of trial and appellate judges on the state bench"); *see also* Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 878 (2014) ("Juries are better positioned to assess matters reflecting their communities' values than are judges because they are more representative of their communities than judges. In contrast to judges, juries are drawn from the local vicinage and are considered bodies 'truly representative of the community.'").

195 Steiker & Steiker, *ALI Report*, *supra* note 185, at 376; *see also* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent as Amici Curiae at 49–50, *Boykin v. Alabama*, 395 U.S. 238 (1969) (No. 642), 1968 WL 112750 ("[T]he selective judgments made at the three most critical stages of a capital proceeding—the prosecutor's decision whether to seek the death penalty, the jury's decision whether to impose it, and the governor's decision whether to commute it—are all made without the slightest pretense of standards or guidelines.") [hereinafter LDF Amicus Brief].

196 Steiker & Steiker, *ALI Report*, *supra* note 185, at 376.

197 Furman v. Georgia, 408 U.S. 238, 386 n. 11 (1972) (Burger, C.J., dissenting); *see also* Gregg v. Georgia, 428 U.S. 153, 182 n.26 (1976); Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976).

198 Shatz & Rivkind, *supra* note 64, at 1288 n.28, 1289.

199 LDF Amicus Brief, *supra* note 195, at 44.

200 *Id.* at 45.

executed for murder were Black defendants, as were 89% of those executed for rape.[201]

Because life without parole is the juvenile equivalent of the adult death penalty,[202] arbitrary sentences would violate the Eighth Amendment because they "are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[203] There was evidence of these effects even prior to *Jones*, as states responded to *Miller*. The overall number of life without parole sentences for children decreased significantly, in part because 21 states and the District of Columbia outlawed the sentence.[204] But from 2012 to 2018, racial disparities in life without parole sentences increased, as the end of mandatory sentencing also increased judicial discretion in states that retained the sentence.[205] After *Miller*, 72% of those receiving new sentences of life without parole were Black children compared to pre-*Miller* numbers of almost 61%.[206] Nor were these sentences uniformly distributed. Prosecutions in Louisiana and Michigan far exceeded those in other states in seeking life without parole.[207] Louisiana was responsible for nearly one-third of new life without parole sentences following *Miller*.[208] In re-sentencing hearings following *Montgomery*, Louisiana prosecutors sought the reimposition of life without parole in 30% of cases, while Michigan prosecutors did so in

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201 *Id.* at 52.

202 *See* Graham v. Florida, 560 U.S. 48, 69–70 (2010).

203 Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). Although many of the *Furman* justices expressed concerns about racially discriminatory outcomes, Stewart's opinion only applied to arbitrary outcomes. Stewart considered and dismissed as unproved the argument that the death penalty was imposed in a racially discriminatory manner. *Id.* at 310 ("My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side." (citation and footnotes omitted)). Arguments that an individual's death sentence violates the Equal Protection Clause under a disparate impact theory have failed because the Court is unwilling to consider statistical evidence as a basis for proving the claim. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

204 CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 5 (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/3D7Y-K9SQ]. Since *Montgomery*, the number of children serving life without parole sentences has decreased 60%, from 2,800 to 1,100. *Id.* at 6.

205 *Id.* at 2. The relationship between increased discretion and increased racial discrepancies is only correlative. A larger study is needed to determine that white defendants sentenced to life without parole were not disproportionately found in states that banned these sentences following *Miller*.

206 *Id.*

207 *Id.* at 7.

208 *Id.*

60% of cases.[209] Following a 2017 50-state survey, the Associated Press observed that states had responded with "an uneven patchwork of policies," concluding that "[t]he odds of release or continued imprisonment vary from state to state, even county to county, in a pattern that can make justice seem arbitrary."[210]

A state's degree of judicial discretion provides one explanation for these outcomes. In her dissenting opinion in *Jones*, Justice Sotomayor compares the sentencing results in two states: Mississippi and Pennsylvania.[211] In Mississippi, where the failure to require a finding of permanent incorrigibility left judicial discretion unbounded, more than 25% of re-sentencings resulted in the re-imposition of life without parole; however, in Pennsylvania, where the state adopted procedural guidelines to cabin judicial discretion, including a rebuttable presumption against life without parole, only 2% of defendants were re-sentenced to life without parole.[212] One critic has observed a similar trend in federal court: "[T]he lack of workable guidelines for district court judges faced with *Miller* defendants has already resulted in a group of resentencing decisions that wildly diverge for no legitimate reason."[213] While these conclusions observe correlations, more research is needed to conclusively demonstrate that unguided discretion has increased arbitrariness and racially discriminatory outcomes following *Miller*.

Despite its dangers, discretion is also an unavoidable part of the criminal legal system. Rules cannot cover every conceivable scenario, requiring individuals to exercise judgment and make decisions.[214] One solution is to confine these decisions within a set of guidelines or principles to minimize the risk of

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209 *Id.*

210 Sharon Cohen & Adam Geller, *AP Exclusive: Parole for Young Lifers Inconsistent Across US*, ASSOCIATED PRESS (July 31, 2017), https://apnews.com/article/mo-state-wire-courts-ar-state-wire-mi-state-wire-north-america-a592b421f7604e2b88a170b5b438235f [https://perma.cc/JR3F-ZQPG].

211 Jones v. Mississippi, 141 S. Ct. 1307, 1333–34 (2021) (Sotomayor, J., dissenting).

212 *Id.* at 1334.

213 Lucy Gray-Stack, Miller *in Federal District Court: What the Stories of Six Juvenile Lifers Reveal About the Need for New Federal Juvenile Sentencing Policy*, 44 N.Y.U. REV. L. & SOC. CHANGE 581, 583 (2021).

214 Kreiner Ramirez, *supra* note 161, at 597–98; Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960) ("Discretion is an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals.").

arbitrariness and bias.[215] In the next section, I discuss several ways that sentencer discretion may be limited to minimize arbitrary and racially discriminatory outcomes in the child sentencing context.

IV
POSSIBLE STATE SOLUTIONS

With *Jones*'s endorsement of unfettered discretion, arbitrary and racially biased sentencing outcomes will likely increase. In this section, I discuss solutions that states may take to curtail these results. The first and best solution to eliminate these outcomes is for states to end life without parole sentences for children. This was the path that many states took following *Miller*, leaving just 16 states that actively sentence children to life without parole.[216] Given the inherent subjectivity involved in sentencing and the limitations on the diversity of sentencers, eliminating these sentences is the only way to prevent bias and randomness from impacting who is sentenced to life without parole.[217]

For those states that choose to retain life without parole as a sentence for children, I discuss possible procedural reforms. I begin by rejecting the most obvious reform: voluntary adoption of a permanent incorrigibility standard. I explain why this standard, though beneficial for some individuals, is unlikely to reduce arbitrary and racially discriminatory sentencing outcomes. Next, I propose three procedural requirements that

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215 Pound, *supra* note 214, at 927 ("It has been necessary to recognize that, because there is no rule in the strict sense, it does not follow that a tribunal on the one hand has no power to do justice, when appealed to therefor, or on the other hand has unlimited power of doing what it chooses on any grounds or on no grounds. It is to reach a reasoned decision in the light of principles."); Guthrie, Rachlinski & Wistrich, *supra* note 170, at 28 (interpreting results of empirical study to deduce that existence of "a web of rules" limiting discretion to determine probable cause "might enable trial judges to avoid the hindsight bias"); *id.* at 41 ("Multifactor tests can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition."); Miller, *Power to Discriminate*, *supra* note 25, at 848 (arguing that capital jurors' unfettered discretion to consider mitigating evidence in sentencing imbues them with a "power to discriminate").

216 Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/HA5P-BUHV]. Life without parole is not permitted in twenty-five states currently. *Id.* Nine more states theoretically permit the sentence but have no one serving it. *Id.*

217 Charles Black famously made this point in the capital context, arguing human frailty would inevitably infect capital sentencing outcomes. CHARLES L. BLACK, Jr., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 76–78 (2d ed. 1981).

would limit these outcomes: genuine narrowing, jury sentencing, and "mitigation as a matter of law" sentencing instructions. Not only are these requirements consistent with the Eighth Amendment, but I also argue that they are critical to avoiding cruel and unusual outcomes. While such solutions may be perceived as legitimating by those favoring abolition, the three proposed reforms seek to minimize harm in states where abolition is rejected. And while the Court's decision in *Jones* does not mandate the reforms, it explicitly does not forbid them: "[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."[218] Critically, these three proposed reforms will also work together to fulfill *Miller*'s substantive mandate that life without parole sentences for children be rare.[219]

While several of my recommendations borrow from death penalty sentencing procedure, I am not arguing for a mere replication. In the capital context, many of these protections have failed to function as intended. In a previous work, I argued that Supreme Court jurisprudence has watered down protective measures like the individualized sentencing requirement by failing to require sentencing guidelines and thereby maximizing the discretion of disproportionately white capital juries.[220] Scholars have written convincingly that other capital sentencing procedural protections have similarly been diluted in practice.[221] Consequently, arbitrary and racially discrimi-

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218 Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021). Justice Kavanaugh went on to specify, "States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States." *Id.*

219 Miller v. Alabama, 567 U.S. 460, 479 (2012).

220 *See* Miller, *Power to Discriminate*, *supra* note 25, at 837 ("[C]ommon practices that result in disproportionately white juries have limited the efficacy of the individualized sentencing requirement.").

221 *See, e.g.*, John Mills, *How to Assess the Real World Application of A Capital Sentencing Statute: A Response to Professor Flanders's Comment*, 51 U.C. DAVIS L. REV. ONLINE 77, 91–92 (2017) (arguing that the Arizona capital sentencing statute did not represent genuine narrowing because both the number and broad applicability of aggravators rendered nearly every first degree murder death-eligible); Steiker & Steiker, *ALI Report*, *supra* note 185, at 395 (discussing that the efficacy of the narrowing requirement has been limited by "aggravator creep," the proliferation of aggravators to the point where most murders become eligible for a death sentence); Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO STATE J. CRIM. L. 37, 50 ("The requirement of guided discretion,

natory outcomes remain the norm in capital sentencing.[222] I therefore distinguish each proposed solution from its death penalty analog to explain how similar failures may be avoided.

Importantly, to be most effective, I argue that all three requirements must be implemented together. Each requirement fills a gap left by the one that precedes it. Thus, picking and choosing among the requirements will likely result in an inadequate solution.

A. Ending Life Without Parole for Children

The only surefire way to eliminate racial bias and arbitrariness in *Miller* sentencing is for states to also eliminate life without parole for children. Regardless of the procedural protections enacted, individualized sentencing will always allow for sentencer discretion, requiring subjectivity and permitting bias to infect the process—a reality I explored in a previous work on capital sentencing.[223] Moreover, both judges and juries continue to be disproportionately white and middle class,

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though it was the first pillar of the Court's Eighth Amendment capital jurisprudence and though it represents the primary concern that led to the constitutional regulation of capital punishment in the first place, has turned out to be a relatively undemanding constraint. The guidance provided by the new generation of 'guided discretion' capital statutes has turned out be minimal in light of the proliferation of aggravating factors promulgated by state legislatures, the breadth with which they have been interpreted, and the open-ended quality of individualized mitigation."); *Panel One—The Capital Crime*, 80 IND. L.J. 35, 35 (2005) (remarks by Edwin Colfax discussing how aggravator creep prevented the Illinois statute from achieving the genuine narrowing that would reduce arbitrariness); William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 699–709 (2012) (arguing that states have not robustly applied the narrowing requirement and appellate review to eliminate arbitrariness); Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81–83 (Austin Sarat ed., 1999) (discussing the rapid increase of statutory aggravators).

222 *See, e.g.*, Miller, *Power to Discriminate*, *supra* note 25, at 837–40 ("The identity of those chosen to live and those chosen to die has not changed substantially in the post-*Furman* era. In the past forty years, capital punishment has consistently exhibited arbitrary and racist outcomes."); Berry, *Practicing Proportionality*, *supra* note 221, at 700 ("More than ever, commentators recognize that there is no way to distinguish defendants who receive the death penalty from those who do not."); Steiker & Steiker, *ALI Report*, *supra* note 185, at 369 ("An abundant literature . . . reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts.").

223 *See* Miller, *Power to Discriminate*, *supra* note 25, at 837 (discussing how individualized sentencing has resulted in arbitrary and racially discriminatory outcomes in the capital sentencing arena).

increasing the risk of anti-Blackness in sentencing.[224] Black children are especially at risk of disproportionate sentencing, as studies indicate they are more likely to be incorrectly perceived as older and more culpable than their white peers.[225]

Elimination as a solution is not farfetched. Prior to *Miller*, 45 states permitted children to be sentenced to life without parole.[226] The trend following *Miller* has been a movement away from these sentences. Half of the states currently ban the sentence for children, and another nine, while theoretically permitting it, have no one serving these sentences.[227] Although the bulk of the states abolished life without parole for children shortly after *Miller*, the trend has steadily continued, with Ohio and Maryland banning these sentences as recently as 2021.[228]

State legislatures have not been the only bodies to abolish life without parole for children. In 2018, the Washington Supreme Court invalidated life without parole punishment for children because it constituted cruel punishment under the state's constitution.[229] William Berry has argued that other states might follow suit, as many state analogs contain broader

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224 *See* Bowers, Steiner & Sandys, *Death Sentencing*, *supra* note 174, at 220 (finding that white jurors believe Black defendants are more likely to be dangerous than white ones, while Black jurors believe that any defendant who kills a Black victim is more likely to be dangerous); Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 184, at 1222 (discussing 2009 study finding anti-Black bias in white judges).

225 *See* Goff, Jackson, Di Leone, Culotta & DiTomasso, *supra* note 175, at 540 (2014) ("Black boys can be misperceived as older than they actually are and prematurely perceived as responsible for their actions during a developmental period where their peers receive the beneficial assumption of childlike innocence."); *see also* John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 77 (2017) (finding young Black men more likely to be perceived as larger and more capable of causing harm than their white counterparts).

226 CAMPAIGN FOR FAIR SENTENCING OF YOUTH, NATIONAL TRENDS IN SENTENCING CHILDREN TO LIFE WITHOUT PAROLE 3 (Feb. 2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf [https://perma.cc/V7YX-5GCD].

227 Rovner, *supra* note 216, at 1. While Texas, North Dakota, and South Dakota have eliminated life without parole as an option for defendants going forward, they do have individuals currently serving life without parole for crimes committed as juveniles. *Id.* at 2.

228 Daniel Nichanian, *Ohio Will No Longer Sentence Kids to Life Without Parole*, THE APPEAL (Jan. 13, 2021), https://theappeal.org/politicalreport/ohio-ends-juvenile-life-without-parole/ [https://perma.cc/29GY-X3DQ]; Elizabeth Weil Greenberg, *Maryland Bans Sentencing Children to Life Without Parole*, THE APPEAL (Apr. 13, 2021), https://theappeal.org/politicalreport/maryland-bans-sentencing-children-to-life-without-parole/ [https://perma.cc/CYC6-WM7C].

229 State v. Bassett, 428 P.3d 343, 346 (Wash. 2018).

language than the Eighth Amendment.[230] Moreover, should the trend to outlaw these sentences continue, it is possible that a future Supreme Court could entertain an argument that their rarity indicates a violation of the Eighth Amendment's evolving standards of decency.[231]

B. Rejecting Permanent Incorrigibility

For states committed to retaining life without parole, the desire to minimize the kind of blatantly unfair sentencing outcomes that compromise confidence in their criminal legal systems may motivate them to consider reforms. To many, the most obvious corrective to *Jones* would be to urge states to adopt a permanent incorrigibility standard for imposing life without parole on children. I do not make this recommendation because, while such a standard would undoubtedly benefit some individuals, it would do little to cure the problem of arbitrary and racially discriminatory sentencing going forward.

A permanent incorrigibility requirement would be most beneficial for defendants like Brett Jones,[232] who were originally sentenced to mandatory life without parole decades earlier, but later sought re-sentencing under *Miller*. Jones, like many of his brethren, had spent the intervening years actively engaged in rehabilitation.[233] Despite limited opportunities for those sentenced to life without parole, Jones earned his GED, became a reliable prison employee, undertook religious study, and made unprompted expressions of remorse.[234] Consequently, defendants like Jones are best positioned to provide concrete evidence of reform that prove they are not permanently incorrigible.

However, the standard becomes problematic in initial sentencing hearings where it serves as a predictor for the future behavior of child defendants. Because only a short time has elapsed between crime, conviction, and sentence, these defendants have not had time to accumulate evidence of their reform,

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230 William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1206 (2020).

231 Berry, *supra* note 158, at 26.

232 Brett Jones was originally sentenced to mandatory life without parole in 2005 for a crime committed in 2004. Adam Liptak, *Supreme Court to Consider When Juveniles May Get Life Without Parole*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/us/politics/supreme-court-teenagers-life-sentence.html [https://perma.cc/JS3Z-DLE4].

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

234 *Id.*

leaving it up to sentencers to determine who they might one day become as adults. In these circumstances, critics across a wide array of political perspectives have suggested that the standard is unworkable to the point of being antithetical to the human condition. Justice Alito has wondered aloud whether there are *any* human beings incapable of redemption,[235] while Rachel Lopez, Kempis Songster, and Terrell Carter—the latter two having themselves received sentences of life without parole—have argued that "all humans have the inner capacity to forgive and be forgiven, to transform and be transformed, and . . . the law should reflect these innate qualities."[236]

Philosophy aside, there is no evidence to suggest that the future criminal behavior of children may be accurately predicted.[237] Empirical studies have repeatedly found the presence of the same risk factors in children who grew into law-abiding adults as in those who later engaged in violent behavior.[238] Not only are such predictions inaccurate, but they also

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235 *See* Transcript of *Jones* Oral Argument, *supra* note 147, at 16.

236 Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 318 (2021).

237 *See, e.g.*, Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1657 (2019) ("All the limitations of predicting future dangerousness in adults become more pronounced when making predictions about whether a juvenile is capable of rehabilitation. There is substantial evidence to suggest that such predictions are impossible."); Kimberly Larson, Frank DiCataldo & Robert Kinscherff, Miller v. Alabama*: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 319, 335–36 (2013) ("[T]here is currently no basis in current behavioral science nor well-informed professional knowledge that can support any reliable forensic expert opinion on the relative likelihood of a specific adolescent's prospects for rehabilitation at a date that may be years to decades in the future."); Alex R. Piquero, *Youth Matters: The Meaning of* Miller *for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 355 (2013) ("[I]t is very difficult to predict early in the life-course which individual juvenile offender will go on to become a recidivistic adult offender."); Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 684 (2016) ("[P]rediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error.").

238 *See, e.g.*, JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 276, 289–90 (2003) (study observing 500 American men from childhood to age seventy that found future criminal behavior difficult to predict despite isolating risk factors); Rolf Loeber et al., *Findings from the Pittsburgh Youth Study: Cognitive Impulsivity and Intelligence as Predictors of the Age-Crime Curve*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1136, 1146 (2012) (finding study of Pittsburgh youth unsuccessful at predicting who would continue to offend into adulthood); *see also* Lila Kazemian, David P. Farrington & Marc Le Blanc, *Can We Make Accurate Long-Term Predictions About Patterns of De-Escalation in Offending Behavior?*, 38 J. YOUTH & ADOLESCENCE 384, 397 (2009) (noting that while the study predicted short-term behavior change, it did not

tend to result in false positives, overpredicting future criminality.[239]

Because the factors determining adult criminality in juveniles are difficult, if not impossible, to identify, a permanent incorrigibility standard provides little guidance for sentencers. With this standard, sentencer discretion remains effectively unchanneled, allowing decision makers to rely on intuition, including personal prejudices and biases.[240]

In these ways, a permanent incorrigibility standard resembles the notorious "future dangerousness" aggravator that exists in capital cases.[241] Future dangerousness, or the determination that an adult defendant is likely to be engaged in future violent behavior, is used as a basis to sentence these defendants to death in many states.[242] Scholars and courts alike have consistently criticized the standard as inaccurate,[243]

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indicate an ability to predict changes in offending behavior within individuals over long periods of time).

239 *See* Laub & Sampson, *supra* note 238, at 290 (discussing "the false positive problem," where prediction scales substantially overpredict future criminality"); Loeber et al., *supra* note 238, at 1139 (revealing a high false positive error rate for their study).

240 *See supra* notes 168, 170 and accompanying text.

241 I am not the first to make this comparison. An excellent student note has addressed the topic. *See* Marshall, *supra* note 237, at 1654–57, 1662–63.

242 The Texas capital sentencing scheme requires a finding of future dangerousness before death may be imposed. TEX. CODE CRIM. PROC. art. 37.071, § (2)(b)(1) (2021). Future dangerousness is a statutory aggravating factor in Idaho, Oklahoma, and Wyoming. IDAHO CODE § 19-2515(9)(i) (2021); OKLA. STAT. tit. 21, § 701.12.7 (2021); WYO. STAT. ANN. § 6-2-102(h)(xi) (2021). Many additional statutes permit consideration of future dangerousness as a non-statutory aggravating factor or in rebuttal of the defendant's mitigating factors. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 898-900 & nn.58–73 (2010) (listing states that allow consideration of future dangerousness as a non-statutory aggravating factor or to rebut defense mitigation) [hereinafter Berry, *Dangerousness*].

243 *See, e.g.*, Carla Edmondson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 895–910 (2016) (discussing studies indicating a failure to accurately predict defendants' future dangerousness); Thomas J. Reidy, Jon R. Sorensen & Mark D. Cunningham, *Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy*, 31 BEHAV. SCI. & L. 286, 299 (2013) ("[J]uries were right 90% of the time when predicting that future violence was not likely, and wrong 90% of the time when they predicted that future violence was likely."); Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 488 (2011) ("[T]he courts—and commentators—have consistently recognized that predictive adjudications, whether it be for future dangerousness or lack of control, are often unreliable or . . . simply inaccurate."); TEXAS DEFENDER SERVICE, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 23 (2004), https://www.prisonlegalnews.org/media/publications/tx_defender_service_subj_deadly_speculation_misleading_tx_capital_juries_with_false_predictions_of_future_dangerousness.pdf [https://perma.cc/9JVR-S4PL] (finding that expert predictions of future dangerousness

speculative,[244] and racially discriminatory.[245] For years—as vividly illustrated in *Buck v. Davis*, where an expert witness testified Duane Buck was more likely to re-offend in the future because he was Black[246]—Texas courts actively encouraged jurors to consider a defendant's race in these determinations.[247] While testimony of this type is no longer permitted, these associations persist in the racially coded language of some prosecutors' closing arguments.[248]

Consequently, while the permanent incorrigibility standard did present an opportunity to fetter judges' discretion in a way that would be meaningful to defendants seeking re-sentencing under *Miller*, it allows for too much subjectivity and bias to serve as a model standard for child defendants appearing for initial sentencing hearings. Accordingly, it is unlikely to reduce arbitrary and racially discriminatory outcomes going forward.

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were wrong 95% of the time with respect to 155 Texas capital defendants); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 362–63 (2003) (arguing that predictions about future dangerousness were too unreliable to be used in court).

244 *See, e.g.*, Berry, *Dangerousness*, *supra* note 242, at 907–08 ("[I]ncontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative.").

245 *See, e.g.*, Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 327–28 (2012) (discussing how data from the Capital Jury Project reveals racial bias in future dangerousness assessments); TEXAS DEFENDER SERVICE, *supra* note 243, at 42 (arguing that the juror's race and the defendant's race have an "undeniable effect on determinations of future dangerousness"); Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305, 317 (2002) ("[A]n African American is more likely to face a jury which will be more prone to sentence him to death on the future dangerousness predicate out of subconscious fears based on his race.").

246 137 S. Ct. 759, 767 (2017) (requiring merits consideration of capital defendant's claim that his trial counsel was ineffective for failing to object to expert testimony that he was more likely to reoffend in the future because he was Black).

247 Duane Buck's trial was not the only capital trial where testimony of this type was permitted. Six additional cases involved similar testimony by the same expert. Jordan Rudner, *Racial Testimony Helped Send Black Man to Texas' Death Row; Will Supreme Court Let Him Appeal?*, DALL. MORNING NEWS (Oct. 4, 2016), https://www.dallasnews.com/news/politics/2016/10/04/racial-testimony-helped-send-black-man-to-texas-death-row-will-supreme-court-let-him-appeal/ [https://perma.cc/8B9M-YQNC]; *see also* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 59–60 (2000), https://www.texasdefender.org/wp-content/uploads/2019/12/TDS-2001-State-of-Denial.pdf [https://perma.cc/QW3B-K6QP] (discussing these seven cases as well as instances where prosecutors were permitted to rely on racially coded language in closing argument to encourage findings of future dangerousness) [hereinafter TEX. DEF. SERV., A STATE OF DENIAL].

248 *See, e.g.*, TEX. DEF. SERV., A STATE OF DENIAL, *supra* note 247, at 59–60.

C. Narrowing Requirement

This Article recommends three procedural reforms—particularly when enacted together—that can have a meaningful impact on arbitrary and racially discriminatory outcomes. A "genuine narrowing" requirement will fulfill *Miller*'s mandate that sentences of life without parole be uncommon for child defendants, while reducing arbitrariness by increasing the predictability of these outcomes. Jury sentencing will reduce racially discriminatory outcomes for eligible defendants. A "mitigation as a matter of law" instruction will accomplish both aims by channeling juror discretion to reflect the principles of *Miller*, while guarding against the cognitive errors that may result from racial bias.

As *Miller* required individualized sentencing for children facing life without parole, the most obvious place for states to begin is with its counterbalance: an offense-based narrowing requirement. Currently, any homicide crime is theoretically eligible for a life without parole sentence from a constitutional standpoint.[249] A narrowing requirement would force states to limit eligibility by identifying a subset of homicide crimes that constitute the "worst of the worst"—crimes severe enough to satisfy the penological justifications of lifelong incapacitation and retribution. As with capital crimes, this could theoretically be satisfied in two ways. First, states could narrow at the charging point by limiting the types of first-degree murder that qualify for a life without parole sentence when applied to children. Alternatively, states could require the sentencer to find evidence of certain statutorily enumerated aggravating factors following a defendant's conviction for the defendant to be eligible for life without parole.

With either method, it is imperative that states avoid the pitfalls of capital sentencing by engaging in narrowing that is also genuine in practice. Most scholars consider the narrowing requirement to have failed in the capital context for two reasons. First, in a phenomenon known as "aggravator creep," the number of statutory aggravators has grown significantly over time across states.[250] Aggravator creep refers to the tendency

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249 *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012). *But see id.* at 490–93 (Breyer, J., concurring) (suggesting *Graham* prohibited life without parole as a sentence for any child who did not intend to kill the victim).

250 Mills, *supra* note 221, at 91–92 (arguing that the Arizona capital sentencing statute did not represent genuine narrowing because both the number and broad applicability of aggravators rendered nearly every first degree murder death-eligible); Steiker & Steiker, *ALI Report*, *supra* note 185, at 395 (noting that the efficacy of the narrowing requirement has been limited by aggravator creep);

of state legislatures to enact more and more aggravators over time, typically because doing so has proved politically popular.[251] In a vivid example, following *Furman*, the state of Arizona originally enacted a capital statute based on the Model Penal Code that included six aggravating circumstances.[252] Over time, the Arizona statute grew to include 14 aggravators, including broad categories such as committing the offense "in an especially heinous, cruel, or depraved manner" and committing the offense in a "cold, calculated manner without pretense of remorse or moral justification."[253] The Arizona statute left one commentator to wonder "whether any first-degree murder would be excluded."[254] Indeed, a review of 866 first-degree murder cases in Maricopa County from 2002 to 2012 revealed that 856, or 98%, were death-eligible.[255]

The second reason the narrowing requirement has failed in practice is due to judicial interpretation.[256] Following its early decisions in *Godfrey* and *Maynard*, Supreme Court jurisprudence has consistently upheld the constitutionality of broad aggravators, provided the state applies some sort of "narrowing construction."[257] These narrowing constructions, which often employ similarly broad language in their explanation of the aggravator, need not necessarily be communicated to the sen-

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Panel One—The Capital Crime, *supra* note 221, at 35 (discussing how aggravator creep prevented the Illinois statute from achieving the genuine narrowing that would reduce arbitrariness).

251 Mills, *supra* note 221, at 91–92; Steiker & Steiker, *ALI Report*, *supra* note 185, at 395.

252 Mills, *supra* note 221, at 90–92.

253 *Id.* (citing a previous version of ARIZ. REV. STAT. § 13-751(F)).

254 *Id.* at 91.

255 *See Hidalgo v. Arizona*, 138 S. Ct. 1054, 1056 (2018) (discussing review of Maricopa County murder cases in a statement by Justices Breyer respecting the Court's decision to deny certiorari in a case challenging whether the Arizona capital statute violated the narrowing requirement).

256 Steiker & Steiker, Miller v. Alabama*: Is Death (Still) Different?*, *supra* note 221, at 50.

257 *See, e.g.*, Bell v. Cone, 543 U.S. 447, 459 (2005) (upholding a death sentence despite resting on "especially heinous, atrocious, and cruel" aggravator); Arave v. Creech, 507 U.S. 463, 468, 479 (1993) (finding that asking the jury to evaluate whether the defendant behaved as a "cold-blooded, pitiless slayer" rendered the otherwise vague aggravating factor regarding "utter disregard for human life" constitutional); Walton v. Arizona, 497 U.S. 639, 653–54 (1990) (upholding a death sentence resting on "especially heinous, cruel, and depraved" aggravator), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002); Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (finding Arizona's "especially heinous, cruel, and depraved" aggravator constitutional as applied).

tencer to pass constitutional muster.[258] For example, in *Bell v. Cone*, the Court affirmed a death sentence that rested on the especially "heinous, atrocious, or cruel" aggravator because the Tennessee Supreme Court had employed a narrowing construction *on review*, interpreting the aggravator to involve a "conscienceless or pitiless crime which [was] unnecessarily torturous to the victim."[259]

Moreover, the failure of the narrowing requirement in the capital context has not happened in a vacuum. It coincided with a similar watering down of the individualized sentencing provision, as I detailed in a previous work.[260] Since *Woodson*, the Court has interpreted individualized sentencing more and more expansively, maximizing juror discretion to consider—but also to disregard—mitigation evidence.[261] Without clear guidelines that particular evidence should be viewed favorably, white jurors frequently hold mitigating evidence against criminal defendants, particularly Black defendants or those whose victims are white.[262]

Just because narrowing in the capital context has failed does not mean it must in the *Miller* context. First, even a modest effort to cabin eligibility would be an improvement on the current situation, where states are free to make any homicide crime eligible for life without parole. At minimum, felony murder and other forms of murder lacking specific intent should not meet the bar for a life without parole sentence, as Justice Breyer's concurrence in *Miller* specified.[263] These crimes meet *Graham*'s criteria of "twice diminished culpability" because they involved children who did not kill or intend to kill.[264]

In addition, states should enact narrowing based on offender attributes. For example, states should authorize an age eligibility threshold categorically banning children below a particular age. Some evidence suggests that 15-years-old would be an appropriate cut-off.[265] This was the initial ask in *Miller*, as the parties argued whether a categorical ban was required for children 14-years-old and younger, but the Court punted

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258 *See, e.g.*, *Bell*, 543 U.S. at 459 (affirming a death sentence where narrowing construction was deployed on review but not communicated to the sentencing jury).

259 *Id.* at 458–59.

260 Miller, *Power to Discriminate*, *supra* note 25, at 837

261 *Id.* at 837, 844–48.

262 *Id.* at 847–48 (discussing studies showing this result).

263 Miller v. Alabama, 567 U.S. 460, 490–93 (2012) (Breyer, J., concurring).

264 *Id.* at 490; Graham v. Florida, 560 U.S. 48, 69 (2010).

265 Brief for Petitioner at 12–26, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646), 2012 WL 92505.

on the question.[266] Life without parole sentences for this age group were already rare, even under the mandatory regime, indicating a moral reluctance to impose the punishment.[267] Research shows that this is the age where susceptibility to peer pressure is at its peak.[268] Because cognitive gains begin to slow around age 16, 14-year-olds tend to perform significantly worse on cognitive tests than older teens.[269]

While enacting these limitations might modestly reduce the class of children eligible for life without parole and prevent some unusual sentences, more extreme narrowing is necessary to meet *Miller*'s substantive mandate that these sentences be uncommon. As such, states should limit life without parole sentences for children to only the most aggravated murders. Evidence in the capital context suggests that these cases are the least likely to fall prey to racial bias. An empirical study of capital cases in Georgia revealed that, for "certain categories of extremely serious [homicides]," juries imposed death consistently regardless of the race of the defendant or victim.[270] The results of this study prompted Justice Stevens to observe, "If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory

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266 *Miller*, 567 U.S. at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.").

267 Between 1971 and 2012, when *Miller* was decided, approximately 79 individuals aged 14 or younger received sentences of life without parole. Brief for Petitioner, *Miller*, *supra* note 265, at 24. Of these, only eight received their sentences in discretionary regimes. *Id.*

268 Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners at 16, Miller v. Alabama, 567 U.S. 460 (No. 10-9646), 2012 WL 174239 (citing ELIZABETH SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 38 (2008); Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCH. 608, 612, 615–616 (1979); Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD. DEV. 841, 848 (1986)).

269 Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 343–44 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on tests of basic cognitive abilities); Daniel Keating, *Cognitive and Brain Development*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 45, 64 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004) (cognitive functions exhibit robust growth at earlier ages but approach a limit in the 14- to 16-year-old group).

270 *See* McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (discussing the "Baldus study," an empirical analysis of 2,484 Georgia homicide cases conducted by David Baldus, George Woodworth, and Charles Pulaski).

imposition of the death penalty would be significantly decreased, if not eradicated."[271]

The way to codify "certain categories of extremely serious homicides" would be first to define a list of aggravating circumstances that enhance the seriousness of the crime and then to require that a certain number of these circumstances exist in order to render the homicide eligible for life without parole. To avoid the pitfalls of the capital context, states should avoid highly subjective aggravators that describe a crime as "heinous" or "outrageous." Instead, aggravators should describe factual circumstances related to well-defined categories, such as the number of victims, the identity of the victims, or the existence of concurrently committed felonies or injuries inflicted prior to death. To isolate the most serious homicides, states should require a finding that multiple aggravators exist before a homicide becomes death-eligible.

In isolation, even extreme narrowing will not eliminate arbitrariness for the simple reason that it would not affect sentencer discretion with respect to individualized sentencing. But it would significantly shrink the size of this class of defendants eligible for life without parole, making those impacted by individualized sentencing only the tip of Justice Stevens's metaphorical pyramid. It would also decrease the variability caused by prosecutorial discretion, as prosecutors in the same state would have the same factual constraints on whom they could charge with a life without parole eligible crime. In these ways, extreme narrowing would create procedural backing for *Miller*'s substantive mandate that these sentences be uncommon.

Renowned death penalty scholars Carol and Jordan Steiker have predicted—to date, correctly, given *Jones*—that the Court is unlikely to constitutionally mandate narrowing in the *Miller* context and have posited that a constitutional mandate is undesirable.[272] Chiefly, the Steikers attributed the failure of narrowing to curb arbitrary and racially discriminatory death sentences to many of the reasons discussed above.[273] But, of course, narrowing in practice has strayed from the "genuine narrowing" proposed in *Furman* that I am advocating for now. The Steikers also addressed two other obstacles. First, they posited that underlying policy concerns regarding

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271 *Id.*

272 Steiker & Steiker, Miller v. Alabama*: Is Death (Still) Different?*, *supra* note 221, at 49–50.

273 *Id.* at 50.

unfair sentencing outcomes are less applicable to judges, who currently impose *Miller* sentences, than to the juries responsible for death sentences.[274] They described judges' "professional norms and repeat-player status" as perceived bulwarks against arbitrary sentences and argued that the persistence of judicial sentencing in most states "reflects . . . faith in judicial judgment."[275] Whether or not these observations reflect conventional wisdom is debatable, but as I detailed in Part III, judges have the same implicit biases as jurors, and the bench skews at least as white and male as juries do.[276] Moreover, judicial sentencing is typically determined by an individual, while jury sentencing requires collaboration, increasing the odds that diverse voices will influence the outcome.

Second, the Steikers warned that narrowing could have significant procedural implications. Specifically, a narrowing requirement is likely to implicate "the Sixth Amendment right to a jury determination of all sentencing facts that function as elements of an offense" by increasing the penalty of the crime.[277] In a line of cases beginning with *Apprendi v. New Jersey*,[278] the Court invalidated sentences imposed by judges conditioned on factual aggravation that only the judge themselves had ever found to exist: first, in the state sentencing

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274 *Id.* at 49.

275 *Id.*

276 *See supra* notes 184–194 and accompanying text (discussing implicit biases of judges and the effect of these biases on sentencing).

277 Steiker & Steiker, Miller v. Alabama*: Is Death (Still) Different?*, *supra* note 221, at 49–50. However, the administrability costs of this constitutional requirement could be sidestepped simply by performing narrowing on the front end via the charging statute. If states chose to implement narrowing by relegating life without parole as punishment for homicides involving a limited set of specific factual scenarios, these facts would necessarily be built into the criminal trial. In deciding innocence or guilt, the jury would necessarily also determine, beyond a reasonable doubt, the absence or existence of these qualifying facts. Sentencing for those convicted of qualifying crimes could still constitutionally be determined by judges, instead of requiring an additional jury sentencing proceeding. It is only in the scenario where states perform narrowing on the back end that the Sixth Amendment comes into play. In these cases, states determine general categories of homicides eligible for life without parole and then, following a defendant's conviction, require an additional finding of aggravating circumstances for a sentence of life without parole. Here, because the finding of aggravating circumstances increases the penalty for the crime, the Sixth Amendment would likely require an additional jury determination, functionally resulting in jury sentencing in *Miller* cases.

278 530 U.S. 466, 469, 497 (2000); *see also* Blakely v. Washington, 542 U.S. 296, 308 (2004) (applying *Apprendi* to state court plea bargains).

context[279] and, later, in the federal sentencing[280] and death penalty contexts.[281] *Ring v. Arizona* held that defendants had a right to the jury determination of aggravating circumstances before a death sentence could be constitutionally imposed because "the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict."[282]

The Steikers were likely right about the current Court's reluctance to implicate Sixth Amendment jury sentencing in the *Miller* context. The specter of *Apprendi* was present during the oral arguments in both *Malvo* and *Jones*, as several judges pushed attorneys to concede that constitutionally mandating a factual finding of permanent incorrigibility would necessarily also constitutionally mandate that this finding be performed by a jury.[283] Justice Kavanaugh incorporated this possibility into the *Jones* opening, noting in a footnote that "[i]f permanent incorrigibility were a factual prerequisite to a life-without-parole sentence, this Court's Sixth Amendment precedents might require that a jury, not a judge, make such a finding. If we were to rule for Jones here, the next wave of litigation would likely concern the scope of the jury right."[284] Although I argue that the permanent incorrigibility standard would have functioned as a narrowing requirement, it is certainly more modest and more ephemeral than my proposal of enumerated aggravating circumstances that genuinely narrow. That said, as I detail below, I view jury sentencing as a positive good, even if the Court is reluctant to impose it.

While the Steikers may be correct about the Court's unwillingness to impose narrowing, they failed to address the role that state legislation could play in implementing change irrespective of a constitutional mandate. States seeking to avoid arbitrary and racially discriminatory outcomes have no constitutional impediment in choosing to enact a narrowing require-

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279 *Apprendi*, 530 U.S. at 491–92; *Blakely*, 542 U.S. at 308.

280 United States v. Booker, 543 U.S. 220, 226–27 (2005) (applying *Apprendi* to the Federal Sentencing Guidelines); Alleyene v. United States, 570 U.S. 99, 103 (2013) (finding that a jury must find beyond a reasonable doubt any fact triggering a mandatory minimum sentence).

281 Hurst v. Florida, 577 U.S. 92, 94 (2016); Ring v. Arizona, 536 U.S. 584, 589 (2002).

282 *Ring*, 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494) (alterations adopted).

283 Transcript of *Malvo* Oral Argument, *supra* note 138, at 49–53 (questioning by Justice Gorsuch); Transcript of *Jones* Oral Argument, *supra* note 147, at 61–63 (exchange with Justice Kavanaugh).

284 Jones v. Mississippi, 141 S. Ct. 1307, 1316 n.3 (2021) (citations omitted).

ment. As Justice Kavanaugh emphasized in *Jones*, states are free to experiment with additional sentencing requirements in the *Miller* context.[285] Indeed, those seeking to avoid future federal and state litigation based on such outcomes have an incentive to do so.

D. Jury Sentencing

Along with a genuine narrowing requirement, states that want to minimize racially discriminatory outcomes should adopt jury sentencing for children eligible for life without parole.[286] Moreover, states may adopt this reform without a fear that doing so will increase arbitrary outcomes, provided they equip jurors with the same knowledge and guidelines as they do judges. Indeed, because jury sentencing will likely result in a more robust presentation of relevant evidence by opposing counsel, its corresponding administrative costs will discourage prosecutors from seeking life without parole sentences for all but the "worst" defendants.

Juries have the potential to be less racially discriminatory than judges in their sentencing determinations. As discussed above, judges fall prey to the same implicit biases as nonjudges, and the bench as a whole tends to be less racially diverse than juries which, at least in theory, represent a cross-section of the community.[287] There is some evidence that white judges might even be more likely to suffer from anti-Black bias. A study published in 2009 involving judges from three jurisdictions concluded that "[t]he proportion of white judges in our study who revealed automatic associations of white with good and black with bad was, if anything, slightly higher than the proportion found in the online surveys of white Americans."[288] The authors also found that judges tended to overestimate their ability to set aside their biases. When asked to rate their own ability to "avoid racial prejudice in decisionmaking" as compared to other judges attending the same conference, 97% placed themselves in the top half, and 50% placed themselves

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285 *Id.* at 1323.

286 Because the studies on noncapital jury sentencing are limited and more research is desirable, states should also permit defendants to waive jury sentencing without requiring prosecutorial approval, should the defendant prefer judicial sentencing. *See* Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, 100 N.C. L. REV. (forthcoming 2022) (on file with author).

287 *See supra* notes 184–194 and accompanying text.

288 Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 184, at 1222.

in the top 25%, resulting in numbers that are unlikely to be true.[289]

Long thought of as a virtue, the repeat-player status of judicial sentencers can also be a hindrance when it comes to avoiding implicit bias. Studies have found that intuitive responses—as contrasted with careful, reason-based decisions—can result from "repetition of the same deliberative procedure."[290] Intuition provides an avenue for unconscious racial, gender, and attractiveness bias to seep into the decision-making process.[291]

This is not to say that juries cannot also engage in racially discriminatory decision-making. Individual jurors are subject to the same implicit biases as judges. And although the Constitution seemingly requires that juries represent a fair cross-section of the community, many scholars have pointed out that this ideal is rarely realized.[292] Jury pools drawn from voter registration rolls disproportionately exclude Black and Brown potential jurors, as do laws temporarily or permanently disqualifying individuals with felony convictions from jury service.[293] In part because of the inefficacy of *Batson v. Kentucky*, prosecutors continue to use peremptory strikes to remove Black and Brown jurors at a higher rate.[294] The race-based preferences of capital juries are also well documented; copious studies indicate that these juries are more likely to impose

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289 *Id.* at 1225–26.

290 Guthrie, Rachlinski & Wistrich, *supra* note 170, at 8 (finding intuitive decisions more error prone).

291 *Id.* at 31.

292 *See, e.g.*, Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 56 n.1 (2020) (quoting Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 103 (2019) ("There is a significant amount of evidence, however, that jury pools do *not* reflect a fair cross-section of their communities, in that they underrepresent African-Americans and Latinos.")).

293 *See, e.g.*, *id.* at 73 (observing that when voter eligibility determines juror eligibility and individuals with felony convictions are excluded from voter registrations, African Americans and Latinx people are most likely to be excluded from juries); James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 3 (2014) (noting that "[f]elon jury exclusion statutes . . . presume that convicted felons pose a unique threat to the jury process" and that "[n]o other group of prospective jurors is categorically excluded from the jury pool because of an alleged pretrial bias").

294 476 U.S. 79, 89, 96–97 (1986) (ruling that a prosecutor cannot "challenge potential jurors solely on account of their race" and creating a burden-shifting framework for challenging a juror's dismissal based on their race); *see* Miller, *Power to Discriminate*, *supra* note 25, at 845–46 (discussing failure of *Batson v. Kentucky* and corresponding scholarship).

death when the victim is white, the defendant is Black, or both.[295]

Noncapital juries are likely more diverse than their capital counterparts because they are not subject to death qualification—the process of excluding potential jurors who state that their opposition to capital punishment would prevent them from imposing a death sentence under any circumstances. Death qualification disproportionately removes Black people and women of all races from capital juries[296] because they are more likely to oppose the death penalty.[297] Although more research is needed, there is some evidence that race of the defendant or the victim is less influential in noncapital jury sentencing. The study of noncapital jury sentences in Virginia and Arkansas revealed an association between race and sentence lengths in only three categories of crime in Virginia and none in Arkansas, leading its author to conclude that "race may play less of a role in non-capital sentencing than it does in capital sentencing."[298]

In essence, jury sentencing guarantees a determination made by multiple individuals of varying backgrounds and biases, while judicial sentencing rests on a single decision maker. This truism has prompted scholars to suggest that "a diversely composed jury" is "[p]erhaps the only entity in the

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295 Ross Kleinstuber, McCleskey *and the Lingering Problem of "Race"*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *McCleskey v. Kemp* 37, 38 (David P. Keys & R.J. Maratea eds., 2016) (indicating that 32 of 36 empirical studies on racial discrimination in capital punishment found this outcome).

296 *See* Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. L. REV. 299, 339–45 (2017) (finding that more Black or women jury members were excused for cause than white jury members due to anti-death penalty views in Lexington County); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016) (finding in a sample of prospective jurors in Louisiana "that nearly sixty percent of [those] who were struck under *Witherspoon* were African American, and more than one-third of all the African Americans in the jury venire were struck for cause on the basis of their opposition to the death penalty"); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1140–43, 1147–48 (2014) (explaining that "[B]lack jurors expressing reservations about capital punishment are subject to exclusion through peremptory strikes" which greatly reduces the number of Black jurors serving on a capital jury); Alec T. Swafford, Note, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 158 (2011) (asserting that disproportional exclusion of Black people from capital juries results in impartiality, particularly in cases with Black defendants).

297 Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 152 (2018).

298 Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 203 (2004).

system that might avoid the influence of the bigot in the brain."[299] In his article arguing for jury sentencing at large, Morris B. Hoffman similarly contends that it is likely "more dangerous to leave the sentencing decision to a single person, whose membership in a particular group might skew his or her views considerably, than to leave it to many people, whose memberships in many groups will force them to accommodate their inter-strata differences."[300]

There is no reason to fear that the cost of jury sentencing will lead to an increase in arbitrary outcomes. Contrary to popular belief, there is no conclusive evidence that juries' sentencing decisions are any more or less arbitrary than those rendered by judges, although more empirical studies are necessary.[301] Despite conventional wisdom that jurors are ruled by their passions while judges dispassionately apply the law, existing empirical evidence does not bear this out. Studies on rates of jury-judge disagreement in criminal trials conducted in 1969, 1994, and 2004 all indicated that in cases where disagreement occurred, jurors were reliably more lenient.[302] While one 1970s study of 1,395 criminal cases in El Paso, Texas, where defendants could choose between judicial and jury sentencing, did conclude that jury sentences were both "more harsh and more dispersed" than judicial sentences,[303] studies examining the transitions in Georgia and Alabama from jury to judicial sentencing showed the opposite.[304] A study of judicial

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299 Rachlinski, Johnson, Wistrich, & Guthrie, *supra* note 184, at 1222.

300 Hoffman, *supra* note 191, at 986–87.

301 *Id.* at 987. Studies involving rates of jury-judge agreement in criminal cases indicate that judges report that they agree with jury decisions between 73 and 78 percent of the time. *See* Jennifer K. Robbennolot, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 476–78 (2005) (summarizing the findings of studies conducted in 1969, 1994, and 2004). These studies also show that the most disagreement comes in "close" cases, and that when disagreement exists, jurors tend to be lenient considerably more often than judges. *Id.* at 479, Table 1.

302 Robbennolot, *supra* note 301, at 479, Table 1. An experimental study of 116 Illinois State Court judges, 154 people who had reported for jury duty, and 55 students asked to determine sentences in four hypothetical cases found similar results. Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 74–75 (1989). While substantial disagreement did not exist in two of the hypothetical cases, lay respondents were more lenient than judges in the remaining two. *Id.* at 75–81.

303 Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 8–9 (1994). Weninger acknowledged that some of these results were likely influenced by the judicial practice of offering a lenient sentence to entice a defendant to forego a jury trial. *Id.*

304 *See* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1796 n.100 (1999) (discuss-

and jury sentences in Virginia and Arkansas from 1995 to 2001 found that jury sentencing was more variable, in part because state laws prevented jurors from accessing judicial sentencing guidelines.[305] A more recent survey of Florida judges revealed that whether or not a capital defendant was sentenced to death resembled the odds of a coin flip: 45% of judges given a capital murder hypothetical voted to sentence the defendant to life imprisonment, while 55% given the same hypothetical voted to impose death.[306] These results suggested that the sentencing decision came down not to the facts of the crime or the characteristics of the defendant, but to the identity of the individual sentencer.

Additionally, the administrative costs of jury sentencing can serve as a backdoor narrowing mechanism by dissuading prosecutors from seeking sentences of life imprisonment without parole against youthful defendants.[307] Jurors require instruction on the law and need time for deliberation, adding to the lengths of sentencing proceedings, and jury selection increases the risk of reversible error.[308] Moreover, empanelment of jurors typically leads to the presentation of witnesses and a more robust development of mitigation evidence, as opposed to

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ing William A. Eckert & Lauri E. Ekstrand, The Impact of Sentencing Reform: A Comparison of Judge and Jury Sentencing Systems 8–10 (1975) (unpublished manuscript)) ("comparing sentences before and after Georgia introduced judge sentencing and finding no evidence of systematic jury-sentencing disparity in any of the crime categories studied except aggravated assault"); *id.* (discussing Brent L. Smith & Edward H. Stevens, *Sentence Disparity and the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States*, 9 CRIM. JUST. REV. 1, 4 (1984)) ("finding a larger deviation from the mean in Alabama in the period of judge sentencing than in the jury sentencing years, although the standard deviation in all three jury states was higher than in the three judge-sentencing states studied").

305 Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 333, 351–57 (2005); *see also* Jenny Gathright, *Jury Sentencing Reform Brings Virginia 'Out of the Ice Age,' Proponents Say*, DCIST (Dec. 17, 2020), https://dcist.com/story/20/12/17/jury-sentencing-reform-brings-virginia-out-ice-age/ [https://perma.cc/X4HG-Y5FM] (discussing Virginia jury sentencing without sentencing guidelines over the last twenty years).

306 *See* Brief of Former Florida Circuit Court Judges as Amici Curiae Supporting Petitioner at 10, Hurst v. Florida, 577 U.S. 92 (2015) (No. 14-7505), 2015 WL 3623138 (citing Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 FLORIDA DEF. 56, 60 (2012)).

307 *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 612 (2015) ("Moreover, because a sentencing proceeding before a jury is likely to be more time-consuming and work-intensive for all parties, the right to jury sentencing for juveniles facing life without parole gives juveniles greater leverage in plea negotiations with prosecutors.").

308 *Id.*

judicial sentencing, which often merely consists of oral argument by the parties.[309] In the capital context, the costs of the sentencing phase have encouraged prosecutors to carefully scrutinize whether a case is worth pursuing a death sentence. As a result, more crimes are charged non-capitally, resulting in an overall decline in death sentences.[310] Thus, jury sentencing is another mechanism to render life without parole sentences for children uncommon—reserved only for the "worst of the worst."

Should states adopt jury sentencing, three possible models exist. First is the model currently practiced in Rhode Island and Vermont, which I call the "eligibility model."[311] Here, juries determine a defendant's eligibility for life without parole, but the judge imposes the final sentence.[312] Second is what I call the "capital model," where jurors hear evidence and determine only whether the sentence should be life without parole or *not* life without parole. If the jury determines the former, the sentence is final; if it determines the latter, the judge determines the lesser sentence. This resembles the process that currently occurs in most capital cases where the jury determines whether death is an appropriate sentence. The capital model differs from the eligibility model in that the jury's imposition of life without parole is binding; under the eligibility model, a judge retains discretion to impose a non-life sentence even after the jury has found the defendant to be "eligible" for life without parole. Third is what I call the "noncapital model," where the jury is given a sentencing range that includes a maximum sentence of life without parole, and the jury may impose a sentence within that range.

Each of these models has drawbacks, but the most desirable one is the noncapital model, provided it comes with some procedural safeguards. The biggest drawback of the eligibility model is that, because jurors understand that a judge is imposing the actual sentence in the case, they do not have to feel responsibility for the outcome.[313] Studies in now-amended capital jurisdictions where the juror's sentence constituted a non-binding recommendation demonstrated that jurors were

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309 *See id.* at 611–12. ("With a jury empaneled, judges are likely to allow more time for the presentation of evidence, and defense lawyers may more readily recognize the need for a higher level of development of mitigating evidence.").

310 Steiker & Steiker, Miller v. Alabama*: Is Death (Still) Different?*, *supra* note 221, at 46.

311 VT. STAT. ANN tit. 13, § 2303 (2014); R.I. GEN. LAWS § 12-19.2-1 (2014).

312 *Id.*

313 Russell, *supra* note 307, at 614.

less likely to take deliberation seriously and less likely to devote significant time to their sentencing determination.[314] The second model fixes this problem to a certain extent by requiring jurors to take responsibility for imposing life without parole sentences; however, it relies on judges to affix lesser sentences, depriving defendants of a decision by a more diverse body. The third model maximizes jury responsibility and participation, but is the most likely to lead to arbitrary results within the range if jurors are not provided with any guidelines to help make their determination—as is currently the case in jurisdictions that conduct noncapital jury sentencing.[315] Scholars have attributed much of the variance in jury sentencing to the fact that, without the sentencing guidelines, jurors have unfettered discretion.[316] Moreover, noncapital sentencing jurors lack access to other basic sentencing information that judges take for granted, such as parole eligibility and rates, the relevance of good time accumulation, and the difference between concurrent and consecutive sentencing, which is necessary to limit arbitrary outcomes.[317] Consequently, while I believe the noncapital model of jury sentencing is the best option, states should not adopt it without a commitment to provide jurors with the same sentencing guidelines and information available to judges.

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314 *See, e.g.*, William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 1010 (2006) (indicating that jurors will fail to feel responsibility for the defendant's punishment if the jury's sentence determination was merely a recommendation).

315 *See* King, *supra* note 298, at 196–98; *see also* ARK. CODE ANN. § 16-97-101 (2018) (prescribing noncapital jury sentencing without guidelines in Arkansas); 2 ARKANSAS MODEL JURY INSTRUCTIONS—CRIMINAL AMCI 2D 9102 (2018) (standard punishment instruction in Arkansas merely states that the offense "is punishable by imprisonment in the Department of Correction for not less than 6 years and not more than 30 year, or by a fine not exceeding $15,000 or by both imprisonment and a fine"); VA. CODE ANN. § 19.2-298.01 (2018) (stating in cases "tried by a jury, the jury shall not be presented any information regarding sentencing guidelines"); 1 WILLIAM S. COOPER & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES § 12.11 (2018) (only guidance in the penalty phase instructions in Kentucky states that "[y]ou shall now fix his punishment for that offense at confinement in the penitentiary for not less than 20 years nor more than 50 years, or for life, in your discretion"); MO. REV. STAT. § 557.036 (2018) (requiring that sentencing juries in Missouri be instructed merely "as to the range of punishment authorized by statute for each submitted offense").

316 *See* King, *supra* note 298, at 196–98.

317 *Id.* at 209.

E. Mitigation as a Matter of Law

While sentencing guidelines are important as a way of channeling sentencer discretion, they are not sufficient in form to avoid arbitrary outcomes. More than just being told factors to "consider," jurors must be told *how* to consider the factors in a manner that is consistent with the Eighth Amendment. Specifically, jurors must be told that the existence of certain types of evidence can only support a more lenient sentence. I previously deemed this concept "mitigation as a matter of law" in a prior work that explored its application to capital sentencing.[318]

Simply labeling types of evidence as "mitigating factors" is not sufficient to ensure that jurors will give them mitigating effect. In the capital context, studies have shown that white jurors, in particular, misinterpret classic mitigation evidence—such as an impoverished childhood, familial substance abuse, mental illness, and a positive institutional history—as reasons to impose death instead of to bestow mercy.[319] There is no reason to think such confusion and/or bias would not appear in the *Miller* sentencing context. Sarah French Russell has predicted as much: "[A]lthough existing studies suggest that juries are likely to view youth as mitigating, racial bias may prevent juries from giving youth mitigating effect in some cases."[320] The Supreme Court found in *Roper* that a categorical bar of death sentences for young people was necessary in part because "[i]n some cases a defendant's youth may even be counted against him," citing the prosecutor's argument that if the defendant was this violent at a young age, he would likely worsen as an adult.[321]

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318 *See* Miller, *Power to Discriminate*, *supra* note 25, at 859–63.

319 *See, e.g.*, Lynch & Haney, *supra* note 297, at 164 (discussing surveys in Solano County, California, where 12–13% of white potential jurors stated that evidence indicating the defendant had a loving family who opposed his execution, had an impoverished childhood, had been raised by a single disabled parent, had himself been a good husband and parent, or had adjusted well to incarceration would have made them more likely to impose a death sentence). The survey found that whites were especially unreceptive to evidence related to the defendant's social history or background. *Id.*

320 Russell, *supra* note 307, at 611.

321 Roper v. Simmons, 543 U.S. 551, 558, 572–73 (2005) (noting that the prosecutor in Mr. Simmons's case responded to defense counsel's argument that Simmons's youth was mitigating by stating, "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."); *see also* Emens, *supra* note 92, at 72–81 (discussing the anti-discriminatory reasoning that underlies the bar against death sentences for juvenile defendants).

In this holding and in additional cases, the Court has made clear that the characteristics of youth are mitigating as a matter of law. Beginning with *Thompson* and extending through *Jones*, the Court has reaffirmed that the characteristics of youth result in "diminished culpability" for children.[322] The *Thompson* Court referred to the "special mitigating force of youth,"[323] while the *Roper* Court acknowledged that "the case for retribution is not as strong with a minor as with an adult."[324] In *Graham*, the Court announced that "incorrigibility is inconsistent with youth."[325] *Miller* mandated consideration of the "mitigating qualities of youth," and found that these qualities decreased the penological justifications for punishment.[326] In finding *Miller*'s holding to be substantive law, the *Montgomery* Court concluded that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[327] Even *Jones*, which recast the holding of *Miller* to a requirement that youth merely be "considered" before sentencing, acknowledged that "[i]n that process, the sentencer will consider the murderer's 'diminished culpability and heightened capacity for change.'"[328]

Of course, an instruction that merely informs the sentencer that youthfulness favors leniency is not sufficient. Instead, jurors should be directed that any evidence of the so-called *Miller* factors—broadly defined as immaturity, vulnerability, and changeability—supports a lesser sentence. More specifically, these include "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; difficulties in "the family and

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322 Thompson v. Oklahoma, 487 U.S. 815, 836–37 (1988) (referring to "lesser culpability of the juvenile offender"); *Roper*, 543 U.S. at 570–71 (2005); Graham v. Florida, 560 U.S. 48, 69 (2010) (finding children who did not commit homicides had "twice diminished moral culpability"); Miller v. Alabama, 567 U.S. 460, 471 (2012) (explaining that juveniles are less deserving of the most severe punishments because of their diminished culpability and greater capacity for reform); Montgomery v. Louisiana, 577 U.S. 190, 207–08 (2015) (discussing how the *Miller* factors require that the sentencing judge consider how children are different, namely, that they have diminished culpability and greater potential for reform, in the sentencing decision); Jones v. Mississippi, 141 S. Ct. 1307, 1316 (2021) (enumerating and applying the *Miller* factors).

323 *Thompson*, 487 U.S. at 834.

324 *Roper*, 543 U.S. at 571.

325 *Graham*, 560 U.S. at 73 (internal citation and quotations omitted).

326 *Miller*, 567 U.S. at 472, 476 (internal citation and quotations omitted).

327 *Montgomery*, 567 U.S. at 208.

328 *Jones*, 141 S. Ct. at 1316.

home environment"; reduced participation in the crime, evidence of peer pressure; "incompetencies associated with youth," including difficulties interacting with police or assisting attorneys; and capacity for rehabilitation.[329]

A possible sample jury instruction—modeled on one I proposed in the capital context[330]—could read:

> You have heard evidence that [insert specific mitigating circumstance]. If you believe this evidence, you must consider it as evidence that supports a sentence that is below the maximum sentence. You may not consider this evidence in support of a sentence of life without parole.

Such an instruction, written in plain language, would channel jurors' discretion by explaining how they should interpret mitigation evidence and how they must factor it into their sentencing decision. This would limit discretion by mandating that jurors take into account evidence of the *Miller* factors and would reduce racial bias by preventing them from considering these factors as evidence of aggravation. The result would reduce the likelihood of arbitrary and racially discriminatory sentencing outcomes.

CONCLUSION

The Court's failure to adopt adequate procedural protections to counteract the unfettered discretion of individualized sentencing for children faced with life without parole will likely produce the same sort of arbitrary and racially discriminatory outcomes that resulted in the invalidation of the death penalty. States can avoid these results by abolishing life without parole for children. Short of this, they can enact a trio of procedural protections that will limit these unfair outcomes. Should they fail to do so, empirical research demonstrating similar "lightning strikes" in the *Miller* context has the potential to demonstrate the unconstitutionality of life without parole for children.

Although further research is needed, there is reason to believe that the same sort of arbitrary and racially discriminatory outcomes occurs in the cases of children sentenced to constructive life without parole[331] and in those of adults sen-

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329 *Miller*, 567 U.S. at 474, 477–78, 489.

330 Miller, *Power to Discriminate*, *supra* note 25, at 863.

331 Constructive life without parole, also known as "de facto life without parole" or "virtual life" refers to sentences that exceed the expected life span of a defendant. THE SENTENCING PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT 3 (2019), https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/ [https://perma.cc/593N-XJAA].

tenced to life without parole.[332] While the Court has yet to recognize special status for these sentences, special status was not requisite for *Furman*'s invalidation of the death penalty. On the contrary, "death is different" was a response to *Furman*. Given life without parole's severity and permanency, one is left to wonder if arbitrary outcomes might have constitutional significance.

332 *See* Carter, López, & Songster, *supra* note 236, at 348 (indicating life without parole sentences often stem from geography in that "the vast majority of people serving LWOP sentences are concentrated in a few states"); Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi, & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. 279, 285 (2021) (finding race-of-victim effects and geographic disparities in study of 1,627 people serving life without parole in North Carolina).