

Juvenile Sentencing After *Roper v. Simmons*

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Part I. Background

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Part III. Comment

In the 2005 case of *Roper v. Simmons* the United States Supreme Court determined the Eighth Amendment to the United States Constitution prohibited the use of capital punishment against juvenile offenders.⁽¹⁾ *Roper* is a landmark decision in the field of juvenile justice for its recognition that age and the characteristics of young offenders render them insufficiently culpable to face the death penalty. However, while there were relatively few juvenile death penalty cases prior to *Roper*, many states continued the practice of sentencing juvenile offenders to life without the possibility of parole in both homicide and non-homicide cases.⁽²⁾

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(1) *Roper v. Simmons*, 543 U.S. 551 (2005).

(2) Before *Roper*, the 1980s and 1990s represented a period of increased severity in juvenile punishment. A 1999 report by the United States Department of Justice - National Report 89 - recognized the 1990s as a period in which “legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive.” At the time of the *Graham v. Florida* decision, discussed *infra*, 37 out of 50 states allowed life without parole sentences for juvenile offenders.

A decade has passed since the *Roper* decision was announced. It is now worthwhile to consider its influence on sentencing juvenile offenders as well as the Court's changing approach to Eighth Amendment analysis and the manner in which it determines a national consensus against specific sentencing practices.

Part I of this article shall review the *Roper v. Simmons* decision noting the Court's reasoning and outlining how it represented a fundamental change in approach to juvenile justice in the United States. Part II shall address the cases of *Graham v. Florida*⁽³⁾ and *Miller v. Alabama*⁽⁴⁾ again considering the reasoning and debate surrounding the sentencing practice of life without parole and mandatory life sentences for juvenile offenders. Finally, Part III shall close with a discussion how the Supreme Court's Eighth Amendment cruel and unusual punishment analysis has changed over recent years and note other emerging issues related to juvenile sentencing.

Part I. Background

The Eighth Amendment to the United States Constitution bars excessive bail, excessive fines, and cruel and unusual punishment.⁽⁵⁾ In *Trop v. Dulles*, the United States Supreme Court held the Eighth Amendment to the United States Constitution must be interpreted in

(3) *Graham v. Florida*, 560 U.S. 48 (2010).

(4) *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). *Miller v. Alabama* was decided with the companion case *Jackson v. Arkansas* listed under the same citation.

(5) U.S. CONST. AMEND. VIII.

light of “evolving standards of decency that mark the progress of a maturing society.”⁽⁶⁾ Not surprisingly, these “evolving standards” have been the subject of considerable debate.⁽⁷⁾ Under the Court’s Eighth Amendment analysis some punishments have been forbidden entirely.⁽⁸⁾ Other punishments have been held unconstitutional when deemed excessive in comparison to the crime or excessive with regard to the culpability of the offender.⁽⁹⁾ After *Trop*, the Court usually began its Eighth Amendment cruel and unusual punishment analysis by considering objective indicia of society’s standards.⁽¹⁰⁾

Starting in the 1980s, the United States Supreme Court considered a number of challenges to the death penalty based on the age and mental development of the defendant. In *Thompson v. Oklahoma*, the Supreme Court took the first step in abolishing the juvenile death penalty, holding that execution of offenders aged 15 years old and under at the time their of their crime would constitute cruel and unusual

(6) *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

(7) See for example Justice Alito’s dissent in *Miller*: “Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?” *Miller*, 132 S.Ct. at 2487.

(8) See *Wilkerson v. Utah*, 99 U.S. 130 (1878) (punishments such as drawing and quartering or burning alive are always forbidden regardless of the crime).

(9) See *Coker v. Georgia*, 433 U.S. 584 (1977) (execution disproportionate for the crime of raping an adult woman); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (execution disproportionate for the crime of raping a child). Cf. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory life sentence for trafficking 672 grams of cocaine not disproportionate).

(10) *Roper*, 543 U.S. at 563.

punishment.⁽¹⁾ The Court recognized that lack of education, intelligence and experience rendered juveniles less able to evaluate the consequences of their conduct and that “such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.”⁽²⁾ One year later in *Stanford v. Kentucky* the Court limited this result, finding no national consensus against death sentences for juveniles convicted of murder when 16 years or older.⁽³⁾ However, following the Supreme Court’s decision *Atkins v. Virginia*,⁽⁴⁾ which held execution executing of mentally retarded defendants violated the Eighth Amendment’s ban on cruel and unusual punishment, the *Roper* Court similarly abolished the death penalty for juvenile offenders.⁽⁵⁾

The *Roper* decision is significant for several reasons. Most importantly, it explicitly rejected the result in *Stanford*. However, *Roper* was also important for the manner in which the Supreme Court followed the reasoning in *Atkins* and *Thompson* cases to find a national consensus against the juvenile death penalty, its reliance on scientific and sociological evidence to recognize the qualitative differences between juveniles and adults, and its acknowledgement of international opinion as to what constitutes cruel and unusual punishment in Eighth

(1) *Thompson v. Oklahoma*, 487 U.S. 815, (1988).

(2) *Id.* at 835.

(3) *Stanford v. Kentucky*, 492 U.S. 361 (1989); the *Stanford* Court also strongly rejected the idea that the Court should substitute its own judgment in place of the legislature on the question of whether penological goals justified the juvenile death penalty.

(4) *Atkins v. Virginia*, 536 U.S. 304 (2002).

(5) *Roper*, 543 U.S. at 568.

Amendment analysis.⁽¹⁶⁾

First, relying heavily on the reasoning in *Atkins*, the *Roper* Court stated under the “evolving standards of decency” test used in Eighth Amendment analysis, a national consensus had developed against the practice since it last considered the issue.⁽¹⁷⁾ The *Roper* Court noted, as in *Atkins*, objective indicia of consensus against the juvenile was evident from the legislative enactments as well as “the Court’s own determination in the exercise of its independent judgment.”⁽¹⁸⁾

The *Roper* Court observed at the time of the *Atkins* decision, 30 States prohibited the death penalty for the mentally retarded, including 12 that had abolished the death penalty completely and another 18 that kept it but prohibited execution of the mentally retarded.⁽¹⁹⁾ Similarly, the *Roper* Court noted, 30 states prohibited the imposition of the death penalty on juvenile offenders, which included 12 states that had abolished the penalty entirely and 18 which maintained it but prohibited its use on juveniles.⁽²⁰⁾

As in *Atkins*, the objective indicia of consensus in this case - the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice - provide sufficient evidence that

(16) *Id.* at 564–577.

(17) *Id.* at 564 (citing *Trop*, 356 U.S. 86).

(18) *Roper*, 543 U.S. at 563, 564.

(19) *Id.* at 564.

(20) *Id.*

today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”⁽²¹⁾

Second, the Court again found the qualitative differences between juveniles under 18 and adults were so significant that, as a class, juveniles could not be classified as the worst offenders. Citing *Atkins*, the *Roper* Court held “Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁽²²⁾ In reaching the conclusion that juveniles cannot reliably be classified as the worst offenders, the *Roper* Court emphasized three fundamental differences between juveniles and adults. The Court emphasized scientific and sociological studies, (as well as the general experience of parents) confirm a lack of maturity and an underdeveloped sense of among the young resulting in “impetuous and ill-considered actions and decisions.”⁽²³⁾ Similarly, the Court recognized, juveniles are more susceptible and vulnerable to negative influences and outside pressures beyond their control.⁽²⁴⁾ Finally, the Court reasoned, unlike adults, juveniles have not had the opportunity to fully develop their own character.⁽²⁵⁾ Thus, it followed that juveniles’ susceptibility to immature and irresponsible behavior and their relative

(21) *Id.* at 567 (citing *Atkins*, 536 U.S. at 316).

(22) *Roper*, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 319).

(23) *Roper*, 543 U.S. at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367).

(24) *Roper*, 543 U.S. at 569.

(25) *Id.* at 570.

lack of control over their immediate surroundings renders their conduct less morally reprehensible than that of adult offenders.⁽²⁶⁾ Moreover, because juveniles have not completely established their own identities, it is “less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably deprived character.”⁽²⁷⁾

Returning to its holding in *Thomson*, the Court concluded, once diminished culpability of juveniles is recognized, the penological justifications of deterrence and retribution for the death penalty apply to juveniles with less strength than adults.⁽²⁸⁾ While the Court recognized that criminal sentencing is an area normally left to the various state legislatures, the Court found the differences between adult and juveniles too striking to risk the imposition of the death penalty on an insufficiently culpable juvenile offender.⁽²⁹⁾

Finally, in support of the abolition of the juvenile death penalty as a disproportionate punishment, the *Roper* majority emphasized that the United States was alone in the international community in sanctioning the practice.⁽³⁰⁾ The Court was careful to recognize that foreign law was not controlling and that the ultimate responsibility for the interpretation of the Eighth Amendment fell to the Court. However, the Court stated, reference to the laws of other countries

⁽²⁶⁾ *Id.*

⁽²⁷⁾ *Id.*

⁽²⁸⁾ *Id.* at 571.

⁽²⁹⁾ *Id.* at 571, 572.

⁽³⁰⁾ Only seven other nations other than the United States have used the death penalty against juvenile offenders since 1990. Those countries are Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. *Roper*, 543 U.S. at 577.

and international authorities was useful in interpreting the Eighth Amendment's Cruel and Unusual Punishment Clause.⁶¹⁾ Moreover, said the Court, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."⁶²⁾

A major focus of the dissents by Justices O'Connor and Scalia attacked the *Roper* majority's conclusion that a national consensus had developed against the juvenile death penalty as well as the manner in which the majority calculated opposition to the practice.⁶³⁾ These issues would remain a concern when the Court turned its attention to the next major question of juvenile sentencing.

Part II. *Graham v. Florida* and *Miller v. Alabama*

The effect of the *Roper* Court's new approach was soon evident in the cases of *Graham v. Florida* and *Miller v. Alabama*. Both cases addressed a practice almost unknown outside the United States legal system: life in prison without parole for juvenile offenders.⁶⁴⁾ The

61) *Roper*, 543 U.S. at 577, 578.

62) *Id.* at 578.

63) *Id.* at 587-630. (O'Connor, J., Scalia, J. dissenting)

64) At the time *Graham* was decided in 2010, 123 juvenile offenders were serving life without the possibility of parole sentences for nonhomicide offenses. *Graham*, 560 U.S. at 64. When *Miller* was decided in 2012, 2,500 prisoners were serving life without the possibility of parole for murders committed before age 18. The *Miller* Court recognized that over 2,000 of these sentences were mandated by the state legislatures. *Miller*, 132 S.Ct. at 2472 n. 10.

Supreme Court ultimately found that to categorically deny the possibility of parole to juvenile offenders constituted a violation of the Eighth Amendment prohibition against cruel and unusual punishment.⁶⁵ The first of these two cases, *Graham v. Florida*, established the rule for non-homicide cases. Two years later the Court extended the rule in *Miller v. Alabama*.

Graham v. Florida

The defendant in the case, Terrance Graham, was 16 years old when he was charged with attempted armed robbery and armed burglary with assault or battery in which the victim was beaten in the head with a metal bar.⁶⁶ Charged as an adult, Graham faced a maximum sentence of 15 years imprisonment for the robbery and life imprisonment without the possibility of parole for the armed burglary.⁶⁷

Graham pleaded guilty to both charges under a plea agreement and wrote a statement to the court promising to turn his life around. The trial court judge accepted the plea agreement withholding adjudication of guilt and imposing concurrent 3-year terms of probation.⁶⁸ Graham was required to spend the first 12 months of probation in county jail but received credit for time served while awaiting trial

⁶⁵ *Graham*, 560 U.S. at 82; *Miller*, 132 S.Ct. at 2460.

⁶⁶ *Graham*, 560 U.S. at 53.

⁶⁷ Florida gives prosecutors discretion whether to charge 16- and 17-year olds as adults for most felonies: § 985.227(1)(b) later renumbered § 985.557(1)(b). *Graham*, 560 U.S. at 53, 54.

⁶⁸ *Graham*, 560 U.S. at 54.

and was released in June, 2004.³⁹ However, less than 6 months after his release Graham was arrested for participation in a home invasion robbery.⁴⁰ Graham was accordingly charged with violation of probation with the state presenting evidence of his involvement in the home invasion as well as possession of a firearm, fleeing from the police and associating with others engaged in criminal activity.⁴¹

Citing Graham's escalating pattern of criminal conduct and the short period of time between his offenses, the trial judge found juvenile sanctions were no longer appropriate and sentenced Graham to life in prison.⁴² Because Florida abolished its parole system by statute in 2003, a life sentence results in no possibility of release short of executive pardon.⁴³ Graham appealed. The Appeals court found the punishment not "grossly disproportionate" in light of his age (17-19 at time of sentencing), violent nature of the crimes, the extraordinary lenient probation terms for a life felony and Graham's own past letter of remorse promising never to engage in future criminal activity.⁴⁴

In a 6-3 decision the Supreme Court held for Graham and found that sentences of life in prison without the possibility of parole were

³⁹ *Id.*

⁴⁰ The state of Florida further alleged a second robbery attempt the same evening in which one of Graham's adult co-defendants was shot. Graham, 560 U.S. at 54.

⁴¹ Graham denied involvement in the home invasion but admitted to other violations. Graham, 560 U.S. at 54, 55.

⁴² Graham, 560 at 57.

⁴³ Florida statute § 921.002(1)(e) (2003).

⁴⁴ Graham, 560 U.S. at 58.

unconstitutional for juvenile offenders.⁽⁴⁵⁾

The *Graham* majority followed the *Roper* Court's reasoning that the qualitative differences evident in juveniles and adults were so significant that as a class juveniles could not be classified as the worst offenders deserving of "the second most serious punishment," that a national consensus has developed against the practice, and that such a practice was viewed as disproportionate throughout the international legal community.⁽⁴⁶⁾

On the first point, the *Graham* Court held under the Eighth Amendment's "evolving standards of decency" analysis, a sentence grossly disproportionate to the crime is unconstitutional.⁽⁴⁷⁾ The Court cited past precedent to emphasize " 'a line between homicide and other serious crimes against the individual.' "⁽⁴⁸⁾ Noting that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers, the Court reasoned that juvenile offenders who do not kill or intend to kill have "twice diminished moral culpability."⁽⁴⁹⁾

The *Graham* majority found a life sentence without the possibility

⁽⁴⁵⁾ *Id.* at 79 (Justice Kennedy wrote for the majority in which Stevens, Ginsburg, Breyer, Sotomayor, JJ. joined. Stevens, J. and Roberts, C.J. filed separate concurring opinions. Justice Thomas filed a dissenting opinion joined by Scalia, J. and joined in part by Alito, J., who also filed a separate dissenting opinion).

⁽⁴⁶⁾ *Id.* at 69, 81, 82.

⁽⁴⁷⁾ *Id.* at 71.

⁽⁴⁸⁾ *Graham*, 560 U.S. at 69 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)).

⁽⁴⁹⁾ *Graham*, 560 U.S. at 69.

of parole particularly harsh for juvenile offenders given the greater percentage of their lives left to be spent in prison.⁵⁰⁾ Moreover, the Court found none of the legitimate goals of penal sanctions - retribution, deterrence, incapacitation, and rehabilitation is adequate to justify life without parole for juveniles in nonhomicide cases.⁵¹⁾

In response to Chief Justice Roberts' concurrence questioning the need for a categorical rule barring states from ever imposing a life sentence on juvenile offenders, the *Graham* majority ruled such a categorical rule barring life without the possibility of parole was necessary to avoid the risks of sentencing less culpable juvenile offenders to life without parole in nonhomicide cases.⁵²⁾

The *Graham* Court again followed *Roper* emphasizing that, just as in regard to the juvenile death penalty, developments in psychology and brain science show a fundamental difference between adults and juveniles in their lack of maturity, underdeveloped sense of

50) *Id.* at 70.

51) *Id.* at 71.

52) *Id.* at 78, 79. While agreeing that the life without parole sentence was unconstitutionally disproportionate in *Graham's* case, Chief Justice Roberts repeated his position in *Roper*, questioning the need for a categorical rule barring states from ever using the sentence. He also noted examples of juveniles who he found sufficiently culpable to qualify for life without parole. The first case was Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill. The victim miraculously survived. The second case involved Nathan Walker and Jakaris Taylor, Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son. *Graham*, 560 U.S. at 93, 94 (Roberts, C. J., concurring).

responsibility, vulnerability to negative influences and outside pressure, and greater ability to change their underlying characters.⁵³

In adopting the categorical prohibition, the Court again argued a national consensus against the practice.⁵⁴ Interestingly, however, rather than focus on the status of current legislation as it did in *Roper*, the *Graham* majority stressed the relative infrequent use of such sentences in practice.⁵⁵ The *Graham* Court noted, “an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.”⁵⁶

The Court identified 123 juvenile nonhomicide offenders serving sentences of life without parole. The Court emphasized that of the juveniles serving sentences without the possibility of parole, all were incarcerated in just 11 states.⁵⁷ Citing Department of Justice statistics, the *Graham* Court argued that “that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found

⁵³ *Graham*, 560 U.S. at 68, 69.

⁵⁴ *Id.* at 62–70.

⁵⁵ *Id.* at 62–64. As discussed *infra*, this was a major focus of the dissent.

⁵⁶ *Id.* at 63. At the time of the *Graham* decision, six jurisdictions did not allow life without parole for any juvenile offenders. Seven jurisdictions permitted life without parole for juvenile offenders, but only in homicide cases. Thirty-seven states, federal law, and the District of Columbia permitted sentences of life without parole for a juvenile nonhomicide offender in some circumstances.

⁵⁷ *Graham*, 560 U.S. at 64. Florida accounted for the majority with 77. The other 10 states were California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia.

to be cruel and unusual.”⁵⁸⁾

Finally, the *Graham* Court again noted the global consensus against denying juvenile offenders the possibility of parole. The Court noted that only 11 nations authorized such sentences by statute and only two in practice.⁵⁹⁾ The two that did so in practice were the United States and Israel. However, the *Graham* Court noted, the only Israeli prisoners identified serving life in prison for juvenile offenses were convicted of homicide or attempted homicide.⁶⁰⁾ Thus, at the time *Graham* was decided, only the United States imposed life in prison without parole for nonhomicide offenses.⁶¹⁾

In response to the state’s argument that there are no international agreement binding the United States to against imposing life without parole for juvenile offenders, the Court noted that the issue was not whether the United States was prohibited from imposing such sentences, but whether such a punishment was cruel and unusual under

58) *Graham*, 560 U.S. at 65, 66. For the most recent year statistics were available at the time of the *Graham* decision, a total of 13,480 individuals, adult and juvenile, were arrested for homicide crimes. In the same year, 57,600 were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson.

59) At the time of the *Graham* decision, the countries that had statutes which could permit life without parole sentences for juvenile offenders were Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. See M. Leighton & C. de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice* 4 (2007). *Graham* 560 U.S. at 80, 81.

60) *Graham*, 560 U.S. at 80, 81.

61) *Id.* at 81.

the United States Constitution.

The Court has treated the laws and practice of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.⁽⁶²⁾

In conclusion, the *Graham* Court ruled that states need not guarantee juvenile offenders eventual release. However, “if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”⁽⁶³⁾

Among the issues raised in his *Graham* dissent, Justice Thomas argued the Court's continued recognition of life without parole for juveniles in homicide cases exposed what he argued was a glaring inconsistency in the majority's reasoning. “The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an 8-year-old and leaves her for dead does not.”⁽⁶⁴⁾ However, this inconsistency between banning life without parole for juvenile offenders whose victims

⁽⁶²⁾ *Id.* at 82.

⁽⁶³⁾ *Id.*

⁽⁶⁴⁾ *Id.* at 119 (Thomas, J. dissenting).

miraculously survived attempted killings while allowing mandatory life without parole for juveniles in other homicide cases was soon addressed in *Miller v. Alabama*.

Miller v. Alabama

The influence of the *Roper* and *Graham* decisions was next seen in the companion cases of *Miller v. Alabama* and *Jackson v. Arkansas*. Unlike *Graham*, the *Miller* and *Jackson* cases involved mandatory life in prison without the possibility of parole sentences for juvenile offenders convicted of murder.⁽⁶⁵⁾ In both cases, the juveniles were 14 years old at the time of their offenses.⁽⁶⁶⁾ This discussion will begin with an outline of the facts of the two cases.

Evan Miller was reportedly heavily involved with drugs prior to his crime.⁽⁶⁷⁾ In 2003, after a night of drinking and drug use he and a companion attempted to rob a neighbor of his wallet. The attempt failed and after beating the victim with a baseball bat the two set fire to the dwelling in order to cover up evidence of their crime.⁽⁶⁸⁾ The victim eventually died from the beating and smoke inhalation.⁽⁶⁹⁾

Miller was originally charged as a juvenile. However, Alabama law allowed the District Attorney to seek removal to adult court which,

(65) *Miller*, 132 S.Ct. at 2460.

(66) *Id.* at 2461.

(67) *Id.* at 2462.

(68) *Id.*

(69) *Id.*

after a transfer hearing, was granted.⁽⁷⁰⁾ Accordingly, Miller was charged as an adult with murder in the course of arson, a crime which carried a mandatory minimum sentence of life without the possibility of parole.⁽⁷¹⁾ Miller was convicted after a jury trial and his sentence was upheld on appeal.⁽⁷²⁾

In 1999, Kuntrell Jackson and two others attempted to rob a video store.⁽⁷³⁾ Jackson originally waited outside as the two others, one armed with a sawed-off shotgun, entered the store. Jackson entered the store during the course of the robbery while his co-defendant Derrick Shields pointed the shotgun at the store clerk and demanded money.⁽⁷⁴⁾ The clerk refused. At trial, the parties disputed whether Jackson made statements threatening the clerk or expressed disbelief that his associates were actually robbing the store.⁽⁷⁵⁾ After his statements, Shields shot and killed the victim.⁽⁷⁶⁾

Arkansas law allowed prosecutors discretion to charge juveniles

⁽⁷⁰⁾ *Id.* at 2463.

⁽⁷¹⁾ *Id.* at 2463, 2464 (citing Ala. Code §§ 13A-5-40(9), 13A-6-2(c) (1982)).

⁽⁷²⁾ The Alabama Court of Criminal Appeals affirmed the decision holding that life without parole in Miller's case was "not overly harsh when compared to the crime." The Alabama Supreme Court denied review. Miller, 132 S.Ct. at 2463 (citing *Miller v. State*, 63 So.3d 676, 690 (2010)).

⁽⁷³⁾ Miller, 132 S.Ct. at 2461.

⁽⁷⁴⁾ *Id.*

⁽⁷⁵⁾ "At trial, the parties disputed whether Jackson warned [the victim] We ain't playin', or instead told his friends, I thought you all was playin'." Miller, 132 S.Ct. at 2461 (citing *Jackson v. State*, 359 Ark. 87, 89, 194 S.W. 3d 757, 759 (2009)).

⁽⁷⁶⁾ Miller, 132 S.Ct. at 2461.

as adults when alleged to have committed certain serious offenses.⁽⁷⁷⁾ The prosecutor in Jackson's case charged him with capital felony murder and aggravated robbery.⁽⁷⁸⁾ After a hearing which considered the facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history, the trial court denied Jackson's motion to transfer the case to juvenile court.⁽⁷⁹⁾ He was subsequently convicted by a jury of both crimes and the trial judge, noting only one possible sentence under Arkansas law, sentenced Jackson to life in prison.⁽⁸⁰⁾

Following the decision in *Roper v Simmons*, Jackson filed a petition for *habeas corpus*, arguing that under *Roper's* reasoning, a mandatory life sentence for a 14-year-old similarly violates the Eighth Amendment.⁽⁸¹⁾ The Arkansas Supreme Court subsequently affirmed Jackson's sentence and the Supreme Court granted certiorari.

Holding and Reasoning

The United States Supreme Court found that the Eighth Amendment forbids sentencing juvenile offenders to mandatory terms of life in prison without the possibility of parole.⁽⁸²⁾

(77) *Id.* (citing Ark. Code Ann. §9-27-318(c)(2) (1998)).

(78) Miller, 132 S.Ct. at 2461.

(79) *Id.*

(80) "A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole" Ark. Code Ann. §5-4-104(b) (1997)).

(81) Miller, 132 S.Ct. at 2461.

(82) *Id.* at 2460. (Justice Kagan wrote the majority opinion which Kennedy, Ginsburg, Breyer and Sotomayor, JJ. joined. Justice Breyer filed ↗

Quoting extensively from *Roper* and *Graham*, the Supreme Court reasoned that sentencing practices which do not match the culpability of a class of offenders with the severity of the sentence may be categorically banned.⁸³ The *Miller* Court further held that the characteristics of juvenile defendants and the reasoning in *Roper* and *Graham* led to the conclusion that mandatory life in prison without parole violates the Eighth Amendment.⁸⁴ Finally, the Court dismissed the claims of Alabama and Arkansas that such practices were consistent with past precedent.⁸⁵

The *Miller* Court first reviewed the line of cases which banned specific sentencing practices under the Eighth Amendment for lack of proportionality. The Court emphasized that, as with nonhomicide offenders and mentally retarded defendants sentenced to death, juvenile offenders have been found to have insufficient culpability to face the most severe punishments of death or life in prison without parole for nonhomicide offenses.⁸⁶ The Court emphasized that “*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.”⁸⁷

As in *Roper* and *Graham*, the *Miller* Court focused on three key differences between juvenile and adult culpability. Those differences

↘ a concurring opinion. Chief Justice Roberts filed a dissenting opinion which was joined by Scalia and Thomas, JJ. Justices Thomas and Alito also wrote separate dissenting opinions.

⁸³ *Id.* at 2461–2469.

⁸⁴ *Id.* at 2463–2471.

⁸⁵ *Id.* at 2469, 2470.

⁸⁶ *Id.* at 2464.

⁸⁷ *Id.*

were first, their lack of maturity and an underdeveloped sense of responsibility which led to recklessness, impulsivity and risk-taking; second, children's greater vulnerability to negative influences and outside pressures from environments which they are unable to avoid; third, the unformed nature of a juvenile's character.⁸⁸ Accordingly, said the Court, these factors established that juveniles were less culpable and less deserving of the most severe punishments.⁸⁹ Moreover, said the Court, such conclusions had only been strengthened by research since the *Roper* and *Graham* decisions were announced.⁹⁰ The Court specifically cited developmental psychological studies showing that adolescent brains are not yet mature in the areas of impulse control, planning, and risk avoidance.⁹¹

Further, building on *Roper* and *Graham* the Court found that the distinctive characteristics of youth render traditional penological justifications for imposing the harshest sentences less valid.⁹² The argument for retribution is weakened, said the *Miller* majority, by the age and lesser blameworthiness of the youthful offender. Deterrence is similarly less effective as "their immaturity, recklessness, and impetuosity - make them less likely to consider potential punishment."⁹³ Life without parole is inconsistent with the

⁸⁸ *Id.*

⁸⁹ *Id.* at 2461.

⁹⁰ *Id.* at 2465 n.5.

⁹¹ "The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger." *Id.*

⁹² *Id.* at 2465.

⁹³ *Id.*

rehabilitative ideal, reasoned the Court, and the idea of incapacitation could not support the life without parole sentence in *Graham*.⁹⁴

The *Miller* Court recognized *Graham's* ban on life without parole sentences for juveniles only applied to nonhomicide cases and the *Graham* Court was careful to distinguish such cases from murder both in terms of culpability and resulting harm.⁹⁵ However, the *Miller* Court emphasized, “none of what it said about children - about their distinctive (and transitory) mental traits and environmental vulnerabilities - is crime specific.”⁹⁶ Thus, the *Miller* Court argued, the reasoning in *Graham* applied to all life-without-parole sentences imposed on juvenile offenders, even if the categorical ban announced in that case only applied to nonhomicide offenses.

Graham compared life without parole sentences on juveniles to the death penalty itself.⁹⁷ That correspondence, said the *Miller* Court, required the same application of individualized sentencing required in death penalty cases. By treating all juveniles as adults, the mandatory sentencing practices at issue in these cases were unconstitutional because they prevent the sentencing authority from taking the “mitigating qualities of youth” into consideration.⁹⁸

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ “Here, as with the death penalty, ‘[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive’ a sentence of life without parole for a nonhomicide crime ‘despite insufficient culpability.’” *Graham*, 560 U.S. at 78 (citing *Roper*, 543 U.S. at 572, 573).

⁹⁸ *Miller*, 132 S.Ct. at 2467 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him - and from which he cannot usually extricate himself - no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys ... And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.⁹⁹

The *Miller* Court addressed each of the states' three main arguments in turn. Along with Justice Thomas writing in dissent, the states argued that the constitutionality of mandatory life without parole sentences was upheld in the Supreme Court's decision in *Harmelin v. Michigan*.¹⁰⁰ There the Court upheld the mandatory life sentence without

⁹⁹ Miller, 132 S.Ct. at 2468.

¹⁰⁰ *Id.* at 2466 (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

the possibility of parole for a defendant convicted of possessing 650 grams of cocaine.⁽¹⁰⁰⁾ In *Harmelin*, the Supreme Court noted, “ ‘a sentence which is not otherwise cruel and unusual’ does not ‘becom[e] so simply because it is ‘mandatory.’ ”⁽¹⁰¹⁾

However, the *Miller* Court rejected the states’ argument as “myopic.”⁽¹⁰²⁾ *Harmelin* did not have anything to do with children, the Court reasoned, and was thus distinguishable.⁽¹⁰³⁾ As sentencing practices are different for death penalty cases, they are also different for children. “We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.”⁽¹⁰⁴⁾

The *Miller* Court similarly rejected the states’ argument, also raised in dissent, that there was no national consensus against mandatory life-without-parole sentences.⁽¹⁰⁵⁾ While recognizing that 29 jurisdictions (28 states and the federal government) employ life-without-parole sentences for some juveniles convicted of murder, the Court nonetheless found such numbers did not preclude its finding such a mandatory practice unconstitutional.⁽¹⁰⁶⁾ Interestingly, the *Miller* Court found the states’ position even weaker than that held unconstitutional in *Graham*. In *Graham*, the Court imposed a categorical ban of a certain penalty on an entire class of offenders. In *Miller*, the Court explained, it only limited the mandatory aspect and required a certain process -

⁽¹⁰⁰⁾ *Miller*, 132 S.Ct. at 2470 (citing *Harmelin*, 501 U.S. at 995).

⁽¹⁰¹⁾ *Miller*, 132 S.Ct. at 2470 (citing *Harmelin*, 501 U.S. at 995).

⁽¹⁰²⁾ *Miller*, 132 S.Ct. at 2470.

⁽¹⁰³⁾ *Id.*

⁽¹⁰⁴⁾ *Id.*

⁽¹⁰⁵⁾ *Id.* at 2470, 2471.

⁽¹⁰⁶⁾ *Miller*, 132 S.Ct. at 2471.

consideration of the defendant's age and associated characteristics - before sentencing an offender to life without the possibility of parole.⁽¹⁰⁸⁾

Moreover, the Court stated the practice of life-without-parole sentencing for nonhomicide offenders found unconstitutional in *Graham* was endorsed by 39 jurisdictions, 10 more than followed the mandatory life sentences at issue in *Miller*.⁽¹⁰⁹⁾ But, even given the lower numbers, the *Miller* Court questioned the idea that all 29 jurisdictions actually favored the mandatory life-without-parole sentences for juveniles. Noting that such sentences were often the result of a several statutes working together rather than a single statute authorizing such a sentence for juvenile offenders specifically, the *Miller* Court doubted the legislatures in those jurisdictions had expressly endorsed such a result through “deliberate, express, and full legislative consideration.”⁽¹¹⁰⁾

Finally, the Court rejected the states' argument that discretion exercised by prosecutors and judges when deciding whether to transfer juvenile cases to the adult system allows sufficient consideration of the juvenile's age, background and circumstances of the crime.⁽¹¹¹⁾ The Court noted that of the 29 jurisdictions at issue in this case, roughly half required automatic transfer.⁽¹¹²⁾ A number of states left the decision

(108) *Id.*

(109) *Id.* at 2471, 2472.

(110) The Court explained this usually occurred when statutes authorizing juveniles to be tried as adults for some kind of homicide and then other statutes subjected them to general penalty provisions which did not account for age. *Miller*, 132 S.Ct. at 2473.

(111) *Miller*, 132 S.Ct. at 2474.

(112) The Court noted states with automatic transfer systems included Alabama, Arizona, Connecticut, Delaware, Florida, Hawaii, Michigan, ↗

up to the prosecutors without any mechanism for judicial reconsideration and often with no clear standards or protocols for the exercise of the discretion.⁽¹³⁾

The *Miller* Court also found that where it exists, transfer discretion was of limited value. At the stage when such determinations were made, the assessor would not have sufficient information.⁽¹⁴⁾ Any relevant evidence regarding the juvenile's culpability revealed after the transfer to the adult system would not overcome the mandatory sentencing scheme.⁽¹⁵⁾ Transfer hearings also differ greatly from post-trial sentencing by framing the issue between the two possible extremes of relatively light sentencing as a juvenile or more serious sanctions as an adult.⁽¹⁶⁾ As the Court explained, "It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate."⁽¹⁷⁾ In the case of juvenile offenders, the discretion granted judges at the transfer stage must also be available to judges at post-trial sentencing.⁽¹⁸⁾

↘Minnesota, Nebraska, New Hampshire, Pennsylvania, Vermont, and Washington. *Miller*, 132 S.Ct. at 2474.

⁽¹³⁾ *Miller*, 132 S.Ct. at 2474 n. 15.

⁽¹⁴⁾ *Id.* at 2473, 2474.

⁽¹⁵⁾ *Id.* at 2474.

⁽¹⁶⁾ *Id.*

⁽¹⁷⁾ *Id.* at 2474, 2475.

⁽¹⁸⁾ *Id.* at 2475.

Part III. Comment

The post *Roper* cases of *Graham* and *Miller* have reemphasized that age matters. *Graham* and *Miller* specifically adopted *Roper's* holding that age and the characteristics of age preclude juvenile offenders from receiving life without parole sentences for nonhomicide offenses as well as barring mandatory life sentences for juvenile convicted of murder.

These cases also raise a number of issues worth noting. Additional areas of interest include the Court's apparent rejection of the "national consensus" standard in Eighth Amendment analysis, as well as the unanswered questions of whether long term-of-years sentences for juvenile offenders will fall within the *Graham* prohibition on life without parole sentences and whether life without parole for juvenile murderers will continue on a discretionary basis.

Term-of-Years

In criticizing the *Graham* majority for attempting to prove the existence of a national consensus against practice of life without parole sentences for juvenile offenders, Justice Thomas pointed out that the Court seemed to have purposely excluded from its calculation all the juveniles serving lengthy term-of-years sentences.⁽¹⁹⁾ In Justice Thomas'

(19) *Graham*, 560 U.S. at 113 n. 11.

words, a term-of-years sentence in the 70 or 80 year range “effectively denies the offender any material opportunity for parole” and should have been recognized as evidence that the practice of life without parole for juvenile offenders was not nearly as rare as the *Graham* majority claimed.⁽¹²⁰⁾

Similarly, the majority in *Miller* suggested a lengthy term-of-years sentence as a favorable alternative for judges faced with the dilemma of deciding between keeping serious cases in juvenile court - which would necessarily result in light punishment - or transferring them to the adult system and mandatory life without parole for juveniles convicted of murder.⁽¹²¹⁾ From this example, an argument can be made that the Court may tacitly approve of such term-of-years sentences.

However, both *Graham* and *Miller* found life without parole to be comparable to the death penalty for juvenile offenders.⁽¹²²⁾ *Graham* imposed a categorical ban on such sentences for juveniles convicted of nonhomicide offenses and *Miller* similarly prohibited mandatory life without parole sentences when imposed on juvenile offenders. It is not difficult to extend the logic of these cases to argue lengthy term-of-years sentences are the functional equivalents to life without parole and are accordingly barred by the Court’s decision in *Graham*. In fact, there is currently a split among state courts on this question. A few examples shall serve to illustrate this divergence.

In the case of *Bunch v. Smith*, the 16-year-old juvenile defendant was

⁽¹²⁰⁾ *Id.*

⁽¹²¹⁾ *Miller*, 132 S.Ct. at 2474, 2475.

⁽¹²²⁾ *Graham*, 560 U.S. at 78; *Miller*, 132 S.Ct. at ____.

tried and convicted in Ohio state court on multiple counts of kidnapping, rape and robbery.⁽¹²³⁾ During sentencing the trial court judge announced his intent to keep Bunch from ever getting out of prison stating, “I have to make sure you get out of the penitentiary. I’ve got to do everything I can to keep you there, because it would be a mistake to have you back in society.”⁽¹²⁴⁾ Bunch was sentenced to a fixed term of 89 years.⁽¹²⁵⁾

Bunch appealed, arguing that the 89 year term amounted to the functional equivalent of life without parole for crimes he committed as a juvenile in violation of the Eighth Amendment’s ban on cruel and unusual punishments.⁽¹²⁶⁾

Bunch’s case was complicated by the fact that he had exhausted his state court appeals before *Graham* was decided.⁽¹²⁷⁾ However, the Sixth Circuit Court of Appeals found that even assuming *Graham*

⁽¹²³⁾ Bunch v. Smith, 685 F.3d 546, 548 (2012).

⁽¹²⁴⁾ *Id.* at 548.

⁽¹²⁵⁾ The trial court ordered Bunch to serve his multiple felony convictions consecutively thus resulting in his lengthy sentence.

⁽¹²⁶⁾ Bunch, 685 F.3d at 548. The Ohio Court of Appeals rejected Bunch’s appeal and the Ohio Supreme Court declined review. Bunch subsequently filed a habeas petition in federal district court which was denied. He then appealed to the United States Court of Appeals for the Sixth Circuit. Bunch, 685 F.3d at 548, 549 (citing *State v. Bunch*, 118 Ohio St. 3d 1410, 2008).

⁽¹²⁷⁾ See the Antiterrorism and Effective Death Penalty Act (AEDPA), which limits the ground on which defendants may seek habeas relief in federal courts to cases which “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.” 28 U.S.C. § 2254(d)(1). In Bunch’s case, this meant the law as it existed at the time of the last state court judgment on the merits. Bunch, 685 F.3d at 549, 550.

applied at the time of *Bunch's* appeal, he would still not have been entitled to relief. The appellate court found the case distinguishable from *Graham* on several grounds. First, the court noted that *Graham* involved a categorical challenge to a particular type of sentence: life without parole for juvenile offenders.⁽¹²⁹⁾ In addition, the *Graham* Court did not analyze sentencing laws or actual sentencing practices with respect to consecutive, fixed-term sentences and thus did not address the constitutionality of such punishments.⁽¹³⁰⁾ Moreover, the *Bunch* court noted that the split among courts as to whether *Graham* applied to consecutive, fixed terms which result in aggregate sentences beyond the defendant's life expectancy demonstrates that *Bunch's* suggested reading of *Graham* was not clearly evident.⁽¹³¹⁾

⁽¹²⁹⁾ *Bunch*, 685 F.3d at 552.

⁽¹²⁹⁾ *Id.*

⁽¹³⁰⁾ *Id.* Examples which specifically read *Graham* to only apply to life without the possibility of parole sentences include *Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012) (a nonhomicide child offender's ninety-year sentence not unconstitutional); *State v. Kasic*, 228 Ariz. 228 (Ariz. Ct. App. 2011) (concurrent and consecutive prison terms of 139 years for a nonhomicide juvenile offender in line with Arizona's penological goals and not unconstitutional); *Walle v. State*, 99 So. 3d 967, (2012) (aggregate sentences totaling ninety-two years not unconstitutional as *Graham* only applied to single sentences); *Adams v. State*, 288 Ga. 695 (2011) (seventy-five-year sentence and lifelong probation for juvenile convicted of child molestation did not violate *Graham*); *People v. Taylor*, 984 N. E.2d 580 (2013) (*Graham* not applicable because defendant was only sentenced to forty years and not life without the possibility of parole). Cases which have reached the opposite result include *People v. Rainer*, 2013 COA 51 (2013) (sentence of 112 years for 17-year-old offender was the functional equivalent of a life sentence without parole and accordingly unconstitutional); *People v. Mendez*, 188 Cal. App. 4th 47, 114 (Cal. Ct. App. 2010) (a sentence of eighty-↗

The Appellate court in *Bunch* also suggested additional questions which could arise from holding a term-of-years sentence was equivalent to life without parole for juvenile offenders. Some of the more interesting of these are at what number of years the Eighth Amendment would be implicated in juvenile sentencing and how would such calculations be made? For example, the *Bunch* Court queried whether “gain time” would be factored in the calculation and if the actual number would vary from offender to offender once race, gender and other life expectancy factors were considered.⁽¹¹⁾ These questions remain unanswered.

In contrast to the Sixth Circuit’s decision in *Bunch*, a number of California courts have found lengthy term-of-years sentences violated *Graham’s* prohibition on life without parole for juvenile nonhomicide offenders. For example, in *People v. Caballero*, a 16-year-old defendant was sentenced to 110 years to life for multiple counts of attempted murder and firearm offenses for a gang-related shooting.⁽¹²⁾ Caballero’s

↘four years to life for a nonhomicide child offender constituted cruel and unusual punishment because it was the equivalent of life without parole); *People v. J. I. A.*, 196 Cal. App. 4th 393, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011) (sentencing juvenile nonhomicide offender so that he would not be eligible for parole until age seventy, his natural life expectancy, unconstitutional); *Floyd v. State*, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (per curiam) (holding that a child sentenced to a combined eighty-year sentence for two counts of armed robbery constituted cruel and unusual punishment as the functional equivalent of a life sentence without parole); and *People v. Caballero*, 55 Cal. 4th 262 (Cal. 2012) discussed *infra*.

(11) *Bunch*, 685 F.3d at 552 (citing *Henry*, 82 So.3d at 1089).

(12) *Caballero*, 55 Cal. 4th at 265. As in *Bunch*, the defendant, Rodrigo Caballero, was ordered to serve consecutive 15 years to life on the ↗

sentence was upheld by the California Court of Appeal.⁽¹³⁾

On appeal to the Supreme Court of California, the state argued *Graham's* prohibition on life without parole sentences did not apply to juvenile offenders who commit the crime of attempted murder.⁽¹³⁾ The state also claimed that such aggregate sentences for separate crimes did not present a cognizable Eighth Amendment claim, as each of defendant's sentences included the possibility of parole within his lifetime.⁽¹³⁾ Moreover, at the appellate level, the California Court of Appeal reasoned that *Graham* applied a categorical rule specifically limited to juvenile nonhomicide offenders receiving an explicitly designated life without parole sentence.⁽¹³⁾

However, the California high court held that term-of-years sentences that extend beyond a juvenile's life expectancy, and are imposed for nonhomicide offenses, violate the Eighth Amendment pursuant to *Graham*. In *Caballero*, the Supreme Court of California reversed the lower appellate court, reasoning as follows:

Consistent with the high court's holding in *Graham* we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life

↘three attempted murder charges as well as consecutive 20, 20 and 25 year sentences on each of the respective firearm enhancements.

⁽¹³⁾ *Caballero*, 55 Cal. 4th at 265.

⁽¹³⁾ *Id.* at 267.

⁽¹³⁾ *Id.*

⁽¹³⁾ *Id.*

expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.⁽¹⁷⁾

At the time of this writing, the approach followed in *Bunch* appears to be the prevailing view. However, the United States Supreme Court has yet to offer its final determination of this issue.

Discretionary Life Without Parole

Another area of interest following the *Graham* and *Miller* decisions is how long courts will be allowed to exercise discretionary life without parole sentencing in juvenile homicide cases. As noted above, the Supreme Court repeatedly emphasized in *Graham* that life without parole was an especially harsh penalty when imposed on juvenile nonhomicide offenders. The Court held that life without the possibility of parole should be reserved for the very worst cases. The *Graham* Court stated “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”⁽¹⁸⁾

⁽¹⁷⁾ *Id.* at 268.

⁽¹⁸⁾ *Graham*, 560 U.S. at 69.

A review of the *Graham* decision turns up over 40 references to “nonhomicide” in the majority opinion.⁽³⁹⁾ It is fair to say that the homicide verses nonhomicide distinction played a major factor in the Court’s determination that life without parole was inappropriate with respect to juveniles. As the Court has noted in other cases involving proportionality review, “death is different.”⁽⁴⁰⁾ However, as noted above, the Court quickly walked back its homicide verses nonhomicide distinction in *Miller*.

To be sure, *Graham’s* flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children -about their distinctive (and transitory) mental traits and environmental vulnerabilities - is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham’s* reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.⁽⁴¹⁾

⁽³⁹⁾ The author counts 48 such references.

⁽⁴⁰⁾ *Harmelin*, 501 U.S. at 994.

⁽⁴¹⁾ *Miller*, 132 S.Ct. at 2465.

On the one hand, the *Miller* Court appeared to argue that its ruling did not represent such a significant change in direction as it was only addressing the mandatory nature of life without parole sentences on juvenile murderers and not banning the practice altogether.⁽¹⁴⁾ Yet, in the very same paragraph the *Miller* Court seemed to signal its willingness to go further and limit discretionary life without parole sentences against juveniles convicted of murder as well. As the Court stated, “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”⁽¹⁵⁾

The *Miller* dissent certainly read it this way. In fact, one of Chief Justice Robert’s main criticisms in *Miller* was that the Court seemed to be inviting appellate courts to overturn life without parole sentences imposed by judges and juries on a discretionary basis. “If that invitation is widely accepted and such sentences for juvenile offenders do in fact become ‘uncommon,’ the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.”⁽¹⁶⁾ The problem, according to Chief Justice Roberts, is that such

(14) *Miller*, 132 S.Ct. at 2469. “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. Because that holding is sufficient to decide these cases, we do not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.”

(15) *Id.*

(16) *Id.* at 2481 (Roberts, C. J. dissenting).

an approach departs from traditional Eighth Amendment analysis toward a pure subjective evaluation.

This process has no discernible end point - or at least none consistent with our Nation's legal traditions. *Roper* and *Graham* attempted to limit their reasoning to the circumstances they addressed - *Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try.⁽⁴⁵⁾

Measuring National Consensus

As a policy matter, there is certainly nothing wrong with the conclusion that the characteristics of young offenders outlined in *Roper*, *Graham* and *Miller* should guide sentencing. However, as noted by the dissents in those cases, a reasonable argument can be made that the Court has abandoned its previous rigorous Eighth Amendment analysis in finding national consensus against specific sentencing practices.

While the wisdom of the “evolving standards of decency” approach announced in *Trop v. Dulles* may be debated, the Court normally began its Eighth Amendment analysis after *Trop* by considering “objective indicia of society's standards, as expressed in legislative enactments and state practice.”⁽⁴⁶⁾ This allowed the Court to confirm it was not

⁽⁴⁵⁾ *Id.* at 2481, 2482 (Roberts, C. J. dissenting).

⁽⁴⁶⁾ *Miller*, 132 S.Ct. 2477 (citing *Roper*, 543 at 563).

merely following its own subjective opinion but that there was in fact a national consensus against the particular sentencing practice in question.⁽¹⁴⁷⁾

When the Court declared the Eighth Amendment prohibited the death penalty for the rape of an adult woman in *Coker v. Georgia*, only one state allowed that possible sentence and at no point in the last 50 years had a majority of states authorized such a punishment.⁽¹⁴⁸⁾ Similarly, in *Enmund v. Florida* the Court prohibited the death penalty for participation in a robbery in which an accomplice committed the murder because 78% of all states which authorized capital punishment banned it in such cases.⁽¹⁴⁹⁾

As noted in the dissenting opinions, the standard for what the Court has been willing to accept as evidence showing national consensus against a specific sentence practice has weakened considerably. When the *Atkins* Court ruled low-IQ defendants may not be sentenced to death, the majority found an anti-death-penalty consensus against the practice even though more than half of the states that allowed capital punishment permitted it in such cases.⁽¹⁵⁰⁾ The *Atkins* Court addressed this issue by emphasizing a strong trend against the practice and citing 18 states that had changed their laws to prohibit it after 1986.⁽¹⁵¹⁾ By

(147) Miller, 132 S.Ct. at 2478 (Roberts, C. J. dissenting)

(148) Coker, 433 U.S. at 595, 596.

(149) *Enmund v. Florida*, 458 U.S. 782 (1982).

(150) At the time *Atkins* was decided less than half of the 38 States that permitted capital punishment had enacted legislation prohibiting execution of the mentally retarded. *Atkins*, 536 U.S., at 342 (Scalia, J., dissenting).

(151) *Atkins*, 536 U.S. at 313-315.

the time the Court decided *Roper* three years later, it had backed away from its emphasis on trend evidence but nonetheless found a national consensus against execution of juvenile offenders. In fact, in the face of exactly the same majority of death penalty states allowing the practice but with a far less pronounced trend toward abolition than evident in *Atkins*, the *Roper* Court instead emphasized the “direction of change” to find a national consensus against the practice.⁽¹⁵⁰⁾

The Court’s method of determining a national consensus against juvenile life without parole sentences was even more suspect in *Graham* and *Miller*. As Justice Thomas noted in his *Graham* dissent, over the previous 20 years states had consistently increased the severity of punishments for juvenile offenders and made it easier to transfer juvenile cases to adult court.⁽¹⁵¹⁾ At the time of the *Graham* decision all 50 states, the federal government, and the District of Columbia allowed juveniles over a certain age to be prosecuted as adults if charged with certain crimes.⁽¹⁵²⁾ Moreover, 45 states along with the federal government and the District of Columbia allowed for juveniles charged as adults to face the very same punishments as adults charged with the same offenses.⁽¹⁵³⁾ Of those states, eight did not provide for life

⁽¹⁵⁰⁾ In *Atkins*, 18 states prohibited execution of the mentally retarded after 1986. In the same period, only five states had enacted legislation barring execution of juveniles. However, the *Roper* Court argued, “Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.” *Roper*, 543 U.S. at 566.

⁽¹⁵¹⁾ *Graham*, 560 U.S. at 109 (Thomas, J. dissenting).

⁽¹⁵²⁾ *Id.* at 106 (Thomas, J. dissenting).

⁽¹⁵³⁾ *Id.* at 106, 107 (Thomas, J. dissenting).

without parole for any nonhomicide offender, regardless of age.⁽¹⁵⁶⁾ Most significant to the national consensus argument is that the remaining 37 states, the federal government, and the District of Columbia all allowed the imposition of life without parole for certain nonhomicide offenses including its imposition on offenders under the age of 18.⁽¹⁵⁷⁾ In Justice Thomas' words,

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes the practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus in favor of its availability.⁽¹⁵⁸⁾

The *Graham* dissent raises additional issues with the Court's national consensus analysis. It was remarkable, Justice Thomas argued, the *Graham* majority was willing to abandon current legislation as an "incomplete and unavailing" measure of national consensus.⁽¹⁵⁹⁾ Such

⁽¹⁵⁶⁾ *Id.* at 107.

⁽¹⁵⁷⁾ *Id.*

⁽¹⁵⁸⁾ *Id.*

⁽¹⁵⁹⁾ In *Graham*, the majority argued legislation to be "incomplete and unavailing," and declared that [t]here are measures of consensus ↗

an approach not only ignored the super majority of states which authorized the practice, it shifted the burden to the states to prove a national consensus in favor what they had already legislated to do, rather than following the traditional approach requiring opponents to prove a national consensus against the practice.⁽⁹⁹⁾ The Court was also wrong, Justice Thomas argued, to equate a jurisdiction's disuse of a legislatively authorized penalty with its moral opposition against to it. Accordingly, he argued, the majority mistakenly counted states which authorized the penalty but were not incarcerating any nonhomicide juvenile offenders at the time *Graham* was decided.⁽¹⁰⁰⁾

In light of the *Graham* Court's dismissal of current legislation as a gauge of national consensus in juvenile sentencing practices, it is hard to disagree with Justice Thomas' view that the Court was more

\other than legislation.'” *Graham*, 560 U.S. at 62. In response, Justice Thomas pointed out that the statistics Justice Kennedy, author of the majority opinion, found inadequate to support the life-without-parole sentence in the instant case were stronger than those used to uphold the death sentence of a 16-year-old in *Stanford v. Kentucky*, an opinion which Justice Kennedy joined. Unlike the like the current situation, no 16-year-old had been executed in the United States for nearly 30 years prior to the Stanford decision. *Graham*, 560 U.S. at 114 (Thomas, J. dissenting).

(99) *Graham*, 560 U.S. at 113 (Thomas, J. dissenting).

(100) As an example, Justice Thomas cited an Oklahoma case decided just weeks before the *Graham* decision was announced in which a juvenile, Keighton Budder, was sentenced to life in prison without parole for a brutal stabbing in which the victim miraculously survived. Prior to that case Oklahoma did not have any juveniles serving life without the possibility of parole. Without that decision, the majority would have counted Oklahoma citizens as morally opposed to life-without-parole sentences, which they clearly were not.

interested in substituting its own “independent moral judgment” than following traditional Eighth Amendment analysis.⁽¹⁰²⁾ However, the Court went even further in abandoning the national consensus approach in its *Miller* decision.

In *Miller*, the Court banned a punishment that was not at all unusual under contemporary Eighth Amendment analysis. As all the parties in the case agreed, 2,500 prisoners were serving sentences of life without parole for murders committed before the age of 18.⁽¹⁰³⁾ In addition, 2,000 of those sentences were recognized to be mandated by a legislature.⁽¹⁰⁴⁾ Moreover, there is evidence that life without parole sentences have become more common in the last 25 years.⁽¹⁰⁵⁾ Surprisingly, however, the *Miller* Court claimed the evidence for a national consensus against mandatory life in prison sentences for juvenile offenders was actually stronger in *Miller* than the sentencing practice it rejected in *Graham*. The *Miller* Court argued,

[I]ndeed, we think the States’ argument on this score weaker than the one we rejected in *Graham* . . . In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. That is 10 more than impose life without parole on juveniles on a mandatory basis. And in *Atkins*, *Roper*, and *Thompson*, we similarly

⁽¹⁰²⁾ *Graham*, 560 U.S. at 114 (Thomas, J. dissenting).

⁽¹⁰³⁾ *Miller*, 132 S.Ct. 2477 (Roberts, C. J. dissenting).

⁽¹⁰⁴⁾ *Id.*

⁽¹⁰⁵⁾ *Id.* at 2478 (Roberts, C. J. dissenting).

banned the death penalty in circumstances in which “less than half” of the “States that permit[ted] capital punishment (for whom the issue exist[ed])” had previously chosen to do so.⁽⁶⁶⁾

The reason this is so remarkable is that the Court had previously argued against these very propositions in each of the cases cited. Chief Justice Roberts noted the reversal in his dissent, pointing out that the majority opinions in each of these cases went to great lengths to minimize the prevalence of the sentencing practice it was banning. In *Graham*, for example, the Court stressed that although the practice at issue was “theoretically” allowed under state law in many states, it was “exceedingly rare” in practice.⁽⁶⁷⁾ In *Miller*, the Court turned this idea on its head, disregarding the frequent imposition of the sentence at issue to argue that the number of states following the practice - although still a majority - was fewer than those earlier cases in which the Court found such practices unconstitutional.⁽⁶⁸⁾ As Chief

⁽⁶⁶⁾ *Id.* at 2471, 2472 (internal citations omitted).

⁽⁶⁷⁾ *Miller*, 132 S.Ct. 2478 (Roberts, C. J. dissenting) (citing *Graham*, 560 U.S., at 67).

⁽⁶⁸⁾ In *Graham*, the Court argued that only 123 prisoners in the entire country were serving life without parole for nonhomicide crimes committed as juveniles, with the majority from a single state. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide offenses in a single year. Based on the sentence’s rarity despite the many opportunities to impose it, *Graham* concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes. *Graham*, 560 U.S. at 62–67.

Justice Roberts pointed out, this was disingenuous. Mandatory life without parole sentences for juvenile murderers, when compared to the number of juveniles arrested for murder, was over 5,000 times higher than the related number in *Graham*.⁽¹⁶⁾

Finally, Chief Justice Roberts similarly noted, the *Miller* Court's argument that mandatory nature of the sentence in most jurisdictions made it impossible to determine whether a legislature had actually endorsed a given penalty for juvenile offenders was merely a distraction.

The Court attempts to avoid the import of the fact that so many jurisdictions have embraced the sentencing practice at issue by comparing this case to the Court's prior Eighth Amendment cases. The Court notes that *Graham* found a punishment authorized in 39 jurisdictions unconstitutional, whereas the punishment it bans today is mandated in 10 fewer. But *Graham* went to considerable lengths to show that although theoretically allowed in many States, the sentence at issue in that case was "exceedingly rare" in practice.⁽¹⁷⁾

In summary, Chief Justice Roberts and the dissenting justices in *Miller* appear to have the better argument. As a policy matter it may be perfectly reasonable for legislatures to conclude the characteristics of youth render juveniles unworthy of the most severe punishments.

⁽¹⁶⁾ *Miller*, 132 S.Ct. at 2479 (Roberts, C. J. dissenting).

⁽¹⁷⁾ *Id.* at 2478.

However, when courts take it upon themselves to unilaterally declare specific sentencing practices out of bounds, such decisions should be based on more than the subjective views of judges resorting to unprincipled and changing interpretations of what constitutes a national consensus when in fact no such consensus actually exists.