JUVENILE "JUSTICE": A PREFACE

By Princess R. Diaz-Birca*

I. INTRODUCTION

Less than twenty years ago, the United States Supreme Court ruled that sentencing a child to death is a violation of the Eighth Amendment.[1] Since then, the juvenile legal landscape has rapidly evolved with advocates achieving a monumental victory in which the Supreme Court held that children are constitutionally different from adults, recognizing the growing science related to adolescent brain development and its key role in understanding the actions, and reduced culpability, of youth.[2] However, following that decision, the political and legal landscape of the Court has again undergone major change, though in a different direction.[3] Now a political minefield, advocates need to once again re-draw the maps to our former victories in order to know which legal challenges have the greatest chance of solidifying crucial protections for our youth. Examining the state of the juvenile legal system today, the authors highlighted in this special edition consider the implications of bad law, like the *Jones v. Mississippi* decision, and explore entirely new community-based systems that circumvent the need to rely on current law and legal institutions. Here, to preface those articles, I'll look at the Supreme Court cases that

* Civil rights lawyer and 2023 graduate of Northeastern University School of Law. I would like to thank my incredible editors and friends – Adrienne Lee and Jaiy Dickson – who encouraged me to write this introduction highlighting the nuance of the criminal legal field as it relates to our children today. I am grateful and honored that my colleagues and I were given the platform and opportunity to draw attention to the plight of some of the most vulnerable children in America. No one should be locked in cages, least of all kids. I hope that my introduction, and the subsequent articles, draw attention to the fact that we can do better – and we must.

[1] Roper v. Simmons, 543 U.S. 551, 568 (2005).

[2] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[3] Since the *Miller* decision, four new Justices have been appointed to the court. *See* PBS News Weekend, *The History and Future Consequences of the Supreme Court's Conservative Shift*, PBS (Apr. 8, 2023), https://www.pbs.org/newshour/show/the-history-and-future-consequences-of-the-supreme-courts-conservative-shift#transcript.

have laid the foundation for the juvenile criminal system as we know it today. Further, I'll briefly touch on steps advocates can take to challenge the current iteration of the juvenile legal system as we work toward dismantling such institutions of oppression and toward building resources for communities in need.

II. ROPER, GRAHAM, MILLER & LEGACIES

Initially, juvenile courts were designed with the goal of rehabilitation and addressing the needs of the child in order to guarantee their future success.[4] Crimes were viewed not as an inherent failure of the child, but rather a failure of society.[5] This system, created and emboldened to act *in loco parentis*, grew into the institutionalized,[6] formalized, and paternalistic system we know today. Without standardized protections for our youth, concerns grew that juvenile proceedings were harming rather than helping kids.[7] As a result, in 1967, the first case to solidify constitutional protections for youth accused of committing crimes was in *In re Gault*.[8] *Gault* was revolutionary for its time, holding that the Due Process Clause of the Fourteenth Amendment also applies to children in the criminal legal system.[9] Importantly, those protections included a child's right to counsel.[10]

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[4] NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 31 (Richard J. Bonnie et al eds., 2013), https://nap.nationalacademies.org/read/14685/chapter/4.
[5] *Id.*
[6] *Institutionalization*, BRITANNICA.COM, https://www.britannica.com/topic/institutionalization (last visited May 9, 2023). Institutionalization is a term derived from sociology and describes a process of regulating the behavior of society or other organizations. Used here, the institutionalization of the juvenile justice system refers to increased formality of the court, adoption of rules, and expectations set for those who interact with the juvenile legal system. *See also* NAT'L RSCH. COUNCIL, supra note 4, at 31.
[7] NAT'L RSCH. COUNCIL, supra note 4, at 31.
[8] *Id.*; In re Gault, 387 U.S. 1 (1967).
[9] In re Gault, 387 U.S. at 30–31.
[10] *Id.* at 36–37.

Post-*Gault*, the influence of politics and racism in the late 1980s and early 1990s bore and advanced the "superpredator" myth – a theory that by the year 2010 there would be "an estimated 270,000 more young predators on the street than in 1990."[11] As a result of reactionary legislation passed in many states, more children were subjected to harsh criminal penalties, laying the groundwork for *Roper v. Simmons*.[12] In *Roper,* the Supreme Court considered whether it was cruel and unusual punishment for a child to be sentenced to death for their crimes.[13] In a 5-4 decision the Court held it was, after considering its recent decision in *Atkins,*[14] societal norms, and the fundamental differences between young people and adults.[15] Just five years later, the logic of *Roper* and the comparison of juvenile life without the possibility of parole (JLWOP) to the death penalty surfaced in the case of *Graham v. Florida*.[16]

In *Graham*, the Court acknowledged studies on brain development and the unique characteristics of youth in holding that a meaningful opportunity for release must be afforded to kids who are sentenced to JLWOP for non-homicide offenses.[17] Two years later, that logic was extended to all youth via the decision in *Miller v. Alabama.*[18] Thus, *Graham* and *Miller* were landmark cases. Before these decisions, a minor defendant's fate was sealed, no matter their age,

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[11] *The Superpredator Myth, 25 years later*, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/; *see also* Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth (last visited Apr. 17, 2023).
[12] Bogert & Hancock, *supra* note 11.
[13] Roper, 543 U.S. at 555–56.
[14] In *Atkins v. Virginia*, 536 U.S 304 (2002), the Supreme Court held that executing people with intellectual disabilities violates the Eighth Amendment. The *Roper* Court addressed this precedent, acknowledging the cognitive and behavioral deficits of the individuals set to be executed and determining that enforcing capital punishment would be contrary to the demands of the Eighth Amendment. *See* Roper, 543 U.S. at 593 (2005).
[15] *See* Roper, 543 U.S. at 569–71.
[16] *See* Graham v. Florida, 560 U.S. 48 (2010).
[17] Graham, 560 U.S. at 49–50, 68 (The Court considered mitigating factors including a child's "lack of maturity and an underdeveloped sense of responsibility" as well as vulnerability to "outside pressures," such as peer pressure.).
[18] Miller v. Alabama, 567 U.S. 460, 465 (2012).

if they were convicted of a crime carrying a life sentence pursuant to a statutory mandate.[19] The Court held that mandatory imposition of LWOP is impermissible under the Eighth Amendment without consideration of the mitigating factors of youth, including the reduced culpability of young offenders; the capacity for rehabilitation; susceptibility to outside pressure; and a weaker ability to appreciate the consequences of their actions relative to adults.[20] Advocates, likening a sentence of LWOP to the death penalty, secured a win and powerful language from the Court. The holding emphasized that a sentence of LWOP should be reserved only for the worst offenders, implying a need for a child to be deemed "incorrigible" before such a sentence could be imposed.[21] Four years later, in *Montgomery v. Louisiana*, the Court clarified that *Miller*'s holding applied to any child ever sentenced to JLWOP – including the now-adults sentenced as minors who have spent a majority of their lives incarcerated.[22] Again, the Court grounded its decision in powerful language, suggesting that a finding akin to "permanent incorrigibility" be present in order to subject a young person to the harsh sentence of JLWOP.[23]

Graham, *Miller*, and *Montgomery* were revolutionary cases in the field of juvenile law that were decided in a period of only six years. Kids were finally being recognized for what they were – kids.

Following this series of victories for minor defendants, the most recent Supreme Court decision regarding children's criminal rights felt like a devastating blow. Decided in 2021, the Court stated in *Jones v. Mississippi* that while *Miller* and *Montgomery* were still good law, states were not required to issue a finding that a child was permanently incorrigible before imposing a

[19] For readers new to the terms LWOP and JLWOP, both phrases mean life without the possibility of parole. JLWOP is used in the context of kids, or adults who were sentenced as a child, who are incarcerated without the possibility of parole.
[20] Miller, 567 U.S. at 471–76; Graham, 560 U.S. at 68–69; Montgomery v. Louisiana, 577 U.S. 190, 195 (2016).
[21] Miller, 567 U.S. at 472–73.
[22] Montgomery, 577 U.S. at 212.
[23] *Id.* at 209.

sentence of JLWOP.[24] Some states that borrowed the Court's "permanent incorrigibility" standard now walked back those decisions.[25] Although *Jones* stripped the language of "permanent incorrigibility" from advocates' toolkits, the overstatement of *Jones*'s damage, including by Justice Sonia Sotomayor,[26] is in and of itself arguably more harmful to the movement than *Jones* itself. *Graham*, *Miller*, and *Montgomery* remain good law;[27] however, inflating the impact of *Jones* could call the legacy of those cases into doubt. For example, youth advocates should be cautious not to use language that could be perceived by a court, or opposing counsel, as agreeing with the extent of *Jones*'s reach. Instead, advocates should focus on emphasizing the protections established for children in *Graham* and its progeny to minimize the harm/impact of the *Jones* decision.[28] With the hand that we are now dealt, it is our role as advocates to bring the fight for our youth closer to home, challenging and honing policies in local forums, while also strengthening the odds of success and reform incrementally.

III. POST-JONES, PRE-ABOLITION: Where do we go from here?

The articles in this publication call special attention to the unique crossroads at which advocates in the juvenile legal field find themselves today. Examining what *Graham*'s assurance of a "meaningful opportunity" entails, Eilidh Currie explores the current landscape of the juvenile legal field post-*Jones* in her article, *What is a "Meaningful Opportunity?": Disparities in Youth Sentencing as Courts Test the Constitutional Floor*. The article laments the *Jones* ruling and draws much-needed attention to the unfulfilled promise of *Miller* and *Montgomery* for

[24] Jones v. Mississippi, 141 S. Ct. 1307, 1310 (2021).
[25] *See, e.g.*, Commonwealth v. Felder, 269 A.3d 1232, 1243 (Pa. 2022).
[26] Jones, 141 S. Ct. at 1328 (Sotomayor, J., dissenting).
[27] *Id.* at 1321.
[28] *See* Felder, 269 A.3d at 1242 n.12.

children who were sentenced to de facto life sentences. Next, Shreya Vijay, the author of *Exploring Community-Based Alternatives to Youth Incarceration,* imagines subverting the current system altogether and explores what alternatives exist for kids entrapped in the criminal legal system. Using an abolitionist framework, Vijay acknowledges community concerns, the societal challenges faced by our youth, and the models that can allow for positive growth and change. Here, I argue that in this transformative period of juvenile law, advocates should continue to capitalize on the momentum of system reform – despite *Jones* – and call attention to the unconstitutional action of caging children under the guise of rehabilitation. The practice of incarcerating youth is unsustainable; the institutions holding these children often violate state, federal, and constitutional mandates;[29] and the impact of the system continues to be racially disparate.[30] In challenging these institutions post-*Jones*, advocates should forge their suits locally, ground their arguments in state constitutions, and use well settled law to exploit the systemic flaws of the carceral institution as applied to youth.

Despite disrupting the momentum of the juvenile reform movement, the *Jones* decision is important in at least two other ways. First, it did not overturn *Miller* and *Montgomery*.[31] Second,

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[29] *See* Jamiles Lartey, *Confronting America's 'Cruel and Unusual' Juvenile Detention Crisis*, THE MARSHALL PROJECT (Aug. 13, 2022 12:00 PM), https://www.themarshallproject.org/2022/08/13/confronting-america-s-cruel-and-unusual-juvenile-detention-crisis ("From Texas and Louisiana to communities in Iowa and Michigan, the way youth are being detained is prompting calls for change."); *see also* Megan Shutzer & Rachel Lauren Mueller, *'Dying Inside': Chaos and Cruelty in Louisiana Juvenile Detention*, N.Y. TIMES (Oct. 30, 2022), https://www.nytimes.com/interactive/2022/10/29/us/juvenile-detention-abuses-louisiana.html ("[I]nside the walls at Ware, one of the state's largest juvenile detention facilities, children have been trying to kill themselves with stunning regularity."); *see also Solitary Confinement & Harsh Conditions*, JUV. L. CTR., https://jlc.org/issues/solitary-confinement-other-conditions (last visited May 10, 2023) ("Harsh conditions or practices in youth prisons interfere with normal child development, traumatize youth, exacerbate physical and emotional disabilities and cause serious life-long health problems.").

[30] *See* OFF. OF JUV. JUST. & DELINQ. PROT., RACIAL AND ETHNIC DISPARITY IN JUVENILE JUSTICE PROCESSING (2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity; *see also* JOSHUA ROVNER, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 1 (2014), https://www.sentencingproject.org/reports/disproportionate-minority-contact-in-the-juvenile-justice-system/ ("Across the country, juvenile justice systems are marked by disparate racial outcomes at every stage of the process, starting with more frequent arrests for youth of color and ending with more frequent secure placement.").

[31] Jones, 141 S. Ct. at 1321.

in dicta, the Court reiterated that states have the authority to expand upon the mandates of *Miller*, noting that *Miller* and *Montgomery* are the constitutional floor.[32] As we turn our attention to the states and institutions imprisoning our children, advocates must look to methods that advance the pro-youth sentiments and constitutional protections established in the *Miller* cases without disrupting this precarious precedent.

Challenging policies upholding the cradle-to-prison pipeline

One foundational step that advocates can take to deconstruct the current iteration of the juvenile legal system is to challenge policies that directly feed into the cradle-to-prison pipeline.[33] One of the most overt examples of criminalizing youth behavior and contributing to the pipeline is school-based arrests, made possible by the presence of police officers in schools.[34] There is no evidence that having police officers in schools makes the school environment safer.[35] Despite this fact, the "double punishment" of school-based arrests and subsequent judicial proceedings continue to be utilized and contribute to the further oppression of marginalized communities in the criminal legal system.[36]

[32] *Id.* at 1323.
[33] NE. UNIV. SCH. OF L., *Mapping the Cradle to Prison Pipeline*, https://www.cradle2prison.info/ ("The Cradle-to-Prison (C2P) Pipeline embodies the cumulative impact of multiple factors—beginning before birth and persisting through childhood, adolescence, and the teen years—that disproportionately diverts youth from communities of color toward incarceration.") (last visited May 9, 2023).
[34] *School-to-Prison-Pipeline*, AM. C.L. UNION, https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline (last visited May 9, 2023).
[35] James Paterson, *Making Schools Safe and Just*, NAT'L EDUC. ASSOC., https://www.nea.org/advocating-for-change/new-from-nea/making-schools-safe-and-just ("Research finds that police officers in schools do not make school safer and leads to harsher discipline for minor infractions.") (last visited May 9, 2023).
[36] Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts are Failing Students*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 179 (2013).

Another concerning entryway for children into the juvenile system is the widespread, unspoken policy of criminalizing poverty. Fines and fees are levied in nearly every state against the youth who interact with the juvenile legal system.[37] One study found that "[a]pproximately one million youth appear in juvenile court each year," making approximately one-million children potentially liable to paying debt imposed by the juvenile courts.[38] When youth and their families are unable to pay these fees, such as those imposed for court expenses, public defenders, or GPS monitoring, their fundamental rights and liberties can be implicated – even at times before a court has adjudicated the child delinquent.[39] The imposition of fines and fees ensures that some youth remain incarcerated and exposed to the danger of carceral institutions, for no other reason than their inability to make such payments.[40]

Challenging either or both of these policies will serve to undermine the cradle-to-prison pipeline and decrease the volume of children being held by the carceral state. These policies are often local or state-based[41] and require innovative, localized litigation to mount an initial attack against harm perpetuated by youth incarceration.

Treating youth as youth

Part of treating kids as the young people they are involves upholding codified protections for those youth and acknowledging the rampant abuse and neglect to which children are

[37] *Juvenile Justice Fines & Fees*, JUV. L. CTR., https://jlc.org/juveniles-justice/juvenile-justice-fines-fees (last visited May 9, 2023).
[38] JESSICA FEIERMAN ET AL., DEBTOR'S PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 4 (2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf.
[39] *Id.* at 5, 8.
[40] *Id.* at 3.
[41] *Id.* at 6.

subjected in many carceral institutions.[42] One example of a legal challenge that attacks the carceral institution without directly challenging the constitutionality of imprisoning youth is education-based lawsuits. Historically, juvenile detention facilities have been documented to provide little to no educational services for youth.[43] By statute, juvenile correctional facilities are required to provide an education for children who are incarcerated comparable to the educational services that children who remain in their communities receive.[44] Further, there is an over-representation of children with disabilities in juvenile detention facilities, an issue which such institutions are required to address according to statutes like the Individuals with Disabilities Education Act (IDEA).[45] Unfortunately, many carceral institutions fall short of providing our children with the education to which they are statutorily entitled.[46] Compelling these institutions to provide legally mandated education to kids serves at least two goals. First, the services for those children will be met as required and kids will have an opportunity to learn despite their incarcerated status, which will better prepare them for life after prison. Second, it forces an acknowledgment of the costs and resources necessary to provide services to youth, which can create a greater incentive to look at alternatives to incarceration.

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[42] *See* Lartey, *supra* note 29 ("From Texas and Louisiana to communities in Iowa and Michigan, the way youth are being detained is prompting calls for change."); *see also* Shutzer & Mueller, *supra* note 29 ("[I]nside the walls at Ware, one of the state's largest juvenile detention facilities, children have been trying to kill themselves with stunning regularity."); *see also* Juvenile Law Center, *supra* note 29 ("Harsh conditions or practices in youth prisons interfere with normal child development, traumatize youth, exacerbate physical and emotional disabilities and cause serious life-long health problems.").

[43] American Civil Liberties Union, *supra* note 34; *see also* DENEIL CHRISTIAN, EDUCATION BEHIND BARS: A REVIEW OF EDUCATIONAL SERVICES IN JUVENILE CORRECTIONAL FACILITIES (2022), http://csesjournal.columbiasouthern.edu/education-behind-bars-a-review-of-educational-services-in-juvenile-correctional-facilities/.

[44] CHRISTIAN, *supra* note 43.

[45] *Id.*; *see also,* 34 C.F.R. § 300.111(a)(1)(i) (2017) ("The State must have in effect policies and procedures to ensure that . . . All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated . . . .").

[46] CHRISTIAN, *supra* note 43; Molly McCluskey, *'What If This Were Your Kid?'*, THE ATLANTIC (Dec. 24, 2017), https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/

Furthermore, without thoroughly examining all the various challenges that children in the carceral system face, I acknowledge the abuse and neglect these children often experience while incarcerated. To this day, children are subjected to solitary confinement.[47] Violence and assault from staff run rampant at detention centers.[48] The abuse occurring in detention facilities are often systemic, and in fact twenty-nine states and the District of Columbia have a documented history of abuse in state-funded facilities.[49] Challenging these institutions' policies and procedures using local laws and constitutions can help secure wins for children throughout the state and draw attention to the unfit environment of those institutions for our youth.

IV. CONCLUSION

Even in a system tainted by bias and racism, the institutionalization of the juvenile legal system is its fatal flaw. By its nature, even the best juvenile courts and the most well-intentioned legal actor could inhibit the potential of a child to succeed by subjecting that child to repeated interactions with the court.[50] These interactions often label youth as delinquent and reinforce that status,[51] compound on pre-existing trauma,[52] and contribute to the negative legal socialization of

[47] McCluskey, *supra* note 46 ("While some kids are sent to solitary for committing violence, others are there for offenses that in a traditional school may not even warrant a teacher's reprimand, let alone a trip to the principal's office or a suspension, experts told me: being restless in class, talking back, or refusing to participate if they don't understand or are frustrated by a lesson.").
[48] RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE (2023), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/.
[49] *Id.*
[50] Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, 6 CAMPBELL SYSTEMATIC REVS. 1, 6 (2010) ("[J]uvenile system processing appears to not have a crime control effect, and across all measures appears to increase delinquency."); Buckingham, *supra* note 36, at 191 n.35 ("As youth progress through the stages of the justice system, the impact of labeling on them is amplified. Studies have found that the impact of appearing in court is associated with higher levels of future delinquency.").
[51] Anne Rankin Mahoney, *The Effect of Labeling upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 L. & SOC'Y REV. 583, 584–85 (1974).
[52] *Trauma Informed Lawyering*, YOUTH JUST. LEGAL CTR. (Apr. 2021), https://yjlc.uk/resources/legal-guides-and-toolkits/trauma-informed-lawyering ("The court experience . . . can reinforce disempowered feelings associated with trauma, which can trigger trauma-related stress or cause re-traumatisation.").

youth.[53] The inherently traumatic environment of courts and the dangerous and harmful environment of youth detention centers serve as a reminder that any resolution that is not actively working toward the abolition of the system we know today falls woefully short of meeting the needs of our children. I hope that this preface and the following articles create a thoughtful discussion about where the challenges lie in the juvenile criminal system currently and how we can work together to carve a pathway toward a system that helps – rather than hurts – our kids.

[53] Buckingham, *supra* note 36 at 189–90.