

# Keeping up with the *Joneses*

## 10 Things I Kinda Maybe Don't Hate About *Jones*

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When I first read *Jones*,<sup>2</sup> I said a bad word. Now, this isn't what we in the biz would call *aberrant* behavior, as I am from New Jersey. However, really, Kavanaugh?!

It is hard to accept any perceived step back when we still have so much more to accomplish in the sphere of youth defense. To make myself feel better, I compiled a list of ten reasons why *Jones* isn't **so** bad.

*Read: It is so bad and sometimes I read it backwards to pretend that Justice Kween Sotomayor's dissent is the opinion.*

### 1. It doesn't disturb *Miller* or *Montgomery*.

So, there is that. We still have that rock solid foundation to build on. And such delicious language from these cases and their progeny to cite from:

First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity."<sup>3</sup>

I feel like someone else said that? Oh, right, defenders did. Every day. In juvenile delinquency court.

### 2. It allows states to provide additional limits.

I know, know, but as a proud New Jerseyan (*Bruuuuuuuuce*), I implore you to read *Zuber*,<sup>4</sup> which expands *Miller* into functional LWOP sentences, and from Washington, *In the Matter of the Personal Restraint of Monschke*,<sup>5</sup> which applies the state constitution to expand *Miller*'s prohibition of mandatory LWOP sentences from age 18 to age 21.

And these cases aren't outliers. In addition to the Garden State and the Evergreen State, 23 other aptly nicknamed states and the District of Columbia (which should be a state, but more on that later) have eliminated JLWOP.<sup>6</sup>

### 3. "Permanently incorrigible" stinks and is a red herring.

Permanent?! At 15? At 15, I wore Hammer's baggy pants, which made me look like I had a soggy diaper.

All this to say, people are capable of change. Just like you rolled your eyes at number 2, I posit whether our path forward in youth justice should be reliant on a judge who heard all the gory details of a trial to

**not** find a youth permanently incorrigible. Especially given what we know about implicit (and explicit) racial bias and structural racism.

The harm from these sentences will not fall equally. The racial disparities in juvenile LWOP sentencing are stark: 70 percent of all youths sentenced to LWOP are children of color. The trend has worsened since *Miller v. Alabama*: 72 percent of children sentenced to LWOP after *Miller* were Black, compared to 61 percent of children sentenced before *Miller*.

Justice Sotomayor, dissenting.<sup>7</sup>

Preach, Kween.

To poke at the herring even further, incorrigible?! We chose a standard that is inconsistent with the science that brought us here. *Graham* emphasizes this exact point when citing from *Workman V. Commonwealth*: “Incorrigibility is inconsistent with youth.”

How can we label a youth as “incapable of being corrected,” “not manageable,” or, if you really want to scream, “bad beyond correction or reform?” The standard says more about our incapability—better said, our unwillingness—to help those deemed “incorrigible” than it says about any youth facing this standard.

**4. Making youth a mitigating factor as opposed to a criteria requiring a finding of fact regarding incorrigibility leaves the door open for more aggressive and creative arguments, including developmental age as opposed to chronological age.<sup>8</sup>**

In fact, we might argue permanent incorrigibility is inconsistent with the concept of adolescent brain development. *Period*.

A child's age is far “more than a chronological fact.”<sup>9</sup> It is a fact that “generates commonsense conclusions about behavior and perception.”<sup>10</sup> Such conclusions “apply broadly to children as a class.”<sup>11</sup>

**5. The need for objective criteria and national consensus in favor of criterion would restrain progressive states from being change agents and shackle us to those resistant to wholly embracing adolescent brain science.**

I’m looking at you, Arizona.

**6. Youth as a mitigating factor allows for wide discretion as to weight and is given wide latitude of discretion as opposed to factual findings underpinning a decision on criteria.**

*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing. Therefore, we can be greedy about how much it matters. And if successful in convincing our judge, the decision is unlikely to be disturbed.

Even when state law requires a sentencer to supply reasons, many States do not impose a formulaic checklist of topics or a magic-words requirement with respect to particular mitigating circumstances. And appellate courts do not necessarily reverse merely because the sentencer could have said more about mitigating circumstances.<sup>12</sup>

**7. We can use *Jones* as a springboard for social workers and mitigation specialists.**

Buried in a footnote is the assertion that “in that highly unlikely scenario, the defendant may have a potential ineffective-assistance-of-counsel claim, not a *Miller* claim—just as defense counsel’s failure to raise relevant mitigating circumstances in a death penalty sentencing proceeding can constitute a potential ineffective-assistance-of-counsel problem, not a *Woodson/Lockett/Eddings* violation.”<sup>13</sup>

**8. It reminds everyone that even the most conservative Justices agreed that you cannot ignore age when sentencing a youth.**

Like, allllll the conservative Justices.

**9. The Court leaves open the possibility of an “as-applied Eighth Amendment claim of disproportionality.”**

(“A State is not required to guarantee eventual freedom,” but must provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”) By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.<sup>14</sup>

**10. We are finally starting to talk about ACEs (adverse childhood experiences) and trauma in relation to violent offenses committed by youth.**

Even if it appears in a footnote . . . in the dissent. “[E]levated adversity scores are as common among killers as they are rare in the general adolescent population.”<sup>15</sup>

If all else fails, scroll to the dissent, pour yourself a glass of McBride Sisters’ Black Girl Magic Rosé, and remind yourself that you are 2Legit 2Quit.

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<sup>2</sup> *Jones v. Mississippi*, 141 S. Ct. 1307, 1334, 209 L. Ed. 2d 390 (2021).

<sup>3</sup> *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2458 (quoting *Roper*, 543 U.S., at 569, 125 S.Ct. 1183; alterations, citations, and some internal quotation marks omitted).

<sup>4</sup> *State v. Zuber*, 227 N.J. 422, 152 A.3d 197 (2017).

<sup>5</sup> 197 Wash. 2d 305, 482 P.3d 276 (2021).

<sup>6</sup> Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (May 24, 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

<sup>7</sup> *Jones* at 1334, internal citations omitted.

<sup>8</sup> See *State in Int. of Z.S.*, 464 N.J. Super. 507, 237 A.3d 344 (App. Div. 2020).

<sup>9</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); accord, *Gall v. United States*, 552 U.S. 38, 58, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

<sup>10</sup> *Alvarado*, 541 U.S., at 674, 124 S.Ct. 2140 (BREYER, J., dissenting).

<sup>11</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011).

<sup>12</sup> *Jones* at 1321.

<sup>13</sup> Cf. *Wiggins v. Smith*, 539 U. S. 510, 533–538 (2003) (counsel in capital case was ineffective for failing to investigate and present mitigating evidence at sentencing).

<sup>14</sup> *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2469.

<sup>15</sup> *Jones* at 1341.