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Youth Matters: *Miller v. Alabama* and the Future of Juvenile Sentencing

John F. Stinneford
University of Florida Levin College of Law, jstinneford@law.ufl.edu

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In *Miller v. Alabama*, the Supreme Court held that statutes authorizing mandatory sentences of life in prison with no possibility of parole [LWOP] are unconstitutional as applied to offenders who were under eighteen when they committed their crimes.[1] *Miller* is the latest in a series of cases restricting the punishments that may be inflicted for crimes committed by minors. In *Roper v. Simmons*, the Court held that it was cruel and unusual to execute anyone for a crime committed under the age of eighteen.[2] In *Graham v. Florida*, the Court held that it was unconstitutional to impose an LWOP sentence on anyone who committed a nonhomicide offense under that age.[3] Finally, *Miller* created a presumption against LWOP sentences even for those minors who commit homicide. The Court held that such offenders have a right to an individualized sentencing determination before being given an LWOP sentence, and that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[4]

Miller arose from two cases involving defendants who received mandatory life sentences for homicides committed when they were fourteen-years-old.[5] In the first case, Kuntrell Jackson participated in the robbery of a video store, during which one of Jackson's associates shot and killed the store clerk.[6] Jackson was charged as an adult and convicted of capital felony murder and aggravated robbery.[7] In the second case, Evan Miller and a friend beat a man in the head with a baseball bat after stealing his wallet.[8] At one point, Miller proclaimed "I am God, I've come to take your life," just before striking the victim on the head.[9] Miller and his friend later set fire to the victim's trailer in an attempt to cover up the crime.[10] The victim died of a combination of head injuries and smoke

* Associate Professor of Law, University of Florida Levin College of Law, Gainesville, Florida.

1 132 S. Ct. 2455, 2460 (2012).

2 543 U.S. 551, 568 (2005).

3 130 S. Ct. 2011, 2034 (2010).

4 132 S. Ct. at 2469.

5 *Id.* at 2460.

6 *Id.* at 2461.

7 *Id.*

8 *Id.* at 2462.

9 *Id.*

10 *Id.*

inhalation.[11] Prior to the crime, Miller had been in and out of foster care because of his parents' substance addictions and abusive behavior.[12] Miller himself regularly used illegal drugs and alcohol and had attempted suicide on four prior occasions.[13] Miller was charged as an adult and convicted of murder in the course of an arson.[14] Both convictions gave rise to a mandatory LWOP sentence.[15]

Several of the themes presented in *Miller* may have future significance both inside and outside the Eighth Amendment context. The most obviously important of these themes is *youth*. The *Miller* Court based its holding on the assertion that "children are constitutionally different from adults for purposes of sentencing."[16] The Court held that minors are generally less morally responsible, more impulsive, less deterrable, and possess a greater capacity for rehabilitation than adults.[17] Bad behavior in minors is not necessarily evidence of a depraved character because their character is not yet "well formed" or "fixed."[18] Minors are also generally more susceptible to negative outside pressures than adults,[19] and less capable of protecting their own interests in dealing with the criminal justice system.[20] In making this final point, the Court cited *J.D.B. v. North Carolina*, a Fifth Amendment case in which the Court held that the age of a suspect is relevant to the question of whether she is in custody for *Miranda* purposes.[21] Taken together, *J.D.B.* and the *Roper/Graham/Miller* line of cases indicate that the Supreme Court may be developing a constitutional distinction between minors and adults that applies across a range of contexts. Children may be "constitutionally different"[22] from adults for many purposes beyond criminal sentencing.

A second significant theme is *science*. In *Miller* (as well as *Roper* and *Graham*) the Supreme Court relied on behavioral studies that tended to confirm the "common sense" belief that minors are generally less responsible, more impulsive, and more amenable to rehabilitation than adults.[23] It also relied on neuroscientific studies showing that "parts of the brain involved in behavior control" are not yet

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 2464

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2468

[21] 131 S. Ct. 2394, 2403 (2011) ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.")

[22] 132 S. Ct. at 2464.

[23] *Id.*

fully developed during adolescence.[24] The Supreme Court's willingness to give scientific findings constitutional significance could impact any number of constitutional doctrines, both inside and outside the Eighth Amendment context. The use of science to inform doctrine holds out the promise of allowing the Court to update constitutional law in accordance with our best understanding of the human person and of the world in which we live. But as a basis for constitutional doctrine, science may undermine tomorrow what it builds up today. The Supreme Court's use of scientific studies in *Roper*, *Graham*, and *Miller* has been criticized on the ground that at least some of the studies are unsound[25] and that the Court has drawn inferences about moral responsibility and deterrability that go well beyond what the studies show.[26] To the extent such studies are merely used to confirm longstanding "common sense" judgments about the nature of adolescents (for example), such criticisms may not pose a serious problem for the Court. But the more the Court tries to use science to move constitutional doctrine beyond settled societal understandings about the human person and the world in which we live, the more vulnerable such doctrine will be to these sorts of critique.

A third important theme of *Miller* is *mandatory sentences*. Whereas *Roper* and *Graham* imposed a categorical ban on certain types of punishment in certain circumstances, *Miller* simply required that juvenile homicide offenders be given an individualized sentencing determination before being given an LWOP sentence. This decision may mark the beginning of a broader change in the Supreme Court's attitude toward mandatory sentencing schemes. Several decades ago, as part of its "death is different" jurisprudence, the Supreme Court held that mandatory sentencing schemes are impermissible in the death penalty context,[27] but pose no constitutional problem in relation to sentences of imprisonment—even LWOP sentences.[28] The *Miller* Court's decision to break down the barrier between capital and non-capital cases (at least in the LWOP context) may herald either a willingness to reexamine the constitutionality of harsh mandatory sentencing

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[24] *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).

[25] *See, e.g.*, Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 379 (2006) (criticizing the Supreme Court for relying on scientific sources that were "insufficient and outdated").

[26] *See, e.g.*, Stephen J. Morse, *Brain Overclaim Syndrome*, 3 OHIO ST. J. CRIM. L. 397, 409 (2006) ("The neuroscience evidence [discussed in *Roper*] in no way independently confirms that adolescents are less responsible. If the behavioral differences between adolescents and adults were slight, it would not matter if their brains are quite different. Similarly, if the behavioral differences were sufficient for moral and constitutional differential treatment, then it would not matter if the brains were essentially indistinguishable."); William J. Katt, Roper *and the Scientific Amicus*, 49 JURIMETRICS J. 253, 268 (2009) ("Although common sense might tell us that adolescents clearly behave differently than adults, the sources cited by the Science Brief do not seem to prove that point.").

[27] *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586 (1978).

[28] *See* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("[A] sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory.").

schemes generally or to impose on the LWOP sentencing process the entire machinery of constitutional procedure currently required in capital cases. Either change could have profound significance for non-capital sentencing.

A fourth potentially important theme of *Miller* is *juvenile transfer statutes.* One could plausibly claim that the entire *Roper/Graham/Miller* line of cases is the result of the movement in the 1990s—in reaction to the "juvenile superpredator" panic—to amend the statutes allowing juvenile offenders to be transferred to adult court for trial. In a single five-year period, some forty-five states amended their transfer statutes to make it easier to move juveniles into adult court, thus making them potentially subject to execution or LWOP sentences.[29] *Roper*, *Graham*, and *Miller* may be a judicial reaction to the resulting increase in underage offenders being given very harsh criminal sentences in adult criminal court. The Supreme Court has not yet entertained a direct constitutional challenge to these new transfer statutes, but their harsh effects could be an underlying motivation for the Court's decision to limit the punishments that may be imposed on underage offenders.

A fifth theme of *Miller* is *the conflict between "evolving standards of decency" and the Supreme Court's "independent judgment."* Since the late 1950s, the Supreme Court has taken the position that it is not bound by the original meaning of the Cruel and Unusual Punishments Clause, but is free to interpret the Clause in accordance with current moral standards.[30] From the beginning, there has been ambiguity and conflict concerning the source of such "current" standards. Should the Court focus on "societal consensus," or should it rely on its own "independent judgment" (perhaps informed by the Court's own reading of scientific and philosophical literature)?[31] For decades, the Supreme Court has pretended that current "societal consensus" and its own "independent judgment" are in perfect accord with each other, but such pretense has become increasingly implausible.[32] In *Miller*, the Supreme Court signals a willingness to move away from consulting "societal consensus" and toward sole reliance on its own independent judgment. The *Miller* Court makes no effort to show that there is a

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[29] *See* U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 88–89 (1999).

[30] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Cruel and Unusual Punishments Clause should be interpreted in light of "evolving standards of decency that mark the progress of a maturing society").

[31] *Compare, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (using both "evolving standards of decency" and the Court's own judgment to determine whether a punishment is cruel and unusual), *with* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (using "evolving standards of decency" but explicitly refusing to use the Court's own judgment as part of the test for unconstitutionality), and Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (using both "evolving standards of decency" and the Court's own independent judgment).

[32] *See, e.g.*, John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 922–23 (2011) (arguing that recent cases "show that the evolving standards of decency test is often deeply at odds with the Supreme Court's own judgment" and that the Supreme Court increasingly resolves this problem by creating a "fictionalized [societal] consensus against the punishment to support its own judgment").

current societal consensus against mandatory LWOP sentences for juvenile homicide offenders. Instead, it argues that its holding is justified because it flows logically and "straightforwardly"[33] from the Court's own prior Eighth Amendment precedents,[34] and because it accords with the Court's own beliefs concerning the proper justifications for punishment.[35] This movement away from "evolving standards of decency" and toward the exercise of judgment unconstrained by binding constitutional standards leaves the future development of Eighth Amendment doctrine radically uncertain.

The articles in this Symposium shed important light on the significance of *Miller* for the Supreme Court's Eighth Amendment jurisprudence, and for juvenile justice more generally.

The first two articles concern the effect *Miller* may have on the "death is different" approach that has dominated the Supreme Court's Cruel and Unusual Punishments jurisprudence over the past thirty years. Until recently, the Supreme Court followed a two-track approach to claimed Eighth Amendment violations: giving robust proportionality review to claims involving the death penalty and virtually no review to claims relating to terms of incarceration.[36] Starting with *Graham v. Florida*, the Court has moved away from the death/imprisonment distinction, and focused instead on whether a case raises a categorical challenge to a given punishment.[37] Categorical challenges now appear to get the searching proportionality review that was previously reserved for death penalty cases,[38] but the Court has done little to specify what sorts of case are appropriate for a categorical challenge, and what sorts are not.

Richard Frase[39] sees *Miller* and other recent applications of categorical analysis as a potential expansion of the "death is different" approach, not a repudiation of it. Frase identifies a number of factors present in these cases that might make a future Eighth Amendment challenge sufficiently "different" from a

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[33] 132 S. Ct. 2455, 2471 (2012).

[34] The *Miller* Court does attempt to answer the argument that there is a societal consensus *in favor of* mandatory LWOP sentences, as demonstrated by the fact that such sentences are authorized by the federal government and twenty eight states. *See id.* The Court makes no effort, however, to demonstrate a societal consensus *against* such punishments.

[35] *Id.* at 2464–66.

[36] *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) ("The Supreme Court takes two very different approaches to substantive sentencing law. Whereas its review of capital sentences is robust, its oversight of noncapital sentences is virtually nonexistent.").

[37] *See* Graham v. Florida 130 S. Ct. 2011, 2021–22 (2010) (distinguishing the Supreme Court's two lines of Eighth Amendment proportionality cases on the ground that some focused on "all of the circumstances of the case" while others "used categorical rules to define Eighth Amendment standards").

[38] *See id.* (declaring that it is cruel and unusual to impose LWOP sentences on the entire category of juvenile nonhomicide offenders).

[39] Richard S. Frase, *What's "Different" (Enough) in Eighth Amendment Law?*, 11 OHIO ST. J. CRIM. L. 9 (2013).

typical term-of-imprisonment challenge to warrant categorical treatment, even for an adult offender. These factors include: 1) whether the offender has constitutionally relevant personal characteristics, such as juvenile status or mental retardation; 2) whether the offender has been given a death sentence or an LWOP sentence, which the Supreme Court considers comparable to death; 3) whether the offender has been given a mandatory sentence; 4) whether the offender has been convicted of a nonhomicide offense; and 5) whether the offender is a low-culpability accomplice. Frase argues that the focus on these factors in *Miller* and *Graham* may signal a burgeoning preference for categorical Eighth Amendment challenges that extends well beyond the old "death is different" approach. Frase analyzes how categorical challenges might work post-*Miller*, and shows how the "different" factors he identifies might even lead to more robust constitutional review in non-categorical "as applied" challenges to terms of imprisonment.

Carol Steiker and Jordan Steiker[40] explore the implications of the *Miller* Court's decision to "breach[] the capital versus non-capital divide"[41] by requiring individualized sentencing in juvenile LWOP cases as well as death penalty cases. They ask, for example, whether the Court will ultimately require states to use the same elaborate and expensive sentencing procedures in LWOP hearings that currently obtain in the death penalty context. If so, they argue, this may force states to abandon or severely limit juvenile LWOP. If the Court were to expand the individualized sentencing requirement to cover adult as well as juvenile LWOPs, however, this move might have the perverse effect of increasing the number of death penalty cases. Prosecutors faced with the choice between a costly death penalty proceeding and a costly LWOP proceeding may well choose the former over the latter. Ultimately, Steiker & Steiker are skeptical as to whether the Supreme Court will move much further toward breaching the capital/non-capital divide, at least with respect to the procedural requirements for sentencing. They are also skeptical as to whether the importation of such procedures into the non-capital context would provide much real protection to defendants. Steiker & Steiker do express modest optimism, however, that the Supreme Court's focus on the inappropriateness of imposing very harsh sentences on juvenile offenders may create an impetus for political reform.

The next three articles focus on the relationship between *Miller* and juvenile justice policy.

Franklin Zimring and Stephen Rushin[42] present an empirical study of the relationship between juvenile homicide rates and the punitive changes made to the juvenile justice system in response to the superpredator panic of the 1990s. Juveniles crime rates rose dramatically from the mid-1980s through the early-

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[40] Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama: *Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37 (2013).

[41] *Id.* at 38.

[42] Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 OHIO ST. J. CRIM. L. 57 (2013).

1990s, then declined dramatically from the mid-1990s through 2010. Some have argued that this decline was caused by widespread statutory changes in the 1990s that made it easier to transfer juvenile offenders into adult court and subject them to harsher punishment. Zimring & Rushin's study calls this hypothesis into question by showing that the rate of homicides committed by young adults declined during this period to almost precisely the same degree as the juvenile homicide rate. Since young adults were not directly affected by changes to the juvenile transfer statutes, Zimring & Rushin's study implies that some other cause affecting both juveniles and young adults must have pushed down the homicide rates for both groups. If this is so, the harsher transfer statutes would appear to have had virtually no effect on juvenile homicide rates, and would thus appear to be seriously misguided.

Elizabeth Scott[43] argues that *Miller* is important, despite its seemingly modest holding, because it clarifies the unique status of juveniles under Eighth Amendment doctrine. *Miller* also demonstrates that the Supreme Court has embraced the wisdom of a developmental model of youth crime regulation and given it constitutional status. Scott identifies four lessons that policymakers should take from this decision. First, because juveniles are generally less culpable than adults, they should generally be subject to more lenient criminal sanctions. Second, the transfer of juveniles to adult court should be rare, and should be based on the individualized decision of a judge. Third, juvenile sanctions should focus on rehabilitation and reform, not punishment. Fourth, juvenile crime regulation can usefully be guided by developmental science.

Barry Feld[44] argues that the reasoning of *Miller* supports a specific juvenile justice sentencing policy: a youth discount. Although the *Roper/Graham/Miller* line of cases recognizes the categorically diminished responsibility of youthful offenders, it provides them limited relief. The death penalty has been forbidden for juvenile offenders, and the use of LWOP sentences has been greatly limited. But beyond these bounds, there are no restrictions on the length of incarceration juvenile offenders may be given. For example, under *Roper/Graham/Miller*, life sentences are still permissible so long as the juvenile offender gets some "meaningful opportunity" to argue for parole at some point during his incarceration. Feld argues that sentencing laws would better reflect the diminished responsibility of youthful offenders if they were changed to provide a "youth discount"—that is, "a proportional reduction of adult sentence lengths based on the youth of the offender."[45] Such a reduction would, Feld argues, formally recognize the mitigating quality of youthfulness, take into account the fact that juvenile offenders have a much greater chance to mature and develop into law abiding

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[43] Elizabeth S. Scott, *"Children are Different:" Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71 (2013).

[44] Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013).

[45] *Id.* at 108.

citizens, and give them a chance at a future life despite the serious mistakes represented by their criminal conduct.

Finally, Jeremiah Bourgeois[46] provides the perspective of a man who was given a mandatory LWOP sentence some twenty years ago for a crime committed when he was fourteen. Bourgeois argues that the criminal justice system provides a mere pretense of rehabilitation to criminal offenders. He argues that the system is based on a distorted view of retribution that fails to recognize the distinction between wrongdoing committed by children and wrongdoing committed by adults. Bourgeois's article demonstrates, by its very existence, that even the most troubled adolescents who commit the most serious crimes have the capacity to grow in knowledge, maturity, and perspective on the world around them—a capacity that is implicitly denied by the imposition of mandatory LWOP sentences on juvenile offenders.

[46] Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149 (2013).