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# ***Miller v. Alabama: What It Is, What It May Be, and What It Is Not***

*Nancy Gertner*\*

## I. INTRODUCTION

In *Miller v. Alabama*,<sup>1</sup> the Supreme Court of the United States, in a five to four opinion written by Justice Elena Kagan, held that mandatory life imprisonment without parole for defendants convicted of murder who were under age eighteen at the time of their crimes violated the Eighth Amendment to the United States Constitution.<sup>2</sup> The decision raises a host of important questions that the University of Missouri School of Law’s recent symposium ably addressed. Is *Miller* a watershed opinion, prefiguring a new era of substantive Eighth Amendment jurisprudence that would apply to other imprisonment sentences across offender and offense categories? Does it suggest a new constitutional procedural right to individualized sentencing for terms of imprisonment just as the Court has required for the death penalty – even casting doubt on mandatory sentences in other areas? Or is it a limited extension of the Court’s “death is different” jurisprudence to what some have called the “living death sentence,”<sup>3</sup> excluding one generic offender category and raising the possibility that other generic offender categories may also be excluded as they have been in death penalty jurisprudence? Or even if it applies “only” to juvenile mandatory life sentences, what are its implications for other areas involving juveniles and the criminal justice system? I offer tentative answers to these questions; others may disagree with this proposition.

Sadly, I do not believe that *Miller* has ushered in a general “right to individualized sentencing,” let alone a constitutional right to proportionality analysis in imprisonment cases, at least not given the current composition of the Supreme Court. As I describe below, our Supreme Court – unlike other common law high courts – has resisted such an analysis in its Eighth Amendment jurisprudence; this resistance is unlikely to fade any time soon. To put it mildly, Eighth Amendment jurisprudence thus far has been a less than powerful tool to deal with the extraordinary prison terms that we have been imposing on defendants across this country for the past three dec-

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1. 132 S. Ct. 2455 (2012). Evan Miller was fourteen years old at the time he committed a homicide, for which he received the mandatory minimum sentence of life without the possibility of parole. *Id.* at 2460.

2. *Id.* at 2475.

3. *See, e.g.,* *People v. Hartzol*, 222 Ill. App. 3d 631, 655 (1991).

ades.<sup>4</sup> It has been a less than powerful tool to address three strikes laws that impose onerous and plainly disproportionate terms for repeat petty offenders.<sup>5</sup> It has been a less than powerful tool to stop America's failed experiment with mass incarceration.<sup>6</sup>

While scholars have argued that the Eighth Amendment requires a proportionality analysis – in other words, “that punishment for crime should be graduated and proportioned to [the] offense”<sup>7</sup> – this view has not found purchase on the Court. Indeed, some justices have not merely rejected the approach, they have suggested that the inquiry itself is illegitimate.<sup>8</sup> Proportionality analysis, as Justice Antonin Scalia has suggested, is not even part of the American judicial role in sentencing at all; it is normative, policy-like – the responsibility and prerogative of the legislature and not the courts.<sup>9</sup> In fact, as I suggest below, part of the appeal of *Miller* and *Graham v. Florida*<sup>10</sup> may be that the petitioners' arguments were based not on norms, policy choices, or values.<sup>11</sup> Rather, the arguments were based on *science* – the teachings of neuroscience that suggest meaningful physical differences between the adult and juvenile brains.<sup>12</sup>

In death penalty cases, the Court has been willing to engage in a proportionality analysis but only at the margins – that is, only with respect to certain generic offenses and offender categories.<sup>13</sup> *Miller* and *Graham* may well

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4. See Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585 (2012) [hereinafter *On Competence, Legitimacy, and Proportionality*] (describing the limitations of Eighth Amendment law in part because of the American understanding of the limits of the competence of courts to make value judgments about sentencing).

5. *Id.* at 1590.

6. See Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 261 (2009).

7. *Graham v. Florida*, 130 S. Ct. 2021 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); see generally Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695-98 (2005).

8. See *Ewing v. California*, 538 U.S. 11, 31-32 (2003) (Scalia, J., concurring); *On Competence, Legitimacy, and Proportionality*, *supra* note 4, at 1589-90.

9. See *Ewing*, 538 U.S. at 32; *On Competence, Legitimacy and Proportionality*, *supra* note 4, at 1590.

10. 130 S. Ct. 2011. Terence Graham was a seventeen year old who received a sentence of life without parole for violating parole on an earlier conviction for a non-homicide crime, namely armed burglary with assault or battery and attempted armed robbery. *Id.* at 2018-20. The parole violation involved allegations that Graham had participated in a home invasion. *Id.* at 2018-19. No further charges were brought on the new offense. See *id.* at 2019. Rather, it formed the basis for the revocation of his probation on the earlier charges, receiving the maximum available penalty of life without parole. See *id.* at 2019-20.

11. See *id.* at 2026.

12. *Id.*

13. Lee, *supra* note 7, at 716-17.

follow the same pattern. While they may not open the door to constitutionally compelled proportionality analysis – at least not yet – they may well do so with respect to the exclusion of other generic categories from mandatory life without parole sentences.

On the surface, *Miller* – and before that, *Graham* – surely *seemed* different. While the Court spoke in the same generic terms as it had in earlier cases, the context of the decisions, their application to imprisonment rather than just the death penalty, and especially the Court’s language suggested a significant change.<sup>14</sup> *Miller* referred broadly to a “requirement of individualized sentencing for defendants facing the most serious penalties,”<sup>15</sup> implying a procedural right in ordinary sentencing analogous to the right to an individualized determination of the application of the death penalty. Indeed, neuroscience, a field upon which the majority relied,<sup>16</sup> may one day open the door to individualized consideration of the brain mechanisms that affect impulse control, aggression, anger, or even mood instability.<sup>17</sup> In *Miller*, the Court finally seemed willing to impose limitations on legislative enactments, and thus exert a judicial check on the punishment process.

But *Miller*’s holding is cabined with restrictions. It barred the automatic imposition of life without parole sentences on juveniles, not the imposition of life without parole sentences generally.<sup>18</sup> And though it strongly suggested that sentencing juveniles to life without parole is illegitimate, it did not bar its use *in toto*.<sup>19</sup> The Court was also careful to confine its decision to a specific combination of a particular type of sentence and offender.<sup>20</sup> It applies to cases involving both mandatory life without parole and juvenile offenders – not all sentences of imprisonment, much less all sentences of life imprisonment, or all offender categories.<sup>21</sup>

Nevertheless, *Miller* is a watershed opinion, if only for its effect on juvenile sentencing. Rightly or wrongly, *Miller* has changed the conversation on juvenile punishment from a general and important one about the evolving standards of decency, to one of fact, evidence, and even science. If the juvenile brain is so distinct and different from that of an adult, and if those differences are so clear that they can be demonstrated in functional Magnetic Resonance Imaging (fMRI) and scientific studies, we may need to change the way we treat juvenile offenders. This includes reconsidering the circum-

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14. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham*, 130 S. Ct. 2011.

15. *Miller*, 132 S. Ct. at 2460.

16. *Id.* at 2464-66.

17. See, e.g., Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KAN. L. REV. 1103 (2008); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006).

18. See *Miller*, 132 S. Ct. at 2475.

19. *Id.*

20. *Id.*

21. *Id.*

stances under which juvenile offenders are transferred to adult courts, the circumstances of their detention or interrogation, the capacity of juveniles for rehabilitation both within and without institutions, and the programs that juveniles receive.

## II. EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS: BEFORE *MILLER*

The Supreme Court's Eighth Amendment case law reflects a continuing debate regarding whether the Constitution compels a constitutional proportionality principle for non-capital cases at all.<sup>22</sup> To some Supreme Court justices, proportionality analysis is not within the competency of the American judiciary or, worse yet, is not even within a judge's legitimate role.<sup>23</sup> As I have described elsewhere, according to this view "[proportionality analysis in criminal justice] is somehow too policy-centered, too 'activist.' It is a task best left to the legislature, or in the case of the federal sentencing guidelines, to an 'independent' agency in the judicial branch the United States Sentencing Commission."<sup>24</sup>

The debate played out most acutely in *Ewing v. California*.<sup>25</sup> In *Ewing*, a plurality of the Court held that a sentence is not unconstitutionally excessive so long as it can be justified under any one of the traditional justifications for punishment.<sup>26</sup> To the plurality, the fact that the Constitution is not clear regarding the metes and bounds of "cruel and unusual punishment" as applied to imprisonment<sup>27</sup> means that the Court should not venture far to critically

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22. Lee, *supra* note 7, at 692.

23. See *supra* notes 8-10 and accompanying text.

24. *On Competence, Legitimacy, and Proportionality*, *supra* note 4, at 1587. In fact, these attitudes are reflected not merely in constitutional litigation. They are currently reflected in the appeals courts' inability to give meaning to substantive reasonableness sentencing review, even after *United States v. Booker* freed them to do so, and even in light of the United States Sentencing Commission's inability to rank offenses based on any coherent proportionality principle.

25. 538 U.S. 11 (2003).

26. *Id.* at 25, 29-30 (plurality opinion). In *Ewing*, no position had a majority other than the general holding that the punishment was constitutionally valid. See *id.* at 30 (plurality opinion); *id.* at 32 (Scalia, J., dissenting); *id.* (Thomas, J., dissenting). The plurality opinion of Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* at 14 (plurality opinion).

27. See *id.* at 21-24. Small wonder; at the time of the Constitution's drafting, there were few penitentiaries. Samuel H. Pillsbury, *Criminal Law: Understanding Penal Reform: The Dynamic of Change*, 80 J. Crim. L. & Criminology 726, 729-730 (1989) (describing the movement concentrated between 1790 and 1830, from the "gallows, whipping post, stocks, and pillory" to "massive structures [i.e. penitentiaries], built in urban and rural areas, designed for collective incarceration and reform of a region's criminals). Most crimes were capital offenses. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J.

evaluate prison terms. To choose one penological purpose over others and evaluate the sentence in reference to that purpose would be to overstep the Court's role. Therefore, where imprisonment was concerned, the Court was simply not a significant institutional player.<sup>28</sup> Since the "traditional justifications of punishment" – retribution, rehabilitation, incapacitation, and deterrence – can justify virtually anything when broadly construed, the Court's decision amounts to a near absolute deference to the legislature's choices of punishments.<sup>29</sup> In effect, a prison term can never be cruel and unusual no matter how long.<sup>30</sup>

As a result, the Court sustained a twenty-five years to life sentence under California's three strikes law, triggered by Ewing's conviction for stealing three golf clubs while on parole from a nine-year prison term and after accumulating a lengthy criminal record (largely for theft).<sup>31</sup> General, ill-defined notions of deterrence and incapacitation were sufficient to justify the sentence.<sup>32</sup> According to the plurality, "[t]he recidivism statute is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole."<sup>33</sup> And, the plurality continued, the legislature is better suited to make "societal decisions" than the Court: "[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment, and . . . successful challenges to the proportionality of particular sentences should be exceedingly rare."<sup>34</sup> "Indeed, Justice Scalia, concurring in the judgment, was characteristically more emphatic: The proportionality principle, unmasked, raises policy questions, not issues of law, and policy questions do not belong in the courts."<sup>35</sup> As Justice Clarence Thomas noted, the Eighth Amendment's cruel

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CRIM. L. & CRIMINOLOGY 691, 692-94 (2010); see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 928 (1994).

28. See Lee, *supra* note 7, at 729 n.246.

29. See *Ewing*, 538 U.S. at 29-31 (plurality opinion); Lee, *supra* note 7, at 682.

30. Justice John Paul Stevens, concurring in *Graham*, underscored the centrality of proportionality review in cases of imprisonment. *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring). He said, "[U]nless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete." *Id.*

31. *Ewing*, 538 U.S. at 17-20, 30-31 (plurality opinion).

32. *Id.* at 29-30.

33. *Id.* at 21 (quoting *Rummell v. Estelle*, 445 U.S. 263, 278 (1980)) (internal quotation marks omitted).

34. *Id.* at 22 (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982)) (internal quotation marks omitted).

35. *On Competence, Legitimacy, and Proportionality*, *supra* note 4, at 1589-90 (citing *Ewing*, 538 U.S. at 32 (Scalia, J., concurring)). Justice Scalia stated:

Perhaps the plurality should revise its terminology, so that what it reads into the Eighth Amendment is not the unstated proposition that all punishment

and unusual clause does not contain a “proportionality principle.”<sup>36</sup> Rather, it “leaves the unavoidably moral question of who ‘deserves’ a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty. . . .”<sup>37</sup>

Significantly, the Court in *Ewing* – and earlier in *Solem v. Helm*<sup>38</sup> – recognized, but did not apply, an empirical, comparative approach that was more determinate and more than just some diffuse choice amongst values, as Justice Scalia suggested. The *Solem* approach looks to three factors to determine whether a sentence is so disproportionate that it violates the Eighth Amendment: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”<sup>39</sup> Factors (ii) and (iii) root the Court’s evaluation in concrete facts – how the same jurisdiction punishes other crimes and how other jurisdictions punish the same crime – in much the same way as an equal protection analysis.<sup>40</sup> Nevertheless, the plurality in *Ewing* refused to apply this approach in all Eighth Amendment cases dealing with imprisonment.<sup>41</sup> On the contrary, it held that the Eighth Amendment “‘did not mandate’ [a] comparative analysis ‘within and between jurisdictions.’”<sup>42</sup>

The *Ewing* plurality’s approach, as a general matter, contradicts that of common law courts around the world.<sup>43</sup> Proportionality analysis is a quintessential judicial methodology, essential in dealing with criminal punishment.<sup>44</sup> Although its meaning varies in different settings, it is the currency of consti-

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should be reasonably proportionate to the gravity of the offense, but rather the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law. That formulation would make it clearer than ever, of course, that the plurality is not applying law but evaluating policy.

*Ewing*, 538 U.S. at 32 (Scalia, J., concurring).

36. *Ewing*, 538 U.S. at 32 (Thomas, J., concurring).

37. *Graham v. Florida*, 130 S. Ct. 2011, 2045 (2010) (Thomas, J., dissenting).

38. 463 U.S. 277 (1983).

39. *Ewing*, 538 U.S. at 22 (plurality opinion) (quoting *Solem*, 463 U.S. at 292) (internal quotation marks omitted).

40. See *Watkins v. U.S. Army*, 837 F.2d 1428, 1440 (9th Cir. 1988) (“[T]he practical difficulties of defining the requirements imposed by equal protection, while not insignificant, do not involve the judiciary in the same degree of value-based line-drawing that the Supreme Court . . . found so troublesome in defining the contours of substantive due process.”), *vacated and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

41. *Ewing*, 538 U.S. at 23 (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

42. *Id.* (quoting *Harmelin*, 501 U.S. at 1004-05).

43. See, e.g., Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1, 9-10 (2010).

44. *Solem*, 463 U.S. at 290.

tutional analysis for common law high courts,<sup>45</sup> as well as the *lingua franca* in ordinary sentencing.<sup>46</sup>

### III. DEATH PENALTY AND PROPORTIONALITY

Notwithstanding these general trends, death penalty jurisprudence before *Miller* and *Graham* was *sui generis* – the “death is different” rationale.<sup>47</sup> Under this rationale, the Court has been willing to draw substantive limits and impose procedural requirements.<sup>48</sup> The substantive limits, as I have suggested, comprise proportionality analyses at the margins – the determination that there are “mismatches between the culpability of a class of offenders and the severity of a penalty,”<sup>49</sup> based on the “evolving standards of decency.”<sup>50</sup> As such, the Court has concluded that the death penalty is disproportionately harsh for certain categories of offenses, such as non-homicide offenses or rape,<sup>51</sup> and for certain categories of offenders; namely, those under the age of eighteen<sup>52</sup> or those who are mentally disabled.<sup>53</sup> In effect, the Court’s majority considers itself competent to create broad rules with respect to the binary determination of life or death, but not with respect to the scalable punishments like imprisonment.

In addition, the Court obviously has faith in its competence to carve out procedural rules for the death penalty that cut across offender categories and the legitimacy of the enterprise. Procedural rules, as the late Professor William Stuntz observed, are easy for courts.<sup>54</sup> The imposition of the death pen-

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45. See generally Barak, *supra* note 44; Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004) (reviewing DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004)).

46. Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 217 (2010) (reviewing E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* (2008)).

47. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009).

48. See *id.*

49. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

50. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

51. *Id.* at 446; *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

52. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the execution of a person who was under 18 years of age at the time of his or her offense violated the Eight Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (holding that the execution of a person who was under 16 years of age at the time of his or her offense violated the Eight Amendment).

53. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

54. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).



alty, for example, requires a death-qualified jury,<sup>55</sup> and in an area most relevant to *Miller*, an individualized determination by that jury considering the characteristics of the defendant and the details of his offense.<sup>56</sup>

#### IV. *MILLER*, *GRAHAM* AND THE EIGHTH AMENDMENT

*Graham* was the first decision in which the Court applied the Eighth Amendment to effect what Justice Kagan rightly characterized as an “unprecedented” ban on a sentence’s use for a term of imprisonment.<sup>57</sup> It barred the application of a life without parole sentence for juveniles in cases that did not involve a homicide.<sup>58</sup> *Miller* went further, addressing mandatory life without parole for juveniles in a homicide prosecution, but it did so narrowly.<sup>59</sup> The issue was not the length of the sentence itself, or even the fact that the offender could never qualify for parole. Rather, the issue was the automatic nature of the punishment’s imposition.<sup>60</sup> A mandatory life without parole sentence “prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change’ and runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.”<sup>61</sup>

To be sure, Justice Kagan’s rationale and language are much broader than the holding. The right to an individualized sentence for defendants facing “the most serious penalties” is a right that could apply as well to mandatory life without parole as to a mandatory minimum twenty or twenty-five year term.<sup>62</sup> The decision even reaffirms a proportional approach to sentencing in general.<sup>63</sup> The Eighth Amendment’s prohibition against cruel and unusual punishment, the Court notes, “flows from the basic precept . . . that punishment for crime should be graduated and proportioned to both the offender and the offense.”<sup>64</sup>

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55. See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

56. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

57. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

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

59. *Miller*, 132 S. Ct. at 2469.

60. *Id.* at 2475.

61. *Id.* at 2460 (citations omitted) (quoting *Graham*, 130 S. Ct. at 2026-27, 2029-30).

62. See Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087 (2013) (suggesting how an Eighth Amendment balancing approach might apply to the mandatory life without parole sentence established by 21 U.S.C. § 841(b)(1)(A) for repeat drug offenders).

63. See *Miller*, 132 S. Ct. at 2463.

64. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)) (internal quotation marks omitted).

And as to the question of competence – or the ability of courts to conduct this kind of analysis – Justice Kagan emphasizes the teachings of neuroscience first articulated in *Graham*.<sup>65</sup> Her analysis is not just the armchair musings of parent, or the normative judgments of a policy maker;<sup>66</sup> this is *science*. As in *Graham*, the Court underscores the fact that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” especially in “parts of the brain involved in behavior control.”<sup>67</sup> Significantly, the juvenile brain is perfectible, with greater prospects for reform.<sup>68</sup> That science makes it difficult to say – as the plurality did in *Ewing*<sup>69</sup> – that a mandatory life without parole sentence was justified by any penological purpose and makes judicial deference to such sentences impossible.

The principles articulated by the majority could apply to any non-parole sentence of a juvenile, or to any punishment that fails to allow for a juvenile’s capacity for growth and change. It could even apply to any lengthy term of years for a juvenile. More generally, if there were anything like a right to an individualized sentence for defendants facing the most serious penalties, it would cast a shadow on lengthy mandatory minimum sentences where, for example, the imposition of a twenty-year term follows directly from a judge or jury’s finding of liability.

The Court’s analysis of what individualized sentencing might have looked like in this case strongly disfavors a life term for almost any eighteen year old. The characteristics that the Court highlighted could well be found in a number of juvenile cases. With respect to the crime, Kuntrell Jackson, the other defendant whose case was consolidated with Evan Miller’s before the Supreme Court, was simply an aider and abettor, which is hardly unusual.<sup>70</sup> Juveniles are typically “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”<sup>71</sup> Jackson found out on the way to the video store – the scene of the crime – that one of his friends had a gun, but his age could have affected his understanding of the risk.<sup>72</sup> As compared to adults, juveniles lack maturity and have “an underdeveloped sense of responsibility.”<sup>73</sup> Also, while he had a family background of vio-

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65. *Id.* at 2464-65.

66. *See id.* at 2464 (“Our decisions rested not only on common sense – on what ‘any parent knows’ – but on science and social science as well.”).

67. *Id.* at 2464 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)) (internal quotation marks omitted).

68. *Id.* at 2458.

69. *Ewing v. California*, 538 U.S. 11, 30-31(2003) (plurality opinion).

70. *Miller*, 132 S. Ct. at 2468.

71. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

72. *Miller*, 132 S. Ct. at 2461.

73. *Id.* at 2464 (quoting *Roper*, 543 U.S. at 569) (internal quotation marks omitted).

lence,<sup>74</sup> this background did not necessarily forecast his future. Juveniles have characters that are “not as well formed” as those of adults, with a greater capacity for change.<sup>75</sup> Miller, who actually committed the homicide, was drunk and high on drugs that had been consumed with his adult victim.<sup>76</sup> Thus, the Court noted, “That Miller deserved severe punishment for killing [the victim] is beyond question. But . . . a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.”<sup>77</sup>

In fact, the majority’s characterization of a right to an individualized sentencing comes closer than any recent decision to what is described in Australia as “intuitive synthesis,”<sup>78</sup> a sentencing approach “in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge.”<sup>79</sup> Australian judges have eschewed any effort by legislatures to systematize sentencing with guidelines, formulae, and numbers that would anchor their analysis, underscoring the institutional role of judges in sentencing individuals.<sup>80</sup>

But the Court went to great lengths to suggest that it had not gone so far, and that this was the familiar categorical approach married to a familiar procedural one – the right to an individualized sentence for the harshest imprisonment sanction, but only with respect to a particular category of offenders: juveniles.<sup>81</sup> It was not life without parole that triggered the constitutional objection for those under eighteen years old; it was the mandatory nature of the punishment.<sup>82</sup> The Court melded the “death is different” approach, now extended to mandatory life without parole sentences, to the “children are different” principles of *Graham*.<sup>83</sup>

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74. *Id.* at 2468.

75. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

76. *Miller*, 132 S. Ct. at 2462.

77. *Id.* at 2469.

78. Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?*, 76 LAW & CONTEMP. PROBS. 265, 268 (2013) (citing *Markarian v. The Queen*, 228 CLR 347, 374 (2005)).

79. *Id.*

80. *Id.* at 269.

81. *Miller*, 132 S. Ct. at 2469.

82. *Id.* at 2463-64.

83. *Id.* at 2470. The Court distinguishes *Harmelin v. Michigan*, in which the Court upheld a mandatory life without parole sentence for a defendant convicted of possessing more than 650 grams of cocaine, reasoning that “a sentence which is not otherwise cruel and unusual [does not become] so simply because it is ‘mandatory.’” *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991)). While individualized sentencing applied in the death penalty context, it did not apply to non capital cases “because of the qualitative difference between death and all other penalties.” *Harmelin*, 501 U.S. at 995. *Harmelin*, the Court noted, “had nothing to do with children.” *Miller*, 132 S. Ct. at 2470. “[A] sentencing rule permissible for adults may not be so

V. *MILLER* AND OTHER GENERIC CATEGORIES

To be sure, as the symposium's panels suggested, *Miller* may lead the way to the exclusion of other categories of offenders that neuroscience shows are the functional equivalents of adolescent offenders. One could envision the Court considering data that shows that a class of defendants with a particular diagnosis of mental impairment has a distinctive fMRI signature mirroring that of an adolescent. Or one could present the brain profiles of addicts, which may well present like those of juveniles, to the extent that they demonstrate an impaired capacity for impulse control together with meaningful capacity to change with treatment over time.<sup>84</sup> *Miller* might also be extended to juvenile sentences that are the functional equivalent of life imprisonment – a mandatory minimum lengthy term of years. The analysis may not be a broad proportionality approach or a general right to an individualized sentence but it would extend *Miller* to categories comparable to the under eighteen category or mandatory “life without parole” category.

VI. *MILLER* AND JUVENILES

One thing is clear: *Miller* and *Graham* surely opened up a new discussion about the criminal justice system's approach to juveniles. It has arguably put the brakes on the movements of the past decades, which have seen juvenile offenders treated more and more as adults.<sup>85</sup> In addition, it has sparked meaningful debate about whether or not children should receive adult sentences, which is now grounded in data and science; that debate is being played out in both federal and state courts.<sup>86</sup> To take one example, courts have been grappling with the impact of *Miller* on the consideration of whether adult convictions stemming from crimes committed before the age of eighteen can count towards the career offender sentencing provisions of the Federal Sentencing Guidelines.<sup>87</sup>

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for children.” *Id.* Just as “death is different,” the Court noted, “children are different too.” *Id.*

84. To be sure, the analogy is imperfect. Neither addicts nor the mentally impaired necessarily present the same picture as that of an adolescent that the Court painted, namely capability to be reformed. See, e.g. Richard A. Millstein and Alan I. Leshner, The Science of Addiction: Research and Public Health Perspectives, 3 J. HEALTH CARE L. & POL'Y 151, 156 (1999).

85. See Kimberly Larson, Frank DiCataldo, & Robert Kinscherff, *Miller v. Alabama: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. & CIV. CONFINEMENT 319, 322-23 (2013).

86. See, e.g., *Chambers v. Minnesota*, 831 N.W.2d 311, 328-29 (Minn. 2013).

87. See generally Andrew Tunnard, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines*, 66 VAND. L. REV. 1309 (2013).

There is judicial resistance to these proposed changes, deriving perhaps from decades of judicial evasion of all Eighth Amendment challenges, despite the imposition of legislative punishments that were progressively onerous and disproportionate. Some courts have refused to apply *Miller* at all, concluding that it is not retroactive.<sup>88</sup> Other courts have ignored the decision's broad themes, focusing instead on its narrow holding and going so far as to reaffirm lengthy sentences for juveniles after an ostensibly "individualized" determination.<sup>89</sup> A bill has been proposed in the Texas Senate that would require a life sentence for murder, adding parole eligibility after forty years.<sup>90</sup> The Texas House indicated that it wants to give juries the option to sentence seventeen year olds to life without parole so long as other factors are considered.<sup>91</sup>

## VII. CONCLUSION

Let me be clear: *Miller* is not about an activist court meddling with legislative prerogatives, as the dissenting justices would suggest. Rather, this is about a Court finally – *finally* – calling a halt to ceding all punishment decisions to the legislature without a modicum of judicial and constitutional checks and balances. While the stunted role that the Supreme Court has adopted for itself in Eighth Amendment challenges has led to a limited holding in this case – limited by the sentence, mandatory life imprisonment, and by the age of the offender, under eighteen – the Court's willingness to critically evaluate a legislature's draconian punishments in the light of scientific data offers the possibility that it will put the brakes on America's carceral state.

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88. *Chambers*, 831 N.W.2d at 328-29.

89. *See, e.g.*, *United States v. Nguyen*, CR 2:99-00433-05 WBS, 2013 WL 2151558, at \*7 (E.D. Cal. May 16, 2013).

90. Brandi Grissom, *Young Killers Await Change in Mandatory Life Sentences*, N.Y. TIMES, July 4, 2013, at A15. <http://www.nytimes.com/2013/07/05/us/young-killers-in-texas-await-change-in-mandatory-life-sentences.html>.

91. *Id.*