Note

Waging the Battle for Society's Soul[1]: The Constitutionality of Juvenile Transfer Legislation in the Wake of *Jones v. Mississippi*

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Trying juvenile defendants as adults is a cruel, yet enduring practice in U.S. criminal law. If convicted, these youthful offenders face brutal conditions in adult prison and a lifelong stigma. Although these devastating consequences of conviction are readily apparent, juvenile transfer is insidious even absent a prison sentence or criminal record.

State-level legislation that mandates or creates a presumption for subjecting juveniles to any degree of proceedings in adult court disregards their unique capacity for rehabilitation—a characteristic of youth that both modern neuroscience and the U.S. Supreme Court have recognized for decades. In the context of sentencing juveniles to life without parole, the Court has acknowledged that the Constitution affords additional protection to children. Accordingly, with few exceptions, this type of sentence violates the Eighth Amendment. But the preclusion of disproportionately harsh punishment for children should not—and cannot—be confined to this one area of criminal law.

Instead, this Note promotes an expansive application of the constitutional prohibition of cruel and unusual punishment with

1. *See* Rachel M. Fugett, *Stop Presumptive Transfers: How Forcing Juveniles to Prove They Should Remain in the Juvenile Justice System Is Inconsistent with* Roper v. Simmons *&* Graham v. Florida, 48 J. MARSHALL L. REV. 365, 365 (2014) ("There can be no keener revelation of a society's soul than the way in which it treats its children." (quoting United States v. Cunningham, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010))).

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respect to juvenile defendants. Guided by the Supreme Court's jurisprudence regarding juvenile life without parole, this Note offers a lens to identify the more subtle dangers of transfer legislation that fails to account for the difference between children and adults.

INTRODUCTION

"We don't build prisons for that age group," York County, Pennsylvania, Judge Maria Cook said after ruling fifteen-year-old Nolan Grove could be released on bail.[2] Grove was charged with third-degree murder and involuntary manslaughter for the fatal shooting of a twelve-year-old acquaintance.[3] At the time of the shooting, Grove was a thirteen-year-old middle school student in Red Lion, Pennsylvania.[4] Although Judge Cook's comments indicate that she recognized the incompatibility of juveniles for adult prison, her ultimate decision to transfer Grove to adult court belied this reality.[5]

Grove's case is not unique. It is one of thousands of cases each year where a juvenile is tried in adult court.[6] In fact, for serious cases such as Grove's, every state in the United States has laws "allowing or requiring young offenders to be prosecuted as adults . . . regardless of their age."[7] This legislation regulates

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2. Lena Tzivekis, *Nolan Grove, 14, Charged with Killing a 12-Year-Old in Red Lion, Can Be Released on Bail*, YORK DAILY REC. (Aug. 23, 2024), https://www.ydr.com/story/news/crime/2024/08/23/nolan-grove-14-charged-with-killing-12-year-old-gets-bail-kain-heiland/74919507007 [https://perma.cc/GB5R-6GXT].

3. *See* Grace Miller, *Judge Issues Gag Order in Case Against Teen Who Shot, Killed 12-Year-Old in Red Lion*, LOC. 21 NEWS (Sept. 19, 2024), https://local21news.com/news/local/judge-issues-gag-order-in-case-against-nolan-grove-teen-who-shot-killed-12-year-old-in-2023-kain-heiland-york-county-pennsylvania-pa [https://perma.cc/T7L7-NNEF] (noting the charges against Grove).

4. *See id.*

5. *See id.* (reporting on the court's decision); Tzivekis, *supra* note 2 (including Judge Cook's comments).

6. *See, e.g.*, Sarah Hockenberry, *Delinquency Cases Waived to Criminal Court, 2020*, U.S. DEP'T OF JUST. 2 (2023), https://ojjdp.ojp.gov/publications/delinquency-cases-waived-criminal-court-2020.pdf [https://perma.cc/R8HN-7ZBC] (stating that 3,000 juvenile cases were waived to adult court in 2020); Marcy Mistrett & Mariana Espinoza, *Youth in Adult Courts, Jails, and Prisons*, SENT'G PROJECT 6 (2021), https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf [https://perma.cc/9CU4-YYMT] (estimating that 53,000 juveniles were tried as adults in 2019); Chelsea Ellen Heaney, Note, *Youthfulness Matters: A Call to Modernize Juvenile Waiver Statutes*, 43 HASTINGS CONST. L.Q. 389, 389–91 (2016) (delineating a juvenile life without parole sentence for a sixteen-year-old convicted of felony murder).

7. *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (last updated Aug. 21, 2024), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws [https://perma.cc/JA2T-3G7U].

the process of juvenile transfer—the removal of juvenile criminal cases from juvenile delinquency court to adult criminal court.[8]

Transfer laws proliferated in response to high juvenile crime rates in the 1980s and 1990s.[9] Compared to juvenile court, defendants in adult criminal court face stricter sentencing for comparable offenses, especially for serious felonies.[10] But following the turn of the century, a decrease in violent crime rates among juveniles led to a massive decrease in juvenile transfers.[11] Nevertheless, forty-six state legislatures maintain some form of transfer law.[12] The majority of these states have discretionary waiver laws which allow judges to determine, based on the individual characteristics of the defendant, whether to transfer the juvenile.[13]

But a smaller number of states have more punitive policies. For instance, twelve states permit presumptive waiver, where the presence of certain categorical classifications create a presumption for waiver, and twelve feature mandatory waiver.[14] While the former allows some room for judicial discretion in determining punishment for a given class of offense, the latter requires uniform transfer of cases for juveniles of certain ages,

8. *See id.* (describing the phenomenon of juvenile transfer).

9. *See* Hockenberry, *supra* note 6, at 2.

10. *See* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 211 (1998) ("Although juvenile courts imposed longer sentences on young property offenders than did criminal courts, the latter sentenced the violent young adults to terms about five times longer than those received by violent juveniles sentenced as delinquents.").

11. *See* Hockenberry, *supra* note 6, at 2 (detailing the fall of the prevalence of juvenile transfer cases, from its height of 13,000 cases in 1994 to only 3,000 in 2020).

12. *See id.* at 1.

13. *See id.* ("Nearly all states . . . have discretionary judicial waiver provisions in which juvenile court judges have discretion to waive jurisdiction over individual youth and refer their cases to criminal court."); *see also Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 7 (explaining that discretionary waiver of juvenile cases to adult court can be done judicially or by the prosecutor, depending on the jurisdiction).

14. *See id.* at 2 (defining presumptive waiver as a waiver which is presumed appropriate if the defendant meets the "age, offense, or other [categorical] statutory criteria that trigger the presumption," while a mandatory waiver automatically requires transfer when such criteria are met); *see also infra* note 161 and accompanying text (describing the nationwide prevalence of certain forms of automatic waiver legislation—which are procedurally distinct yet substantively similar to mandatory waiver in that they automatically result in the juvenile facing proceedings in adult court—such as statutory exclusion and "once-an-adult-always-an-adult" legislation).

offense types, or other categorical classifications.[15] The types of crimes mandating transfer are usually the most serious, like the violent felonies with which Grove was charged.[16] Yet both presumptive and mandatory waiver laws overlook characteristics of the individual juvenile offender and instead apply a universal, "one-size-fits-all" approach.[17]

Since the 2000s, presumptive and mandatory waiver legislation has been on the decline.[18] An increased understanding of juvenile neuroscience contributed to the reduction of these laws, recognizing a lesser degree of culpability of juvenile offenders.[19] At the same time, the U.S. Supreme Court decided a series of cases that enshrined juveniles' lower culpability in law.[20] First, the Court held that death sentences for juvenile defendants violates the Eighth Amendment's prohibition on cruel and unusual punishment.[21] Then, the so-called *Graham* trilogy (2010–2016)[22] collectively established that this constitutional protection also precludes mandatory sentences of juvenile life without parole (JLWOP).[23]

Graham v. Florida, the first entry of the *Graham* trilogy, banned JLWOP in non-homicide cases.[24] Taking *Graham* a step further, *Miller v. Alabama* held that *mandatory* JLWOP

15. *See id.* at 1.

16. *See Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 7 ("Murder and serious violent felony cases are most commonly 'excluded' from juvenile court.").

17. *See* Hockenberry, *supra* note 6, at 2.

18. *See id.*

19. *See infra* notes 166–69 and accompanying text.

20. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (banning life without parole for juveniles convicted of non-homicide offenses); Miller v. Alabama, 567 U.S. 460, 489 (2012) (extending *Graham*'s protection to include mandatory life without parole sentences for juvenile homicide offenses); Montgomery v. Louisiana, 577 U.S. 190, 213 (2016) (applying *Miller* retroactively to cases in state collateral review); *see also* Roper v. Simmons, 543 U.S. 551, 579 (2005) (holding that imposing death sentences on juveniles is unconstitutional under the Eighth Amendment's ban against cruel and unusual punishment).

21. *See Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

22. The *Graham* trilogy is comprised of *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*.

23. *See Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 489; *Montgomery*, 577 U.S. at 213.

24. *See Graham*, 560 U.S. at 82.

sentences for any offense, including homicide, is unconstitutional.[25] Finally, *Montgomery v. Louisiana* retroactively applied *Miller*'s universal ban of mandatory JLWOP to encompass cases on state collateral review—proceedings that allow a convicted person to challenge their incarceration.[26]

Graham, *Miller*, and *Montgomery* all recognize the pivotal role of neuroscience in diminished juvenile culpability.[27] Compared to their adult counterparts, juvenile defendants are entitled to heightened constitutional protection from harsh sentences.[28] Taken together, these cases establish legal and constitutional safeguards for juvenile defendants, which would mandate sentencers to assess the culpability of each defendant before imposing JLWOP.[29]

With its decision in *Jones v. Mississippi* in 2021, however, the Court seemingly allowed states to disregard juvenile neuroscience and impose the most severe sentences on children.[30] Prior to *Jones*, the *Graham* trilogy required more scrutiny by sentencers in assessing each juvenile offender's capacity for rehabiliation before issuing a sentence of JLWOP.[31] *Jones* held there was no requirement for any separate factual finding of whether the individual juvenile was permanently incorrigible.[32]

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25. *See Miller*, 567 U.S. at 489 ("[T]he mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

26. *See Montgomery*, 577 U.S. at 197, 204–05 (deeming *Miller*'s ban on mandatory JLWOP a "new substantive rule that is retroactive in cases on state collateral review").

27. *See infra* Part I.B.

28. *See id.*

29. *See id.*

30. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1318 (2021) (eliminating the need for sentencers to make a separate factual finding of "permanent incorrigibility"—the determination that an individual juvenile defendant will be incapable of responding to rehabilitative measures).

31. *See* Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

32. *See Jones*, 141 S. Ct. at 1318; *accord Miller*, 567 U.S. at 473 (holding that barring a juvenile from reintegration into society would require finding that juvenile incorrigible, but that "incorrigibility is inconsistent with youth" (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968))); Jac Lyons, Comment, *California Youth Offender Parole Hearings Produce a New Form of De Facto Life Without Parole and Fail to Create Meaningful Opportunities for Release*, 54 GOLDEN GATE U. L. REV. 103, 112 (2024)

As a result, *Jones* appeared to restrict the constitutional protections the *Graham* trilogy afforded to juvenile defendants.

This Note argues that the Eighth Amendment jurisprudence in the *Graham* trilogy and *Jones* implicates more than JLWOP sentences; the connection of neuroscience to juvenile culpability from that line of cases also extends to juvenile transfer legislation. These "collateral holdings"[33] of the Court's JLWOP jurisprudence should be construed to bar the most punitive forms of juvenile transfer legislation, including mandatory waiver, automatic waiver, and certain forms of presumptive waiver.

These punitive laws remain unconstitutional, even after *Jones*. Despite its tension with the *Graham* trilogy, *Jones* did not meaningfully undermine the constitutional protections of juveniles. Any damage it did to *Graham* was largely procedural. As a result, the Court's previous consideration of diminished juvenile culpability has endured post-*Jones*, thereby preserving the veracity of its challenge of unconstitutional transfer punishments.

Part I of this Note provides an overview of the social and scientific context giving rise to the *Graham* trilogy and *Jones*. This Part evaluates the Court's gradual acceptance of the juvenile neuroscience that increasingly influenced its Eighth Amendment decisions leading up to *Jones*. Part II then assesses the relationship between the JLWOP jurisprudence and juvenile transfer legislation, arguing that transfer statutes like mandatory waiver, automatic waiver, and harsher forms of presumptive waiver—legislation that fails to account for juveniles' diminished culpability—are subject to the Eighth Amendment protections recognized by the *Graham* trilogy. Finally, Part III argues that these forms of waiver legislation are unconstitutional under the *Graham* trilogy and *Jones*, before concluding with proposed policy solutions.

("['Separate factual finding'] means that if a judge states that the defendant's age was taken into account, there is no further burden to explain how or in what ways.").

33. *Cf.* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 124 (2010) (arguing that the neuroscience inherent in the *Graham* Court's decision implicates constitutional protections for juveniles in the context of waiver and that *Graham* has "collateral holdings" which extend beyond the precise issue before that Court—JLWOP—and into other areas of criminal law, such as juvenile transfer).

I. JUVENILE DEFENDANTS' DIMINISHED CULPABILITY UNDER THE EIGHTH AMENDMENT

One of the central justifications for punishment in the U.S. criminal legal system is retribution.[34] The penological rationale behind retribution is that those guilty of criminal offenses are deserving of a punishment mirroring the severity of their crimes and the culpability of the offender.[35] Therefore, culpability, or moral blameworthiness, is central to the retributionist framework.[36] And as recent U.S. Supreme Court decisions have demonstrated, culpability has become a staple of jurisprudence regarding the constitutionality of juvenile sentencing.[37] At the crux of the Court's measurement of culpability in these cases has been neuroscience.[38]

Section A tracks the development of the scientific understanding of juvenile neurology near the turn of the century. Section B highlights the pivotal role of juvenile neuroscience in the Court's reasoning behind the *Graham* trilogy. Section C evaluates the relative scarcity of neuroscience in the Court's decision in *Jones*.

A. THE EVOLUTION OF MODERN JUVENILE NEUROSCIENCE

Neuroscience has uncovered a substantial link between the cognitive development of juveniles and their criminal culpability.[39] Breakthroughs in neurology during the 1990s demonstrated that during adolescence, the brain undergoes a

34. *See* Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 49 (2017) ("According to the [*Roper*] Court, the differences between youth and adults undercut the traditional penological justifications for criminal punishment: retribution, deterrence, incapacitation and rehabilitation.").

35. *See* Vanessa F. Hernandez Levin, *Children Sentenced as Adults*, 37 NOTRE DAME J.L. PUB. POL'Y & ECON. 81, 87 (2023) ("[The United States'] system of punishment is based on the traditional concept that most individuals can distinguish and choose between right and wrong. Therefore, if one chooses a wrong, they should be punished.").

36. *See id.* (defining the "retributive theory of punishment").

37. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 73 (2010) (holding that JLWOP is disproportionate to the severity of the offense given the juvenile's relatively low culpability, compared to adult offenders).

38. *See infra* Part I.B.

39. *See, e.g.*, Trisha Jawahar, *Age-Based Policies and Adolescent Brain Development: An Analysis of the Juvenile Justice Act, 2015*, 3 INDIAN J. INTEGRATED RSCH. L. 1, 3–4 (2023) (outlining recent breakthroughs in the assessment of juvenile brain development).

transformation involving the gradual discarding of the brain's grey matter and replacement with white matter, or myelin.[40] This process is known as myelination.[41] Following myelination, the brain's neural connections are stronger and better reinforced by myelin.[42] This process extends well into a person's twenties and perhaps into their thirties.[43]

These neuroscientific discoveries soon became relevant in the context of criminal law. The breakthroughs relating to myelination led researchers to understand that the incomplete development of juvenile brains contributed to juveniles' diminished ability in areas including "planning, decision-making, impulse control, working memory, judgments, and even emotions."[44] Juveniles are also more vulnerable to the influence of others, especially authority figures.[45] Due to their hindered capacity for decision making, juveniles' criminal activity often reflects their immaturity rather than innate malice.[46] They are less adept

40. *See* Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999) (discussing a research study highlighting the reduction in gray matter between adolescence and adulthood as a result of increased myelination).

41. *See id.*

42. *See id.* at 1; Dylan Raymond, Note, *25 Is the New 18: Extending Juvenile Jurisdiction and Closing Its Exceptions*, 2023 UTAH L. REV. 727, 730 (2023) ("[During myelination], the brain matures back to front . . . to make the brain more efficient."); Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 217 (2009) ("[Myelination] allows nerve impulses to travel throughout the brain more quickly and efficiently and facilitates increased integration of brain activity.").

43. *See* Jawahar, *supra* note 39, at 3–4.

44. *Id.* at 4; *see also* Jeffrey Fagan, Atkins*, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 207 (2003) (comparing the neurological limitations of people with intellectual disabilities with those of adolescents).

45. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 357 (2003) ("Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures . . . ."); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSYCH. REV. 53, 62 (2007) ("[Juveniles] are more susceptible to the influence of others, both peers and adults.").

46. *See* Katherine I. Puzone, *Juvenile Court Exists for a Reason: An Argument in Support of Recognizing a Constitutional Right for Those Under the Age of Majority to be Tried in Juvenile Court*, 19 STAN. J. C.R. & C.L. 157, 176 (2023) ("Scientists confirm that '[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains.' Studies have shown that adolescents rely

than adults at processing their emotions and rationally calculating their decisions before acting out.[47] Without this natural restraint, juveniles are less capable of avoiding criminal conduct.[48]

The neuroscientific community has overwhelmingly accepted the evidence supporting a cognitive difference in children relative to adult neurological functioning.[49] That said, the scientific community features some difference in opinion regarding the age at which defendants possess the cognitive faculties necessary for courts to treat them as adults.[50] Although it is unknown exactly where the line should be drawn between juvenile and mature defendants, it is the consensus that children are

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more than adults on the amygdala, the area of the brain associated with the primitive impulses of anger, aggression, and fear."); Scott-Hayward, *supra* note 45, at 62 ("[Juveniles] are less future oriented than adults and tend to put more weight on the short-term rather than the long-term consequences of their decisions.").

47. *See* Christopher Northrop et al., *What's My Age Again?: Adolescent Development and the Case for Expanding Original Juvenile Court Jurisdiction and Investing in Alternatives for Emerging Adults Involved in Maine's Justice System*, 74 ME. L. REV. 243, 257 (2022) ("[The] neurobiological immaturity of the adolescent brain may render it more vulnerable to making poor decisions in emotionally charged contexts, leading to an inappropriate behavioral response to stimuli."); Jawahar, *supra* note 39, at 4 ("[Full frontal lobe development] enable[s] a person to take a moment to gather their thoughts, weigh their alternatives, plan a course of action, and carry it out. All the challenges that come with poor executive functioning due to a developing prefrontal cortex can impair judgement and decision-making.").

48. *Cf.* Jawahar, *supra* note 39, at 6 (arguing that the breakthroughs in neuroscience demonstrate juveniles' lesser responsibility for their conduct).

49. *See* Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL'Y & L. 410, 413 (2017) ("In general, adolescents and individuals in their early 20s are more likely than either children or somewhat older adults to engage in risky behavior; most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence . . . ."); Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1162 (2005) (explaining that available evidence in neuroscience conclusively demonstrates that juvenile defendants lack the cognitive development of their adult counterparts).

50. *Compare* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 174 (1997) (concluding that only young and mid-age juveniles should be subject to more lenient treatment by the courts), *with* Steinberg, *supra* note 49, at 413 (describing the incomplete cognitive development of adolescents into their early twenties), *and* Hernandez Levin, *supra* note 35, at 110 (describing legislatures' recognition of juveniles up to age twenty-four), *and* Jawahar, *supra* note 39, at 3–4 (describing frontal lobe development into a person's thirties).

indeed different.[51] In summary, children lack the rationality and impulse control of adults. Their incomplete neurology reduces the extent of their control over their own conduct, rendering the conduct less morally reprehensible than their adult counterparts.[52]

Given these observations about juveniles' incomplete cognitive development, their criminal offenses inherently present with lower culpability.[53] As such, their moral blameworthiness is lower than that of adults committing similar offenses.[54] These scientific breakthroughs would soon cause a shift from the legal system's focus on the culpability of the offense itself, to the culpability of the offender.[55]

B. *ROPER* AND THE *GRAHAM* TRILOGY RECOGNIZE CONSTITUTIONAL PROTECTIONS FOR JUVENILE DEFENDANTS

The U.S. Supreme Court took notice of these major developments in the scientific community's understanding of juvenile neurology. Beginning in 2005, the Court issued four decisions that heavily relied on neuroscience as a justification for requiring lesser punishments for juvenile defendants.[56] This Section examines the Court's gradual recognition of juveniles' diminished culpability in the context of the Eighth Amendment. First, this Section explores the Court's foundational decision in a death penalty case: *Roper v. Simmons*. Second, this Section analyzes the Court's extension of *Roper* to JLWOP, as embodied by the *Graham* trilogy: (1) *Graham v. Florida*, (2) *Miller v. Alabama*, and (3) *Montgomery v. Louisiana*. Finally, this Section discusses

51. Miller v. Alabama, 567 U.S. 460, 471 (2012) ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.").

52. *See supra* notes 44–48 and accompanying text.

53. *See, e.g.*, Jawahar, *supra* note 39, at 3–4 (connecting incomplete juvenile cognitive development to reduced criminal culpability); William Hannan, Note, *Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 193, 219 (2008) ("Knowing that children are inherently less culpable than adults, it is a mistake to take away any chance for them to reform while they are still young enough to have a reasonable chance of success later in life.").

54. *See* Hannan, *supra* note 53, at 219 ("[C]hildren are less culpable than adults.").

55. *See infra* Part I.B.

56. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (discussing scientific research supporting the cognitive underdevelopment of juveniles).

how the *Jones* Court weakened the procedural protections the *Graham* trilogy established for juvenile defendants.

1. *Roper* First Recognizes the Relevance of Juvenile Neuroscience to Eighth Amendment Jurisprudence

In *Roper*, the U.S. Supreme Court held that juvenile death sentences constitute cruel and unusual punishment in violation of the Eighth Amendment.[57] In its decision, the *Roper* Court explicitly cited scientific studies.[58] First, referencing the scientific literature, the Court found that juveniles display a unique immaturity that differentiates them from otherwise comparable adults.[59] After all, the Court argued, states impose a minimum age on other activities—from voting to marrying.[60] The criminal court system should similarly recognize juveniles' immaturity and inhibited decision-making capabilities.[61] Second, the Court cited neuroscientific support of the unique juvenile susceptibility to external influences.[62] Again, this finding closely echoed the scientific literature.[63] Third, the Court emphasized that children are undergoing cognitive development and, as a result, their character traits are "less fixed."[64] Each of these observations by the Court reflected emerging neuroscience.[65] In fact, the Court

57. *Id.* at 578.

58. *Id.* at 569 ("It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992))).

59. *Id.* ("[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'" (second alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).

60. *Id.*; *see also* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (holding that typical youth behavior sets juvenile defendants apart from adults in terms of appropriate sentencing).

61. *Id.*

62. *See Roper*, 543 U.S. at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").

63. *See* Scott-Hayward, *supra* note 45, at 62 (discussing juveniles' unique susceptibility to the influence of peers and adults).

64. *Roper*, 543 U.S. at 570.

65. *See* Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 189 (2007) ("*Roper* makes it clear that the law will, and does, reflect a changing understanding of cognitive, behavioral, and social norms, and that those norms are determined with the help of cognitive research.").

posited that reduced juvenile culpability challenged the relevance of punishment justifications such as retribution and deterrence.[66] Thus, the scientific studies discussed in the previous Section heavily influenced the Court's decision in *Roper*.

Although *Roper* only explicitly addressed the constitutionality of capital punishment for juveniles, it was highly influential on the *Graham* trilogy's decisions regarding JLWOP.[67]

2. The *Graham* Trilogy Adopts *Roper* in The Context of JLWOP

In the years that followed *Roper*, the Court doubled down on its recognition of the neuroscientific difference between children and adults. In the trilogy of its JLWOP decisions issued between 2010 and 2016, the Court solidified its commitment to erecting constitutional guardrails to protect juveniles from certain categorical sentences.

a. Graham v. Florida

First, in 2010, *Graham v. Florida* declared JLWOP unconstitutional for nonhomicides.[68] In so holding, *Graham* advanced the concept of proportionality—the notion that sentences must accurately reflect the extent of the offender's moral culpability.[69] The *Graham* Court held that none of the rationales for punishment—including retribution—could justify JLWOP for nonhomicide offenses.[70] Juveniles' low culpability rendered a sentence of JLWOP for nonhomicide offenses disproportionate, and thus unconstitutional.[71]

Proportionality was part of the Court's analysis for cruel and unusual punishment as early as 1910, when it held that proportionality is based on the "precept of justice that punishment for

66. *See Roper*, 543 U.S. at 571–72.

67. *See infra* Part I.B.2.

68. *See* Graham v. Florida, 560 U.S. 48, 82 (2010).

69. *See id.* at 61 (applying the two-prong proportionality test: whether JLWOP was in accordance with (1) "objective indicia" of society's standards (as measured by state-level legislation on JLWOP) and (2) the Court's independent judgment (citing *Roper*, 543 U.S. at 563–64)).

70. *See id.* at 74 ("[P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.").

71. *See id.* at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

crime should be graduated and proportioned to [the] offense."[72] But *Graham* expanded the proportionality test's primary emphasis on the severity of the offense to also include the culpability of the juvenile offender.[73]

To ensure proportionate sentences on a case-by-case basis, the *Graham* Court promoted the practice of evaluating the individual defendant's characteristics.[74] Namely, in determining punishment, the sentencer must account for the juvenile offender's "demonstrated maturity and rehabilitation."[75] Mandating individualized consideration of juvenile offenders—weighing their age and other mitigating circumstances—reinforces the Eighth Amendment's prohibition against disproportionate punishment. The *Graham* Court made clear, however, that the Eighth Amendment does not necessarily require eventual freedom for the juvenile sentenced for a non-homicide offense, so long as the sentence itself was not JLWOP.[76] The individualized determination based on each juvenile's cognitive function formed the basis of the *Graham* decision.

Extending *Roper* to JLWOP for non-homicide cases, *Graham* relied on contemporary neuroscience regarding juveniles' lessened culpability.[77] Again citing *Roper*, the Court stressed the importance of a categorical ban of JLWOP for non-homicides.[78] The Court explained that offender culpability in such cases is "twice diminished" in that (1) juvenile offenders have lower

72. Weems v. United States, 217 U.S. 349, 367 (1910).

73. *See Graham*, 543 U.S. at 82.

74. *See id.* at 73 ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.").

75. *Id.* at 75.

76. *See id.* ("Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life."); Kyle Stutzman, Comment, *The End of "Permanently Incorrigible": Putting* Jones v. Mississippi *into Context*, 73 WASH. U. J.L. & POL'Y 374, 405 (2024) ("[E]liminating juvenile LWOP sentences does not spell the end of all juvenile life sentences. . . . *Graham* does not suggest or require the constant presence of an opportunity for parole throughout a term sentence.").

77. *See Graham*, 560 U.S. at 50 ("No recent data provide reason to reconsider *Roper*'s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment.").

78. *Id.* at 82 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

culpability and (2) the "severity and irrevocability" of non-homicide offenses are lower than in murder.[79] In addition to reduced culpability of juvenile offenders, *Roper* and *Graham* both recognized minors' heightened amenability to rehabilitation.[80] Thus, with *Graham*, the Court elevated the importance of the individualized determination of culpability as a component of proportionality, to be measured alongside the severity of the offense.

Graham's categorical ban on JLWOP for non-homicide offenses was necessary to mitigate the risk of imposing JLWOP on a juvenile whose culpability was too low to warrant it.[81] The *Graham* Court worried that, in spite of a complete dearth of penological justification for JLWOP in non-homicide cases, permitting sentencer discretion would lead to a disregard of "the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" in cases involving brutal or cold-blooded crimes.[82] Even in these more sensational instances, the Court's focus remained on insulating the juvenile from punishments which exceeded their culpability.

b. Miller v. Alabama

Two years later, *Miller v. Alabama* further extended *Graham*'s protection of individualized determinations of juvenile culpability.[83] At the time *Miller* was decided, a mere three states had banned JLWOP.[84] Simultaneously, the punitive criminal

79. *Id.* at 69 (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008)).

80. Cara H. Drinan, Jones v. Mississippi *and the Court's Quiet Burial of the* Miller *Trilogy*, 19 OHIO ST. J. CRIM. L. 181, 182 (2021).

81. *See Graham*, 560 U.S. at 74 (noting the "limited moral culpability" of juveniles); Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. 1319, 1336 (2022).

82. *Graham*, 560 U.S. at 78 (quoting *Roper*, 543 U.S. at 573).

83. *See* Soohoo, *supra* note 34, at 51 ("[*Miller*] required that LWOP sentences can only be imposed on youth convicted of a homicide crime after an individual sentencing determination, which considers the differences between youth and adults as a mitigating factor.").

84. Ashley Nellis & Devyn Brown, *Still Cruel and Unusual: Extreme Sentences for Youth and Emerging Adults*, SENT'G PROJECT (Aug. 8, 2024), https://www.sentencingproject.org/reports/still-cruel-and-unusual-extreme-sentences-for-youth-and-emerging-adults [https://perma.cc/78GY-ZBA4] ("[O]nly three states had excluded individuals under 18 from receiving parole-ineligible life sentences when *Miller* was decided: Alaska, Kansas, and Kentucky.").

laws that were passed in the wake of the high juvenile crime rates of the 1990s produced sizable inequities.[85]

Applying *Roper*'s standard of "irreparable corruption," *Miller* explicitly prohibited *mandatory* JLWOP sentencing schemes for all offenses, including homicide.[86] Although post-*Miller* sentencers could still impose JLWOP in homicide cases, they could not do so without first weighing juveniles' reduced culpability.[87] Due to the Court's increased understanding of neuroscience, the presumption was firmly against JLWOP, even in murder cases.[88]

As the *Miller* Court stressed, "children are constitutionally different from adults for purposes of sentencing."[89] In light of this realization, the Court held that JLWOP violated the Eighth Amendment because (1) then-existing legislative trends suggested a "national consensus" against JLWOP and (2) the penological justifications failed to support such a sentence.[90] These criteria heavily overlapped with those employed by *Roper* and *Graham*.[91] Without consideration of these "mitigating qualities of youth," a juvenile sentence was disproportionate to the offender's culpability, and thus unconstitutional.[92]

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85. *See* Ioana Tchoukleva, Note, *Children* Are *Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CALIF. L. REV. CIR. 92, 99–100 (2013) (discussing how this legislative climate led to disproportionate JLWOP sentences for Black youth, along with juveniles who aided and abetted felony murder); Rebecca Orleans, *Exposing the Backroom Shakedown: The Weaponization of Adult Prosecution in Juvenile Court Plea Negotiations*, 46 N.Y.U. REV. L. & SOC. CHANGE 483, 503 (2023) ("Black children are 18 times more likely than white children to be sentenced as adults.").

86. Miller v. Alabama, 567 U.S. 460, 480 (2012) ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how *those differences counsel against irrevocably sentencing them to a lifetime in prison*." (emphasis added)).

87. Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) ("*Miller*, then, 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.'" (quoting *Miller*, 567 U.S. at 472)).

88. *See Miller*, 567 U.S. at 480.

89. *Id.* at 471.

90. *Id.* at 462, 472.

91. *See supra* Part I.B.1–2(a).

92. *Miller*, 567 U.S. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

Like *Graham*, *Miller* also made frequent reference to *Roper*'s discussion of the universal characteristics that lessen juvenile culpability, such as lack of maturity and responsibility, vulnerability to external influence, and a conduciveness to future change.[93] *Miller* leaned on these differences from adults to conclude that irrespective of the crime in question, the incomplete neurological development of juveniles makes them less morally blameworthy.[94]

By expanding the JLWOP prohibition to all mandatory sentencing schemes, *Miller* retained *Graham*'s focus on the necessity of individualized determinations of culpability while shifting away from *Graham*'s continued emphasis on the severity of the offense.[95] Although *Miller* did not obviate such a consideration, it lessened its importance relative to the need for sentencers to account for juvenile defendants' categorically reduced moral blameworthiness.

Thus, diminished juvenile culpability played a major role in *Roper*, *Graham*, and *Miller*. Building on each other, these cases continuously cited the same underlying neuroscience and, in so doing, established a consistent line of precedent that considered the importance of neuroscience to the (lack of) proportionality of JLWOP sentences.

One key difference between *Graham* and *Miller* is that the former limits space for sentencer discretion, whereas the latter arguably encourages it.[96] Though it requires state sentencers to consider mitigating factors such as youth, scholars have argued that *Miller* failed to impose "formal guidelines of any kind," thereby leaving the door open for unfettered discretion by sentencers.[97] Although *Miller* pushed toward severe limitation of JLWOP for juvenile offenders, this lack of more explicit guardrails allowed enough of an opening for the future Court to scale back sentencers' procedural duties.[98]

But even without these formal instructions, the *Miller* Court noted that juveniles' reduced culpability and amenability to change should make for "uncommon" JLWOP sentences due to

93. *Id.* at 471–72.

94. *See id.*

95. *See id.* at 477.

96. *See id.* at 477–80.

97. Miller, *supra* note 81, at 1338–39.

98. *See infra* Part III.B (delineating the *Jones* Court's exploitation of this lack of express guardrails set by the *Graham* trilogy).

the difficulty in discerning crimes reflecting immaturity versus "irreparable corruption."[99] Kathryn Miller has interpreted this logic to be *Miller*'s "substantive guidelines," suggesting that JLWOP should be imposed rarely and only in cases where the offender's moral corruption is beyond redemption.[100] Without this irreparable corruption, imposing JLWOP on a juvenile offender is unconstitutionally disproportionate to their underlying culpability. Thus, *Miller* marks a continuation of the Court's promotion of neuroscience.

c. Montgomery v. Louisiana

Following *Miller*, numerous states prohibited JLWOP.[101] Subsequently, *Montgomery v. Louisiana* retroactively applied *Miller*'s substantive holding that the "class" of offenders whose crimes reflected the "transient immaturity of youth" were immune from JLWOP.[102] Because the holding from *Miller* was a "substantive" holding, it must be applied retroactively to cases on state collateral review wherein the juvenile was sentenced without this enhanced constitutional protection.[103] As such, only those juveniles with "irreparable corruption" could be subjected to JLWOP.[104] *Miller* discussed the tension between a juvenile offender's capacity for rehabilitation and JLWOP—with which it is squarely at odds.[105] *Montgomery* further solidified juvenile defendants' Eighth Amendment protections by explicitly

99. *Miller*, 567 U.S. at 479–80.

100. Miller, *supra* note 81, at 1341.

101. *See* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 539 (2017) ("In the five years since *Miller* was decided, twenty-seven states and the District of Columbia have amended their sentencing laws for juveniles convicted of homicide, and nineteen of these states have elected to abolish juvenile life without parole.").

102. Montgomery v. Louisiana, 577 U.S. 190, 206–08 (2016) (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

103. *Id.* at 212.

104. *Montgomery*, 577 U.S. at 195 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). The Court also uses the term "permanent incorrigibility" to refer to *Miller*'s notion of the narrow class of juvenile defendants who are beyond rehabilitation. *Id.* at 209.

105. Miller v. Alabama, 567 U.S. 460, 473 (2012) ("Life without parole 'forswears altogether the rehabilitative ideal.'" (quoting Graham v. Florida, 560 U.S. 48, 74 (2010))).

acknowledging the extreme rarity of the juvenile whose offense justified a sentence of JLWOP.[106]

The *Montgomery* Court held that states could "remedy a *Miller* violation" by granting parole eligibility to juveniles.[107] Although the Court clarified that *Miller* did not necessarily require a formal factual inquiry into each defendant's individual characteristics, sentencers nonetheless were required to account for juvenile immaturity in their decision.[108] Once again building off prior precedent, *Montgomery* further solidified the importance of individualized determinations of culpability in the context of proportionality and the Eighth Amendment. Although *Miller* and *Montgomery* did not expressly mandate this factual finding, the framework of these cases served to reduce the likelihood of JLWOP sentences.[109]

Taken together, *Miller* and *Montgomery* greatly reduced sentencer discretion by confining JLWOP to a narrow class of juvenile offenders.[110] The constitutional guardrails around JLWOP provided for an individualized assessment of age-related culpability, significantly mitigating the risk of sentences disproportionate to juvenile culpability.[111] Rather than solely basing these determinations on the offense itself, the *Graham* trilogy's guidelines instead framed the proportionality analysis around

106. *Montgomery*, 577 U.S. at 209 ("*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").

107. *Id.* at 212. The court argued that retroactivity was necessary because, as a new substantive rule of constitutional law, *Miller*'s rule "necessarily carr[ies] a significant risk that a defendant"—here, the vast majority of juvenile offenders—"faces a punishment that the law cannot impose upon him." *Id.* at 209–10 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

108. *Id.* at 208.

109. *See* Miller, *supra* note 81, at 1340–41 ("By shrinking the class of children eligible for life without parole sentences to those whose crimes exhibited '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." (quoting *Montgomery*, 577 U.S. at 209)).

110. *Id.*

111. *Id.* at 1341 ("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.'" (first citing Miller v. Alabama, 567 U.S. 460, 479–80 (2012); and then citing *Montgomery*, 577 U.S. at 208–09).

the offender's youth and, relatedly, their capacity for rehabilitation.[112]

In the years following *Miller* and *Montgomery*, a majority of states amended their juvenile homicide laws, and nineteen states fully abolished JLWOP.[113] Yet, as scholars have pointed out, *Graham* and *Miller* "whittled away" at JLWOP without completely undermining it.[114] Although the trilogy collectively established that mandatory JLWOP was unconstitutional, it did not bar JLWOP in all instances; the punishment remained an option for cases where the offender demonstrated irreparable corruption.[115] As a result, there was an uneven, highly variable state response to these cases—many states adapted their JLWOP statutes to reflect an individualized determination of culpability, while others took no action towards reform.[116] While some states in the former category have imposed an outright ban on JLWOP sentences,[117] those in the latter group have interpreted *Miller* not to preclude JLWOP sentences if the state sentencer has any level of discretion.[118] Thus, the trilogy's universal promotion of juvenile neuroscience proved somewhat lacking as to instructions to state sentencers applying JLWOP statutes. Despite this confusion, there were several points of clear agreement throughout the *Graham* trilogy with respect to the Eighth Amendment's application to juvenile defendants.

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112. *Id.* at 1340.

113. Moriearty, *supra* note 101; *see also infra* Part I.C (overviewing states' continual trend towards JLWOP abolishment until 2021—by which time twenty-five states had prohibited it).

114. *Id.* at 540–41 ("[T]he trilogy has made the sentence of juvenile life without parole more difficult for states to impose.").

115. *Miller*, 567 U.S. at 479–80.

116. Moriearty, *supra* note 101, at 540 ("Legislation enacted [post-*Miller*] in response to the decisions varies widely.").

117. *Id.* at 540–41.

118. *See* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 95–96 (2015) ("In [the view of those states with a narrower interpretation], *Miller* created a threshold question—whether a juvenile offender's sentence was mandatory under the state's sentencing scheme—which, if resolved in the negative, left these states completely exempt from *Miller*'s remaining considerations regarding the differences between youth and adults, and the differences between youth.").

d. The Graham *Trilogy's Enduring Legacy of Protections for Juvenile Defendants*

Collectively, *Graham*, *Miller*, and *Montgomery* advanced several observations regarding the application of the Eighth Amendment to children. First, and most relevant to this Note, the trilogy was united in its conclusion that the constitutional difference between children and adults precluded states from imposing the harshest penalties without weighing youth and the mitigating circumstances it entails, such as immaturity and susceptibility to external influence.[119]

Second, as Laurence Steinberg has argued, the trilogy embodied the paradigm shift in jurisprudential recognition of juvenile neuroscience.[120] At the time of *Roper*, there remained substantial reservations as to the place of juvenile neuroscience in the Court's discussion of the Eighth Amendment.[121] Writing for the dissent, Justice O'Connor contested the majority's proportionality argument.[122] Although she acknowledged the mitigating characteristics of youth, she did not think they warranted a universal age limit for imposition of the death penalty.[123] Writing separately for the dissent, Justice Scalia believed the majority's cited scientific studies were not shown to be "methodologically sound."[124]

Conversely, the dissent in *Miller* placed greater trust in the integrity of the neuroscience than Justice O'Connor and Justice Scalia had seven years earlier.[125] Rather than contesting the

119. *See* Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 269 (2018) ("At this point, children possess a permeating right in the form of individualized assessment, a right that places affirmative duties on state actors.").

120. *See* Steinberg, *supra* note 49, at 415 (reviewing the evolution of the Court's discourse regarding juveniles' diminished culpability).

121. *See id. Compare* Roper v. Simmons, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) (questioning the efficacy of the neuroscience studies cited by the majority), *with* Miller v. Alabama, 567 U.S. 460, 502 (2012) (Roberts, C.J., dissenting) (accepting the scientific validity of a constitutional difference between the culpability of children and adults).

122. *Roper*, 543 U.S. at 590–93 (2005) (O'Connor, J., dissenting).

123. *See id.* at 588.

124. *Id.* at 617–18 (Scalia, J., dissenting) ("At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.").

125. *See Miller*, 567 U.S. at 499 (Roberts, C.J., dissenting) ("[*Roper* and *Graham*] undoubtedly stand for the proposition that teenagers are less mature, less

scientific validity of the majority's recognition that children were constitutionally different, Chief Justice Roberts' dissent opined that the *Miller* majority simply overextended the holdings of the Court's precedent.[126] Juveniles' diminished culpability, therefore, gained the Court's widespread endorsement over the course of its JLWOP jurisprudence.

The *Graham* trilogy was a major turning point in the law's recognition of juvenile neuroscience.[127] By its conclusion, the Court framed the Eighth Amendment around juveniles' lower culpability as a class—that is, juvenile defendants' "youthful characteristics" made JLWOP a disproportionate punishment in many cases, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[128] Subsequent case law, however, muddied the waters regarding the enforcement of these constitutional protections for juvenile offenders.

C. *JONES* WEAKENED THE PROCEDURAL GUARDRAILS OF THE *GRAHAM* TRILOGY

Miller and *Montgomery*, the most recent entries of the *Graham* trilogy, limited sentencer discretion in imposing JLWOP to all but the rare cases where the juvenile exhibited permanent incorrigibility.[129] The *Graham* trilogy correlated with a clear trend; by the time *Jones* was decided in 2021, twenty-five states had abolished JLWOP sentences.[130] But the Court in *Jones*—which featured a very different makeup of justices—seemed to

responsible, and less fixed in their ways than adults—not that a Supreme Court case was needed to establish that . . . .").

126. *Id.* at 500 ("*Roper* provides even less support for the Court's holding.").

127. *See* Hernandez Levin, *supra* note 35, at 99–100 (emphasizing how juvenile neuroscience proved to be a "foundational basis" for the Court's holdings throughout the *Graham* trilogy).

128. Darden, *supra* note 119, at 242–43; Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults after* Graham *and* Miller, 61 EMORY L.J. 1445, 1485 (2012) ("The Court's decision in *Miller* reaffirms the Court's commitment to considering a defendant's youth and the purposes of punishment in determining the constitutionality of sentencing schemes as applied to juveniles.").

129. Miller, *supra* note 81, at 1341.

130. Gabriela Seguinot, The *Miller* Trilogy, *Jones*, and the Future of Juvenile Sentencing and Constitutional Interpretation in the Post-*Jones* America 51 (Spring 2024) (B.A. thesis, Trinity College) (JSTOR).

walk back some of the constitutional protections the Court had recognized for the preceding sixteen years.[131]

The Court did not consider the specific appropriateness of the JLWOP sentence issued to Jones, who was convicted of stabbing his grandfather to death when he was fifteen years old.[132] In upholding Jones's sentence, the Court reasoned that *Miller* and *Montgomery* did not require state sentencers to conduct independent factfinding as to a juvenile's character of incorrigibility.[133] Sentencing courts were not obligated to formally assess each juvenile's amenability to rehabilitation by determining the role of their underdeveloped cognition in the offense.[134] Instead, as long as a state sentencer had the *discretion to consider* reduced juvenile culpability, the Court held, this procedure was sufficient to meet the Eighth Amendment threshold set forth by *Miller* and *Montgomery*.[135]

Jones made several pertinent arguments as to why JLWOP requires no separate factual finding.[136] First, the discretionary nature of JLWOP sentences indicates that sentencers weigh youth as a mitigating factor, especially given how rarely this sentence is issued.[137] Consequently, the majority argued, there is no need for a separate factual finding.[138]

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131. Tori A. Shaw, *The Pendulum Swings Right: How the Roberts Court Rejected Precedent and Mobilized Federalism to the Detriment of American Youth in* Jones v. Mississippi, 82 MD. L. REV. 443, 475–76 (2023) (arguing the *Jones* Court prioritized states' rights and law and order over the "constitutional rights of marginalized children across the nation").

132. Jones v. Mississippi, 593 U.S. 98, 119 (2021) ("[O]ur ruling on the legal issue presented here should not be construed as agreement or disagreement with the sentence imposed against Jones."). *But see id.* at 148 (Sotomayor, J., dissenting) (arguing that the factual circumstances of the case, including Jones's naïve attempt to perform CPR on his deceased grandfather, demonstrated immaturity and impulsivity rather than malice).

133. *Id.* at 112 (majority opinion) ("Jones's *Montgomery*-based argument for requiring a finding of permanent incorrigibility is unavailing because *Montgomery* explicitly stated that '*Miller* did not impose a formal factfinding requirement' and that 'a finding of fact regarding a child's incorrigibility . . . is not required.'" (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016))).

134. *Id.* at 112–13.

135. *Id.*

136. *See* Shaw, *supra* note 131, at 458–62 (outlining *Jones*'s three central arguments as to why no separate factual finding of permanent incorrigibility is required).

137. *Jones*, 593 U.S. at 113–18.

138. *Id.* at 113 ("[*Miller* and *Montgomery* required only that] a discretionary sentencing procedure would make life-without-parole sentences relatively rare

Second, *Jones* highlighted the *Miller* Court's dearth of explicit language referencing a finding of permanent incorrigibility.[139] That is, if *Miller* required this separate factual finding, it "easily could have and surely would have said so."[140] Because of this omission, *Jones* maintained it was not actually contradicting the *Graham* trilogy.[141] Seizing an opportunity to capitalize on the trilogy's confusing instructions to state sentencers,[142] the *Jones* Court relaxed the procedures governing the assessment of individualized juvenile culpability.

The *Jones* dissent, however, discussed in detail how Jones exhibited a low culpability: He had turned fifteen just before the murder; he had been "abruptly cut off" of medication for his severe mental health issues, including self-harm; his father and stepfather had subjected him to severe physical and emotional abuse; and he had emotionally matured in subsequent years while in custody.[143] Irrespective of the discretionary procedures in place, *Miller* and *Montgomery* universally barred JLWOP sentences for minors with diminished culpability such as Jones.[144]

But the *Jones* majority rejected the notion that it overruled *Miller* or *Montgomery*, instead characterizing any discrepancy with the dissent as a "good-faith disagreement" as to the application of the *Graham* trilogy.[145] As long as state sentencers

for juvenile offenders."); *see also id.* at 108 ("[T]he *Miller* 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.").

139. *Id.* at 115–16 ("*Miller* highlighted 15 existing discretionary state sentencing systems as examples of what was missing in the mandatory Alabama regime before the Court in that case. . . . But the Court did not suggest that those discretionary sentencing regimes required some kind of sentencing explanation.").

140. *Id.* at 116.

141. *Id.*

142. *See infra* Part III.B.

143. *Jones*, 593 U.S. at 147–49 (Sotomayor, J., dissenting) (highlighting the rehabilitative efforts undertaken by Jones while incarcerated, including earning his GED, largely abstaining from disciplinary issues in prison, and expressing remorse for the murder).

144. *Id.* at 137 (Thomas, J., concurring) ("No set of discretionary sentencing procedures can render a sentence of LWOP constitutional for a juvenile whose crime reflects 'unfortunate yet transient immaturity.'" (quoting Miller v. Alabama, 567 U.S. 460, 479 (2012)).

145. *Id.* at 118 (majority opinion). *But see id.* at 144 (Sotomayor, J., dissenting) ("How low this Court's respect for *stare decisis* has sunk."); *id.* at 127 (Thomas, J., concurring) (concluding that the majority preserved the *Graham* trilogy "in substance but not in name").

considered youth, said the Court, then the requirements of *Miller* and *Montgomery* were satisfied.[146] The *Jones* court characterized the holdings of these prior cases as embodying the "simple proposition" that "[y]outh matters in sentencing."[147]

Perhaps just as helpful for understanding the logic of *Jones* was what the Court did not say. As Gabriela Seguinot highlighted, *Jones* did not point to the scientific data which had become a hallmark of the *Graham* trilogy.[148] The only reference to neuroscience studies throughout the entirety of *Jones* is located in the dissent.[149] Therefore, *Jones* represented a marked shift away from the logic of its predecessors. Departing further from *Roper* and the *Graham* trilogy, the *Jones* Court upheld Jones' sentence.[150] All in all, by loosening the guardrails as to a separate factual finding of incorrigibility, *Jones* proved far more deferential to state sentencing decisions than its predecessors. As a result, a lack of a requirement for a separate factual finding of permanent incorrigibility arguably puts JLWOP "fully back on the table."[151]

Nonetheless, as discussed in this Part, the constitutional parameters established by *Miller* and *Montgomery* facilitated the rarity of JLWOP. Along with *Graham*, these decisions collectively cemented the lower culpability of juveniles as a class. By mandating individualized determinations of juveniles' culpability—despite what *Jones* had to say about this—the trilogy recognized the constitutional and procedural protections that should preclude imposition of JLWOP in all but the rarest instances. *Jones*, however, softened these guardrails, thereby altering the enforcement of the previous standards governing permissibility of JLWOP. That is, *Jones* changed the feasibility of courts' enforcement of the *Graham* trilogy with respect to the

146. *Id.* at 118 (majority opinion).

147. *Id.* at 109.

148. Seguinot, *supra* note 130, at 51.

149. Stevie Leahy, *Disparities in Sentencing: Creating a "Benchcard" on Brain Development to Incorporate Neuroscience Research*, 4 LA. STATE U. L.J. FOR SOC. JUST. & POL'Y 23, 30–31 (2024); *see also Jones*, 593 U.S. at 130–31 (Sotomayor, J., dissenting) ("[A]s scientific and sociological studies have confirmed, juveniles are less mature and responsible than adults . . . .").

150. *Jones*, 593 U.S. at 121.

151. Arthur Ago & Rochelle Swartz, *SCOTUS Takes Alarming Step Backwards for Criminal Justice Reform*, BLOOMBERG L. NEWS (May 17, 2021), https://news.bloomberglaw.com/us-law-week/scotus-takes-alarming-step-backwards-for-criminal-justice-reform [https://perma.cc/9HAE-P796].

conduct of sentencers. But it did not meaningfully change the substantive constitutional protections recognized by earlier precedent.

Indeed, as this Note will argue in the next Part, the *Graham* trilogy continues to remain in force. As a result, that line of Eighth Amendment jurisprudence still applies to other realms of criminal law—areas including juvenile transfer legislation.

II. JUVENILE TRANSFER LEGISLATION MUST ACCOUNT FOR THE NEUROSCIENCE RECOGNIZED IN THE COURT'S JLWOP JURISPRUDENCE

Part II extends the *Graham* trilogy and *Jones* into the realm of juvenile transfer legislation, which implicates the same diminished juvenile culpability as JLWOP sentences.[152] Section A provides a brief overview of modern juvenile transfer legislation. Section B then argues that the Court's JLWOP jurisprudence applies to juvenile transfer.

A. MODERN HISTORY OF JUVENILE TRANSFER LEGISLATION

The first major Supreme Court case governing juvenile transfer was *Kent v. United States*.[153] Today, *Kent*'s holding that a juvenile defendant is entitled to a hearing before the juvenile court can waive its jurisdiction over her remains good law, and its extension of due process protections to juvenile proceedings is still binding.[154] In 1967, the year following *Kent*, the Court elaborated that the process of juvenile transfer requires the same level of due process as cases in adult criminal court, which includes the right to be heard on critically important issues such as the juvenile court's decision to waive jurisdiction.[155]

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152. *See, e.g.*, Fugett, *supra* note 1, at 386–87 (connecting *Roper* and *Graham*'s discussion of diminished juvenile culpability to juvenile transfer legislation).

153. Kent v. United States, 383 U.S. 541, 561–62 (1966) (requiring a hearing in cases where the juvenile court judge determines the juvenile defendant is fit for adult court).

154. For further discussion of the rights inherent to due process, see *id.* at 561 ("The right to representation by counsel is not a formality. . . . It is of the essence of justice.").

155. *See id.* ("Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel."); *see also In re* Gault, 387 U.S. 1, 41 (1967) (holding that the Due Process Clause extended protections to defendants in juvenile delinquency proceedings).

In the following decades, juvenile transfer reentered national discourse. Particularly during the 1980s and 1990s, there was widespread public concern regarding what was perceived to be high (and increasing) rates of violent juvenile crime.[156] In response, state legislators passed transfer legislation that expanded the crimes and age groups for which juveniles could be transferred to adult court.[157] In addition, these laws often shifted decision-making power from judges to prosecutors and substituted consideration of case-specific details for transfer policies governed by brightline categorical rules.[158]

Today, of the thousands of transfers that occur annually, the majority occur due to either statutory transfer and other forms of categorical exclusion, or prosecutorial decisions.[159] These two categories of waiver legislation are overly punitive, since they severely—if not entirely—restrict individualized sentencing determinations based on the defendant's characteristics.[160] This Note focuses on statutory transfer such as judicial waiver and automatic waiver, which widely vary in terms of form and severity.

Some of the harshest statutory transfer policies include mandatory, automatic, and presumptive waiver. First, mandatory waiver and automatic waiver necessitate proceedings in adult court if the case involves the specified age, offense, or other criteria; the latter includes statutory exclusion laws, which provide that certain types of offenses—usually serious felonies—are automatically ineligible for juvenile court.[161] Automatic waiver

156. Fugett, *supra* note 1, at 369.

157. *Id.* at 369–70.

158. *See* Soohoo, *supra* note 34, at 8–9 (describing the erosion of judicial discretionary authority in transfer cases, as well as the ages and offense types that automatically transferred juvenile cases to adult court).

159. *See* Sarah Hockenberry & Charles Puzzanchera, *Delinquency Cases Waived to Criminal Court, 2011*, U.S. DEP'T OF JUST. OFF. OF JUVENILE JUST. & DELINQ. PREVENTION 1–2 (2014), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248410.pdf [https://perma.cc/83VM-JBY9]; Heaney, *supra* note 6, at 398 ("[D]irect file statutes [ ] give prosecutors the authority to surpass juvenile jurisdiction altogether by directly filing a juvenile's case in adult criminal court."). But *see id.* at 421–22 (advancing discretionary waiver, as opposed to direct file or statutory exclusion laws, as a means to promote juvenile rehabilitation).

160. *See* Hockenberry & Puzzanchera, *supra* note 159, at 1.

161. Pagnanelli, *supra* note 65, at 189–90; *see also* Heaney, *supra* note 6, at 398 ("Rather than originating in juvenile court and later being transferred to adult court [as in mandatory and presumptive waiver, and other forms of

can also take the form of "once-an-adult-always-an-adult" statutes, which preclude juvenile court for juveniles previously adjudicated as adults.[162] These are among the harshest forms of transfer legislation, leaving virtually no room for sentencer discretion in considering details of the offense or the offender.

Second, presumptive waiver places the burden of proof on the juvenile; they must demonstrate that their capacity for rehabilitation makes them fit for the juvenile system, rather than adult prison.[163] Slightly less punitive than mandatory waivers, presumptive waivers trigger the presumption of juvenile transfer when categorical factors such as specific ages or certain crimes are present.[164] Like mandatory waiver laws, presumptive waiver can take multiple forms, varying in severity.[165]

Both judicial waiver (i.e., mandatory and presumptive) and automatic waiver increase the risk of children—who, as a class, are less culpable and more prone to rehabilitation than adults[166]—being subjected to the dangerous conditions of adult prison.[167]

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judicial waiver], juvenile cases subject to direct file and statutory exclusion may have original jurisdiction in adult criminal court."); *id.* at 400–01 (stating that, as of 2016, twenty-eight states had statutory exclusion laws, while thirty-one featured "once-an-adult-always-an-adult" statutes).

162. *Id.*; Clay Ward, *Chronic Youth: How History Has Been Rewritten to Deny Children Justice*, 46 WOMEN'S RTS. L. REP. 95, 145 (2024) (recounting how in states like California and Delaware, once-an-adult-always-an-adult statutes physically separate children from adults, resulting in the child being "forced into solitary confinement and endur[ing] even more significant forms of punishment solely for being a child"); Ariana D'Agostino, *What Goes Up but Never Comes Down? Juvenile Punitive Practice Within the United States*, 54 CAL. W. INT'L L.J. 221, 238 (2023) ("As of 2019, thirty-five states had 'once an adult, always an adult' statutes, which require juveniles previously tried as adults to be prosecuted as adults in all subsequent offenses.").

163. Fugett, *supra* note 1, at 373.

164. *See id.* ("Admittedly, both mandatory and presumptive waivers require the state to prove that probable cause exists that the relevant statutory requirements are satisfied.").

165. *See, e.g.*, Marisa Slaten, Note, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 834 (2003) (describing less punitive forms of presumptive waiver, such as Alaska's rebuttal of the presumption in favor of transfer—a rebuttal that occurs only after the prosecution demonstrates probable cause supporting the defendant's guilt). This type of presumption is less harsh than that where the presumption is automatically against the defendant. *Id.*

166. *See infra* Part III.A.

167. *See id.*

Following the spike in more punitive waiver legislation in the late-twentieth century, many states decreased their harshest waiver laws in the 2000s and 2010s.[168] They did so amid concerns that such statutes had completely failed to reduce recidivism or to provide vulnerable youth with rehabilitation programs from which they are especially likely to benefit.[169]

That said, twelve states retain some form of mandatory waiver or presumptive waiver, while many more states still employ automatic waiver laws.[170] Like sentences of JLWOP, this transfer legislation implicates juveniles' Eighth Amendment protections.

B. JLWOP JURISPRUDENCE APPLIES TO JUVENILE TRANSFER

Although the *Graham* trilogy and *Jones* do not explicitly address juvenile transfer, these decisions relate to juvenile transfer by proxy of the Court's endorsement of the juvenile neuroscience discussed in Part I.[171] The Court's JLWOP jurisprudence extends to juvenile transfer for two central reasons: Transfer (1) disregards the access to rehabilitative resources that the Eighth Amendment guarantees juvenile defendants and (2) constitutes

168. Hockenberry, *supra* note 6, at 2 (delineating a decrease in states with laws permitting presumptive or mandatory waiver schemes).

169. *See* Hannan, *supra* note 53, at 212 ("Juveniles who have been transferred into the criminal system have higher rates of recidivism, are rearrested more quickly, and commit more serious crimes once they are released than do those adjudicated in the juvenile courts."); Pagnanelli, *supra* note 65, at 186 ("[T]he juvenile court system is the most appropriate forum for juvenile offenders."); Hernandez Levin, *supra* note 35, at 102–06 (outlining juveniles' particular susceptibility to recidivism and their unique amenability to rehabilitation). *But see* Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 410 (2001) ("[T]he juvenile justice system must continue to expand its focus to include not only its original goal of rehabilitation but also punishment and deterrence.").

170. *See Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 7 (describing types of transfer statutes such as statutory exclusion transfer and "once-an-adult-always-an-adult" legislation); *see also supra* note 161 and accompanying text (describing the dozens of states permitting statutory exclusion and "once-an-adult-always-an-adult" legislation).

171. *Cf.* Dora W. Klein, *Taking Corrigibility Seriously*, 28 BERKELEY J. CRIM. L. 35, 77 (2023) (recounting how, in the wake of the *Graham* trilogy and *Jones*, "some state legislatures have . . . enacted various other reforms, such as eliminating the automatic transfer of juvenile offenders to adult courts, limiting discretionary transfers, and expanding the jurisdiction of juvenile courts").

a punishment in itself—irrespective of whether the juvenile is actually convicted or sentenced in adult court.

1. Adult Criminal Court Is Inadequate in Promoting Juvenile Rehabilitation

First, because *Graham* guaranteed juvenile defendants a constitutional right to rehabilitation, that decision brings juveniles potentially subject to transfer, whose capacity for rehabilitation is also at issue, within its scope.[172] The *Graham* Court established that the other penological justifications—retribution, deterrence, and incapacitation—are inadequate justifications for JLWOP.[173] Instead, one of *Graham*'s "collateral holding[s]" is that juvenile offenders are entitled to rehabilitation under the Eighth Amendment.[174] As previous scholars have noted, even Justice Thomas's *Graham* dissent acknowledged the necessity of state legislatures taking account of juvenile capacity for rehabilitation.[175] And *Graham* precluded excessive judicial discretion on the grounds that it is frequently impossible to predict an individual's future amenability to rehabilitation.[176]

These collateral holdings of *Graham* establish the constitutional importance of protecting rehabilitation-ready juvenile offenders from adult court.[177] Transferring a juvenile case to adult court, where the system severely deemphasizes the role of rehabilitation and instead primarily focuses on punishment,[178]

172. *See* Arya, *supra* note 33, at 124 (describing juveniles' universal right to rehabilitation); Graham v. Florida, 560 U.S. 48, 75 (2010) ("[States must] give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

173. *See supra* Part I.B.2.

174. Arya, *supra* note 33, at 127.

175. *Id.* ("Justice Thomas' dissent chastising the majority opinion makes this clear: legislatures 'may not forswea[r] . . . the rehabilitative ideal. In other words, the Eighth Amendment does not mandate any one penological theory, just the one the Court approves.'" (quoting *Graham*, 560 U.S. at 116 (Thomas, J., dissenting))).

176. *See supra* Part I.B.2.

177. *See infra* Part III.A; *see also* Raymond, *supra* note 42, at 731 ("The highly malleable minds of young adults present an opportunity for great harm from lengthy prison sentences or great benefit from rehabilitative efforts.").

178. Feld, *supra* note 10, at 194–95.

suppresses any potential rehabilitative efforts that could help the defendant successfully reenter society.[179]

2. Juvenile Transfer Constitutes Punishment in Itself

The second reason certain forms of transfer invoke the *Graham* trilogy and *Jones* is that they constitute disproportionate punishment, in violation of the Eighth Amendment.[180] As culpability factors into the analysis for JLWOP proportionality, it also pertains to removing a child's case to adult criminal court. Although *Graham* explicitly addressed only JLWOP for non-homicide offenses, the trilogy's "collateral holding[s]" can be construed to encompass a larger spectrum of conduct.[181] That is, *Miller* and *Montgomery*'s holdings that the most severe punishments should be reserved only for offenders with the greatest culpability invokes the proportionality of transferring juvenile cases to adult court and the repercussions such transfer can have.[182]

Because the *Graham* trilogy changed the discourse regarding proportionality—from a predominant emphasis on the severity of the offense to the culpability of the individual offender—the constitutionality of transfer necessarily hinges on individualized determinations of culpability.[183] Mandatory waiver, automatic waiver, and the most severe forms of presumptive waiver,

179. *See* Puzone, *supra* note 46, at 187 (arguing that recognizing a constitutional right for juveniles to be tried in juvenile court will reduce sentencing discrepancies and promote juvenile offenders' rehabilitation).

180. See *infra* Part III.A for a more detailed discussion of how mandatory waiver and some forms of presumptive waiver constitute cruel and unusual punishment.

181. Arya, *supra* note 33, at 123 ("It would be an anomaly that youth convicted of the most serious charges and are [sic] subjected to JLWOP sentences would somehow have a right to rehabilitation whereas other children convicted of less serious crimes would not."); *see also* Klein, *supra* note 170 and accompanying text; Suzanne S. La Pierre & James Dold, *The Evolution of Decency: Why Mandatory Minimum and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*, 27 VA. J. SOC. POL'Y & L. 165, 176 (2020) ("[U]nder *Miller*'s rationale, requiring a court to consider the mitigating factors of youth should not only invalidate life without parole sentences for all but a tiny subset of juvenile offenders, but it also calls into question all mandatory sentencing schemes as applied to children."); Orleans, *supra* note 85, at 511 (applying *Roper* and the *Graham* trilogy to challenge prosecutorial threats of transfer to secure plea bargains).

182. *See supra* Part I.B.2 (discussing the holdings of the *Graham* trilogy).

183. *See supra* Part I.B (discussing the evolution of the Supreme Court's JLWOP jurisprudence from *Roper* through the *Graham* trilogy).

which remove or severely limit this type of determination, are thus unconstitutional under the *Graham* trilogy.

Further, sentencers have used transfer legislation to evade constitutional prohibitions of JLWOP under the *Graham* trilogy.[184] Therefore, failure to address the implications of the *Graham* trilogy beyond the realm of JLWOP permits clever legislatures and sentencers to exploit loopholes in the Court's jurisprudence.[185] Extending the *Graham* trilogy to juvenile transfer is essential for ensuring the efficacy of the *Graham* trilogy itself.

Additionally, the lifelong consequences juveniles incur for a conviction in adult court amounts to a "punishment" which brings transfer law within the domain of the Eighth Amendment.[186] This is so even before a conviction; simply trying a juvenile in adult court carries a disproportionate impact on his life.[187] This punishment must also meet the proportionality requirements in the Court's JLWOP jurisprudence by allowing for inquiry into rehabilitative capacity. Thus, juvenile transfer legislation revolves around the same questions of culpability and proportionality discussed in the Court's JLWOP line of cases.

The *Graham* trilogy and *Jones* are not about JLWOP per se; these cases stand for the proposition that rehabilitation is more appropriate for juvenile defendants as a class.[188] Criminal conduct by juveniles generally reflects their "transient immaturity"

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184. *See* State v. Sweet, 879 N.W.2d 811, 835 (Iowa 2016) ("[M]any of the states that do allow life in prison for juveniles do so only through statutes that allow the transfer of juveniles to adult court.").

185. *Cf.* Graham v. Florida, 560 U.S. 48, 67 (2010) (describing a then-existing Florida statute that hypothetically permitted transfer for a five-year-old child, and concluding that "the [hypothetical] example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration").

186. *See* Arya, *supra* note 33, at 138 (arguing that the "lifelong impact of a criminal court conviction" weighs in favor of applying *Graham* to juvenile transfer); Mistrett & Espinoza, *supra* note 6, at 5 (describing the increased likelihood of recidivism for juveniles transferred to adult court, as well as the enhanced difficulty of expunging or sealing adult court records, as opposed to juvenile processing).

187. *See infra* Part III.A (describing the consequences of adult waiver, including a decrease in prospects for rehabilitation and an increase in racial disparities, social stigma, and rates of suicide and abuse).

188. *See supra* Part I.B.2, I.C (describing the constitutional mandate of promoting juvenile rehabilitation following the Court's jurisprudence in the *Graham* trilogy and *Jones*).

more than malice in need of punishment.[189] Accordingly, cases where juveniles are subject to adult prison sentences are especially egregious forms of disproportionate punishment.[190] But even absent a conviction in adult court, juveniles' placement in the adult court system deprives them of rehabilitative resources, amounting to the overly punitive, unconstitutional treatment of juvenile offenders.

The decision to transfer a juvenile is, in itself, a decision that they deserve punishment. Transferring a juvenile to face adult court proceedings—irrespective of any ultimate conviction or sentence—is not merely procedural. It is a substantive decision that subjects the juvenile to an entire system without a focus on rehabilitation.[191] Anything short of this rehabilitative effort runs afoul of the Court's JLWOP cases, which are more concerned with reintegration into society than a retributivist mentality.[192] In response to the argument that transfer falls short of true "punishment" within the meaning of the Eighth Amendment,[193] this Note argues that the very act of transfer separates the juvenile offender from a rehabilitative system that is better tailored to her culpability and to her needs.

For these reasons, juvenile transfer legislation is subject to the protections under the Eighth Amendment. In fact, courts in at least one jurisdiction have already recognized the connection between the U.S. Supreme Court's jurisprudence on cruel and unusual punishment and juvenile transfer.[194] Although

189. *See* Montgomery v. Louisiana, 577 U.S. 190, 206–08 (2016) (discussing the Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), and noting the decision's reliance on children's "lesser culpability" and "transient immaturity").

190. *See infra* notes 219–22 and accompanying text (describing the particularly serious consequences of juvenile confinement in adult prisons, including increased rates of suicide, sexual assault, abuse by correctional staff, and violence, as well as lifelong stigma).

191. See *infra* Part III.A for an analysis of the adverse effects of non-discretionary juvenile waiver on rehabilitation-ready defendants.

192. *See supra* Part I.B.2–C (describing the evolution of the Court's JLWOP jurisprudence towards a greater emphasis on juvenile rehabilitation).

193. *See, e.g.*, People v. Patterson, 2014 IL 115102, ¶ 105, 25 N.E.3d 526, 551 ("We reject the connection between the transfer statute and the imposition of harsher punishment . . . as simply too attenuated to be persuasive.").

194. *See* People v. Williams, 2016 IL App (1st) 133894-U, ¶ 35 ("Although the mandatory term-of-year sentencing range to which defendant was subjected is not unconstitutional based on the current state of the law, we nonetheless strongly object to the application of any mandatory sentencing requirements to juveniles transferred to adult court pursuant to either the automatic transfer or exclusive jurisdiction provision."); People v. Willis, 2013 IL App (1st) 110233,

Montgomery v. Louisiana had not yet been decided at the time the Appellate Court of Illinois decided *People v. Willis*, both *Willis* and *People v. Williams* discussed *Roper*, *Graham*, and *Miller* with regards to automatic transfer statutes.[195]

Although the *Willis* court upheld the constitutionality of the statute at issue, it nevertheless acknowledged the appropriateness of viewing transfer legislation through the lens of the U.S. Supreme Court's Eighth Amendment jurisprudence[196] and kept the door open for automatic transfer statutes to be struck down as unconstitutional on the basis of societal norms shifting in the future.[197] As stated by the Appellate Court of Illinois in *Williams*, courts cannot adequately consider the "hallmark characteristics of youth" when subject to the restrictions of mandatory sentencing requirements.[198]

That said, the Supreme Court of Illinois rejected a similar argument in *People v. Patterson* regarding the constitutionality of a state-level automatic transfer statute.[199] The court's ultimate conclusion, however, stops short of precluding the

¶ 44, 997 N.E.2d 947, 958 ("Although *Roper*, *Graham*, and *Miller* address constitutional challenges to sentencing statutes, we agree their analysis bears consideration when discussing the constitutionality of an automatic transfer provision."); *see also* State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014) (applying IOWA CONST. art. I, § 17, Iowa's nearly verbatim equivalent of the Eighth Amendment, in finding unconstitutional statutes with mandatory minimum prison sentences for juveniles that do not make individualized determinations of culpability).

195. *Williams*, 2016 IL App (1st) 133894-U, ¶¶ 31–35; *Willis*, 2013 IL App (1st) 110233, ¶¶ 44–46 (declining to extend *Roper*, *Graham*, and *Miller* to prohibit a state automatic transfer statute but conceding that the court "agree[s] [those cases'] analysis bears consideration when discussing the constitutionality of an automatic transfer provision").

196. *See Willis*, 2013 IL App (1st) 110233, ¶ 53 ("Although we see a nationwide trend developing to treat juvenile offenders differently than adult offenders and agree that this trend might some day lead to a realization that a mandatory transfer provision implicates constitutional rights, the current decisions of our state and federal court do not allow us to reach that result at this time.").

197. *Id.* ¶ 55 ("While the constitutional underpinnings necessary to reverse the automatic transfer provision would be a stretch at the current time, *the law in this area continues evolving, as well it should*. The decision of whether to try a minor as an adult has costly and lifelong consequences for the juvenile and for society as a whole." (emphasis added)).

198. *Williams*, 2016 IL App (1st) 133894-U, ¶ 35.

199. *See* People v. Patterson, 2014 IL 115102, ¶¶ 105–06, 25 N.E.3d 526, 551 (rejecting "the connection between the transfer statute and the imposition of a harsher punishment alleged by defendant as simply too attenuated" and holding that "in the absence of actual punishment imposed by the transfer statute, defendant's Eighth Amendment challenge cannot stand").

argument advanced by the Appellate Court of Illinois and by this Note—that harsh transfer legislation like mandatory waiver, by its nature, inhibits the weighing of juveniles' reduced culpability as required under the *Graham* trilogy.

First, the court in *Patterson* held that the possibility of a conviction in adult criminal court did not, by itself, violate the Constitution.[200] But this holding was in direct response to the specific argument raised by the appellant, which did not account for attributes of the adult system—short of a conviction—that amount to punishment.[201] That is, transfer punishes juveniles in manners far beyond a "mere possibility" of incarceration in adult prisons.[202] By focusing only on a potential prison sentence, *Patterson* interpreted the punitive nature of juvenile transfer too narrowly.

Second, the *Patterson* majority shared the concern of the *Williams* court and the *Patterson* dissent regarding the total lack of judicial discretion afforded by the state's automatic transfer statute.[203] In fact, the court concluded by imploring the Illinois legislature to review (and impliedly amend) the automatic transfer statute so as to facilitate room for judicial discretion, in accordance with modern neuroscience.[204] That court's holding, therefore, was largely influenced by separation of powers

200. *Id.* ¶ 105.

201. *See id.* ¶¶ 104–06 (rejecting the "defendant's assertion that the transfer statute effectively functions as a sentencing statute" and holding that "*the mere possibility that a defendant may receive a potentially harsher sentence if he is convicted in criminal court* logically cannot change the underlying nature of a statute delineating the legislature's determination that criminal court is the most appropriate trial setting" (emphasis added)); *infra* Part III.A (overviewing the comprehensive punishment imposed on juveniles subject to transfer, even when there is no conviction—factors that the *Patterson* court failed to address).

202. *Contra Patterson*, 2014 IL 115102, ¶ 105 ("*The mere possibility that a defendant may receive a potentially harsher sentence if he is convicted in criminal court* logically cannot change the underlying nature of a statute delineating the legislature's determination that criminal court is the most appropriate trial setting in his case. We reject the connection between the transfer statute and the imposition of harsher punishment alleged by defendant as simply too attenuated to be persuasive." (emphasis added)).

203. *See id.* ¶ 111 (conceding that "the mandatory nature of that statute denies [the] reality" that juveniles' underdeveloped cognitive functioning may affect their judgment and behavior).

204. *See id.* ("[W]e strongly urge the General Assembly to review the automatic transfer provision based on the current scientific and sociological evidence indicating a need for the exercise of judicial discretion in determining the appropriate setting for the proceedings in these juvenile cases.").

principles; the legislature spoke, and it is not the court's place to question the legislature's decision that adult criminal court was the proper forum.[205] The court nevertheless emphasized the need for individualized determinations accounting for juveniles' diminished culpability.[206] Without deeming juvenile transfer legislation outright unconstitutional, existing precedent's discussion of these laws recognizes their problematic relationship with the Eight Amendment, prompting the conclusion that juvenile transfer legislation is also subject to the U.S. Supreme Court's class-wide protection of juvenile offenders.

As this Note argues in the next Part, transfer legislation that inhibits or minimizes individualized determinations is unconstitutional in light of the *Graham* trilogy and *Jones*. Although *Jones* softened the trilogy's procedural safeguards, harsher forms of transfer remain unconstitutional following that decision.

III. NON-DISCRETIONARY TRANSFER LEGISLATION IS UNCONSTITUTIONAL

This Part argues that the stricter forms of juvenile transfer violate the Eighth Amendment. Section A argues that presumptive waiver, mandatory waiver, and automatic waiver leave insufficient room, if any, for juveniles to demonstrate their decreased culpability and their augmented capacity for rehabilitation. Section B addresses counterarguments regarding *Jones*'s impact on the *Graham* trilogy. This Note argues that even after *Jones*, harsher forms of transfer legislation violate the Eighth Amendment. Section C concludes with several proposed solutions that may help legislators and practitioners reconcile the Eighth Amendment with transfer legislation.

A. MANDATORY WAIVER, AUTOMATIC WAIVER, AND PRESUMPTIVE WAIVER ARE DISPROPORTIONATE TO JUVENILES' CULPABILITY

The *Graham* trilogy is substantially at odds with the more punitive forms of juvenile transfer laws.[207] These laws run afoul

205. *See id.* ¶ 106 ("[W]e decline to second-guess the validity of the legislature's judgment.").

206. *Id.*

207. *See* Heaney, *supra* note 6, at 421–22 (arguing that *Graham* and *Miller* are inconsistent with direct file and statutory exclusion laws).

of *Miller* because they "ignore the mitigating circumstances of youth."[208] In particular, mandatory and automatic waiver laws—including statutory exclusion laws and "once-an-adult-always-an-adult" statutes[209]—contradict the proportionality standards set forth by the *Graham* trilogy. The same is true for presumptive waiver laws.[210] Thus, waiver laws that minimize or entirely eliminate sentencer consideration of individualized determinations of culpability—via mandatory or automatic waiver or by initially placing the burden to rebut the presumption of transfer on the defendant—violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Furthermore, the automatic transfer of juvenile cases due to the presence of certain categorical factors nullifies *Miller* and *Montgomery*'s holding that certain punishments are unconstitutional for classes with lower culpability: namely, juveniles.[211] The same is true regarding *Roper*.[212] That is, automatic transfer legislation silences the categorical distinctions acknowledged by the *Graham* trilogy and *Roper*.[213] These cases sought to ensure

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208. Tchoukleva, *supra* note 85, at 102; *see also* Heaney, *supra* note 6, at 412–14 (arguing that, given *Miller* and subsequent cases, "[a] juvenile's case should not be directly filed in adult court or automatically transferred to adult court because such practices fail to consider the unique factors associated with youth").

209. See *supra* Part II.A for an overview of modern juvenile transfer legislation, including mandatory and automatic waiver laws.

210. But see Slaten, *supra* note 165, at 834 for an example of a less punitive state-level presumptive waiver law that may conform with the Eighth Amendment's requirements.

211. *See supra* Parts I.B.2, II.A (describing the development of the Court's jurisprudence across the *Graham* trilogy, including the holdings in *Miller* and *Montgomery*, and the modern history of juvenile transfer legislation, respectively).

212. *See* Pagnanelli, *supra* note 65, at 188 (arguing that "[t]he rationale behind *Roper* is germane to all areas of juvenile justice" and that "[s]imilar logic should preclude the transfer of juveniles to the adult criminal system" because "[j]uveniles are insufficiently culpable to be the target of retribution, and insufficiently developed to be rehabilitated by the criminal system").

213. *See id.* at 189–91 (arguing that *Roper* should lead legislatures to establish a higher maximum age for adult classification in the context of waivers, as well as promote transfer policies more aligned with juvenile rehabilitation); Steinberg, *supra* note 49, at 411–12 (tracking, beginning with *Roper*, the Court's increasing reliance on neuroscience in its decisions regarding juveniles); Seguinot, *supra* note 130, at 43–46 (discussing the Court's reliance on emerging neuroscience in *Roper* and the *Graham* trilogy, in the context of JLWOP). *But see* Seguinot, *supra* note 130, at 51–53 (finding that the *Jones* Court opted not to apply the neuroscience underlying its previous decisions).

that the vast majority of juveniles' amenability to rehabilitation guaranteed them a less severe sentence.[214] However, automatic and mandatory transfer blatantly contradict this objective.

Indeed, transfer inhibits, rather than improves, juveniles' prospects for rehabilitation.[215] Merely trying a juvenile in adult court risks increasing their distrust of the adjudication process, making them more likely to re-offend.[216] Moreover, a disproportionate number of Black juveniles see their cases transferred to adult criminal court.[217] As such, the process of juvenile transfer exacerbates existing racial inequities inherent to the U.S. criminal legal system.[218]

Further Eighth Amendment violations ensue if the juvenile is ultimately convicted in adult court. Adult prison may "harden" youthful offenders by instilling in them values of domination and exploitation.[219] A conviction further harms juveniles by

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214. *See supra* Part I.B.2–C (highlighting how imposition of JLWOP should be reserved only for the rare juvenile offender who is beyond rehabilitation); Miller v. Alabama, 567 U.S. 460, 479 (2012) ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without the possibility of parole] will be uncommon.").

215. *See* Pagnanelli, *supra* note 65, at 184 ("A juvenile who has been tried in a criminal court often feels unjustly treated, and juveniles with this negative perception of the adjudication process are more likely to adopt a 'delinquent self-concept' which also causes them to re-offend.").

216. *Id.*

217. *See* Mistrett & Espinoza, *supra* note 6, at 2 ("In 2018 it was found that despite Black youth making up less than 15% of the total youth population in the United States, they comprise 63% of the total youth detained pending judicial waiver or awaiting criminal court hearing.").

218. *See, e.g.*, Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 886–87 (2022) ("Studies of every aspect of the criminal justice system—from policing to prosecution to sentencing—demonstrate that opportunities to exercise discretion, for decision makers to make individualized decisions, have race skewing effects. . . . We see this in the tendency to adjudge Black boys as older, and therefore more culpable for their misdeeds, than their same-age white counterparts."); Tiffani N. Darden, Jones v. Mississippi*: Sweeping Away the Due Process Protections of Juvenile Offenders*, 59 GA. L. REV. 949, 987 (2025) ("[A]bout 70% of children sentenced to life without parole have been people of color, primarily Black or Hispanic. Even more shocking, since *Miller* in 2012, the number of Black juveniles sentenced to life without parole rose from 61% pre-*Miller* to approximately 72% today.").

219. Pagnanelli, *supra* note 65, at 184; *see also* Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, SENT'G PROJECT (Mar. 1, 2023), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence [https://perma.cc/V7WE-BRJJ] ("State-level data on recidivism consistently show that youth who are released from

stigmatizing them.[220] Furthermore, juvenile convicts are especially susceptible to victimization in adult prisons.[221] And outside of juvenile court, they lose access to critical juvenile-system resources tailored to their needs.[222] Because capacity for rehabilitation is integral to the *Graham* trilogy's assessment of juvenile culpability, undermining it via automatic removal to adult court violates this jurisprudence.

Furthermore, presumptive waiver ignores the constitutional difference between the culpability of children and adults.[223] This form of waiver law requires juveniles to prove "what the Supreme Court has already recognized": Juveniles have diminished culpability that warrants a more lenient sentence.[224] By placing the burden to show rehabilitation on the juvenile, presumptive

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correctional confinement experience high rates of rearrest, new adjudications (in juvenile court) or convictions (in adult court), and reincarceration.").

220. *See* Pagnanelli, *supra* note 65, at 184 ("The criminal system also may cause juveniles to feel exploited and humiliated by the judicial process, and stigmatized by society."); Mistrett & Espinoza, *supra* note 6, at 2 ("[I]f a youth is sentenced to an adult facility, they will have a harder time being able to seal their records (in contrast to juvenile processing). Open records allow potential employers and financial institutions to see the criminal record when performing a background check and thus makes it harder to obtain a job, home, or to participate in our democracy due to voting restrictions.").

221. *See* Malcolm C. Young & Jenni Gainsborough, *Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences*, SENT'G PROJECT 6–7 (2000), https://www.prisonpolicy.org/scans/sp/juvenile.pdf [https://perma.cc/Q7RX-G4J8] (discussing the array of problems facing youth held in adult prisons and jails, including increased rates of suicide, sexual assault, abuse by correctional staff, and violence); Anna S. Jones, Comment, *No Child Is "Incorrigible": A Proposal for Juvenile Justice Reform in Louisiana and the United States*, 70 LOY. L. REV. 219, 252 (2023) ("[S]tudies show that juveniles housed in adult facilities are far more likely to be sexually assaulted, experience violence, or commit suicide than their peers housed in juvenile facilities."); Orleans, *supra* note 85, at 497 ("Adult prosecution is akin to a nuclear option in juvenile court.").

222. *See* Hannan, *supra* note 53, at 211 (contrasting the counseling, job training, and other rehabilitative services available in juvenile facilities with the "purely punitive" staff and environment of adult prison); *Youth Tried as Adults*, JUV. L. CTR., https://jlc.org/issues/youth-tried-adults [https://perma.cc/WT3J-P2DU] ("Education is also closely linked to reducing reoffending; youth's successful re-entry to their communities is compromised when they are deprived of adequate and appropriate educational opportunities.").

223. *See* Fugett, *supra* note 1, at 389 (observing that the Supreme Court has "categorically ruled that juveniles are less culpable than adults" and that "[p]resumptive waivers directly conflict with the Court's finding").

224. *Id.* at 387.

waiver ignores the trilogy's holding that youth categorically entails lower culpability.

Moreover, state-level expansion of the transfer presumption to include a larger number of offenses and, consequently, offenders, as many states have done,[225] violates *Miller*'s pledge that the harshest forms of punishment should be reserved only for those "uncommon" cases where the juvenile is beyond rehabilitation.[226] Transfer legislation, and the expansion thereof, is thus disproportionate to juvenile offenders' culpability.

Instead, narrowing this type of sentence to the select few cases where the defendant's culpability genuinely warrants it will reconcile this form of punishment with the Court's Eighth Amendment precedent.[227] At the very least, the form of presumptive waiver wherein the presumption is automatically against the defendant—rather than requiring the defendant to rebut the presumption only after the government establishes probable cause—is unconstitutional.[228] Conversely, presumptive sentencing schemes that soften the presumption against the defendant help preclude transfer for juveniles whose conduct reflects their immaturity and underdeveloped cognitive functioning.[229] If any type of presumptive transfer is most likely to be constitutional, it is this less severe version of the policy.

Therefore, the *Graham* trilogy does not preclude juvenile transfer *in itself*. But mandatory transfer law, automatic waiver like statutory exclusion, and "once-an-adult-always-an-adult" statutes, and the more rigid forms of presumptive waiver,[230] blatantly contradict this precedent's promotion of juvenile

225. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 84 (2000) ("[In the 1990s], most states expanded the list of cases eligible for transfer by making modifications in offense, age, and prior record criteria.").

226. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without the possibility of parole] will be uncommon."); Bishop, *supra* note 225, at 155 ("[T]ransfer should be reserved for those 'extreme cases' to which it has traditionally been applied . . . .").

227. *See supra* Part I.B.2 (discussing *Miller* and *Montgomery*'s requirement that the harshest sentences be reserved for only the most culpable offenders).

228. *But cf.* Slaten, *supra* note 165, at 834 (assuming the constitutionality of Alaska's more lenient version of presumptive waiver, where rebuttal occurs only after the prosecution demonstrates probable cause supporting the defendant's guilt).

229. *See supra* note 208 and accompanying text.

230. *See supra* notes 207–09 and accompanying text.

neuroscience.[231] Extending beyond the realm of JLWOP, those cases' recognition of juveniles' reduced culpability applies to transfer legislation that amounts to disproportionate punishment. Compared to the more rehabilitation-friendly discretionary waiver, mandatory and automatic waiver, as well as presumptive waiver that automatically requires the defendant to rebut the presumption of transfer, are thus prohibited under the *Graham* trilogy.[232] The same is also true following *Jones*.

B. MANDATORY WAIVER, AUTOMATIC WAIVER, AND PRESUMPTIVE WAIVER REMAIN UNCONSTITUTIONAL IN LIGHT OF *JONES*

At first glance, it may seem that the *Jones* Court went in the opposite direction of the *Graham* trilogy. By holding that *Miller* and *Montgomery* merely stood for the proposition that "youth matters in sentencing,"[233] commentators have argued that *Jones* disregarded those cases' true holdings—namely, that the Eighth Amendment precludes JLWOP for certain classes of offenders.[234] But this criticism overstates *Jones*'s legacy.

Although it is true that *Jones* expressly discounted a bright-line rule in the form of a finding of permanent incorrigibility,[235] the essence of the *Graham* trilogy remains. At the heart of the *Graham* trilogy is *Miller*'s assertion that, in the eyes of the Eighth Amendment, "children are different."[236] At no point did *Jones* challenge this holding in any substantive way. Even after *Jones*, there remains a categorical prohibition against imposing disproportionate punishments—including harsh transfer

231. *See* Tchoukleva, *supra* note 85, at 94 (arguing that, by failing to prohibit automatic transfer and prosecutorial transfer, *Miller* fails to duly extend Eighth Amendment protections to juvenile defendants).

232. *See* Hannan, *supra* note 53, at 213 ("[J]udicial waiver is the method that is least likely to result in the waiver of juvenile offenders who could be helped by the rehabilitative aims of the juvenile system.").

233. Jones v. Mississippi, 141 S. Ct. 1307, 1314 (2021).

234. *See, e.g.*, Drinan, *supra* note 80, at 186 (arguing that *Jones* amounted to "intellectual dishonesty" by the majority, in that it claimed to keep the *Graham* trilogy intact while in actuality undermined it).

235. *See Jones*, 141 S. Ct. at 1313 ("[T]he Court has already ruled that a separate factual finding of permanent incorrigibility is not required."); *see also supra* Part I.B–C (discussing the ambiguity surrounding whether a finding of permanent incorrigibility was required in the wake of *Montgomery*).

236. Miller v. Alabama, 567 U.S. 460, 481 (2012).

policies—on defendants who are not beyond rehabilitation.[237] Yes, *Jones* increases the difficulty of enforcing this requirement.[238] Forgoing any brightline rule in favor of a discretionary scheme naturally complicates enforcement. Here, expressly declining to require a sentencing explanation with an implicit finding of permanent incorrigibility muddles the process of ensuring state sentencers uniformly make individualized determinations of culpability.[239]

By holding that a state sentencer need not make this exact factual determination as to the individual's rehabilitative capacity, *Jones* did a great disservice to future appellate courts. Commentators have argued that the post-*Jones* sentencer has effectively boundless discretion to impose JLWOP, significantly complicating appellate efforts to discern any clear rule while reviewing sentencer decisions.[240] Further, it has been argued that *Jones*'s mere requirement of considering youth—rather than thoroughly interrogating its role in each juvenile's case—renders any potential appeal based on failure to consider youth "basically null."[241]

This Note agrees with this segment of the literature but reiterates that these concerns are predominantly procedural.[242]

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237. *See Jones*, 141 S. Ct. at 1317 ("*Miller* required a discretionary sentencing procedure.").

238. *See, e.g.*, Juliet Liu, Note, *Closing the Door on Permanent Incorrigibility: Juvenile Life Without Parole After* Jones v. Mississippi, 91 FORDHAM L. REV. 1033, 1064 (2022) ("The primary point of contention from the dissenters in *Jones* was that the decision . . . left a black box of judicial discretion where the permanent incorrigibility principle used to be.").

239. *See Jones*, 141 S. Ct. at 1320 (concluding that the separate factual finding was not necessary to "ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth").

240. *See, e.g.*, Miller, *supra* note 81, at 1347 (arguing that this high degree of discretion allows state sentencers to make arbitrary decisions, knowing that the Court will not intervene); Liu, *supra* note 238, at 1064 ("To illustrate by way of a hypothetical, the *Jones* majority would not have a problem with two judges considering the same defendant's youth differently and arriving at different sentences. All that matters is that each judge had the discretion in the first place.").

241. Rachel Lopez, *SCOTUS Dodges on Human Redemption, Leaves It to States*, BLOOMBERG L. NEWS (June 11, 2021), https://news.bloomberglaw.com/us-law-week/scotus-dodges-on-human-redemption-leaves-it-to-states [https://perma.cc/2NZ9-WVVG].

242. *Cf.* Liu, *supra* note 238, at 1065 ("The problem *Jones* does not solve is how courts can meaningfully and *consistently* determine when a sentence of juvenile life without parole is appropriate." (emphasis added)).

Indeed, the greatest concern for the constitutionality of transfer legislation following *Jones* is the reliable, accurate state-level distinguishing of immature juveniles from those who cannot be rehabilitated.[243] This is a logistical problem for courts attempting to apply *Jones*, not a substantive one.

The *Jones* Court did not challenge the need to consider the proportionality of the sentence in the first place. Thus, *Jones* did not disturb the core of the *Graham* trilogy. In this respect, this Note disagrees with some of the existing literature.[244] If anything, rather than overrule the *Graham* trilogy, *Jones* overestimated state-level sentencers' respect for the Court's ruling. That is, states can now choose to violate the law by implementing a sentencing scheme that does not account for diminished culpability.[245] But the *Graham* trilogy remains good law.

Jones makes the *Graham* trilogy more difficult to enforce, but it does not meaningfully undermine this precedent's substance. By giving state sentencers loose parameters for considering youth, *Jones* created a substantial procedural headache.[246] For this reason, *Jones* is unhelpful precedent because it fails to provide meaningful oversight to state sentencers, producing a large swath of possible sentencing schemes.[247] However, juvenile transfer legislation that ignores individual defendants'

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243. *See* Drinan, *supra* note 80, at 186 (writing in the context of JLWOP sentencing that "without some factual finding [of permanent incorrigibility] . . . there is no meaningful way to draw this constitutionally required line between transient immaturity and irreparable corruption").

244. *See, e.g.*, *id.* at 188 (arguing that *Jones* represents a "denial of the precedent and logic that animated the *Miller* trilogy" and that the Court, while insisting that "it has left intact the 'differentness' of youth for sentencing purposes" has, in fact, "gutted what that difference means in practice").

245. *See* Liu, *supra* note 238, at 1065 ("*Jones* threw a wrench in [judges' post-*Montgomery* practice of treating incorrigibility as the standard] by expressly rejecting the notion that judges must make explicit or implicit findings of incorrigibility.").

246. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021) ("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 sentences to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding a 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.*" (emphasis added)).

247. *See* Liu, *supra* note 238, at 1059–61 (describing the spectrum of state and federal court interpretations of *Jones* in the years since the decision).

capacity for rehabilitation remains unconstitutional under the Court's JLWOP jurisprudence.

Jones softened the trilogy's procedural requirements and protections by only holding state sentencers to discretionary imposition of JLWOP.[248] State sentencers could potentially argue that they followed *Jones* by considering youth, despite sentencing to JLWOP a juvenile who was not irreparably corrupt. But this argument misreads *Jones*. The Court held that the *Graham* trilogy required no automatic factfinding mission by the state sentencer to determine permanent incorrigibility before imposing JLWOP.[249] It did not hold that assessing juvenile amenability to rehabilitation—an inextricably connected component of considering youth—was not required in some capacity.[250] The same can be said for transfer legislation, which similarly implicates juveniles' unique susceptibility to the effectiveness of rehabilitation.[251]

Thus, because *Jones* also claimed *Miller* and *Montgomery* were still good law, sentencers are in a position to heed the advice of Justice Sotomayor's dissenting opinion and "hold this Court to its word."[252] That is, states should continue to enforce *Miller* and *Montgomery*, along with their narrowing of the most severe punishments to only the harshest and most extreme cases. Short of that rare occasion, permitting waiver is disproportionately punitive and thus unconstitutional.

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248. *See Jones*, 141 S. Ct. at 1318 ("The key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where the sentence is appropriate in light of the defendant's age. If the *Miller* or *Montgomery* Court wanted to require sentencers to also make a factual finding of permanent incorrigibility, the Court easily could have said so—and surely would have said so.").

249. *See supra* Part I.C (discussing the holding in *Jones*).

250. *See* Lyons, *supra* note 32, at 113 ("As it stands, children are still entitled to a sentencing hearing that considers the mitigating factors of youth as required by *Miller*, but sentencers need not go so far as to make a separate factual finding of incorrigibility prior to sentencing a child to life without parole.").

251. See *supra* Part II.B for a discussion of the overlap of the Court's JLWOP Eighth Amendment decisions and juvenile transfer legislation.

252. *Jones*, 141 S. Ct. at 1337 (Sotomayor, J., dissenting); *see also* Drinan, *supra* note 80, at 196 ("[Y]outh advocates should follow Justice Sotomayor's lead and 'hold [the Supreme] Court to its word: *Miller* and *Montgomery* are still good law.' This means that counsel for youth facing LWOP should insist that there is a substantive bar on that sentence for all but the rarest of juvenile defendants." (quoting *Jones*, 141 S. Ct. at 1337)).

Under *Jones*, if the sentencer has discretion to consider youth, then the juvenile transfer legislation is constitutional.[253] By contrast, because it bars minor defendants formerly adjudicated as adults from the juvenile delinquency system, automatic waiver policies such as "once-an-adult-always-an-adult" fully preclude discretion for consideration of youth in sentencing.[254] Consequently, automatic waiver, including "once-an-adult-always-an-adult" laws and statutory exclusion legislation, along with mandatory waiver, violate *Jones*.

This argument is still viable regarding presumptive waiver. Since presumptive waiver places the burden of demonstrating rehabilitative capacity on the defendant, the sentencer technically need not consider the defendant's youth unless she raises it as an issue in the first place.[255] Although weaker than the argument against mandatory or automatic waiver, presumptive waiver nonetheless threatens juveniles' constitutional rights. Thus, taking *Jones* at face value, only transfer legislation affording sentencers meaningful discretion (e.g., discretionary waiver or presumptive waiver that does not automatically require the juvenile to rebut the presumption of transfer) conforms with the Eighth Amendment.

At the most, *Jones* makes it easier in practice to impose longer sentences on juveniles. It did not weaken the force of the *Graham* trilogy's Eighth Amendment protections in a meaningful way. Taking the *Jones* Court at its word, *Miller* and *Montgomery* remain good law.[256] As such, overly punitive transfer legislation is unconstitutional following *Jones*. Even with the more limited guidance *Jones* provides to state sentencers, transfer law must consider the juvenile offender's capacity for rehabilitation and other metrics of culpability. To that end, there are certain forms of waiver law that help ensure transfer reflects only serious culpability.[257]

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253. *See supra* Part I.C (discussing the holding in *Jones*).

254. *See supra* Part III.A (discussing how this type of legislation violates the *Graham* trilogy).

255. *See supra* notes 223–29 and accompanying text; Slaten, *supra* note 165, at 834 ("If the juvenile's case meets all of the requirements triggering presumptive waiver and the juvenile fails to sufficiently rebut the presumption concerning criminal court amenability, the juvenile court must waive the case.").

256. *Jones*, 141 S. Ct. at 1337 (Sotomayor, J., dissenting).

257. See *infra* Part III.C for a discussion of potential strategies for reconciling state transfer legislation with the demands of the Eighth Amendment.

This Section has shown that, despite its weakening of the procedural guardrails supporting the *Graham* trilogy, *Jones* did not defeat the constitutional necessity of preventing JLWOP sentences for low-culpability juvenile offenders. That is, the *Jones* Court was correct in its conclusion that it did not overrule *Miller* and *Montgomery*.[258] *Jones* does not invalidate the *Graham* trilogy's holding that JLWOP sentences violate the Eighth Amendment in all but the most extreme cases. Therefore, as forms of transfer legislation that do not permit sufficient room for individualized determinations of juvenile culpability, automatic waiver, mandatory waiver, and more restrictive presumptive waiver policies are unconstitutional in light of the *Graham* trilogy and *Jones*.

Given the enduring potency of individualized determinations, this Note highlights several proposals that may help ensure transfer legislation adheres to the Eighth Amendment.

C. PRACTICAL SOLUTIONS TO UNCONSTITUTIONAL JUVENILE WAIVER LEGISLATION

To ensure the constitutionality of their transfer laws, state legislators may take advantage of several policy options that promote discretion in juvenile transfer cases. For instance, "Raise-the-Age" legislation narrows the range of juveniles potentially subject to transfer legislation by raising the minimum age of waiver.[259] At exactly what age courts and legislatures should

258. *See supra* Part I.C (describing the holding in *Jones*).

259. *See* Hernandez Levin, *supra* note 35, at 106–07 (describing raise-the-age laws as a means for keeping a larger number of juveniles out of the jurisdiction of adult courts); Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults*, HARV. KENNEDY SCH. 8–9 (2015), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/ESCC-CommunityBasedResponsesJusticeInvolvedYA.pdf [https://perma.cc/V3H7-E7S8] (arguing, based on empirical findings, that the age of juvenile jurisdiction should be raised to at least twenty-one, with gradually diminishing protections up to the age of twenty-five); Peggy D. Nicholson, *The Children Are Our Future (Not Our Future Criminals): Protecting South Carolina's Youngest Citizens by Setting a Minimum Age of Juvenile Court Jurisdiction*, 75 S.C. L. REV. 883, 906 (2024) (observing that "[t]he justifications supporting a statutory minimum age for juvenile court jurisdiction range from the fact that most crimes committed by young children are not serious, to the short- and long-term harms that juvenile court intervention can cause to young children, to the financial and administrative costs of juvenile court" and arguing that each of these justifications support raising the minimum age); Marrus & Rosenberg, *supra* note 49, at 1179 ("[C]ourts or legislatures should eliminate waiver of children under eighteen regardless of the crime or past history.").

draw the line remains unclear.[260] But empirical research supports precluding adult courts from trying juvenile defendants, due to their underdeveloped cognition.[261] Practically, states can achieve this objective by raising the age of adult court jurisdiction.[262] Such policy matches the juvenile offender with resources more tailored to the goal of rehabilitation and staves off the dangers of the adult criminal system and the recidivist tendencies it frequently promotes.[263]

Abolishment of more punitive forms of transfer could also reconcile state transfer legislation with the *Graham* trilogy.[264] In addition to abolishing certain types of judicial waiver (i.e., mandatory waiver and harsher forms of presumptive waiver) and automatic waiver (i.e., statutory exclusion and "once-an-adult-always-an-adult" legislation), prosecutorial waiver should be eliminated.[265] Prosecutorial discretion naturally trends towards the more punitive.[266] In lieu of this option, a blended

260. *See* Steinberg, *supra* note 49, at 416 ("[I]t is not clear how rethinking the upper boundary of adolescence to 21, much less 25, on the basis of brain science can easily be reconciled with existing laws that draw the boundary between adolescence and adulthood at 18.").

261. *See* Grisso et al., *supra* note 45, at 333, 359 (discussing a study assessing adjudicative competence among 927 adolescents and concluding that "even with youths older than this minimum age, defense attorneys, prosecutors, and judges should be concerned about a defendant's competence to stand trial whenever adult adjudication is proposed for a juvenile"). *But see id.* at 358 (cautioning "against the *application* of these results to legal issues other than competence to stand trial" (emphasis added)).

262. *See* Northrop et al., *supra* note 47, at 271 ("A majority of states already have extended original juvenile court jurisdiction, meaning that youth adjudicated in juvenile or family court can remain under juvenile jurisdiction up to age twenty-one . . . ."); *id.* at 276 (advocating for Maine to raise its age of jurisdiction to twenty-five).

263. *See* Pagnanelli, *supra* note 65, at 190 (arguing that increasing the legal age of adulthood to twenty-four or twenty-five would "decrease the likelihood of negative effects of transfer" and "prolong the juvenile's stay in the more secure and stabilizing juvenile system"); *supra* notes 219–22 and accompanying text (describing adult prisons' deleterious effects on juveniles' safety and prospects for rehabilitation).

264. *See supra* Part III.A (outlining existing scholars' arguments for abolishing the harshest forms of waiver).

265. *See* Hannan, *supra* note 53, at 210 ("Automatic and prosecutorial transfers are 'quick-fixes' designed to appease a panicked public; they send too many young people who are good candidates for rehabilitation into the criminal justice system.").

266. *See* Pagnanelli, *supra* note 65, at 191 ("A prosecutor is a champion of retribution and has no incentive to consider a juvenile's lack of culpability or the failure of the adult criminal court system to tame violent juveniles.").

sentencing scheme—whereby a partial adult sentence may be imposed, subject to the juvenile's capacity for rehabilitation—may serve as a substitute.[267] Without straying too far from *Jones* and its lack of requiring an express brightline rule for culpability determinations,[268] this blended sentencing scheme would balance state control over its own statute with consideration of the individual defendant's cognitive development and amenability to reform. Although there exist several models of blended sentencing schemes,[269] the version that most effectively satisfies the Eighth Amendment's proportionality requirement is the one that prioritizes rehabilitation over disproportionately punitive measures.[270]

Ultimately, abolition of these unconstitutional forms of waiver is the most practical solution. In fact, the Court's JLWOP jurisprudence requires this legislation be modified to promote rehabilitation over punishment.[271] Either state legislatures modify or abolish existing legislation allowing for automatic waiver, mandatory waiver, or overly punitive presumptive waiver, or courts must strike it down.

Besides state-level legislative action, individual practitioners also have some degree of influence in fighting against unconstitutional transfer. Namely, defense attorneys in cases involving juvenile transfer may be able to use the Court's holdings in the *Graham* trilogy and *Jones* to argue against punishment-oriented transfer legislation. By framing their argument around the Eighth Amendment, in accordance with this Note's characterization of the punitive nature of stricter transfer laws,[272] defense attorneys could implore state sentencers to consider the disproportionate punishment that is transferring juvenile cases

267. *See* Hannan, *supra* note 53, at 221 ("Blended sentences are an effective way to give a juvenile an incentive to stay out of trouble and to rehabilitate himself, while still providing an insurance option to the state if he proves he is not amenable to treatment in the long run.").

268. *See supra* Part I.C (describing the holding in *Jones*).

269. See Jones, *supra* note 221, at 234–36, for a description of five blended sentencing schemes that U.S. states are currently using.

270. *See id.* at 255–56 (proposing a new blended sentencing structure that caps an offender's incarceration in adult prison at twenty-one years).

271. *See supra* Part III.A (arguing that the Court's JLWOP jurisprudence is at odds with the more punitive forms of juvenile transfer laws).

272. See *supra* Part III.A for a discussion of the types of waiver that infringe on juveniles' Eighth Amendment rights against cruel and unusual punishment.

to a system that prioritizes defendants' punishment.[273] Thus, even in lieu of legislation expressly banning this unconstitutional practice, attorneys still have the leeway to introduce Eighth Amendment arguments into juvenile transfer cases. This Note advocates for this practice.

Because waiver hinges on assessments of juvenile amenability to rehabilitation, U.S. Supreme Court jurisprudence on JLWOP applies to juvenile transfer as well. And because *Jones* did not hamper the driving force of the *Graham* trilogy, the Court's JLWOP jurisprudence renders transfer laws which do not adequately account for rehabilitation—namely, mandatory waiver, automatic waiver, and harsher presumptive waivers—unconstitutionally disproportionate to the minor's underlying culpability. Accordingly, to conform with the Eighth Amendment, this legislation must be abolished.

CONCLUSION

Juvenile transfer poses an enormous threat to the defendants subject to its power. Allowing legislatures to issue this punishment risks severe harm to juvenile defendants as a class. Given the Court's line of JLWOP cases, the Eighth Amendment's prohibition on cruel and unusual punishment also encompasses juvenile transfer legislation.

This Note advances an argument that transfer remains constitutional, but only for extreme cases where the defendant is beyond rehabilitation. Although *Jones* complicated the individualized calculation of each juvenile's amenability to rehabilitation, that Court's unwillingness to overturn prior case law led the *Graham* trilogy to retain its potency. As such, juveniles' culpability remains relevant in JLWOP sentencing determinations and the decision of whether to remove a child's case to adult court. Under the *Graham* trilogy and *Jones*, punitive transfer policies like mandatory waiver, automatic waiver, and the harshest forms of presumptive waiver are disproportionate to the culpability of the juvenile offender and thus should be struck down as unconstitutional. Instead, states may implement only discretionary waiver laws and other forms of waiver that entail

273. *Cf.* Liu, *supra* note 238, at 1064 (discussing the possibility of defendants' attorneys capitalizing on *Jones*'s broad judicial discretion by making "creative arguments" on behalf of their clients in JLWOP proceedings).

sufficient consideration of the defendant's culpability.[274] Such is the perseverant, collateral impact of the *Graham* trilogy and *Jones*.[275]

As the court rightly noted in the case of Nolan Grove, before it transferred him to adult court, adult prisons are inappropriate for juvenile offenders.[276] These defendants are constitutionally entitled to a legal process that keeps them far away from adult court and adult prisons in all but the rarest of cases. By restricting waiver to those who are uniquely culpable and resistant to rehabilitation—a group that excludes the vast majority of juvenile offenders—state sentencers would move closer to providing full constitutional protections to children.

274. *See supra* Part III.A–B (arguing that automatic waiver, mandatory waiver, and some forms of presumptive waiver are unconstitutionally disproportionate punishments); *see also supra* Part III.C (discussing alternative approaches to waiver that are consistent with the *Graham* trilogy and *Jones*).

275. *See supra* Part II.B (arguing that the nature of juvenile transfer legislation mandates consideration of the Court's JLWOP jurisprudence).

276. *See supra* Introduction (discussing the case of Nolan Grove).