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I. INTRODUCTION

> Life without parole is an especially harsh punishment for a juvenile. 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 in punishment in name only.[1]

Juvenile sentencing within the United States is but one illustration of how the legal system reinforces the marginalization of populations that have been historically underinvested and underrepresented.[2]

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1. Graham v. Florida, 560 U.S. 48, 70 (2010); *see also* Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J. L. & SOC. POL'Y 428, 434 (2011).

> As with social constructions, biological narratives of youth may stand in tension with one another. One narrative suggests that adolescents are inchoate beings, capable while changing and developing and that society's duty is to protect and nurture them. Another narrative describes youth as hard-wired during this formative stage of life; a too-late mentality here concentrates societal resources and energy on early childhood interventions and control, containment, and zero tolerance of older youth.

Id.

2. The United States is an outlier when it comes to sentencing juveniles to a life of incarceration. ACLU, *End Juvenile Life Without Parole*, AM. C.L. UNION (Dec. 12, 2022), https://www.aclu.org/end-juvenile-life-without-parole [https://perma.cc/WXE3-UHEJ].

Throughout the past century, the macro-narrative on sentencing has fluctuated nationally, as well as within individual states, with the reasoning used to justify decisions sliding between the conflicting lenses of rehabilitation and punishment.[3] This has necessarily impacted the micro-narrative—the way that an individual's story is considered and weighed (or ignored) within sentencing. There are endless factors that affect outcomes in sentencing: class, race and or ethnicity, gender, and access to counsel are just a few examples. However, decades of jurisprudence from the Supreme Court of the United States has emphasized over and over that one particular factor requires special constitutional consideration: youth.[4] Yet it is nearly impossible to consider the narrative of youth in isolation.

Despite this mandate, analysis of the treatment of juveniles within individual states is significantly disparate in the way that youth is "considered" in a sentencing decision. Underscoring the concept of "justice by geography,"[5] a seventeen-year-old in one state could receive juvenile life without parole (JLWOP) with extraordinarily little written reasoning (or meaningful consideration). Yet in another state, that sentence would be constitutionally prohibited.[6] These disparities were present even prior to *Jones v. Mississippi*,[7] a 2021 Supreme Court decision that has injected more uncertainty into juvenile sentencing procedures and that will widen disparities in sentencing. The contrasting narrative within the *Jones* decision itself is stark—the majority focuses

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Within this article, the acronym JLWOP refers to a juvenile sentence of life in prison without the possibility of parole. A life without parole sentence means that an individual is precluded from the *possibility* of parole. *Id*. They thus have no opportunity to be released from prison once sentenced. They are, in effect, sentenced to die in prison, absent clemency from the executive branch. What constitutes a "juvenile" for sentencing purposes will be discussed *infra* Section II.

3. *See generally* Francine T. Sherman, *Thoughts on A Contextual View of Juvenile Justice Reform Drawn from Narratives of Youth*, 68 TEMP. L. REV. 1837, 1837 (1995) (explaining that "legal approaches to delinquency emerge from a policy box of limited alternative—rehabilitation or punishment"); *see also* Anne E. Parrish, *After* State v. Lyle*: How the Iowa Supreme Court Maintained Mandatory Minimum Sentences for Juvenile Criminal Offenders Despite Recognizing Their Unconstitutional Nature*, 107 IOWA L. REV. 1801, 1818 (2022) (describing the four dominant theories discussed within sentencing: punishment, deterrence, incapacitation, and rehabilitation).

4. *See* Miller v. Alabama, 567 U.S. 460, 483 (2012).

5. *See, e.g.*, Jay D. Blitzman, *Let's Follow the Science on Late Adolescence*, A.B.A. CRIM. JUST. MAG. (Nov. 1, 2022), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2022/fall/lets-follow-science-late-adolescence/ [https://perma.cc/F3L8-DNVU].

6. *See, e.g.*, State v. Haag, 495 P.3d 241, 251–52 (Wash. 2021) (vacating forty-six-year sentence for 17-year-old).

7. 141 S. Ct. 1307 (2021).

on the details of the crime and the need to ensure that protections for juveniles are not broadened by the judicial branch.[8] This is the macro-narrative of punishment for the crime over rehabilitation. The dissent, however, includes the factors that led to this moment for the individual juvenile defendant, a micro-narrative ignored by the majority.[9] It is a story of poverty, abuse, mental health, lack of services, lack of financial resources, and, crucially, the "signature qualities of youth."[10]

This Article will address the way that micro-narrative of youth is considered (or ignored) in juvenile sentencing decisions and highlight the myriad factors that impact an individual's story and final outcome. Part II focuses on definitions of what constitutes juvenile and the importance of terminology within conversations about incarceration. Part III focuses on the cradle-to-prison pipeline and the work done at Northeastern University School of Law's Center for Public Interest Advocacy and Collaboration (CPIAC). Through the C2P Project, CPIAC uses an interdisciplinary collaboration to advance the goal of dismantling the cradle-to-prison pipeline and decreasing incarceration. Part IV will unpack the role of the media and other forces in influencing juvenile narratives. Finally, Part V will examine the battle of the narratives as illustrated in the majority and minority decisions of *Jones*.[11] The Article concludes with reflections from the Mercer University School of Law Symposium, "Past is Prologue: Legal Narratives and the Law's Potential for Justice and Injustice."

II. NECESSARY DEFINITIONS FOR DISCUSSION ON JUVENILE NARRATIVES IN THE LEGAL SYSTEM

"Juvenile justice policy has lost its way. What began as a system designed to rehabilitate juveniles is moving piecemeal toward a system that punishes them."[12]

Even before delving into the use of narrative within juvenile systems, an examination of what individuals fall under this label is necessary.

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8. *Id.* at 1312, 1321.

9. *Id.* at 1329 (Sotomayor, J., dissenting).

10. *Id.* (Sotomayor, J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

11. *See generally id.* at 1311, 1328.

12. Sherman, *supra* note 3, at 1837. Sherman made this statement in 1995, and the system is still in dire need of reform nearly three decades later. *See generally* Blitzman, *supra* note 5; *see also* Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENTENCING PROJECT (Dec. 8, 2022), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/ [https://perma.cc/3LRG-HANS].

Within the United States, treating juveniles as a separate category within their own institutions and processes is a somewhat recent historical development.[13] Currently, a juvenile is defined in many jurisdictions with a bright-line cut at age eighteen,[14] and numerous outcomes or determinations within the judicial system hinge on this cut-off, including sentencing.[15] However, as developments in science enhance understanding of adolescent brain development (and confirm Supreme Court of the United States categorization of this group as constitutionally different),[16] the wisdom of using this bright-line has been called into question.[17] Some jurisdictions that are more protective of juveniles have extended "juvenile" protections in sentencing up to age twenty-one and even twenty-five in some cases.[18] A recent publication by the Center for Law, Brain & Behavior suggests the following terminology for use when describing systems-involved individuals: early adolescence (ages ten to thirteen), middle adolescence (ages fourteen to seventeen), late adolescence (ages eighteen to twenty-one), and young adulthood (ages twenty-two to twenty-five).[19] While courts (and legislatures)

13. PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 1 (5th ed. 2021) ("From the beginning of the colonial period to the early 1800s, youths were subject to the same criminal justice process as adults. Consequently, children who were apprehended for crimes were tried in the same courts and, when found guilty, were often given the same punishments as adults."); *see also* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 63–64 (2012). "The first juvenile court was established in 1899 in Chicago through the work of Lucy Flower, a philanthropist; Julia Lathrop, a child-welfare expert; and Jane Addams, the founder of the pioneering settlement, Hull House, where college-educated men and women who sought to work with the poor could live." *Id.* at 63. "The 'moral crusade' that these women spearheaded on behalf of indigent children took more than a decade and culminated in the world's first juvenile court act." *Id*. at 64.

14. *See, e.g.*, *An Interactive Overview of the Massachusetts Juvenile Justice System*, CITIZENS FOR JUVENILE JUSTICE (Dec. 12, 2022), https://www.cfjj.org/jj-system-overview ("In Massachusetts, children between the ages of 12 and 18 may be arrested, charged in court, removed from their homes, and confined in secure, locked facilities.").

15. *Id. But see Age Boundaries in Juvenile Justice*, NAT'L GOVERNORS ASS'N (Aug. 12, 2021), https://www.nga.org/publications/age-boundaries-in-juvenile-justice-systems/ [https://perma.cc/S2XS-H5CJ] (noting disparities across states as to age of juvenile court jurisdiction).

16. Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Miller v. Alabama, 567 U.S. 460, 471 (2012); Montgomery v. Louisiana, 577 U.S. 190, 207 (2016); Jones v. Mississippi, 141 S. Ct. 1307, 1328 (2021) (Sotomayor, J., dissenting).

17. CATHERINE INSEL ET AL., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 27 (2022), https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/ [https://perma.cc/98A7-GXR6] [hereinafter CLBB Whitepaper].

18. Blitzman, *supra* note 5.

19. CLBB Whitepaper, *supra* note 17, at 30.

grapple with those definitions,[20] for purposes of this article the term juvenile will refer to individuals under eighteen—but in recognition that this space is evolving because "youth" is a "fluid concept."[21]

Regardless of where the line is drawn, individuals who violate criminal laws are subject to intense societal stigma, beginning with arrest. To combat this stigmatization, intentional language choices should be employed within discussion.[22] For example, terms like "prisoners," "parolees," or "ex-cons" will be avoided; instead, terms such as "incarcerated persons," "people in prison," "people on parole," or "formerly incarcerated persons" will be used.[23] As is the ever-evolving nature of language, even these terms may be less desirable than labels that avoid reference to incarceration completely (or less desirable as determined by the individuals who have been incarcerated, who should drive the conversation on terminology). For example, the phrase "youth involved with the juvenile justice system"[24] omits all reference to confinement. Intentional dialogue around selection of terminology (within carceral spaces, the legal system, academia, and beyond) can better help to include these individuals as members of society and recognize them as human beings.[25]

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20. *See, e.g.*, Commonwealth v. Farouk F., 182 N.E.3d 346, *review denied,* 186 N.E.3d 725 (Mass. 2022).

21. Soung, *supra* note 1, at 428.

22. Stephanie Baggio et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, 18 BMC INT'L HEALTH HUM. RTS. 41 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6240232/ [https://perma.cc/9J2Y-9GEH].

> Stigma can be enacted and reinforced through labelling. Such labelling can drive the stereotyping, prejudice, and discrimination of groups of people, such as individuals involved in the criminal justice system who are often denounced as being responsible for their incarceration. As a result, those in the criminal justice system are excluded from social and economic resources and services that ultimately affect their health and wellbeing. Therefore, language used to describe individuals and populations, either respectful or stigmatizing, matters and shapes people's views and understanding of past and present events, as well as future possibilities.

Id.

23. Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 176, 190 (2004) ("A panoply of economic, social, and political post-conviction penalties, including the denial of the right to vote, is intended to assure that the shame of incarceration is not forgotten or avoided." (citation omitted)).

24. *Youth Involved with the Justice System*, YOUTH.GOV (Dec. 15, 2022), https://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system [https://perma.cc/EUJ6-K5X6] (addressing use of the term "justice").

25. Austin, *supra* note 23, at 190 ("Many people have engaged in conduct that, in some context other than the one they were fortunately in, would have landed them in jail or have

Defining the group itself is an issue that carries significant weight because of the additional protections afforded to juveniles in certain spaces. The Supreme Court, as well as many state courts, recognizes that juveniles have a capacity for rehabilitation that exceeds adults.[26] "Rehabilitation is 'the idea that the purpose of punishment is to apply treatment and training to the offender so that he is made capable of returning to society and functioning as a law-abiding member of the community.'"[27] The goal of rehabilitation is what "sets the juvenile/family court apart from the adult criminal system. If there is no rehabilitation, there is no hope."[28] Yet, while the stated goal of a juvenile system is rehabilitation, the actual operation of the system is rarely in line with this goal.[29] Once again, we see fluctuation between rehabilitation and punishment (or, arguably, torture).[30]

As a final note in this conversation on definitions and terminology, strict categorization of individuals into "check the box" demographic groups is an inherently complex undertaking.[31] This task is compounded by the historical development of these constructs within the legal system.[32] Yet, to see patterns or trends that can be dismantled or

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been, at the very least, a big mistake.") (citation omitted)). The author recognizes that the use of any terminology should be determined by those who the terminology applies/describes, and not scholarship or academia.

26. Commonwealth v. Lutskov, 106 N.E.3d 632, 642 (2018) (noting heightened capacity of juveniles for rehabilitation); *see also* CLBB Whitepaper, *supra* note 17, at 36 (discussing *Miller* factor five, greater potential for rehabilitation of individuals up through age twenty-five).

27. Parrish, *supra* note 3, at 1819.

28. ELROD & RYDER, *supra* note 13, at 198, 199 ("[A]ny system that simply lock people away and offers them no hope, no hope of changing their behavior, or reintegrating into society cannot in my opinion be justified or cost effective.") (quoting from an Interview with the Honorable Carolyn Williams, former Presiding Judge, Family Division, Kalamazoo County Court, Michigan)).

29. *Id.* at 57; *see also* Mendel, *supra* note 12.

30. Mendel, *supra* note 12.

31. *See, e.g.*, Eric Jensen et al., *Measuring Racial and Ethnic Diversity for the 2020 Census*, U.S. CENSUS BUREAU (Aug. 4, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2021/08/measuring-racial-ethnic-diversity-2020-census.html [https://perma.cc/WUC2-JD2F]; *see also* Juliana Menasce Horowitz et al., *Race and Multiracial Americans in the U.S. Census*, PEW RSCH. CTR. (June 11, 2015), https://www.pewresearch.org/social-trends/2015/06/11/chapter-1-race-and-multiracial-americans-in-the-u-s-census/ [https://perma.cc/P7RT-PTPQ].

32. Horowitz et al, *supra* note 31.

Every U.S. census since the first one in 1790 has included questions about racial identity, reflecting the central role of race in American history from the era of slavery to current headlines about racial profiling and inequality. But the ways in which race is asked about and classified have changed from census to census, as the politics and science of race have fluctuated. And efforts to measure the multiracial population are still evolving.

bolstered within our systems necessarily requires categorization at some level. Therefore, use of constructs like "Black" or "white" does not reflect endorsement of the parameters of that categorization as used within systems—just recognition that these are the currently employed categories.[33] The intersection of age, race, and other factors are essential to narrative within the juvenile sentencing space.[34] These concepts ground any discussion of what it means to "consider" youth within sentencing decisions, but also at every point of their involvement with the system. And because youth is a concept subject to interpretation, when layering over that the broad discretionary powers from *Jones*, control of the narrative does not belong to the individual juvenile.[35]

III. THE CRADLE TO PRISON PIPELINE AND ITS IMPACT ON JUVENILES

> At crucial points in their development, from birth through adulthood, more risks and disadvantages cumulate and converge that make a successful transition to productive adulthood significantly less likely and involvement in the criminal justice system significantly more likely. Lack of access to health and mental health care; child abuse and neglect; lack of quality early childhood education to get ready for school; educational disadvantages resulting from failing schools that don't expect or help them achieve or detect and correct early problems that impede learning; zero tolerance school discipline policies and the arrest and criminalization of children at younger and younger ages for

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Id; *see generally* IAN HANEY-LOPEZ, WHITE BY LAW (2006) (tracing court decisions to justify whiteness of some individuals).

33. *See generally* Lauren S. Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1246 (2014) ("The multiplicity of new racial categories and blurring of existing racial categories may make it difficult for the state to collect meaningful racial statistics that can be used to prove racial disparities or to enforce civil rights statutes").

34. Soung, *supra* note 1, at 428–29.

> Within the juvenile justice system, youth is thus a construct that is subject to interpretation, including through the lens of race. The fluid and racially informed constructions of youth existed when society first developed an understanding of the age group. Such constructions persist today in shaping the juvenile justice system, which over-selects for youth of color at every stage of its process. The legal and political implications of such dueling narratives for youth justice are far-reaching.

Id.; *see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 404 (2013) ("Today, disparities in the treatment of poor youth of color persist notwithstanding similarities in the normative development of youth across all ethnicities and socioeconomic classes.").

35. Blitzman, *supra* note 5 ("Experience has also shown that broad discretion without concrete guidelines contributes to an increased likelihood of exacerbating racial and ethnic disparities in all contexts."); *see generally* Jones v. Mississippi, 141 S. Ct. 1307, 1307 (2021).

> behaviors once handled by schools and community institutions; neighborhoods saturated with drugs and violence; a culture that glorifies excessive consumption, individualism, violence and triviality; rampant racial and economic disparities in child and youth serving systems; tougher sentencing guidelines; too few positive alternatives to the streets after school and in summer months; and too few positive role models and mentors in their homes, community, public and cultural life overwhelm and break apart fragile young lives with unbearable risks.[36]

In 1973, juvenile justice pioneer and leader Marian Wright Edelman established the Children's Defense Fund, which later launched a "Cradle to Prison Pipeline" Initiative.[37] This initiative produced an in-depth report to document more systematically what they were hearing from attorneys, families, and young people across the nation.[38] The report notes that the pipeline can be reduced to one simple fact: the U.S. is not a level playing field, and our legal system and "our nation does not value and protect all children's lives equally."[39] This statement carries the same weight, if not more, than it did at its publication in 2007. The Report defined the pipeline in the quote at the outset of this section.[40]

Building on this work, the Center for Public Interest Advocacy and Collaboration (CPIAC) at Northeastern University School of Law has diagrammed the pipeline in Massachusetts using an interdisciplinary approach (the C2P Project).[41] CPIAC's goal is to amplify the data transparency pioneered by Edelman and so many others to ameliorate the diversion of historically underrepresented and under resourced individuals into the carceral system. CPIAC wants this project to serve

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36. CHILDS. DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE 3–4 (2007), https://www.childrensdefense.org/wp-content/uploads/2018/08/cradle-prison-pipeline-report-2007-full-lowres.pdf [https://perma.cc/96TB-WBPC]; *see also* CLBB Whitepaper, *supra* note 17, at 17 (discussing *Miller* factors two and three, family and home, and peer influence).

37. CHILDS. DEF. FUND (Dec. 12, 2022), https://www.childrensdefense.org/ [https://perma.cc/9JQZ-DW9T]

38. CHILDS. DEF. FUND, *supra* note 36, at ii.

39. *Id.* at 3.

40. *Id.* at 3–4.

41. Our ongoing work at CPIAC builds upon the work of many scholars and activists who have contributed to this space. At its core, CPIAC is intended to work as a catalyst for systemic transformation, not just on behalf of vulnerable populations and communities, but in collaboration with them. This work is all to promote the realization of social justice, and in particular, juvenile justice. CPIAC is guided by a board of advisors that is representative of a cross section of expertise, including judges, academics, lawyers, students, activists, and more. *Mapping the Cradle to Prison Pipeline*, NE. UNIV. SCH. OF LAW (Dec.12, 2022), https://www.cradle2prison.info/ [https://perma.cc/ZM4G-37JF].

as a bridge from Massachusetts to other organizations that are doing this work nationally and are interested in collaborating to dismantle the pipeline. The C2P project is working to build a new, holistic model of contributors to the entrenched problem of mass incarceration.

After an in-depth interdisciplinary literature review and interviews with practitioners, community members, and advocates, CPIAC constructed an initial visualization of the pipeline that identifies entry points into the pipeline at the highest levels (for example, housing inequity and pervasive poverty).[42] As the visualization moves to lower levels, it identifies some of the actors within that entry point.[43] It then singles out policies and principles that contribute to the web of systems that divert youth into the pipeline.[44] At the end of all these systems funneling juveniles, and in particular Black youth and youth of color, there is incarceration.[45]

Figure 1–Top Level "Entry Points" into the Cradle to Prison Pipeline[46]

Pervasive Poverty	Housing Inequality	Population Health	Child Welfare System	Education	Juvenile Justice

Diagrams of the Cradle to Prison Pipeline and potential points of intervention were developed in a collaboration between CPIAC, Northeastern's College of Arts, Media and Design (CAMD), and Northeastern's College of Social Sciences and Humanities (CSSH). The visualizations show how juveniles enter the pipeline, illustrating the cumulative and interconnected impact of factors that lead to disproportionate rates of incarceration among communities of color in Massachusetts.[47] The pipeline, supported by both data and narrative, requires the viewer to see the weight of the sheer complexity of the system.[48] The use of narrative

42. *Mapping the Cradle to Prison Pipeline*, NE. UNIV. SCH. OF LAW (Dec. 13, 2022), https://www.cradle2prison.info/visualization [https://perma.cc/28U8-WLVU].

43. *Id.*

44. *Id.*

45. *Id.* And here is one point where *Jones* and juvenile sentencing come directly into play—but as anyone who has worked with the pipeline knows, it is less a linear path and more of an overlapping and recursive web.

46. *Id.* CPIAC recognizes that this list is underinclusive. *See also* ELROD & RYDER, *supra* note 13, at 66 (examining the social context of juvenile crime).

47. *Mapping the Cradle to Prison Pipeline*, *supra* note 42; *see also* CLBB Whitepaper, *supra* note 17, at 17 (discussing *Miller* factors two and three, family and home, and peer influence).

48. Professor Hirsch of CAMD is quoted as saying:

> One reason it is so hard to stem the flow of welfare-involved kids into the criminal justice system is sheer complexity. It can be very difficult to understand

is at the heart of what CPIAC hopes to accomplish, and the inclusion of individuals' narratives alongside project data and systems maps illustrate more effectively the true impacts of these systems.

IV. THE ROLE OF THE MEDIA IN PERPETUATING HARMFUL NARRATIVES

> On the one hand, the Court tried to adhere to a consistent view of childhood—children as infants with diminished capacity. On the other hand, the Court relied on its own notions of childhood, maturity, competence, and capacity instead of turning to research studies.[49]

The way the narrative of youth is considered (whether meaningfully or in "name only") in systems and their actors is influenced by news, journalism, and media portrayals related to juveniles and crime.[50] There have been regressive shifts when it comes to juvenile policy and punishment "driven in part due to media narratives criminalizing Black and Brown youth."[51] These narratives have infiltrated many of our systems. Media, as digested by judges and juries (and every individual), is a "dominant purveyor of the narratives of youth, race[,] and crime."[52] This influence has been happening for centuries and is absorbed consciously and subconsciously.

> how institutions, policy, and other social forces conspire to lead kids into the criminal justice system. Visualizing these effects with maps, charts, videos and other media will help policymakers, advocates and concerned citizens make sense of the cradle-to-prison pipeline and, hopefully, create policies and interventions that effectively dismantle it.

Northeastern University Research Team Launches Resources to Dismantle the Cradle-to-Prison Pipeline, NE. UNIV. (Oct. 28, 2020), https://law.northeastern.edu/northeastern-university-research-team-launches-resources-to-dismantle-the-cradle-to-prison-pipeline/ [https://perma.cc/VBA3-52A3].

49. Larry Cunningham, *A Question of Capacity: Towards A Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 300 (2006).

50. Doreen St. Felix, *How Alexandra Bell is Disrupting Racism in Journalism*, THE NEW YORKER (May 29, 2018), https://www.newyorker.com/culture/culture-desk/how-alexandra-bell-is-disrupting-racism-in-journalism [https://perma.cc/WD32-J7UK].

51. *Changing the Narrative*, NAT'L JUVE. JUST. NETWORK (Oct. 2017), http://www.njjn.org/uploads/digital-library/Changing%20the%20Narrative%20Toolkit%20FINAL.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef [https://perma.cc/XKA4-36GG]; *see also* ELROD & RYDER, *supra* note 13, at 57.

> A consequence of the focus given to violent juvenile crime by the media and policy makers beginning in the early 1980s was the passage of state laws and the development of juvenile court practices in many jurisdictions that shifted attention away from the traditional juvenile court focus on treatment towards a new focus on punishment and accountability.

Id.

52. Sarah Jane Forman, *Countering Criminalization: Toward A Youth Development Approach to School Searches*, 14 SCHOLAR 301, 321 n.93 (2011).

Perhaps the most well-known example of this influence is the creation of the label "Superpredator," attributed to a November 1995 article.[53] Entitled "Coming of the Super—Predators,"[54] the author described an uptick in juvenile crime.[55] The basis for the theory was a study conducted in Philadelphia that found 6% of the boys in the study committed five or more crimes before they were eighteen—accounting for half of all serious crimes and two-thirds of all violent crime committed by the group as a whole.[56] The culprit? Moral poverty.[57] The article warned of 150,000 juvenile criminals who would need to be incarcerated in the coming few years.[58] Throughout the article, the term superpredator was used seven times but never explicitly defined.[59] However, the following description was given:

> On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior —sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes

53. Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth (last visited Apr. 19, 2023).

54. John DiLulio, *The Coming of the Super—Predators*, THE WEEKLY STANDARD (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/SY57-K6M3]. Author John DiLulio is a political scientist whose research focuses on religion and civil society. During the Second Bush administration, DiLulio served as the first Director of the White House Office of Faith-Based and Community Initiatives. *John DiLulio*, PENN ART & SCIS. POL. SCI. DEP'T, https://live-sas-www-polisci.pantheon.sas.upenn.edu/people/standing-faculty/john-diiulio [https://perma.cc/AE2K-7F8F]. DiLulio was a mentee of political scientist James Q. Wilson who influenced his writing in this area; Wilson is the academic who is attributed the idea of the "broken windows" theory of policing. Describing this relationship with Wilson, DiLulio told an interviewer "I didn't go to Harvard, I went to Wilson." Bogert & Hancock, *supra* note 53.

55. DiLulio, *supra* note 54.

56. Bogert & Hancock, *supra* note 53.

57. *Id.* (describing moral poverty as "the poverty of being without loving, capable, responsible adults who teach you right from wrong.").

58. DiLulio, *supra* note 54.

59. *Id.*

> "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.[60]

The author, John DiLulio, later defined the meaning of the word superpredator: "A superpredator is a young juvenile criminal who is so impulsive, so remorseless, that he can kill, rape, maim without giving it a second thought."[61] DiLulio met with President Clinton in 1995 at a working dinner on juvenile crime at the White House, where Clinton took copious notes.[62] In January 1996, two months after the publication of the article coining the term, then-First Lady Hillary Clinton referenced superpredators in a speech about President Clinton's crime agenda.[63]

In the years following, the term caught fire in media circles and was picked up by talk show hosts, journalists, newspapers—even Oprah Winfrey.[64] The Marshall Project identified 281 mentions of the term in media from 1995 to 2000 (and that is an undercount).[65] Compounding this, state legislatures responded harshly to the

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60. *Id.*; *see also* Brief for Jeffrey Fagan et al. as *Amici Curiae* Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (No. 10-9646), Jackson v. Hobbs, 565 U.S. 1203 (No. 10-9647) (2012) (hereinafter Amicus Brief).

> The fears of a juvenile crime wave that prompted these changes became embodied in the notion of a "juvenile superpredator," which was reflected in academic and political discourse. Juvenile superpredators were characterized as ruthless sociopaths who lacked a moral conscience and were unconcerned about the consequences of their actions and undeterred by punishment.

Amicus Brief at 8.

61. Bogert & Hancock, *supra* note 53 (in an interview with CBS news in April 1996).

62. Kevin Drum, *A Very Brief History of Super-Predators*, MOTHER JONES (Mar. 3, 2016), https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators/ [https://perma.cc/8B92-FL39].

63. Hillary Clinton, First Lady of the United States, Campaign Speech at Keene State College (Jan. 25, 1996), https://www.c-span.org/video/?69606-1/hillary-clinton-campaign-speech [https://perma.cc/KPJ6-K6PV].

> We also have to have an organized effort against gangs, just as in a previous generation we had an organized effort against the mob. We need to take these people on. They are often connected to big drug cartels, they are not just gangs of kids anymore. They are often the kinds of kids that are called "super-predators"—no conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel.

Id.; *see also* Drum, *supra* note 62.

64. Bogert & Hancock, *supra* note 53. DiLulio, along with William J. Bennett and John P. Walter, further promoted the idea of superpredators and warned of a rapidly increasing number of superpredators on the streets in the 1996 book *Body Count*. WILLIAM J. BENNETT, JOHN J. DILULIO, JR., JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (1996).

65. Bogert & Hancock, *supra* note 53. DiLulio has since expressed regret at the proliferation of the term and renounced the theory. In a summer 1996 interview with NPR, he said, "The term 'superpredator' has become, I guess part of the lexicon . . . [the word has] sort of gotten out and gotten away from me." *Id.* The stigma of the term still remains, though. In a 2020 debate, Donald Trump accused Joe Biden of using the term. Biden denied the usage.

perceived juvenile problem, with virtually every state changing their laws to increase the treatment of systems-involved-youth **as adults** for purposes of punishment.[66] By 2001, DiLulio had admitted his theory was mistaken and said he was "sorry for any unintended consequences"[67] and that he regretted that he could not "put the brakes on the super-predator theory."[68] Yet, lasting damage had been done to the narrative of Black youth and youth of color within the judicial system (and more broadly, society).

The creator of the superpredator label again attempted to undo the damage in 2012, signing onto an amicus brief in *Miller v. Alabama* pushing to limit JLWOP.[69] As discussed *infra*, *Miller* is a landmark case in the juvenile sentencing space, and it did in fact ultimately prohibit *mandatory* JLWOP sentences under the Eighth Amendment.[70] The brief clearly and unequivocally dispelled the superpredator narrative to a very receptive Supreme Court bench:

> [T]he fear of an impending generation of superpredators proved to be unfounded. Empirical research that has analyzed the increase in violent crime during the early- to mid-1990s and its subsequent decline demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless. *Amici* have been unable to identify *any* scholarly research published in the last decade that provides support for the notion of the juvenile superpredator, and the scholar credited with originating that term has acknowledged that his characterizations and predictions were wrong; he is one of the *amici* who submit this brief.[71]

Despite the brief (and the outcome in *Miller*), this "tough on crime" approach still reverberates today: "the narrative of youth criminality as a serious threat to society

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> While there is no record of Biden using the phrase, much of the harsh anti-crime legislation embraced by both parties in the 1990s continues to be a hot-button issue to this day. From the moment the term was born, 25 years ago this month, "superpredator" had a game-changing potency, derived in part from the avalanche of media coverage that began almost immediately.

Id.

66. *Id.* (emphasis added).

67. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/GV5P-76W2]; *see also* Bogert & Hancock, *supra* note 53.

68. *The Origins of the Superpredator: The Child Study Movement To Today*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (May 2021), https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf [https://perma.cc/DSP6-9PHJ].

69. Amicus Brief, *supra* note 60; Bogert & Hancock, *supra* note 53; *The Superpredator Myth, 25 Years Later*, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/DZ6U-82WU].

70. *See infra* Part V.

71. Amicus Brief, *supra* note 60, at 8.

remains a potent theme in American culture and a driving force of public policy."[72] For example, in the 2022 midterm elections, politicians across the country are running on platforms that promise to bring harsher enforcement against those who violate the law.[73] "The focus on punishment and retribution is summed up as 'adult time for adult crime.'"[74] But, the media-fueled public fear about crime, juvenile crime, or superpredators does not match reality.[75] Public fear about crime often leads to harsher sentencing laws, as it did in the 1980s and 1990s.[76] It also leads to disproportionate punishment for historically underrepresented and under resourced individuals.[77]

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72. Forman, *supra* note 52, at 317.

73. Julie Bosman, Jack Healy, & Campbell Robertson, *Fear of Crime Looms Large for Voters, to Republicans' Advantage*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/us/midterm-elections-republicans-crime.html.

> These concerns are generally benefiting Republican candidates, who have bluntly blamed Democratic elected officials for a surge in violent crime in many cities that began during the pandemic and has yet to fully subside. Conservative news outlets like Fox have also focused heavily on crime, as has local TV news. In interviews, voters criticized liberals' efforts to eliminate cash bail, decriminalize marijuana and decrease funding for police departments, even if those policies have not been put in place where they live.

Id.; *see also* Gia Orsino, *GOP AG Candidate Jay McMahon Vows a Tough-on-Crime Tenure*, WGBH (Oct. 6, 2022), https://www.wgbh.org/news/politics/2022/10/06/gop-ag-candidate-jay-mcmahon-vows-a-tough-on-crime-tenure [https://perma.cc/7UJQ-UZ6B].

74. *Superpredators: The Demonization of Our Children by the Law*, 3 J. L. & FAM. STUD. 251, 251 (2001).

75. Jamiles Lartey, Weihua Li, & Liset Cruz, *Ahead of Midterms, Most Americans Say Crime is Up. What Does the Data Say?*, THE MARSHALL PROJECT (Nov. 5, 2022), https://www.themarshallproject.org/2022/11/05/ahead-of-midterms-most-americans-say-crime-is-up-what-does-the-data-say [https://perma.cc/Y3HY-MVXE].

> You've likely heard a lot about crime recently, with the midterm elections right around the corner. It's been a major topic of campaign rhetoric and featured in a cacophony of often misleading ads. More Americans than ever now believe that crime is up in their community, according to a recent Gallup poll.

Id.

76. *Id.*

77. Josh Rovner, *Racial Disparities in Youth Commitments and Arrests*, THE SENTENCING PROJECT (Apr. 1, 2016), https://www.sentencingproject.org/reports/racial-disparities-in-youth-commitments-and-arrests/ [https://perma.cc/UPR5-XLYE].

Figure 2–Political Advertising in the 2022 Midterm Election in Pennsylvania[78]

Juveniles are already at a disadvantage when it comes to presenting their own narrative in our systems because "they have little access to forums through which their stories might be told and even less access to arenas of law reform. Adults generally speak for children."[79] This disadvantage when it comes to communicating a narrative is compounded by media treatment of juveniles. Ultimately, in part because of media treatment and societal stigma, juveniles in the system are seen as less worthy and meriting less attention—however, "narratives of the lives of juveniles in the delinquency system reveal enormous complexity as well as many individual resources and insights."[80] But these complexities, resources, and insights are often lost when a juvenile is being considered at any stage within the legal system. The contrast between the majority and the dissent in the 2021 *Jones v. Mississippi* Supreme Court ruling is one such example of failure to meaningfully consider youth as constitutionally required, and it fails to advance the ultimate (stated) goal of juvenile sentencing: rehabilitation. Meaning, consideration of youth in name only.

78. Bosman, Healy, & Robertson, *supra* note 73.

79. Sherman, *supra* note 3, at 1845. "Every aspect of the law could benefit from actual evidence and knowledge from the field of psychology. The legal system has puttered along with unfounded and incorrect assumptions for too long." Cunningham, *supra* note 49, at 365.

80. Sherman, *supra* note 3, at 1846; *see also* CLBB Whitepaper, *supra* note 17, at 2–3.

V. BATTLING NARRATIVES IN *JONES V. MISSISSIPPI*

The approach to incorporation of evolving science into legal decisions related to juveniles is inconsistent.[81] As in many facets of jurisprudence, the law is slow to realize that precedent and their operation are not in line with current scientific understandings.[82]

The 2021 *Jones v. Mississippi* decision, authored by Justice Brett Kavanaugh with a powerful dissent from Justice Sonia Sotomayor, is the latest in a lengthy line of cases related to juvenile sentencing that have reached the Supreme Court of the United States.[83] Forward progress was happening at the federal level in this space, but it was fractured in implementation throughout the states in what could be referred to as a discretionary roulette. Some states, like Massachusetts, extended the federal precedent to outright ban LWOP for all individuals under eighteen.[84] However, other states, including Mississippi, still allowed

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81. Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447 (2014).

> If the law were to more fully incorporate scientific research on minors, it would be better able to justify current legal policies and would be far better informed to tailor laws to meet minors' specific needs. However, when doing so, legal policymakers must be aware of the significant challenges of incorporating this research, as with all scientific principles, into the law. When approached carefully and consistently, scientific research can be successfully integrated into our legal structure, infusing it with greater understanding and ability to meet the needs and realities of adolescents rather than the panic of older generations or the self-interested demands of corporate and governmental pressure.

Id. at 453.

82. *Id.* at 471; *see also* Mary Jane Angelo, *Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don't, and How We Can*, 86 TEX. L. REV. 1527, 1532 (2008) ("Another obvious reason why law and science have such an uneasy relationship in the courtroom is that the great majority of judges and juries are not educated in the hard sciences and do not have the technical expertise necessary to fully understand, interpret, and apply scientific evidence."). Judges have long grappled with how to best approach the challenge of changes within the scientific knowledge base over time. *See, e.g.,* Joy Lyngar, *Educating Judges at the Intersection of Law and Science*, 56 JUDGES' J. 33, 33–34 (2017) ("There is a basic disconnect between the institutions of law and science.").

83. 141 S. Ct. 1307 (2021).

84. The watershed *Miller v. Alabama* banned mandatory juvenile life without parole sentences, but a sentencer could still impose them if a particularized hearing was held. 567 U.S. 460 (2012). This case created the "*Miller* factors" and "*Miller* hearings" that apply to juveniles who live in a jurisdiction that still allows JLWOP. "[O]n July 20, 2022, Massachusetts, based on analysis of what constitutes cruel and unusual punishment under article 26 of its Declaration of Rights, extended the scope of *Miller* hearings to include persons who were 18–20 years old at the time of their crimes." Blitzman, *supra* note 5. "The Massachusetts cases had been sent to the Superior Court for fact finding by the Massachusetts Supreme Judicial Court. If, as appears likely, the decisions are affirmed,

JLWOP if a sentencing hearing occurred (and, ostensibly, youth was considered). The question before the Court in *Jones* was whether there needed to be any specific finding when handing down what essentially equates to a sentence of death for an individual under eighteen.[85]

At the center of this case is Brett Jones. By his early teens, Jones had endured many of the markers that significantly increase an individual's likelihood of being channeled into the prison pipeline: poverty, significant physical and emotional abuse, lack of educational resources and opportunity, insecure housing, and lack of access to necessary health treatment (with his story tracking to the C2P Project work discussed earlier).[86] When Jones was fifteen, he was kicked out of his home by his stepfather and moved to Mississippi with his grandparents. At that time, he was forced to abruptly stop taking medications to treat his mental illness. Jones's girlfriend followed him to Mississippi and one day was discovered by his grandfather, who kicked her out. That same day, Jones and his grandfather go into an argument over the girlfriend, resulting in Jones stabbing his grandfather multiple times, killing him (although Jones later attempted to give CPR). Jones later confessed to murdering his grandfather.[87] He was charged with murder and sentenced to life without parole, which, at the time, was *mandatory* for homicide offenses in Mississippi.[88]

Jones's case has a lengthy history following his original sentence. In 2006, the Mississippi Court of Appeals affirmed the JLWOP sentence and, following this, his motion for post-conviction relief was denied (and

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this means that Massachusetts has now joined Washington [in extending the LWOP prohibition through age twenty]." *Id.*

85. *Jones*, 141 S. Ct. at 1311. The term of art at the focus of *Jones* was "permanent incorrigibility," a label that even scientists are not confident can be accurately described or found. *See* Zotaj, *infra* note 97.

86. *Jones*, 141 S. Ct. at 1337–40 (Sotomayor, J., dissenting) (providing the pre-crime narrative of Jones' life in Section III); *see also Mapping the Cradle to Prison Pipeline*, supra note 42.

87. *Id.*

88. *Id.* at 1312; *see also* Delvin Davis, *Juveniles with Long Prison Sentences in Mississippi*, SPLC ACTION (Jan. 11, 2022), https://www.splcactionfund.org/blog/2022/01/11/juveniles-long-prison-sentences-mississippi#:~:text=According%20to%20November%202021%20data,14%20people%20incarcerated%20by%20MDOC [https://perma.cc/Z4LA-MAX9]:

> According to November 2021 data from the Mississippi Department of Corrections (MDOC), 1,181 people currently incarcerated in Mississippi prisons were arrested and detained before age 18 – roughly 1 out of every 14 people incarcerated by MDOC. Out of those incarcerated as juveniles, 68 have been in prison for at least 20 years – collectively costing the state over $1.2 million a year.

Id.

later affirmed on review) by the Mississippi Court of Appeals.[89] In 2012, the Supreme Court of Mississippi was considering whether to review the case when the Supreme Court decided *Miller v. Alabama*, the watershed case that increased protections for juveniles by prohibiting *mandatory* sentences of life without parole.[90] The Mississippi Supreme Court, following *Miller*, ordered a new sentencing hearing and ordered that the sentencing judge "consider" Jones's youth at the time of his offense in setting a new sentence.[91] At the hearing, the sentencing judge reimposed the JLWOP sentence without articulating any specific factual findings that would establish if and how youth was considered.[92]

Jones again appealed his sentence to the Mississippi Court of Appeals. During this time, the Supreme Court decided another case that made *Miller*'s protections retroactive and clarified that *Miller* prohibited JLWOP sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[93] After the Mississippi Court of Appeals affirmed Jones's JLWOP sentence once again, his case arrived at the Supreme Court of the United States.[94] The core legal issue presented on *certiorari* was whether, under *Miller* and its progeny, a sentencing judge must make a specific finding of permanent incorrigibility before imposing JLWOP.[95] By the time his case came to the Supreme Court, Jones had spent more time behind bars than he had ever lived outside.

A. The Majority Narrative

The Supreme Court responded with an answer that was unsurprising to those following the changing composition of the Justices, holding that no specific factual findings of incorrigibility were required.[96] JLWOP is

89. *Jones*, 141 S. Ct. at 1312.

90. *Id.* at 1312–13.

91. *Id.*

92. *Id.* at 1313 ("At the end of the hearing, the sentencing judge acknowledged that he had discretion under *Miller* to impose a sentence less than life without parole. But after considering the factors 'relevant to the child's culpability,' . . . the judge determined that life without parole remained the appropriate sentence for Jones.").

93. *Id.* at 1325.

94. *Id.* at 1313.

95. *Id.*

96. *Id.* ("The Court has already ruled that a separate factual finding of permanent incorrigibility is not required."); *see also* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 HARV. L. REV. F. 67, 68–69 (2021).

> Justice Ginsburg's death, and the appointment of Justice Barrett, narrowed the path for Mr. Jones. Early news reports of the argument accurately heralded a loss. My colleagues avoided predictions and tried to seem upbeat but probably knew the score. And on April 22, 2021, the Court issued its ruling. The 6–3

permitted as long as the sentencing judge has discretion to consider the mitigating qualities of youth and impose a lesser punishment.[97] The Court found that *Miller* explicitly rejects Jones's arguments and the majority analyzes each in turn.

First: Jones's attorneys analogized juvenile sentencing decisions to other situations in which sentencers are required to make findings before sentencing the offender to death, such as insanity or intellectual disability.[98] The Court disagreed that permanent incorrigibility was a similar eligibility criterion (which is typically required when there is national consensus in favor).[99]

Second: Jones's attorneys also argued that *Montgomery* must have assumed that separate factual findings are required because it found that *Miller* was a substantive rule and only allowed JLWOP for the permanently incorrigible.[100] While the majority agreed that *Miller* is a substantive rule for retroactivity purposes, it held that *Montgomery* only required juvenile offenders receive a hearing in which youth is considered.[101]

Third: Jones's attorneys argued that factual findings were necessary to ensure the goals of *Miller* and *Montgomery* were fulfilled: that only in the rarest instances would a juvenile offender be sentenced to JLWOP.[102] The majority disagreed, holding that discretionary sentencing

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> breakdown of the votes was *Montgomery*'s true mirror image—identical, except in the completely opposite direction.

Id.

97. *Jones*, 141 S. Ct. at 1319.

> But if the sentencer has discretion to consider the defendant's 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 [eighteen] 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.

Id. (emphasis in original). This means that a sentencer's mere ability to "make a determination about a juvenile's crime [is] sufficient to mitigate the risk of excessive punishment." Courtney Zotaj, *Evolving Standards of Decency: Applying A "Permanent Incorrigibility" Standard Despite* Jones v. Mississippi, 46 LAW & PSYCHOL. REV. 201, 221 (2022).

98. *Jones*, 141 S. Ct. at 1315 ("[T]he Court has recognized that it 'is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"); *see also* CLBB Whitepaper, *supra* note 17, at 3 ("Science cannot divine which 'rare' adolescent may be 'permanently incorrigible,' but it can identify the characteristically 'transient characteristics' of adolescence.").

99. *Jones*, 141 S. Ct. at 1315.

100. *Id.* at 1316–17.

101. *Id.* at 1317–18.

102. *Id.* at 1318.

procedures would do so because the sentencer necessarily considers youth as a mitigating factor.[103]

The majority decision continued to repeat that "it would be all but impossible" for the sentencer not to consider the defendant's youth, reiterating that *Miller* does not require any specific findings nor on-the-record sentencing explanations.[104] According to the majority, it would be "anomalous" to require on-the-record sentencing decisions for JLWOP when it is not even required for the death penalty, and that imposing this "new" rule would intrude more than was necessary upon the states.[105] Absent a short fact section describing the crime, the majority decision lacks consideration of the narrative of the juvenile offender. Also lacking is a finding that Jones is one of those "rare" juveniles that are so irredeemable that justice requires permanent incarceration. In so ruling, the Supreme Court has given the green light to any sentencer to likewise ignore the signature qualities of youth and merely consider youth in name only.

B. The Minority Narrative

In the dissenting opinion, Justice Sotomayor sharply condemned the majority's disregard for *stare decisis*.[106] The composition of the bench here was the difference between the *Jones* "backslide" and the more protective *Miller* line of cases.[107] Sotomayor argued that the majority holding—that a sentencer does not need to make factual findings of irreparable corruption—is a drastic departure from *Miller* and *Montgomery*, which banned JLWOP for all but the rarest children, whose crimes reflect irreparable corruption.[108] She argued that none of the

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103. *Id.* at 1319.

104. *Id.*

105. *Id.* at 1320–21; *see also Eighth Amendment–Cruel and Unusual Punishment–Juvenile Sentencing–*Jones v. Mississippi, 135 HARV. L. REV. 381, 384 (2021) ("Justice Thomas concurred in the judgment. He suggested that the Court adopted a 'strained reading' of *Montgomery* in order to reach the correct result and would have been better off acknowledging that *Montgomery* is inconsistent with *Miller*.").

106. *Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting). "How low this Court's respect for *stare decisis* has sunk. Not long ago, that doctrine was recognized as a pillar of the rule of law, critical to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." *Id.* at 1336–37 (internal quotations omitted).

107. Justice Sotomayor was joined by Justices Breyer and Kagan. Shapiro & Gonnerman, *supra* note 96, at 69.

108. *Jones*, 141 S. Ct. at 1335–36 (Sotomayor, J., dissenting). Sotomayor returns to the language of the opinion, pointing out the Court's misleading reliance on its explicit language:

> As the Court quietly admits in a footnote, however, *Montgomery* went on to clarify that the fact "[t]hat *Miller* did not impose a formal factfinding

traditional reasons for overturning a decision (quality of the precedent's reasoning, consistency with other decisions, legal and factual developments, or workability) would justify overturning *Montgomery,* as the Court effectively does.[109] Yet, as it stands post-*Jones*, the only thing that is now required to juvenile defendants like Brett Jones to life without parole—effectively a death sentence—is "a discretionary sentencing procedure where youth [is] considered."[110]

The decision is a devastating result for advocates for juvenile justice reform and those who support rehabilitation for juvenile offenders.[111] Justice Sotomayor carefully and clearly explains the shortcomings of the majority holding in Parts I and II—but Part III is where the contrasting narrative is stark. Part III is Brett Jones's narrative, one which embodies "the heartbreaking nature of juvenile crime."[112] Many of the details leading up to the crime align with C2P pipeline entry points: for example, Jones's biological father was an alcoholic who physically abused him and his mother, knocking out his mother's teeth and breaking her nose on

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> requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."

Id. at 1330–31. Sotomayor rejects the Court's assertion that sentencers will necessarily consider youth, pointing out that Mississippi has not reduced JLWOP sentences for juvenile offenders with a purely discretionary procedure. *Id.* at 1333; *see also* Davis, *supra* note 88.

109. *Jones*, 141 S. Ct. at 1335 (Sotomayor, J., dissenting) ("Today, however, the Court transforms *Miller* into a decision requiring only a 'discretionary sentencing procedure.'").

110. *Id.* at 1328.

111. *Id.* at 1341 ("The question is whether the State, at some point, must consider whether a juvenile offender has demonstrated maturity and rehabilitation sufficient to merit a chance at life beyond the prison in which he has grown up. For most, the answer is yes." (internal citations omitted)); *see also* Sarah French Russell, *A "Second Look" at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489, 505–07 (2013) (noting that juvenile LWOP narratives often focus primarily on humanizing the client to place the criminality in context). As in *Jones*, sometimes these narratives make their way into court opinions. *Id.* at 506–07.

> In addition to focusing on the individual client's story, advocates in juvenile LWOP cases make generalizations about how children are, as a group, "different" from adults. They assert that these differences make them less culpable than adults and less deserving of the harshest penalties. This approach was initially used to persuade the Court to prohibit the imposition of the death penalty on juvenile offenders, and the argument convinced the Court in *Graham* and *Miller* to adopt broad categorical rules regarding the sentencing of juvenile offenders outside of the death penalty context.

Id. at 507.

112. *Eighth Amendment–Cruel and Unusual Punishment–Juvenile Sentencing–Jones v. Mississippi*, *supra* note 105, at 390. The details included by Sotomayor (and ignored by the majority) are so significant that when law students first read the dissent and then the majority, they often think that the decisions are not from the same case.

several occasions.[113] Jones was the victim of an abusive home environment, poverty, lack of access to stable housing, education, and health services.[114] Similarly, as written by Sotomayor, many of the actions Jones took after his crime reflect an adolescent immaturity, impetuosity, and failure to appreciate risks or consequences.[115]

Brett Jones committed a terrible crime, taking the life of his grandfather Bertis Jones. Supreme Court precedent on the Eighth Amendment does not excuse crime, nor does it prevent punishment for individuals who commit them, even when they are kids.[116] Yet, those signature qualities of youth were not meaningfully considered when determining the appropriate sentence for Jones. By failing to weigh these details that reflect Jones's narrative, the majority rules that these factors are not significant when it comes to imposing JLWOP, which essentially amounts to a death sentence for a fifteen-year-old. The dissent closes by addressing the implications of the Court's decision, both on Jones's life and those of other juvenile offenders sentenced to JLWOP.[117] It is a direct statement to Jones and other individuals who are bearing the weight of discretionary sentencing procedures that amplify justice by geography:

> Jones should know that, despite the Court's decision today, what he does in life matters. So, too, do the efforts of the almost 1,500 other juvenile offenders like Jones who are serving LWOP sentences. Of course, nothing can repair the damage their crimes caused. But that is not the question. The question is whether the State, at some point, must consider whether a juvenile offender has demonstrated maturity and rehabilitation sufficient to merit a chance at life beyond the prison in which he has grown up. For most, the answer is yes.[118]

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113. *Jones*, 141 S. Ct. at 1338.

114. *Id.*

115. *Id.* at 1339; *see also* CLBB Whitepaper, *supra* note 17, at 10 (discussing *Miller* factor one, immaturity, impetuosity, and risk taking).

> The predisposition for sensation seeking, hypersensitivity to immediate rewards, and present-focused decision making peaks in middle to late adolescence and then declines in young adulthood. Further, capacities for self-regulation also improve with age and stabilize in young adulthood. This is in part due to changes in brain function and connectivity and to improved executive functioning as the prefrontal cortex matures.

Id.

116. *Jones*, 141 S. Ct. at 1340.

117. *Id.* at 1337.

118. *Id.* at 1341 (internal citations omitted).

*C. The Post-*Jones *Landscape*

As of April 2023, *Jones* has been cited in 204 state court cases and 100 federal court cases,[119] with disparities in how the states are interpreting the federal floor (just as we saw in the wake of *Miller*). For example, the state of Washington has been a leader in extending protections for juveniles when it comes to JLWOP sentencing, not only in the judiciary, but the legislature as well.[120] Pre-*Jones*, in a 2021 5–4 decision by the Supreme Court of Washington, Washington was the first state to extend the constitutional protection against mandatory life sentences without parole to individuals up to twenty-one.[121] Post-*Jones*, Washington had the opportunity to once again revisit this issue.[122] Washington did not backslide and allow *Jones* to be used to undo formerly extended state protections. Instead, the Court further extended the prohibition to *de*

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119. *Jones v. Mississippi, Citing Decisions*, LEXIS+ (Apr. 19, 2023), https://plus.lexis.com/shepards/shepardspreviewpod/?pdmfid=1530671&crid=26f10a1b-ee69-477d-a3ec-4c0731a12bd0&pdshepid=urn%3AcontentItem%3A62HD-7RM3-GXF7-32V5-00000-00&pdshepcat=citingref&pddoctabclick=true&prid=24b64ce1-24a9-463a-9028-fef7e3decaa6&ecomp=2gntk#/citingref. *See also* Francis X. Shen et al., *Justice for Emerging Adults after Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 NYU L. REV. ONLINE 101 (2022), https://ssrn.com/abstract=4126374 [https://perma.cc/C6U5-7SGL]:

> Our analysis finds that litigants regularly argue that drawing the line at age 18 is inconsistent with current neuroscientific consensus. It is clear, however, that courts are presently unreceptive to raising the age for *Miller* protections. In our database, the record for Eighth Amendment challenges is 0 wins and 494 losses. One temporary win, in federal district court, was subsequently vacated and remanded at the appellate level. A second win, in the Illinois Supreme Court, was made on the basis of a state constitutional provision rather than the Eighth Amendment.

Id. at 105.

120. Blitzman, *supra* note 5; *see also In re* Pers. Restraint of Monschke, 482 P.3d 276 (Wash. 2021) (holding that the state constitutional provision prohibiting cruel punishment prohibited mandatory LWOP for a nineteen-year-old and a twenty-year-old).

121. *Monschke*, 482 P.3d at 277.

> *Roper* considered juveniles' lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character when it increased the minimum age for death eligibility from 16 to 18. All three of these factors weigh in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17-and 18-year-olds as a class.

Id. at 284. An October 2022 decision in Washington declined to extend this reasoning to a sentence of thirty-six years (as opposed to a mandatory LWOP sentence). State v. Nevarez, 519 P.3d 252, 255 (Wash. Ct. App. 2022). A dissenting opinion argued that the principles should extend to all sentencing. *Id.* at 257.

122. State v. Haag, 495 P.3d 241, 243 (Wash. 2021) ("We hold that the resentencing court erred because it gave undue emphasis to retributive factors over mitigating factors. We also hold that Haag's 46-year minimum term amounts to an unconstitutional de facto life sentence. We reverse and remand for resentencing in accordance with this opinion.").

facto life sentences, for example a sentence given to an eighteen-year-old of forty-six years (while not technically life without parole, it functions as its equivalent).[123]

In contrast to Washington, consider the state of Pennsylvania and the *Commonwealth v. Felder*[124] decision of February 2022, holding that *Jones* completely unwinds the state court's *Miller* jurisprudence.[125] Michael Felder was initially sentenced to JLWOP for a first-degree murder committed when he was seventeen.[126] Following *Miller*, Felder's sentence was vacated, and he was resentenced to a term of fifty years to life. Similar to the Washington case, Felder argued on appeal that fifty years was an unconstitutional *de facto* life sentence. [127] In a *Jones* backslide, the Supreme Court of Pennsylvania found that *Jones*:

> severely narrowed the holdings of *Miller* and *Montgomery* as previously understood by many courts, including this one. Upon careful review of this new guidance, we are constrained to conclude [prior decisions from the court] ha[d] largely been abrogated . . . [Under] *Jones*, even if a term-of-years sentence amounts to a *de facto* life sentence, *Miller* provides no viable avenue for relief. Accordingly, we affirm appellant's judgment of sentence.[128]

Washington is one example of a state that already had momentum for increased protections, which do not seem affected by the *Jones* backslide.[129] However, just as we saw in the wake of *Miller*, inequities

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123. *Id.* at 245.

124. 269 A.3d 1232 (Pa. 2022), *reargument denied* (Apr. 12, 2022).

125. *Id.* at 1246.

> Though we might prefer the more expansive view of *Miller* as seen through the lens of *Montgomery*, we cannot ignore that *Jones*'s interpretation is controlling as a matter of Eighth Amendment law. And because that decision abrogates our foundational understanding in *Batts II* that a juvenile homicide offender cannot constitutionally receive a sentence of life without parole unless he or she is proven to be permanently incorrigible, the procedural protections we adopted in that case to ensure that result are no longer tenable as an exercise of this Court's power of judicial administration.

Id.

126. *Id.* at 1239.

127. *Id.* at 1240.

128. *Id.* at 1235.

129. *But see* State v. Nevarez, 519 P.3d 252, 255 (Wash. Ct. App. 2022). A Washington appellate court declined to extend these principles to ALL sentencing. Whether the state supreme court will affirm this decision is, as of yet, unclear. *See generally* Shapiro & Gonnerman, *supra* note 96, at 69 ("Of course, state supreme courts regularly interpret their state constitutions as exceeding the floor set by the U.S. Constitution."); *see also* Madiba Dennie & Douglas Keith, *State Courts Advance Protections for Young Defendants Even as SCOTUS Slows Progress*, BRENNEN CTR. FOR JUSTICE (Nov. 17, 2022),

will prevail state-by-state and justice by geography will continue;[130] and continue to disproportionately impact Black youth and youth of color.[131] It is unlikely that the current composition of the Supreme Court will be favorably receptive to a push to continue to increase protections for juveniles—experts argue that the battle must be taken to the individual states.[132] This is also true when it comes to arguments to extend the definition of who is a juvenile beyond the age of eighteen:

> The data suggest that at present, Eighth Amendment arguments to categorically extend federal *Miller* protections to those 18 and above are unlikely to win. At the same time, however, state constitutions and state-level policy advocacy provide a path to expand constitutional protections for emerging adults.[133]

VI. CONCLUSION

Consideration of youth in juvenile sentencing decisions under the *Jones* majority allows sentencers to functionally ignore the narrative of youth and all its complexities. It allows a court to confine an under-eighteen-year-old to a life behind bars without hope for true rehabilitation. For decades now, the need has been present to re-build or construct from scratch a "reimagined system—one which is more humane, hopeful, and coherent."[134] To further this end, in October of 2022, Mercer University School of Law convened a panel entitled "Past is Prologue: Legal Narratives and the Law's Potential for Justice and Injustice." The purpose of the Symposium was to create an interdisciplinary dialogue that might reimagine the system and address some of the injustices illustrated by the way narrative is used (and ignored) in our justice system. Just like the work done at CPIAC, the Symposium recognized the need to draw from advocates, experts, and authors from a diverse cross section, which generated powerful

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https://www.brennancenter.org/our-work/analysis-opinion/state-courts-advance-protections-young-defendants-even-scotus-slows [https://perma.cc/JRH2-Z9X5].

130. *See generally* Blitzman, *supra* note 5.

131. Mendel, *supra* note 12.

> Black youth and other youth of color are incarcerated in detention centers (the equivalent of jails in the adult justice system) at far higher rates than their white peers. Many studies have found that these disparities at detention are driven, at least in part, by biased decision-making against youth of color.

Id.

132. Shen, *supra* note 119, at 116.

133. *Id.* at 101.

134. Sherman, *supra* note 3, at 1841. "Without such a vision, each innovation is viewed in isolation, tested against existing justifications of rehabilitation or punishment, and often not developed fully." *Id*.

conversations and questions throughout the event. The Symposium highlighted conflicting legal narratives in briefs, judicial decisions like *Jones v. Mississippi*, press accounts, and conventional wisdom. Similar to the complexity of the C2P pipeline and the myriad factors that channel youth to incarceration, the ways in which narrative influences the operation of law and society are too vast to enumerate.

Yet within this overlapping maze, one theme repeatedly raised was the use of narrative "in name only" to reinforce marginalization of populations that have been historically underinvested and underrepresented. This also elicited audience questions about how to find a path for change in the years to come and make consideration of youth a meaningful consideration. In light of *Jones*, and as exemplified in the powerful voice of dissent by Justice Sotomayor, change-makers must continue to push for inclusion of the individual micro-narrative in legal spaces. While centering and honoring the individual, champions of that narrative must work to separate and elevate those individual stories, to the best of our abilities, from bias (including our own) and unproductive rhetoric. While there is not a clear blueprint at present to reform a system that has been stifling certain narratives for many decades, the Symposium provided a venue for collaboration, conversation, and hope—and the awareness of others working towards common goals.