WHAT IS A "MEANINGFUL OPPORTUNITY?"

DISPARITIES IN YOUTH SENTENCING AS COURTS TEST THE CONSTITUTIONAL FLOOR

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When it comes to criminal culpability, the Supreme Court has consistently treated children[1] in a manner different than adults.[2] Because of this understanding, the Court has recognized that sentences of life without parole may be too harsh for minors. The Court has banned mandatory juvenile life without parole (JLWOP) but permits courts to issue discretionary JLWOP sentences. The Supreme Court also permits courts to impose lengthy sentences, often called "virtual" or "de facto" life sentences. However, when issuing these lengthy sentences, courts must ensure that a minor retains a meaningful opportunity for release. Striking this balance is a challenge for sentencing courts: how long of a sentence is too long? Which sentences equate to JLWOP? What is a meaningful opportunity?

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[1] There is support for moving away from the use of "juvenile" to describe those under eighteen due its punitive connotation and dehumanizing effect. Thus, for purposes of this article, I use the terms "minor," "child," or "youth." However, I use "juvenile life without parole" to describe life sentences issued to young people as this is a legal term of art. Also relevant are the various Raise the Age campaigns in states across the country, which urge state legislatures to extend the age of juvenile court jurisdiction to age twenty-one or even age twenty-five. These campaigns seek sentencing practices in line with adolescent brain development research, which shows that adolescent brain development continues through one's early-mid twenties. Therefore, the use of "minor" or "child" in this article should not be construed to strictly limit youth sentencing laws to those under 18. To learn more about the shift away from the term "juvenile," please see Anya Kamenetz, Delinquent. Dropout. At-Risk. When Words Become Labels, NPR (Apr. 28. 2015), https://www.npr.org/sections/ed/2015/04/28/399949478/delinquent-dropout-at-risk-whats-in-a-name. For more information about adolescent brain development and Raise the Age campaigns, please visit the Center for Law, Brain, and Behavior at https://clbb.mgh.harvard.edu/.

[2] *See* Miller v. Alabama*,* 567 U.S. 460, 471 (2012) ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."); *see id.* at 480 ("We require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

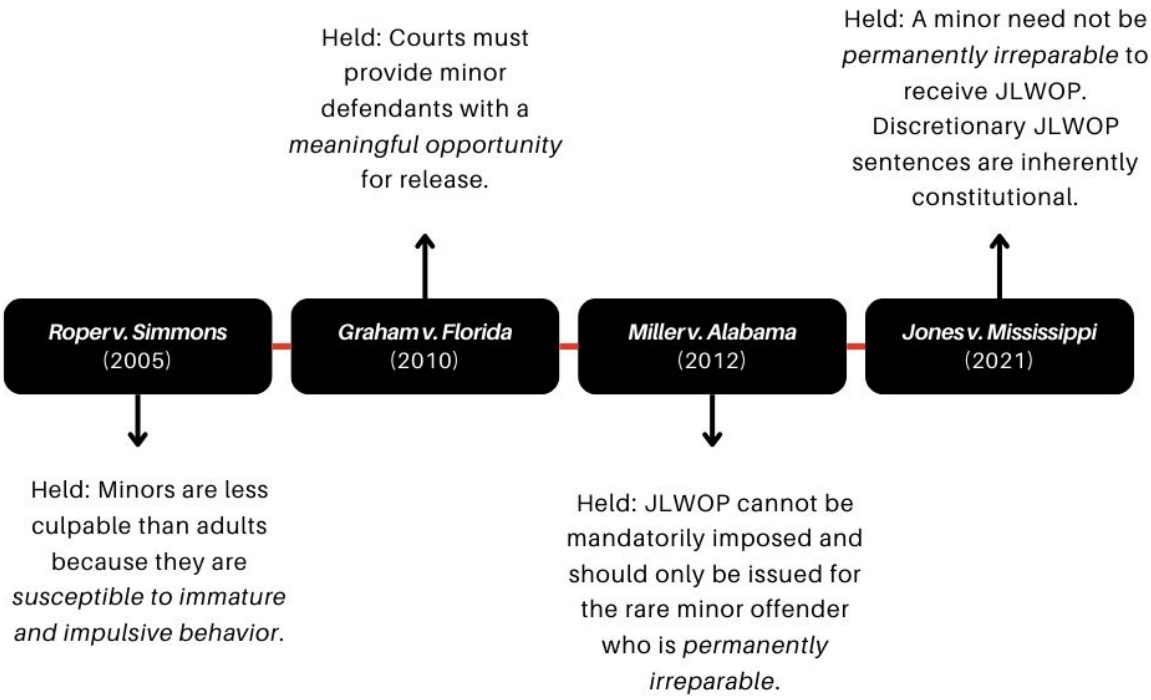
Courts across the country define "meaningful opportunity" differently – and for different reasons. This article will first discuss the varied benchmarks courts use to measure the constitutionality of a de facto life sentence. Next, this article will discuss how the 2021 Supreme Court decision in *Jones v. Mississippi* has exacerbated justice by geography and widened the disparities in sentencing outcomes. It will conclude with a look to the future, examining the fairness of each benchmark and how youth sentencing can more closely honor the meaningful opportunity standard going forward.

Background

In 2005, the Supreme Court found that imposing the death penalty on minors violated the Eighth Amendment.[3] In 2010, *Graham v. Florida* applied the same reasoning to juvenile life without parole for non-homicide offenders, requiring courts to give minors a "meaningful opportunity" for release.[4] *Graham* left the definition of "meaningful opportunity" up for lower court interpretation, resulting in a variety of definitions across the country.[5] Then, in 2012, *Miller v. Alabama* extended *Graham*'s logic to abolish mandatory life without parole for all minors, regardless of the offense.[6] To be clear, *Miller* prohibited only those life-without-parole sentences issued to minors under mandatory sentencing schemes.[7] Under *Miller*, minors may still be sentenced to discretionary life sentences without parole, albeit only in rare circumstances.[8] This gives each state wide latitude to determine its own requirements as to how that discretion should

[3] Roper v. Simmons, 543 U.S. 551, 568 (2005).
[4] Graham v. Florida, 560 U.S. 48, 74-75 (2010).
[5] Parag Dharmavarapu, Comment, *Categorically Redeeming* Graham v. Florida *and* Miller v. Alabama*: Why the Eighth Amendment Guarantees All Juvenile Defendants a Constitutional Right to a Parole Hearing*, 86 U. CHI. L. REV. 1439, 1466 (2019).
[6] Miller, 567 U.S. at 479 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").
[7] *Id.*
[8] *Id.* "Rare circumstances" refer to situations where the juvenile is deemed "permanently incorrigible" and/or "irreparably corrupt."

be used. However, despite *Miller*'s mandate against mandatory JLWOP, courts continue to issue lengthy sentences. These "virtual" or "de facto" life sentences effectively amount to life



sentences while avoiding the label.

As courts interpret the Supreme Court's jurisprudence on youth sentencing, they confront the question: how long can a sentence be before a minor is deprived of a "meaningful opportunity" for release?[9] With the Supreme Court's recent decision to loosen the prohibition on mandatory JLWOP in *Jones v. Mississippi*,[10] many courts have effectively abandoned the "meaningful opportunity" test, issuing lengthy sentences without concern for *Miller* or *Graham*.

[9] Graham, 560 U.S. at 75.
[10] Jones v. Mississippi, 141 S. Ct. 1307 (2021).

As more courts begin interpreting *Jones*, the threshold question of what constitutes a meaningful opportunity becomes less and less clear. As a result, youth across the country face vastly different sentences depending on their sentencing court's interpretation of *Graham, Miller,* and now *Jones*.

Many states define virtual life sentences as those that are the functional equivalent of LWOP, but even this is interpreted differently in courts across the country. Some states apply a biological benchmark, finding unconstitutional only those sentences that exceed average human life expectancy.[11] Other states rely on retirement age or parole eligibility statutes.[12] A few refer to the U.S. Sentencing Commission's benchmark[13] of approximately forty years.[14] The myriad ways courts define virtual life sentences illustrate the concept of justice by geography:[15] because courts interpret *Graham*'s "meaningful opportunity" language[16] so differently, youth sentencing outcomes vary widely across state lines. For instance, a minor in Washington is likely to receive a much shorter sentence than a minor in South Dakota.[17] These disparities are exacerbated by the

[11] *See, e.g.*, United States v. Friend, 2 F.4th 369, 378 (4th Cir. 2021).
[12] *See, e.g.*, Carter v. State, 192 A.3d 695, 734 (Md. 2018).
[13] *See, e.g.*, Cloud v. State, 2014 WY 113, ¶ 33, 334 P.3d 132, 142 (Wyo. 2014).
[14] U.S. SENT'G COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 10 (2015).
[15] "Justice by geography," in the context of juvenile sentencing, describes the correlation between the state in which one lives and the juvenile sentencing outcomes that result. Because the juvenile court structure permits states to design their own juvenile justice systems (within constitutional boundaries), a juvenile's sentencing outcome can vary significantly depending on where they live. *See generally* Jay D. Blitzman, *The State of Juvenile Justice,* A.B.A. 2021 CRIM. JUST. SECTION. There are other factors at play, of course, including race, gender, poverty, immigrant status, and more. For instance, in 2019, the national incarceration rate for black youths was over four times higher than that of white youths. Joshua Rovner, *Black Disparities in Youth Incarceration,* THE SENT'G PROJECT (July 15, 2021), https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/.
[16] *See* Graham v. Florida, 560 U.S. 48, 75 (2010).
[17] The Washington Supreme Court held in State v. Haag that a juvenile's forty-six-year sentence was unconstitutional because release at age sixty-three would deprive him of a meaningful opportunity for life outside of prison. 495 P.3d 241, 250 (Wash. 2021). In contrast, in South Dakota, the Supreme Court upheld a juvenile's ninety-two-year sentence, even despite the fact that such a sentence would keep the juvenile in prison until age 106. State v. Charles, 892 N.W.2d 915, 920-21 (S.D. 2017).

waterfall effects of youth incarceration on communities of color, creating what experts have labeled the cradle-to-prison pipeline.

The role of life expectancy in defining "meaningful opportunity"

States that interpret the functional equivalent of life as a strict biological benchmark invalidate only those sentences that clearly exceed life expectancy. For instance, the Fourth Circuit has held that only those sentences that "equate to a life sentence" are problematic.[18] A sentence of fifty-two years was not equivalent to a life sentence because release in one's sixties provided a "limited period of freedom."[19] Limited as it may be, it was enough to pass *Graham*'s test. Moreover, the South Dakota Supreme Court upheld a ninety-two-year sentence by interpreting "meaningful opportunity" to mean "realistic opportunity" for release.[20] The court reasoned that because the defendant would be eligible for release at sixty, his sentence did not guarantee that he would die in prison; he had a realistic, and therefore meaningful, opportunity for release.[21] For these courts, *any* life outside of prison – regardless of brevity or quality – is sufficient to pass *Graham*'s test.

Even among those courts that apply the life expectancy benchmark, there is still variety in the way that life expectancy is calculated. While several states rely on Centers for Disease Control (CDC) data,[22] there is disagreement regarding the weight to be given to factors such as race, age, and gender in calculating a defendant's life expectancy. In *People v. Contreras*, for

[18] United States v. Friend, 2 F.4th 369, 378 (4th Cir. 2021).
[19] *Id.* at 378.
[20] *Charles*, 892 N.W.2d at 921.
[21] *Id.*
[22] *E.g.*, State v. Moore, 149 Ohio St. 3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 30; Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046 (Conn. 2015).

instance, the California Supreme Court rejected the "actuarial approach," holding that life expectancy was not a fair benchmark.[23] The Court grounded its argument on two bases: first, life expectancy calculations could never adequately account for all relevant factors, which include income, education, healthcare access, and more.[24] Second, accounting for factors like race, age, and gender necessarily implies that those with longer life expectancies (such as women) would receive longer sentences.[25] This, the Court argued, raises a dangerous Equal Protection issue.[26] This constitutional challenge puts courts using life expectancy as a benchmark in a bind: either risk an Equal Protection issue by accounting for the reality that several factors affect life expectancy, or deny that reality and treat all individuals as entirely equal.

These dichotomous interpretations of a seemingly objective measuring stick demonstrate the consequences of justice by geography. Even among states that apply the functional life equivalent benchmark, a minor's future largely hinges on a court's understanding of just how "meaningful" an opportunity for release must be.

Other states are not so literal, employing a benchmark less about biological survival and more about quality of life. In striking down a 112-year sentence where the defendant would be eligible for release at age ninety-two, the Ohio Supreme Court held that *Graham* "intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people."[27] For Ohio courts, a meaningful opportunity for release is about more than survival. The Washington Supreme Court shared this sentiment in *State v. Haag*.[28] Haag's forty-

[23] 411 P.3d 445, 449-51 (Cal. 2018).
[24] *Id.*
[25] *See id.* at 449.
[26] *See id.* at 449-450.
[27] Moore, 149 Ohio St. 3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 46.
[28] 495 P.3d 241, 250-51 (Wash. 2021).

six-year sentence was unconstitutional because it would deprive him of meaningful life outside of prison, especially considering the effect of incarceration on life expectancy.[29] It did not matter to the court that Haag would be released at sixty-three, technically below average life expectancy: "[a] juvenile sentenced to be released at the age of 63 has lost incalculably more than an adult in the same circumstances, the ability to work, to vote, or even to operate a motor vehicle."[30] These courts recognize *Miller*'s logic that harsh punishments are unsuitable for minors. Not only are minors less culpable,[31] they are also incarcerated earlier in life – meaning they are deprived of the most important parts of life when they are sentenced to lengthy terms in prison.

Beyond life expectancy: other virtual life sentence benchmarks

For some states, life expectancy is not a consideration. Some look to parole eligibility statutes: in Massachusetts, the Supreme Judicial Court struck down a sentence rendering the defendant eligible for parole after twenty-seven and a half years.[32] The sentence violated a state rule that minors convicted of first-degree murder must be parole-eligible after fifteen years.[33] Similarly, the Maryland Supreme Court struck down a lengthy sentence because its parole eligibility term exceeded the fifteen-year statutory maximum.[34] When existing statutes require

[29] *Id.* at 251.
[30] *Id.*
[31] The Supreme Court has recognized that juvenile brains have not yet fully developed capacity for sound decision making, weighing consequences, and assessing risk. Therefore, juvenile offenders are less morally culpable because they are generally acting out of immaturity rather than permanent criminality. Miller v. Alabama, 567 U.S. 460, 471-72 (2012).
[32] Commonwealth v. Perez, 106 N.E.3d 620, 624.
[33] *Id.* at 627-28 (Mass. 2018). Perez was convicted of non-homicide offenses and sentenced to 32.5 years. *Id.* at 624-25. Under Diatchenko v. Dist. Att'y, 27 N.E.3d 349, 354 (Mass. 2015), juveniles convicted of first-degree murder would receive a sentence of life with the possibility of parole after fifteen years. The *Perez* court reasoned that no aggravating factors justified giving Perez a longer sentence than that of a juvenile convicted of first-degree murder. Perez, 106 N.E.3d at 631.
[34] Carter v. State, 192 A.3d 695, 734 (Md. 2018).

parole eligibility after an individual serves a certain portion of their sentence, these courts will invalidate sentences with parole terms that exceed the statutory limit.

Others look to retirement age as a measure of constitutionality. In 2015, the Connecticut Supreme Court invalidated a fifty-year sentence because the defendant would be released at age sixty-six, breaching the Social Security Act's definition of retirement age between sixty and sixty-seven.[35] In using retirement age as a benchmark, the Court argued that "[a] juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment."[36] A North Carolina appeals court applied the same benchmark, invalidating a fifty-year sentence because the defendant would not be parole-eligible until age sixty-seven.[37] This late release violated the North Carolina Constitution, which lists "enjoyment of the fruits of their own labor" as an inalienable right.[38] Denying youth the opportunity to contribute to society therefore deprives them of a meaningful opportunity for life outside of prison.[39] This interpretation of the retirement benchmark contrasts sharply with an Ohio ruling that release at sixty-two was constitutionally permissible because "most people are living full, productive lives at 62."[40]

Virtual life sentences in the aftermath of *Jones*

[35] Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046-47 (Conn. 2015).
[36] *Id.* at 1046.
[37] State v. Kelliher, 849 S.E.2d 333, 335, 350-51 (N.C. Ct. App. 2020).
[38] *Id.*
[39] *Id.*
[40] State v. Moore, 159 N.E.3d 842, 850 (Ohio Ct. App. 2020). After the Ohio Supreme Court found Moore's 112-year sentence unconstitutional in 2016, Moore received a fifty-year sentence on remand. *Id.* at 846-47. This sentence was affirmed in the 2020 appeal. *Id.* at 852.

The disparities that result from this patchwork structure have only been exacerbated by the Supreme Court's decision in *Jones v. Mississippi*. In *Jones,* the Supreme Court turned its back on *Miller*'s reasoning that JLWOP was only justified for "the rare juvenile offender whose crime reflects irreparable corruption."[41] *Jones* clarified that courts need not make any formal finding of irreparable corruption before issuing JLWOP.[42] Under *Jones,* a judge need not find that the minor before them is permanently incorrigible in order to justify JLWOP: as long as the sentence is not mandatory, it is constitutionally sound.[43]

With *Jones* setting a new constitutional floor, justice by geography is particularly relevant, especially with respect to de facto life sentences. States interpret *Jones* differently when it comes to drawing the line between permissible and unconstitutionally lengthy sentences. The result is that already disparate youth sentencing policies vary even more widely across state lines than they did under *Miller* and *Graham*. For instance, a few states stand firm in setting their constitutional bars higher than *Jones*' low floor. The North Carolina Supreme Court has effectively rejected *Jones*'s holding that a state's discretionary sentencing system is constitutionally sufficient on its own.[44] The Court refused to read *Jones* as abandoning youth sentencing precedent, and instead maintained that minors may not receive LWOP without a finding of irreparable corruption.[45] For North Carolina, then, a discretionary fifty-year sentence is unconstitutional where the defendant has not been found irreparably corrupt — even after *Jones*.[46]

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[41] Miller v. Alabama, 567 U.S. 460, 479-80 (2012). "Irreparable corruption," or permanent incorrigibility, describes juveniles whose crimes reflect an inability for rehabilitation, as opposed to those juveniles whose crimes reflect "transient immaturity." *See* Roper v. Simmons, 543 U.S. 551, 573 (2005).
[42] Jones v. Mississippi, 141 S. Ct. 1318-19 (2021).
[43] Jones, 141 S. Ct. at 1313.
[44] State v. Kelliher, 873 S.E.2d 366, 379 (N.C. 2022).
[45] *Id.*
[46] *Id.* at 578.

Unfortunately, it seems North Carolina is in the minority. In *United States v. Grant*, the Third Circuit applied *Jones*'s central holding to virtual life sentences: lengthy sentences are permissible as long as they are not mandatory.[47] No formal finding of permanent incorrigibility is required. If the judge could have imposed a different sentence but chose a virtual life sentence instead, the outcome is constitutionally sound.[48] Several courts around the country agree. In Pennsylvania, a discretionary fifty-year sentence was upheld because "pursuant to the reasoning in *Jones,* even if a term-of-years sentence amounts to a de facto life sentence, *Miller* provides no viable avenue for relief."[49] In other words, as long as it is imposed "with discretion," a sentence's length is irrelevant for constitutional purposes. In Wisconsin, a discretionary fifty-five-year sentence – rendering the defendant eligible for release at age seventy-one – was upheld for the same reason.[50] This reasoning calls into question the role of *Graham*'s "meaningful opportunity" requirement. Under *Jones*, youth may be incarcerated for life – whether or not it is labeled accordingly – without any such opportunity.

The future of the "meaningful opportunity"

Justice by geography is not a new phenomenon – it is a central feature of the American juvenile justice system. States have long retained the power to design their youth justice systems with a great deal of latitude. *Graham* and *Miller* set a constitutional floor grounded in an understanding that harsh punishments are not appropriate for most minors. With respect to de facto life sentences, this structure has put justice by geography on full display: two minors living in different states will have two very different sentencing outcomes. *Miller* gave courts discretion

[47] United States v. Grant, 9 F.4th 186, 197 (3d Cir. 2021).
[48] *Id.*
[49] Commonwealth v. Felder, 269 A.3d 1232, 1235 (Pa. 2022).
[50] State v. Morgan, No. 2017AP2357, 2022 WL 1573402, at *2 (Wis. Ct. App. Jan. 25, 2022).

to consider each minor's individual circumstances, with the understanding that most offenses committed by minors are the result of temporary immaturity. But that discretion comes at a cost – one that is borne most heavily by youth living in states that define "meaningful opportunity" most narrowly. Within those states, youth of color will pay the biggest price.[51]

What, then, is the best benchmark to use? Simply put, many of the popular benchmarks are still too limiting. The debate hovers around ages sixty to seventy, with a "meaningful opportunity" for release getting lost in the noise. Courts focus on life in the literal sense; there is little consideration for quality of life. Youth released at such a late age spend only their first fifteen and likely their last fifteen years of life outside of prison. There is no room for a serious legal conversation about whether incarceration for any length of time is appropriate for minors. Is this truly the "meaningful opportunity" *Graham* intended?

With *Jones*, the promise of a meaningful opportunity for release has become even less attainable. Courts may no longer have to consider whether a lengthy sentence is appropriate in light of a minor's youthful mitigating circumstances. Many states have abandoned *Graham* and *Miller'*s reasoning that most minors should not spend their lives in prison by finding that, in light of *Jones*, there is no constitutional issue in imposing discretionary de facto life sentences. For these states, the length of a sentence is constitutionally irrelevant, so there is no point in struggling to draw the line between permissible and impermissible lengthy sentences. Whether a

[51] Juveniles of color are more likely to receive lengthy sentences and JLWOP sentences than their white peers. Sixty-two percent of individuals serving JLWOP sentences are Black and, notably, Black juveniles convicted for murdering a white victim are more likely to receive a JLWOP sentence than a white juvenile convicted for murdering a Black victim. Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/. Further, in Florida, a study found that Black juveniles received sentences 7.8% longer than white juveniles. Jeree Thomas, *Racial Disparities in Jail and Prison Sentences for Youth Tried as Adults in Florida,* CAMPAIGN FOR YOUTH JUST. (Ap 28, 2017), http://www.campaignforyouthjustice.org/research-policy/item/racial-disparities-in-jail-and-prison-sentences-for-youth-tried-as-adults-in-florida.

sentence provides a meaningful opportunity for release is effectively a moot consideration. With courts' interpretations of *Jones* varying so widely across state lines, justice by geography has run rampant.

As the image of a meaningful opportunity for release becomes less and less clear, a better standard from the Supreme Court may be helpful. There are plenty of benchmarks for the Court to choose from, but each comes with its own challenges, especially in striking the right balance between clarity and discretion. Alternatively, advocates might find it more effective to lobby state legislatures to adopt more favorable standards. Some states are moving in a promising direction, giving minors shorter sentences proportionate to their diminished culpability: Washington and Connecticut both consider whether a sentence will allow a minor to enjoy the essential elements of adult life – employment, driving, starting a family – in determining its constitutionality.[52] As a result, youth in these states are likely to receive sentences on the shorter end of the national spectrum. This model retains the essential element of discretion while also giving courts *some* specific guidelines beyond the meaningful opportunity standard. No standard will be perfect, but for now, it is clear that the Supreme Court has opened the door for dangerous levels of discretion with *Jones*. In this post-*Jones* era, then, it may be best to take advantage of justice by geography by lobbying state legislatures to use that discretion wisely. The national consensus once shifted against the death penalty for minors; it shifted again against JLWOP. It can shift again against long sentences for young people. Even better, a national consensus against youth incarceration may be on the horizon.

[52] State v. Haag, 495 P.3d 241, 251 (Wash. 2021); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046 (Conn. 2015).