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## Symposium: Bombshell or Babystep - The Ramifications of Miller v. Alabama for Sentencing Law and Juvenile Crime Policy: Symposium Foreword

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# MISSOURI LAW REVIEW

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## Symposium: Bombshell or Babystep? The Ramifications of *Miller v. Alabama* for Sentencing Law and Juvenile Crime Policy

### Symposium Foreword

*Paul Litton*\*

#### I. INTRODUCTION

In June 2012, the Supreme Court of the United States decided *Miller v. Alabama*, holding that the Eighth Amendment prohibits mandatory sentences of life without parole (LWOP) for juveniles, regardless of the crime committed.<sup>1</sup> *Miller* represents the fifth time since 2002 that the Supreme Court invoked the Eighth Amendment to bar a punishment for a class of offenders based on either offender characteristics or the particular crime.<sup>2</sup> Three of those five decisions pertain to juveniles, prohibiting the death penalty,<sup>3</sup> LWOP for non-homicide offenders,<sup>4</sup> and mandatory LWOP.<sup>5</sup> The *Miller* opinion raises many important matters: practical issues for lower courts in the twenty-nine affected jurisdictions that had authorized mandatory LWOP for juveniles; challenges for attorneys representing juveniles charged with homicide; moral and policy questions for legislators who should reform their

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\* Associate Professor of Law, University of Missouri School of Law. I would like to sincerely thank all participants for a wonderful symposium: Judge Nancy Gertner, Doug Berman, William Berry, Frank Bowman, Bradley Bridge, Emily Buss, Sarah Jane Forman, Marsha Levick, Michael O'Hear, Clark Peters, Mary Price, and Mae Quinn.

1. 132 S. Ct. 2455, 2469 (2012).

2. The other four cases are *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the death penalty for persons with mental retardation); *Roper v. Simmons*, 543 U.S. 551, 562 (2005) (prohibiting the death penalty for juveniles); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the death penalty for child rape); and *Graham v. Florida*, 130 S. Ct. 2011 (2010) (prohibiting LWOP for non-homicide, juvenile offenders).

3. *Roper*, 543 U.S. at 578.

4. *Graham*, 130 S. Ct. at 2034.

5. *Miller*, 132 S. Ct. at 2455.

states' juvenile justice systems; and questions regarding the future of the Supreme Court's Eighth Amendment jurisprudence.

In March 2013, the *Missouri Law Review* brought together an outstanding group of scholars and attorneys to address sentencing law issues stemming from *Miller*. Our first panel explored constitutional questions, ranging from the desirability of the opinion itself to its potential implications for individualized adult sentencing. A common theme of these presentations was the Court's *methodology* in conducting Eighth Amendment proportionality analyses, with specific focus on the role of "objective indicia" of evolving standards. Presenters on our second panel, who are all involved in post-*Miller* litigation, focused on relevant practical issues facing state courts and legislatures, including here in Missouri: Are lower courts applying *Miller* retroactively? What challenges will defense attorneys face in trying to demonstrate that their clients are capable of reform?<sup>6</sup> What alternatives to juvenile LWOP are acceptable? Our third and final panel's charge was broader, discussing policy considerations for juvenile justice reform more generally.

Part II of this Foreword briefly addresses one open constitutional question in the wake of *Miller*: in light of its rationale, is juvenile LWOP – whether mandatory or the result of an individualized sentencing process – constitutionally permissible? I argue that the *Miller* opinion itself is incoherent insofar as it permits juvenile LWOP as a constitutionally viable sentence. Part III provides a short synopsis of the controversy among Justices regarding the proper methodology for Eighth Amendment proportionality analyses. Then, with particular attention to the authors' different takes on *Miller*'s implications for methodology, Part III provides a guide to the symposium contributions focusing on the Eighth Amendment. Parts IV and V will then briefly summarize our symposium contributions focusing on sentencing policy more generally and on Missouri's juvenile justice system.

## II. THE PERPLEXING RATIONALE OF *MILLER V. ALABAMA* AND THE FUTURE OF JUVENILE LWOP

The Supreme Court justified its holding by invoking two strands of precedent interpreting the Eighth Amendment's ban on excessive punishments. The first strand prohibits certain "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."<sup>7</sup> Two decisions specifically place limits on juvenile sentencing: *Roper v. Simmons* prohibits the death penalty for juveniles,<sup>8</sup> and *Graham v. Florida* forbids LWOP sentences for juvenile, non-homicide of-

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6. For an excellent discussion of these important practical questions, see Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller and Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369 (2013).

7. *Miller*, 132 S. Ct. at 2463.

8. *Roper*, 543 U.S. at 578.

fenders.<sup>9</sup> Those opinions recognize that children are “constitutionally different from adults” because of their “diminished culpability and greater prospects for reform.”<sup>10</sup>

The Court summoned a second strand of precedent based on its view that juvenile LWOP is “akin to the death penalty.”<sup>11</sup> By comparing juvenile LWOP to execution, the Court invoked its capital jurisprudence, which prohibits mandatory death sentences.<sup>12</sup> *Woodson v. North Carolina* held that a mandatory death penalty unconstitutionally prevents the sentencer from considering characteristics of the offender and circumstances of the offense that may speak in favor of a more lenient sentence.<sup>13</sup> An overarching purpose of *Woodson* and other Supreme Court cases is to shape capital sentencing schemes “so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.”<sup>14</sup> Together, these two lines of cases led the Court to ban mandatory juvenile LWOP.<sup>15</sup> *Miller* permits juvenile LWOP, but a juvenile is entitled to an individualized sentencing hearing before a court decides whether to impose it.<sup>16</sup>

One of the puzzling aspects of the Court’s rationale is its invocation of *Woodson* from its capital jurisprudence. Of course, the dissent and critics of the decision decry the majority’s razing of the “death is different” wall that had limited the Court’s more active oversight of state capital sentencing schemes.<sup>17</sup> But even on the assumption that the Court justifiably invoked its capital jurisprudence, its reliance on *Woodson* is perplexing for the following reason: the Court’s capital jurisprudence directly addresses whether juveniles may receive the death penalty. *Roper* held that they may not.<sup>18</sup> In the same way that *Woodson* permits the death penalty but disallows a mandatory scheme, *Miller* permits juvenile LWOP while prohibiting only its mandatory imposition.<sup>19</sup> But if juvenile LWOP is truly akin to the death penalty, warranting the Court’s death penalty jurisprudence, then one should conclude that *Roper* applies, prohibiting juvenile LWOP in the same way it prohibits the death penalty for juveniles.

Is there a principled reason that explains why *Woodson*, but not *Roper*, applies? Perhaps some unexposed reason exists for saying that juvenile LWOP is “like death” for *Woodson* purposes but not for *Roper*’s. However, none is evident. Maybe *Miller* prohibits mandatory juvenile

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9. *Graham*, 130 S. Ct. at 2034.

10. *Miller*, 132 S. Ct. at 2464.

11. *Id.* at 2466.

12. *Id.* at 2467.

13. 428 U.S. 280, 303-05 (1976).

14. *Miller*, 132 S. Ct. at 2467.

15. *Id.* at 2468-69.

16. *Id.* at 2475.

17. *Id.* at 2488-89 (Alito, J., dissenting).

18. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

19. *Miller*, 132 S. Ct. at 2475.

LWOP to minimize the risk that an undeserving juvenile will receive that sentence, but it ultimately permits juvenile LWOP because some juvenile murderers might, in fact, deserve it. The problem with that response, though, is that similar arguments were made to the Court in *Roper* and *Graham* and rejected. In forbidding a “case-by-case approach,” which would have permitted juvenile LWOP for some juvenile non-homicide offenders, the *Graham* majority stated:

For even if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,” to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.<sup>20</sup>

The Court made a similar statement in rejecting a case-by-case approach to the death penalty for juveniles, in which one’s youth and attendant characteristics would serve as mitigating factors rather than a categorical bar:

An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant’s youth may even be counted against him.<sup>21</sup>

A defendant’s youth may be counted against him – either in a case where death or juvenile LWOP is on the line – if the sentencer is concerned about the defendant’s future conduct. A judge deciding between juvenile LWOP and a more lenient sentence for juvenile homicide offenders will not have a better chance of making crucial distinctions about desert and the possibility of reform than sentencers would have if the death penalty were on the table.

Perhaps the *Miller* majority believes that the risk of a judicially imposed, undeserved juvenile LWOP sentence is acceptably low because, according to the Court, juvenile LWOP sentence will be very rare after this opinion. If the sentence is extremely rare, then, arguably, occasions for wrongfully imposed juvenile LWOPs will be acceptably rare. The Court predicted that “appropriate occasions for sentencing juveniles to [juvenile LWOP] will be uncommon” because “of the great difficulty [it] noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare

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20. *Graham v. Florida*, 130 S. Ct. 2011, 2031-32 (citation omitted) (quoting *Roper*, 543 U.S. at 572).

21. *Roper*, 543 U.S. at 573.

juvenile offender whose crime reflects irreparable corruption.”<sup>22</sup> However, it is hard to grasp why the Court thinks that the difficulty of making such distinctions will actually result in extremely few juvenile LWOP sentences. Yes, rationally, it seems nearly impossible to make such distinctions among juveniles. But, as noted, the *Graham* and *Roper* majorities acknowledged that the “brutality or cold-blooded nature” of a particular offense can overwhelm the rationality of a sentencer. The Justices’ prediction is in tension with the rationale they invoked in *Roper* and *Graham* for rejecting a case-by-case approach in their respective contexts, favoring categorical bans.

As we asked with *Roper*, we can similarly ask whether *Furman v. Georgia*<sup>23</sup> applies given that *Woodson* does. The very idea of applying *Furman*, though, is incomprehensible, in part for reasons already stated. If *Furman* applies, does that mean that juvenile LWOP should be reserved only for the worst of the worst juvenile murderers? If so, *Roper*’s rejection of a case-by-case approach to the juvenile death penalty is relevant again. As the Court stated, “even . . . expert psychologists” are unable to identify “irreparable corruption.”<sup>24</sup> Moreover, *Miller* suggests in some places that “irreparable corruption” should not imply greater culpability and result in a harsher sentence. In distinguishing juveniles from adults, the Court recognized that character corruption might be the result of an environment from which we could not expect the juvenile to have escaped.<sup>25</sup>

Actually, maybe we asked the wrong *Furman* question in wondering whether the decision would require juvenile LWOP reservation for the worst of the worst *juveniles*. If LWOP is truly akin to the death penalty for juveniles, then *Furman* would seem to require that juvenile LWOP be limited to the worst of the worst in the *entire pool* of murderers, *adult and juvenile*. That is, for juvenile LWOP (a punishment akin to death) to be appropriate for a juvenile, that juvenile would have to be among the worst of the worst of all killers. After all, if LWOP is the same as death for a juvenile, then it should not matter to the Court’s analysis whether LWOP or death is on the line. For either sentence to be appropriate for a juvenile, the juvenile should be among the worst of the worst of all murderers. But precedent – *Roper* – has already established that juveniles, due to their diminished culpability, cannot be among the worst of the worst.

The *Miller* Court failed to appreciate other aspects of *Roper*. The majority stated that a mandatory juvenile LWOP, preventing consideration of an offender’s youth and associated characteristics, “contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe

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22. *Miller*, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573) (citing *Graham*, 130 S. Ct. at 2026-27).

23. 408 U.S. 238 (1972).

24. *Roper*, 543 U.S. at 573 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1014-16 (2003)).

25. *Miller*, 132 S. Ct. at 2464.

penalties on juvenile offenders cannot proceed as though they were not children.”<sup>26</sup> However, that principle simply cannot be the foundation of *Roper*. State schemes that permitted the death penalty for juveniles did *not* proceed “as though [juvenile offenders] were not children.”<sup>27</sup> *Lockett v. Ohio* gave a juvenile capital defendant the right to introduce mitigating evidence about his age and associated characteristics.<sup>28</sup> Indeed, permitting consideration of youth and its characteristics as mitigating factors is exactly what *Miller* requires before a court imposes juvenile LWOP! *Roper* had to be based on a much stronger principle, one that requires the categorical removal of juveniles from the universe of death-eligible defendants. If juvenile LWOP is truly akin to death, justifying the invocation of the Court’s capital jurisprudence, the Court will have to acknowledge that the “foundational principle” of *Roper* prohibits juvenile LWOP, as well.

### III. SYMPOSIUM CONTRIBUTIONS ABOUT EIGHTH AMENDMENT JURISPRUDENCE

In asking whether *Miller* represents a “bombshell or babystep,” we naturally would expect participants to discuss ways in which *Miller*’s rationale might be extended to other categories of offenders and sentences. To what extent, if any, will the Court require individualized sentencing in other contexts? Will other categories of offenders receive the same Eighth Amendment protections as juveniles? Our participants, of course, addressed these questions. But a different fascinating theme emerged from the symposium: what are *Miller*’s implications regarding the Court’s methodology for conducting proportionality analyses, and specifically, what is the role of the “objective indicia” of public attitudes? Before getting a sense of the articles to follow, let us briefly start with some background.

#### A. The Role of “Objective Indicia”

The States in *Miller* argued that mandatory juvenile LWOP for murder cannot offend the Constitution given that twenty-nine jurisdictions permit that sentence for at least some juveniles.<sup>29</sup> The majority first responded that, when its holding requires a particular sentencing procedure as opposed to a categorical penalty bar, the Court relies less on objective indicia such as legislative enactments.<sup>30</sup> One problem with this response, however, is that the plurality opinion in *Woodson* – which does not categorically bar a penalty but rather

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26. *Id.* at 2458.

27. *Id.*

28. 438 U.S. 586, 608 (1978).

29. *Miller*, 132 S. Ct. at 2459.

30. *Id.* at 2471.

requires a procedure for capital sentencing – does, in fact, rely on historical and contemporary surveys of public attitudes.<sup>31</sup>

Nonetheless, the Court's second response engaged the States' argument, assuming that objective indicia are relevant. The Court noted that it invalidated juvenile LWOP for non-homicide offenses in *Graham* even though thirty-nine jurisdictions – ten more than in *Miller* – authorized the challenged sentencing practice.<sup>32</sup> Moreover, the *Miller* Court added, it could not conclude that state legislatures truly endorsed mandatory juvenile LWOP for juvenile homicide offenders.<sup>33</sup> In most of the twenty-nine relevant jurisdictions, a juvenile could become eligible for mandatory juvenile LWOP only after transfer to adult court. Legislatures did not necessarily have juveniles in mind when they passed statutes permitting mandatory LWOP sentences for adult offenders.<sup>34</sup>

Despite the Court's response, it appears that the Court was less deferential to states and to the "objective indicia" of public attitudes than in past cases. As Chief Justice John Roberts emphasized in his dissent, mandatory juvenile LWOP sentences were not nearly as rare as the LWOP sentences invalidated in *Graham*.<sup>35</sup> Justice Samuel Alito's dissent also documented the Court's diminishing deference to legislative decisions about punishment.<sup>36</sup>

Diminishing deference to legislative enactments and other indicia of public sentiment might not be a problem, of course. Defining the scope of an individual right by appeal to the majoritarian sentiment is "at odds with the nature and significance of a constitutional right."<sup>37</sup> Chief Justice Roberts, however, views the objective indicia analysis as relevant to discerning what is "unusual"<sup>38</sup> and to minimizing the Justices' reliance on their own moral judgment.<sup>39</sup> He cited *Gregg v. Georgia* to support his claim that the Court "look[s] to these 'objective indicia' to ensure that we are not simply following our own subjective values or beliefs."<sup>40</sup> The *Gregg* plurality stated that "an assessment of contemporary values . . . does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."<sup>41</sup>

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31. *Woodson v. North Carolina*, 428 U.S. 280, 289-302 (1976).

32. *Miller*, 132 S. Ct. at 2471.

33. *Id.* at 2473.

34. *Id.*

35. *Id.* at 2478-79 (Roberts, C.J., dissenting).

36. *Id.* at 2488-89 (Alito, J., dissenting).

37. Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 405 (2011).

38. *Miller*, 132 S. Ct. at 2477-78 (Roberts, C.J., dissenting).

39. *Id.* at 2478 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

40. *Id.* (citing *Gregg*, 428 U.S. at 173).

41. *Gregg*, 428 U.S. at 173.



However, the *Gregg* plurality did not characterize the “objective indicia” as dispositive in a case in which public attitudes approved the challenged punishment. Its next sentence reads:

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with “the dignity of man,” which is the “basic concept underlying the Eighth Amendment.” This means, at least, that the punishment not be “excessive.”<sup>42</sup>

By saying that a constitutional punishment “also must accord with the ‘dignity of man,’”<sup>43</sup> the *Gregg* plurality implied the following: (i) if public attitudes disapprove a challenged sentencing practice, that practice is unconstitutional, but (ii) public approval of the punishment in question is not sufficient to render it constitutionally permissible. The Justices are to make their own judgment, which may trump the public’s attitudes.

Subsequent Eighth Amendment analyses in 1977 (*Coker v. Georgia*) and 1982 (*Enmund v. Florida*) are, at least, consistent with this understanding of *Gregg*. *Coker* states that public attitudes, as expressed through legislative enactments and jury verdicts, “do not wholly determine” an Eighth Amendment analysis because “the Constitution contemplates that in the end our own judgment will be brought to bear” on the constitutional status of the punishment in question.<sup>44</sup> *Enmund* endorsed the idea that objective indicia are not dispositive but rather inform the Justices’ own judgment as to whether the challenged punishment was excessive in light of the purposes of punishment: “Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty” for felony murder *simpliciter*.<sup>45</sup>

Heightened controversy regarding the role of objective indicia accompanied changes in Court membership. In 1989, the Court in *Stanford v. Kentucky* upheld sentences of capital punishment for sixteen- and seventeen-year-olds.<sup>46</sup> Justice Antonin Scalia, writing for a plurality, stated that the Justices’ own moral judgments regarding the challenged practice and its relation to the purposes of punishment were irrelevant where objective indicia failed to establish a national consensus against that practice:<sup>47</sup> “The punishment is either ‘cruel and unusual’ (*i.e.*, society has set its face against it) or it is not. The

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42. *Id.* (emphasis added) (citation omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

43. *Id.* (emphasis added) (quoting *Trop*, 356 U.S. at 100).

44. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

45. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

46. 492 U.S. 361, 380 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

47. *Id.* at 378-80.

audience for [moral or scientific] arguments, in other words, is not this Court but the citizenry of the United States.”<sup>48</sup>

The Court’s 2002 opinion in *Atkins v. Virginia* returned to the pre-*Stanford* approach, strongly rejecting Justice Scalia’s characterization of the role of objective indicia in Eighth Amendment analyses.<sup>49</sup> The majority made clear that public attitudes are *not* dispositive.<sup>50</sup> In fact, the Court’s stated methodology reflects the reading of *Gregg* above, maintaining that public approval of a capital sentencing practice, while relevant to its own judgment, is not dispositive.<sup>51</sup> Citing its approach from *Enmund*, the Court stated that even “in cases involving a consensus, our own judgment is ‘brought to bear[]’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>52</sup> The Court’s ultimate decision turns on the strength of its reasons, if any, to disagree with public attitudes. *Roper* reaffirmed this approach, stating that a review of objective indicia is its “beginning point,” providing “essential instruction”; but ultimately the Court must “exercise [its] own independent judgment” on proportionality.<sup>53</sup>

Does *Miller* provide any normative lessons about this debate? In terms of predicting the role of objective indicia in future Supreme Court proportionality analyses, does *Miller* represent a “bombshell” of any sort?

#### *B. Guide to Symposium Contributions About the Eighth Amendment*

Professor Frank Bowman’s contribution to this symposium primarily addresses the Court’s shrinking deference to state legislatures and objective indicia of social consensus.<sup>54</sup> His concerns are magnified by his view that the ramifications of *Miller*’s rationale may be extensive because it can be limited in principle to neither juveniles nor LWOP sentences. Even if such extensions of *Miller* appear humane, Professor Bowman passionately and elegantly argues that the Court brings its institutional legitimacy and power of judicial review into question to the extent it defies democratic judgment, resting its holdings solely on the moral views of individual Justices.

Judge Nancy Gertner, Professor of Practice at the Harvard Law School, delivered the keynote address – the Earl F. Nelson Lecture – at the symposium. Judge Gertner’s insightful remarks and article lament the Supreme Court’s historic refusal to conduct robust proportionality analyses, a “quintes-

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48. *Id.* at 378.

49. 536 U.S. 304, 312-13 (2002); *see also Roper*, 543 U.S. at 562 (recounting the Court’s return to the pre-*Stanford* approach).

50. *See Atkins*, 536 U.S. at 312.

51. *See id.* at 312-13.

52. *Id.* at 313 (citation omitted) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

53. *Roper*, 543 U.S. at 564.

54. Frank Bowman, *Juvenile Lifers and Judicial Overreach: A Curmudgeonly Meditation on Miller v. Alabama*, 78 MO. L. REV. 1015 (2013).

sential” task of the judiciary.<sup>55</sup> Her article directly addresses the methodology of Eighth Amendment analyses, rejecting the idea that the Court’s holding is based merely on subjective moral judgment. In past Eighth Amendment cases, the Court appealed to “objective indicia” of public attitudes to convey that its judgment did not rest solely on individual members’ moral opinions. According to Judge Gertner, different “objective” facts – *scientific* facts – compelled the Court’s ruling in *Miller* and provided objective grounds on which the Court could rest its decision.

Professor William Berry’s article observes that the objective indicia analysis is not the Court’s sole means to “achieve a sense of legitimacy”:<sup>56</sup> it also employs the concept of “differentness” to signal limits on the reach of its proportionality analyses. For more than thirty years, the Court contained its active regulation of state capital sentencing schemes by declaring “death is different.” *Graham* and *Miller* introduced a second “differentness” doctrine – “juveniles are different.” Professor Berry helpfully illuminates different lines of arguments for lawyers to use in urging courts to extend this principle. “Juveniles are different” might mean that juveniles are distinct by virtue of their diminished culpability or that juvenile LWOP is unique as a punishment, and Professor Berry explores the potential implications of each interpretation.

If juvenile LWOP is akin to death, rendering the Court’s capital jurisprudence relevant, Professors Berry and Bowman ask whether other long sentences, including adult LWOP, could be akin to death as well. However, as Professor Berry states, a “broader conception” of what is akin to death for Eighth Amendment scrutiny contravenes the Court’s non-capital proportionality cases, such as *Harmelin v. Michigan* and *Ewing v. California*.

Professor Michael O’Hear’s project is to reconcile the Court’s minimal protections for adults in *Harmelin* and *Ewing* with its robust proportionality analyses for juveniles.<sup>57</sup> His reconciliation addresses and provides a compelling account of the controversial role of objective indicia of public attitudes in constitutional proportionality analyses. Through an incisive examination of cases, Professor O’Hear argues that objective indicia and other considerations determine the level of scrutiny to which the Court will subject a challenged punishment. Like Professor Berry, Professor O’Hear demonstrates the usefulness of his analysis. His reconciliation of *Graham/Miller* with *Harmelin/Ewing* speaks in favor of robust protections for some categories of adults, such as some drug offenders sentenced under the three-strikes provision of 21 U.S.C. § 841(b)(1)(A).

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55. Nancy Gertner, *Miller v. Alabama: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041 (2013).

56. William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053 (2013).

57. Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087 (2013).

#### IV. POLICY-FOCUSED SYMPOSIUM CONTRIBUTIONS

Two symposium contributions focus on lessons derived from *Miller* for sentencing policymakers. Mary Price, representing Families Against Mandatory Minimums, draws a normative one. She urges legislators to take proportionality in sentencing law seriously for the sake of just deserts and utilitarian considerations.<sup>58</sup> Her timely<sup>59</sup> article argues that disproportionate, mandatory minimum sentences contribute to unnecessary prison population growth, which diverts funding from law enforcement and other public safety measures.

Professor Clark Peters offers predictive lessons from the *Miller* opinion.<sup>60</sup> Appealing to renowned work in political science, Professor Peters argues that by articulating the political and scientific factors that led the Supreme Court to address juvenile LWOP and influenced its opinion, we will be able to foresee trends that will emerge in sentencing policy and juvenile justice. For example, Professor Peters suggests that the Court's reliance on sociological and biological evidence suggesting an "extended adolescence" could undermine a movement to increase recognition of youth autonomy, particularly in judicial settings.

#### V. SYMPOSIUM CONTRIBUTIONS ABOUT THE MISSOURI JUVENILE JUSTICE SYSTEM

Missouri was one of the twenty-nine jurisdictions affected by *Miller*, with eighty-four persons mandatorily sentenced to LWOP for crimes committed as juveniles.<sup>61</sup> Two articles in this symposium volume directly address Missouri's juvenile justice system and advocate changes beyond the elimination of mandatory juvenile LWOP.

Professor Mae Quinn runs a youth advocacy clinic at Washington University in St. Louis. Her article expounds her deep frustration with the Mis-

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58. Mary Price, *Miller(ing) Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama*, 78 MO. L. REV. 1147 (2013).

59. See, e.g., Charlie Savage, *Dept. of Justice Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, at A1, available at <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html> (reporting Obama administration's directive to federal prosecutors to take measures to "sidestep[] federal laws that impose strict mandatory minimum sentences for drug-related offenses" and Attorney General Eric Holder's defense of the policy on both moral and economic terms).

60. Clark Peters, *Precedent as a Policy Map: What Miller v. Alabama Tells Us About Adults and the Direction of Contemporary Youth Services*, 78 MO. L. REV. 1183 (2013).

61. Meghann Mollerus, *Ruling Could Free 84 Juveniles Serving Life Without Parole*, KOMU 8 (Nov. 12, 2012, 1:39 PM), <http://www.komu.com/news/exclusive-ruling-could-free-84-juveniles-serving-life-without-parole-37606/>.

souri juvenile justice system, especially given the narrative that Missouri's Department of Youth Services (DYS) serves as a humane model for the nation.<sup>62</sup> A very small percentage of Missouri's youth offenders receive DYS benefits. Professor Quinn wants to shed light on ways in which the system infringes many children's right to hope, from due process violations and lack of representation to school discipline policies and unjustified incarceration.

Professor Josh Gupta-Kagan's article focuses on Missouri's unique juvenile court system, in which the person who determines whether to file a child welfare or delinquency case and who litigates the case before a juvenile court judge is actually a supervisee of the juvenile court judges.<sup>63</sup> After arguing that this court structure both violates the Missouri Constitution's separation of powers doctrine and is inefficient, Professor Gupta-Kagan proposes helpful policy reforms.

## VI. CONCLUSION

Our symposium participants focus on different aspects of *Miller* in addressing whether it represents a "bombshell or babystep." In the coming years, we will assess the decision's role in subsequent Supreme Court Eighth Amendment jurisprudence, relating both to children and adults, and the extent to which *Miller* reflects trends in our attitudes and policies about juveniles, the crimes they commit, and sentencing more generally.

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62. Mae C. Quinn, *The Other "Missouri Model": Systemic Juvenile Injustice in the Show Me State*, 78 MO. L. REV. 1193 (2013).

63. Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 MO. L. REV. 1245 (2013).