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**DEVELOPMENTAL DETOUR: HOW THE MINIMALISM OF
MILLER V. ALABAMA LED THE COURT’S “KIDS ARE
DIFFERENT” EIGHTH AMENDMENT JURISPRUDENCE
DOWN A BLIND ALLEY**

Mary Berkheiser†*

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|------|---|-----|
| I. | The Setting: <i>Graham v. Florida</i> | 491 |
| II. | The Decision..... | 493 |
| III. | Unprincipled | 501 |
| IV. | Unsound..... | 507 |
| V. | Misguided Caution | 514 |
| VI. | Conclusion | 517 |

The juvenile justice community applauded the Supreme Court’s decision in *Miller v. Alabama*,¹ which struck down mandatory life without parole sentences for all juvenile homicide offenders.² No longer will courts be required to condemn to death in prison persons not yet adults for homicides committed in their youth.³ Instead, sentencers now must consider the mitigating factors that are the essence of childhood and adolescence and that animate the lives of young offenders.⁴ In this respect, the Court followed *Graham v. Florida*⁵ and once again traversed

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1. 132 S. Ct. 2455 (2012)

2. See, e.g., *U.S. Supreme Court Bans Mandatory Life-Without- Parole Sentences for Children Convicted of Homicide*, EQUAL JUSTICE INITIATIVE (June 25, 2012), <http://www.eji.org/eji/node/646>; *Supreme Court Rules Mandatory JLWOP Unconstitutional*, NAT’L JUVENILE DEFENDER CTR, <http://www.njdc.info/news.php> (last visited Mar. 9, 2013).

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

4. *Id.* at 2467-68.

5. 130 S. Ct. 2011 (2010).

the divide between capital and noncapital cases,⁶ granting to noncapital defendants the individualized consideration in sentencing historically reserved for those facing the death penalty.⁷

To be sure, this is an advance for those facing the harshest of all penalties for the young. But it is only a step forward.⁸ The *Miller* Court opted for the narrower of two rulings sought by petitioners Evan Miller and Kuntrell Jackson.⁹ Instead of striking down all life without parole sentences for juveniles as cruel and unusual, the Court merely banned the mandatory imposition of that harshest of all penalties constitutionally permissible for minors convicted of murder.¹⁰ Thus, it remains constitutional even for fourteen-year-olds like Evan Miller and Kuntrell Jackson to be sentenced to life without parole, so long as they receive individualized consideration at sentencing.¹¹ Given the developmental factors setting juveniles apart from adults, as recognized first by *Roper v. Simmons*¹² in 2005 and then by *Graham*¹³ five years later, the requirement that those who sentence consider young defendants' individual histories is an important development.

History has shown, however, that the individualized consideration now required before sentencing our young to death in prison is no friend to youth.¹⁴ Before the Supreme Court banned the death penalty for those under eighteen years of age, it had long required each of the youthful offenders who populated death row (or were executed before *Roper*) to receive the same individualized consideration the Court has now mandated before the imposition of a sentence of life without parole on a

6. *Miller*, 132 S. Ct. at 2463-64 (citing *Graham*, 130 S. Ct. at 2022).

7. *Miller*, 132 S. Ct. at 2467-68 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)).

8. See David R. Dow, *Don't Believe the Hype: Supreme Court Decision on Juvenile Life Without Parole Is Weak*, THE DAILY BEAST (June 25, 2012, 5:38 PM EDT), <http://www.thedailybeast.com/articles/2012/06/25/don-t-believe-the-hype-supreme-court-decision-on-juvenile-life-without-parole-is-weak.html> (criticizing the ruling as being "tepid and narrow," failing "to do anything morally important," and representing "incrementalism at its worst" and opining that "you have to have awfully low standards to think this decision marks much by way of progress when it comes to criminal punishment.").

9. See Petition for Writ of Certiorari at 9-30 *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2011 WL 5322568 at *9-29; Petition for Writ of Certiorari at 8-25, 31-35 *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012) (No. 10-9647), 2011 WL 5322575 at *8-25, *31-35. The Supreme Court consolidated *Jackson* with *Miller* for decision. See *Miller*, 132 S. Ct. at 2455.

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

11. *Id.*

12. *Roper v. Simmons*, 543 U.S. 551, 568-71 (2005).

13. *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010).

14. See *infra* text accompanying notes 151-206.

juvenile.¹⁵ After considering the mitigating factors owing to their youth, none of the juvenile offenders in these cases were saved from society's harshest penalty.¹⁶ There is little reason to believe that Evan Miller or Kuntrell Jackson will fare any better. With its narrow ruling, *Miller* has taken the Eighth Amendment *kids are different* jurisprudence on a deleterious detour that could lead Miller and Jackson and others like them to a certain dead end.

Where *Miller* went wrong is the subject of this paper. It begins with *Graham* and the significance of the Court's ruling that the Eighth Amendment categorically precludes imposition of a sentence of life without parole on a juvenile nonhomicide offender. Next, this paper turns to the Supreme Court's decision in *Miller*, parsing the Court's reliance on precedent and the reasoning that led it to adopt a ruling that stops short of a categorical ban on life without parole for all juvenile homicide offenders. This paper then launches a critique of *Miller*, arguing that it is both unprincipled and unsound because of its failure to rule categorically that the Eighth Amendment prohibits the imposition of life without parole on a juvenile regardless of the crime. This paper concludes by offering as an explanation for the Court's limited ruling the judicial minimalism that characterizes the Roberts Court and by explaining how minimalism fails the criminal justice system in this case.

I. THE SETTING: *GRAHAM V. FLORIDA*

The Supreme Court's landmark 2010 decision, *Graham v. Florida*,¹⁷ set the stage for *Miller*. Like *Miller*, *Graham* was a challenge to a noncapital sentence—a sentence of life without parole for a juvenile nonhomicide offender.¹⁸ To grant relief to those juvenile offenders, the Court first had to stare down its noncapital Eighth Amendment jurisprudence and forge an alternate route.¹⁹ The reigning precedent for

15. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (requiring sentencing court to consider as mitigating circumstances defendant's troubled upbringing and youth, including an alcoholic mother who prostituted herself and a father who used excessive physical punishment, and his own emotional disturbance and delayed cognitive development). See generally Mary Berkheiser, *Capitalizing Adolescence: Juvenile Offenders on Death Row*, 59 U. MIAMI L. REV. 135 (2005) (cataloging peer involvement in crimes and related information for the seventy-two juvenile offenders on death row at the time of the *Roper* decision).

16. Berkheiser, *supra* note 15.

17. 130 S. Ct. at 2011.

18. *Id.* at 2017-18.

19. See Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court's 'Kids Are Different' Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 5-7 (2011) (analyzing the Court's first ever reliance on death penalty cases to decide an Eighth Amendment

the Supreme Court's noncapital Eighth Amendment jurisprudence was then and remains today *Harmelin v. Michigan*,²⁰ which abandoned the three-part proportionality analysis adopted by *Solem v. Helm*²¹ and established a "gross disproportionality" standard as the threshold consideration.²² In the more than two decades between *Harmelin* and *Graham*, the Supreme Court had applied *Harmelin* only twice, ruling in both cases that sentences of twenty-five years to life for minor property offenses under California's "three strikes" law were not grossly disproportionate and, therefore, passed constitutional muster.²³

Graham rejected *Harmelin*'s niggardly approach and plotted a different course.²⁴ In an historic stride, the *Graham* Court applied the thorough-going analysis traditionally reserved for death penalty cases to the life without parole sentence Terrence Graham had received for the crime of armed burglary.²⁵ The Court did so, it said, because Graham had challenged an entire sentencing practice and not just the sentence imposed on him.²⁶ Thus, the proper analysis was that employed in other cases establishing categorical rules, even though all of those cases had

challenge to a noncapital sentence); Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L.L. REV. 457, 459 (2012) (commenting on the "death is different" jurisprudence requiring that "capital sentences are reviewed with extremely careful scrutiny" while review of noncapital cases has been "'so deferential to state interests as to make Eighth Amendment challenges to excessive incarceration essentially non-starters'") (quoting Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008)). See also Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 713-14 (1995) (stating "the 'death is different' campaign of opponents of capital punishment [has] won capital defendants certain additional protections, but only at the considerable cost of lumping together all other penalties under the rubric of 'noncapital' punishments, thereby effectively shielding incarceration from constitutional scrutiny.").

20. 501 U.S. 957 (1991).

21. 463 U.S. 277, 290-92 (1983) (setting out three factors to guide noncapital proportionality review: (1) the gravity of the offense and the harshness of the penalty, (2) comparison of the sentences imposed on other criminals in the same jurisdiction, and (3) comparison of the sentences imposed for the same crime in other jurisdictions). See *Harmelin*, 501 U.S. at 965 (opinion by Scalia, J., joined by Rehnquist, C.J.) (explicitly rejecting the *Solem* three-part test).

22. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (concluding that to get to the intrastate and interstate comparisons required by *Solem*, the Court first had to determine that the sentence was "grossly disproportionate" to the crime).

23. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (stating that the gross disproportionality principle was to be reserved for the "extraordinary case," and Andrade's two consecutive terms of twenty-five years to life for shoplifting videotapes valued at approximately \$150 was not such a case); *Ewing v. California*, 538 U.S. 11, 30 (2003) (plurality opinion) (recognizing that Ewing's twenty-five years to life sentence for stealing golf clubs valued at slightly less than \$1,200 was long, but not grossly disproportionate).

24. *Graham v. Florida*, 130 S. Ct. 2011, 2022-23 (2010).

25. *Id.*

26. *Id.* at 2022.

involved the death penalty.²⁷ Of the three most recent cases adopting categorical rules, the first was *Atkins v. Virginia*,²⁸ in which the Court ruled that the Eighth Amendment prohibited the death penalty for a mentally retarded individual. The second case, *Roper v. Simmons*,²⁹ held similarly that executing one who committed his crime before the age of eighteen was cruel and unusual and, therefore, unconstitutional. Finally, *Kennedy v. Louisiana*³⁰ established that the death penalty for the rape of a child was off-limits under the Eighth Amendment. All three cases, like *Graham*, were categorical challenges to sentences imposed on a certain category of offenders or for a certain category of offenses. The fact that all three were death penalty cases did not give the *Graham* Court pause because what mattered was that the challenge embraced all juveniles as a category of nonhomicide offenders.³¹

Following *Graham*'s lead, Evan Miller and Kuntrell Jackson raised categorical challenges to the mandatory life without parole sentences they received after being convicted of murder.³² They also challenged the mandatory nature of their life without parole sentences.³³ Although the Court ultimately ruled in their favor, they did not receive the full measure of relief they had sought. Nor did the Court's decision live up to the promise of *Roper* and *Graham*'s *kids are different* Eighth Amendment jurisprudence.

II. THE DECISION

The *Miller* Court began and ended its legal analysis by looking to *Roper* and *Graham*. Front and center in that analysis was the proportionality requirement of the Eighth Amendment.³⁴ The Court quoted *Roper* for the century-old "'precept of justice that punishment for a crime should be graduated and proportioned' to both the offender and the offense."³⁵ Only in this way, the Court declared, is the Eighth

27. *Id.* at 2022-23.

28. 536 U.S. 304 (2002).

29. 543 U.S. 551 (2005).

30. 554 U.S. 407 (2008).

31. See Guggenheim, *supra* note 19, at 461 (arguing that, given the weaknesses in Justice Kennedy's finding of a national consensus against the use of life without parole for juvenile nonhomicide offenders, "[o]ne can confidently say . . . that the majority felt strongly that this punishment is morally wrong").

32. Miller Petition, *supra* note 9, at 9-25; Jackson Petition, *supra* note 9, at 8-25.

33. Miller Petition, *supra* note 9, at 26-29; Jackson Petition, *supra* note 9, at 31-35.

34. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012) (quoting *Graham*, 130 S. Ct. at 2021).

35. *Id.* (quoting *Roper*, 543 U.S. at 560 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

Amendment right of every individual “not to be subjected to excessive sanctions” guaranteed.³⁶

With proportionality as its lodestar, the Court then pivoted to two strands of sentencing precedent.³⁷ As it had done for the first time in *Graham*,³⁸ the Court looked to its death penalty jurisprudence for guidance in this non-death case.³⁹ Turning first to its cases that had adopted categorical prohibitions on sentencing, the Court cited its most recent trilogy of capital cases, in which it had put the death penalty off-limits for mentally retarded persons,⁴⁰ for juvenile offenders,⁴¹ and for the crime of raping a child.⁴² The Court then recognized that, with *Graham*, it had held that the same categorical bar applied to the noncapital sentence of life without parole for nonhomicide offenses imposed on juvenile offenders.⁴³ In part, because *Graham* had “likened life without parole for juveniles to the death penalty,”⁴⁴ the *Miller* Court extended its reach into death penalty law by embracing a second line of precedents that barred mandatory death sentences and required individualized consideration of the details of both the offender and the offense.⁴⁵ It was the “confluence of these two lines of precedent” that led the Court to conclude that the Eighth Amendment prohibits mandatory life without parole sentences for juvenile homicide offenders.⁴⁶

The Court took care to demonstrate that the principles that first

36. *Id.* (quoting *Roper*, 543 U.S. at 560).

37. *Id.*

38. See Berkheiser, *Death Is Not So Different*, *supra* note 19, at 5-7 (discussing the Court’s original reliance on death penalty cases to decide an Eighth Amendment challenge to a non-death case); Alison Siegler & Barry Sullivan, “*Death is Different*” No Longer: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327 (2010) (discussing the Court’s decision in *Graham* to apply the categorical approach to a noncapital case); Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010) (noting application of categorical exclusions to nonhomicide offenses committed by juveniles).

39. *Miller*, 132 S. Ct. at 2463-64.

40. *Id.* at 2463 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

41. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

42. *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

43. *Id.* (citing *Graham v. Florida*, 130 S. Ct. 2011 (2010)).

44. *Id.*

45. *Id.* at 2455 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (striking down mandatory death penalty because it did not permit consideration of individual characteristics of the offender or the circumstances of the offense and excluded from consideration “the possibility of compassionate or mitigating factors”); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) (striking down Ohio death penalty statute because it did not permit the type of individualized consideration of mitigating factors required by the Eighth Amendment).

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

guided *Roper* and then *Graham* applied with equal force to life without parole sentences for homicides: “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”⁴⁷ However, the Court stopped short of the categorical ruling it rendered in *Graham*. The Court announced that although “*Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile, . . . its categorical ban relates only to nonhomicide offenses.”⁴⁸ Instead of a categorical ruling against all life without parole sentences for juveniles, the Court adopted a ban only on the mandatory imposition of such sentences.⁴⁹

As the foundation for that ban, the Court cataloged in detail what has now become unassailable—that juveniles are “constitutionally different from adults for purposes of sentencing.”⁵⁰ Calling upon *Roper* and *Graham*, the Court recognized, as those cases had, “three significant gaps between juveniles and adults”:⁵¹ first, juveniles lack maturity and a developed sense of responsibility, leading to “recklessness, impulsivity, and heedless risk-taking”;⁵² second, juveniles are more vulnerable to peer pressures and other negative influences and cannot leave their often terrible home environments;⁵³ and third, juveniles’ characters are not as established as adults’.⁵⁴ These differences, the Court said, cause juveniles to have diminished culpability and stronger prospects for reform than adults, and thus make them “less deserving of the most severe punishments.”⁵⁵ Nonetheless, after the Court’s ruling, all juveniles convicted of homicides still may face a sentence of life without parole, which means certain death in prison. The difference pre- and post-*Miller* is in the details.

The rationale for the Court’s rejection of the categorical ruling sought by both *Miller* and *Jackson* is not transparent,⁵⁶ but the reason for

47. *Id.* at 2465.

48. *Id.*

49. *Id.* at 2475.

50. *Id.* at 2464.

51. *Id.*

52. *Id.* at 2465

53. *Id.*

54. *Id.*

55. *Id.* (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)). The Court noted that its decisions concerning juvenile sentencing rest not only on common sense but on science and social science as well. *Id.* at 2464-65 & n.5 (citing Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 3-4 *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647), 2012 WL 174239 at *3-4; Brief for J. Lawrence Aber et al. as Amici Curiae in Support of Petitioners at 12-28 *Miller*, 132 S.Ct. 2455 (Nos. 10-9646, 10-9647), 2012 WL 195300 at *12-28).

56. The Court’s jurisprudential approach of adopting a narrower rule that decided the cases

striking down mandatory life without parole sentences is clear: mandatory sentencing schemes prevent the sentencer from considering the offender's status as a juvenile and all that entails.⁵⁷ Such sentencing with blinders on, the Court explained, contravenes the foundational principle of both *Roper* and *Graham* "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."⁵⁸

Among the factors that must be considered at capital sentencing, the Court said, are the "mitigating qualities of youth."⁵⁹ The Court relied, in particular, on its decision thirty years earlier in *Eddings v. Oklahoma*.⁶⁰ In *Eddings*, a sixteen-year old shot and killed a police officer and was sentenced to death. The Court overturned his death sentence, reasoning that the sentencing judge did not consider his "neglectful and violent family background (including his mother's alcoholism and his father's physical abuse) and his emotional disturbance."⁶¹ The Court noted that *Eddings* found such evidence more relevant for sentencing a youthful defendant than an adult because "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability."⁶²

The Court was troubled that, absent consideration of the mitigating features of adolescence, every juvenile convicted of homicide, regardless of age or level of participation in the crime, would receive the same sentence as "the vast majority of adults committing similar homicide

before it without making a sweeping pronouncement enjoys a long history in the jurisprudence of the Court. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4, 8, 17-19 (1999) (explaining the "legitimate role" of the Supreme Court in our constitutional order and the philosophical approach identified as "decisional minimalism," which eschews ambitious theoretical doctrines and strives to do no more than is necessary to decide cases). See *infra* text accompanying notes 207-217.

57. *Miller*, 132 S. Ct. at 2466-68 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (recognizing necessity of considering youth in capital sentencing decisions); *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987) (prohibiting mandatory death penalty for murderers already serving life without parole); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (vacating death sentence where state courts had refused to consider defendant's youth and his "unhappy upbringing" and emotional disturbance as mitigating factors); *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion) (requiring judges and juries to consider all mitigating evidence)).

58. *Miller*, 132 S. Ct. at 2466.

59. *Id.* at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

60. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

61. *Id.* (quoting *Eddings*, 455 U.S. at 115).

62. *Id.* (quoting *Eddings*, 455 U.S. at 116).

offenses.”⁶³ This is so because even though adults are subject to the death penalty in many jurisdictions, “very few offenders actually receive that sentence.”⁶⁴ Thus, mandatory life without parole subjects juvenile homicide offenders to “the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.”⁶⁵ Even then, the penalty imposed on an adolescent is “the same . . . in name only”⁶⁶ as the penalty imposed on an adult because an adolescent will serve “more years and a greater percentage of his life in prison than an adult offender.”⁶⁷ Having recognized the demonstrable lack of proportionality inherent in those mandatory sentences, the Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”⁶⁸

With that holding, the Court finished defining the law.⁶⁹ Because striking down mandatory life without parole was “sufficient to decide [the] cases,”⁷⁰ the Court did not consider Miller and Jackson’s broader argument for a categorical ban on juvenile life without parole, either for all juveniles or for those fourteen and under.⁷¹ Thus, it remains possible for a juvenile to receive a sentence of life without parole after the sentencer has heard the juvenile homicide offender’s complete mitigation story. The Court did not rule out that possibility; indeed, it appeared to anticipate some such sentences: “[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”⁷²

Having announced its ruling, the Court quickly dispatched the arguments of the States of Alabama and Arkansas.⁷³ First, the Court distinguished cases involving juveniles sentenced to life without parole

63. *Id.* at 2468.

64. *Id.* n.7 (citing Sean Rosenmerkel, Matthew Durose & Donald F. Farole Jr., *Felony Sentences in State Courts, 2006 – Statistical Tables*, 28 Table 4.4, U.S. DEPT. OF JUSTICE (Rev. Nov. 22, 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>).

65. *Miller*, 132 S. Ct. at 2468 n.7. See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010) (advocating an end to prosecuting juveniles as adults and arguing that the focus should be on allowing juveniles to prove that the mistakes they made no longer define them).

66. *Miller*, 132 S. Ct. at 2466 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010)).

67. *Id.* (quoting *Graham*, 130 S. Ct. at 2028).

68. *Id.* at 2469.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2469-75 (noting the dissenters’ assertion of the same arguments).

from other non-death penalty cases, which are governed by the “gross disproportionality” rule of *Harmelin*.⁷⁴ The Court stated that *Harmelin* “had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders.”⁷⁵ While *Harmelin* recognized that “death is different,”⁷⁶ *Miller* recognized that “children are different too,”⁷⁷ and that difference had led the Court “on multiple occasions” to hold that “a sentencing rule permissible for adults may not be so for children.”⁷⁸ Therefore, those cases, and not *Harmelin*, governed *Miller*’s and *Jackson*’s sentences.⁷⁹

Again the Court held fast to its insistence that youth matters for purposes of sentencing when it rejected the States’ argument that the Court could not hold the sentences here unconstitutional because no national consensus against them existed.⁸⁰ The Court found that argument weaker than in *Graham* because, unlike *Graham* and *Roper*, the *Miller* decision did not categorically ban a penalty but only mandated a certain sentencing process.⁸¹ Moreover, the number of states permitting life without parole for the juvenile nonhomicide offenders addressed by *Graham* was greater by ten than the number imposing mandatory life without parole on juveniles convicted of

74. *Id.* at 2470 (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

75. *Id.*

76. *Id.*

77. *Id.* (“Indeed, it is the odd legal rule that does *not* have some form of exception for children.”).

78. *Id.*

79. *Id.* at 2471.

80. *Id.*

81. *Id.* The Court did not address the question whether *Miller* will apply retroactively, but its characterization of its decision as mandating a certain sentencing process, not banning a particular penalty, could be significant. Following the rule laid out in *Teague v. Lane*, 489 U.S. 288 (1989), if the Supreme Court announces a new rule, that rule will not be applied retroactively unless it falls within one of two exceptions. *Id.* at 307. Only the first exception is relevant here. That exception includes “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Thus, if *Miller*’s ruling that life without parole cannot be imposed on juveniles mandatorily is interpreted as a prohibition of a “certain category of punishment,” *Miller* will be applied retroactively. If that ruling is seen as merely a procedural change in how life without parole is imposed on minors, it will not apply retroactively. See Laurie Levenson, *Retroactivity of Cases on Criminal Defendants’ Rights*, NAT’L L.J. 26 (Aug. 13, 2012) (suggesting that if the retroactivity record of *Graham v. Florida* is a guide, the courts will not unanimously embrace retroactivity for *Miller*). See also Erwin Chemerinsky, *Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. JOURNAL (Aug. 8, 2012 8:30 AM CDT), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ (predicting that the Supreme Court will have to resolve the retroactivity question and opining that *Miller* made a substantive change in the law and therefore should be applied retroactively).

murder, as in *Miller*.⁸² Considering the facts, the Court concluded that it was “breaking no new ground in these cases.”⁸³

Finally, the Court explained why the presence of discretion in some jurisdictions’ provisions for transfer of a juvenile to adult court has “limited utility” for the later sentencing determination.⁸⁴ At such an early pretrial stage, judges typically have limited information about either the offender or the offense.⁸⁵ In addition, the choices available at the transfer stage are stark: remain in juvenile court and be released in a matter of months or years or go to adult criminal court and face being sentenced to life without parole, as in the cases before the Court.⁸⁶ In adult court, the possible sentences do not represent such extremes: rather than life without parole, one could be sentenced to life with parole or a long term of years.⁸⁷ Because of those differences, the Court concluded: “the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court – and so cannot satisfy the Eighth Amendment.”⁸⁸

In the end, it was *Graham*, *Roper*, and the Court’s individualized sentencing decisions that carried the day for Evan Miller and Kuntrell Jackson.⁸⁹ Going forward, the Court said, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”⁹⁰ Because the mandatory

82. *Miller*, 132 S. Ct. at 2471 (stating that thirty-nine jurisdictions permitted the sentence prohibited by *Graham*, whereas twenty-nine jurisdictions imposed mandatory life without parole sentences on juvenile murderers).

83. *Id.* at 2472.

84. *Id.* at 2474 (observing that in about half of the relevant jurisdictions, some juvenile homicide offenders are transferred to adult court automatically, without any discretionary review by the juvenile court, and in several states the decision is a matter of pure prosecutorial discretion with no opportunity for judicial review).

85. *Id.* See *Arya*, *supra* note 65, at 130-31 (arguing that, even with the best information, judges and experts have difficulty assessing the culpability and maturity of youth).

86. 132 S. Ct. at 2474-75.

87. *Id.*

88. *Id.* at 2475.

89. *Id.*

90. *Id.* By referring to “imposing the harshest possible penalty for juveniles,” the Court again anticipates that some juvenile offenders will receive a sentence of life without parole, even after the individualized sentencing required by the Court’s ruling. *Id.* Juvenile homicide offenders will face a high hurdle because no right to counsel exists for those new sentencing hearings, as they would occur in a state post-conviction setting. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1326 (2012) (confirming absence of constitutional right to counsel in state post-conviction proceedings); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (same). The perils of proceeding without counsel have aroused a call for a “moral right to counsel” in these cases. See Editorial, *A Moral Right to Counsel*, N.Y. TIMES, July 3, 2012, at A22 (“And not just any lawyer. . . . The hearings will require lawyers with training in psychology and human development to argue convincingly that an offender’s record supports reducing a life sentence—including what Justice Elena Kagan, in her

sentencing schemes in Alabama and Arkansas had condemned Miller and Jackson to die in prison, they violated the principle of proportionality and the ban on cruel and unusual punishment contained in the Eighth Amendment.⁹¹

With its ruling, the Court reaffirmed what *Roper* and *Graham* have told us: First, kids are different from adults in ways that diminish their culpability for the crimes of their youth. Second, those differences apply to everyone below the age of eighteen. Third, nothing in *Roper* and *Graham* suggests that the distinctive traits and vulnerabilities of juveniles are more or less salient depending on the seriousness of the crime. Instead, what is true about our youth applies with equal force to the worst of crimes, like the homicides of which Evan Miller and Kuntrell Jackson were convicted.⁹² Having embraced all of those principles, the Court's detour around a categorical rule against all life

majority opinion, called a juvenile offender's 'immaturity, recklessness, and impetuosity' at the time of the crime").

91. *Miller*, 132 S. Ct. at 2455, 2475. Justice Kagan delivered the opinion of the Court, with Justices Kennedy, Ginsburg, Breyer, and Sotomayor joining. Justice Breyer also filed a concurring opinion, in which Justice Sotomayor joined. He wrote to add the point that, if the State continues to seek a sentence of life without parole for Kuntrell Jackson, a determination whether he "kill[ed] or intend[ed] to kill" the robbery victim will have to be made, based on *Graham*'s "clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'" *Id.* at 2476 (Breyer, J., concurring) (citing *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010)). Three dissenting opinions were filed. In the first, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, concluded that "[n]either the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole." *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting). Justice Thomas, joined by Justice Scalia, expressed his perennial disagreement with the notion of an Eighth Amendment proportionality principle, contending that there is no such thing. *Id.* at 2483 (Thomas, J., dissenting). Writing more broadly, Justice Thomas condemned the majority for relying on precedents that are inconsistent with or "have no basis in the original understanding of the Eighth Amendment." *Id.* at 2484 (Thomas, J., dissenting). Finally, Justice Alito, joined by Justice Scalia, decried the majority's willingness to countermand democratic decision-making and establish Eighth Amendment principles that "are no longer tied to objective indicia of society's standards." *Id.* at 2490 (Alito, J., dissenting).

92. See FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 84 (1998) ("Doctrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control. . . . if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle."); Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 43-44 (2008) ("Juveniles' criminal responsibility is just as diminished when states sentence them to life without parole (LWOP) as it is when it executes them. Although the Court's capital punishment jurisprudence insists that 'death is different,' there is no principled penal basis to distinguish between juveniles' diminished responsibility that precludes the death penalty from their equally reduced culpability for other severe sentences").

without parole sentences for juveniles is perplexing. Worse yet, it is unprincipled and unsound.

III. UNPRINCIPLED

Miller is unprincipled because it purports to embrace both *Roper* and *Graham* while rendering a decision that veers far from the principles of those cases. *Miller*'s departure from the precedents finds the foundation for its narrow ruling in the fact that *Graham*'s "flat ban on life without parole applied only to nonhomicide crimes."⁹³ But while *Graham* limited its holding to nonhomicide offenses,⁹⁴ the *Miller* Court was not constrained by that ruling. Indeed, in both cases before the Court, the petitioners asked the Court to extend its categorical prohibition to life without parole for homicides committed by juveniles.⁹⁵ *Miller* declined the invitation without considering the question.⁹⁶

Miller also asserts that *Graham* "took care to distinguish those [nonhomicide] offenses from murder."⁹⁷ It is true that *Graham* distinguished the more serious crime of murder from nonhomicide offenses.⁹⁸ However, it did so as a building block of its foundation for recognizing the "twice diminished moral culpability" of a juvenile offender who did not kill, as compared to an adult murderer.⁹⁹ As the Court explained, "[t]he age of the offender and the nature of the crime each bear on the analysis."¹⁰⁰ Thus, even for juveniles who commit murder, their moral culpability compared to adults remains diminished by their age (though not by their crime), and they, therefore, are still less

93. *Miller*, 132 S. Ct. at 2465.

94. *Graham*, 130 S. Ct. at 2030. Of course, the only crimes before the Court at that time were nonhomicide offenses. *See id.*

95. *Miller* Petition, *supra* note 9, at 9-25; Jackson Petition, *supra* note 9, at 8-25.

96. *Miller*, 132 S. Ct. at 2469 ("Because that holding [that the Eighth Amendment forbids mandatory life without parole sentences for juvenile offenders] 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").

97. *Id.* at 2465.

98. *Graham*, 130 S. Ct. at 2027 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and holding that death penalty for rape of a child violates Eighth Amendment); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the death penalty for one whose participation in felony resulting in murder was major and whose mental state was reckless indifference did not violate Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that death penalty for one who does not kill or intends to kill violates Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that death penalty for rape of adult woman violated Eighth Amendment)).

99. *Graham*, 130 S.Ct. at 2027.

100. *Id.*

deserving, as a categorical matter, of the most severe punishments.¹⁰¹

Graham did not answer the question of what “once diminished moral culpability” would mean for juvenile homicide offenders because that question was not before the Court.¹⁰² Perhaps it would mean exactly what *Miller* ruled: that mandatory life without parole sentences for juvenile homicide offenders violate the Eighth Amendment, and that those offenders must receive individualized consideration at their sentencing hearings.¹⁰³ The problem for *Miller* is that nothing in the Court’s juvenile sentencing precedents suggested such a result. Indeed, both *Roper* and *Graham* rejected in no uncertain terms the case-by-case individualized sentencing process now mandated by *Miller*.¹⁰⁴ As the following shows, *Miller*’s full-throated endorsement of a sentencing process roundly denounced by its predecessors is devoid of principle and lacks any moral grounding.

We begin with *Roper*. There, the Court considered and rejected the State of Missouri’s argument that the Court’s adoption of a categorical rule barring the death penalty for offenders under eighteen was “arbitrary and unnecessary” because of the Court’s insistence on individualized sentencing in capital cases.¹⁰⁵ The Court recognized that “[a] central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender.”¹⁰⁶ That system, the Court explained, “is designed to consider both aggravating and mitigating circumstances, including youth.”¹⁰⁷ The Court found that system wanting, however, when applied to juvenile offenders because “[a]n 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.”¹⁰⁸ That possibility existed, the Court said, “even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”¹⁰⁹

101. See, e.g., *The Supreme Court 2009 Term Leading Cases: Eighth Amendment—Juvenile Life Without Parole Sentences*, 124 HARV. L. REV. 209, 217 (2010) (arguing that “the higher culpability of murder has never before trumped considerations of the lessened culpability of a class of murderers” and that the Court should exercise its independent judgment to abolish all life without parole sentences).

102. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

103. *Id.* at 2460.

104. See *infra* text accompanying notes 105-149.

105. *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005).

106. *Id.* at 572.

107. *Id.*

108. *Id.* at 573.

109. *Id.*

Roper recognized what developmental psychologists¹¹⁰ and the Court¹¹¹ itself have long known: that juveniles are categorically different from adults and are, therefore, less culpable for the crimes they commit.¹¹² Because juveniles are more susceptible than adults to immature and irresponsible behavior, “their irresponsible conduct is not as morally reprehensible as that of an adult.”¹¹³ Moreover, the vulnerability and lack of control that are a hallmark of youth “mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environments.”¹¹⁴ Because juveniles are at a stage of life where they are still struggling to define their unique identities, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”¹¹⁵ Finally, “from a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”¹¹⁶ The differences between juvenile and adult offenders, the Court concluded, are “too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”¹¹⁷ Only a rule placing all juveniles off limits, the Court concluded,¹¹⁸ would protect them from the possibility of a death

110. *Id.* at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992) (“[A]dolescents are overrepresented statistically in virtually every category of reckless behavior”); Laurence B. Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”).

111. *Roper*, 543 U.S. at 569-70 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (the reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explains why “their irresponsible conduct is not as morally reprehensible as that of an adult”); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . Even the normal 16-year old customarily lacks the maturity of an adult”).

112. *Roper*, 543 U.S. at 569-70 (“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”).

113. *Id.* at 570 (citing *Thompson*, 487 U.S. at 835 (plurality opinion)).

114. *Id.* (citing *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting)).

115. *Id.*

116. *Id.*

117. *Id.* at 572-73.

118. *Id.* at 570-71 (“In *Thompson*, a plurality of the Court recognized the import of these characteristics [differences between juveniles and adults] with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. We conclude that the same reasoning applies to all juvenile offenders under 18”) (internal citation omitted).

sentence despite their diminished culpability.¹¹⁹ The answer was to adopt a categorical ban on the juvenile death penalty, and so the Court did just that.¹²⁰

Five years later, the Court was asked to apply *Roper* to the case of a seventeen-year-old who had been sentenced to life in prison without the possibility of parole for an armed burglary he had taken part in with three other teenagers in Jacksonville, Florida.¹²¹ Following the lead of Christopher Simmons, whose appeal had brought about the abolition of the juvenile death penalty,¹²² Terrance Graham challenged the entire sentencing practice of condemning juvenile nonhomicide offenders to life in prison.¹²³ That challenge propelled the Court into new territory, for it never before had considered a categorical challenge to a “term-of-years sentence.”¹²⁴ The novelty of the claim did not deter the *Graham* Court. The approach in the noncapital sentencing precedents, while “suited for considering a gross proportionality challenge to a particular defendant’s sentence,”¹²⁵ was inappropriate for Graham because he had thrown an entire sentencing practice into question.¹²⁶ The Court signaled the difference between Graham’s case and all of its earlier term-of-years challenges when it stated that “[t]his case implicates a particular type of sentence as it applies to an entire class of offenders.”¹²⁷ Although the Court had always before limited its categorical rulings to death penalty cases,¹²⁸ with *Graham* it was those

119. *Id.* at 571.

120. *Id.* at 574. There is more than a hint of irony in the fact the sentences of the juvenile offenders on death row would be converted to life without parole. See Feld, *supra* note 92, at 21-22; Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006) (“In many states, life without parole and death are the only two options when sentencing homicide offenders”). See, e.g., *Duncan v. State*, 922 So. 2d 245, 252 (Ala. Crim. App. 2005) (remanding, based on *Roper*, to set aside Duncan’s sentence of death and to resentence him to life imprisonment without the possibility of parole—the only other sentence available for a defendant convicted of capital murder); *Lecroy v. State*, 954 So. 2d 747, 748 (Fla. Dist. Ct. App. 2007) (affirming trial court’s decision to conform Lecroy’s sentence to the state supreme court’s specifications—life without the possibility of parole for twenty-five years).

121. *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010).

122. See *Roper*, 543 U.S. at 578-79.

123. *Graham*, 130 S. Ct. at 2022-23.

124. *Id.* at 2022.

125. *Id.*

126. *Id.*

127. *Id.* at 2022-23.

128. See *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (eschewing reliance on death penalty cases that applied proportionality principles because “a sentence of death differs in kind from any other sentence of imprisonment, no matter how long”). But see *Solem v. Helm*, 463 U.S. 277, 284-88 (1983) (tracing history of proportionality rules and concluding that Eighth Amendment does not

cases, and not the Court's noncapital proportionality precedents, that governed the resolution of *Graham's* appeal.¹²⁹

To reach its categorical ruling, the Court in *Graham* considered and systematically rejected other alternatives. The State of Florida argued that its laws and the laws of other states "take sufficient account of the age of a juvenile offender."¹³⁰ The Court acknowledged the relevance of an offender's age to the Eighth Amendment analysis, but was concerned that "[n]othing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character.'"¹³¹ That, the Court said, "is inconsistent with the Eighth Amendment."¹³²

The Court next considered an approach holding that the Eighth Amendment requires sentencers to "take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime."¹³³ Such an approach to sentencing must, the Court said, "be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this."¹³⁴ The problem with a case-by-case proportionality analysis, the Court reasoned, is that courts cannot "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."¹³⁵

suggest any distinction between types of punishments, but forbids excessiveness in all punishments).

129. *Graham*, 130 S. Ct. at 2022-23.

130. *Id.* at 2030-31 (noting Florida's arguments that prosecutors are required to charge sixteen and seventeen year olds as adults "only for certain serious felonies," and that Florida "in only the narrowest of circumstances" imposes no age limit for trial of juveniles as adults).

131. *Id.* at 2031 (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

132. *Id.*

133. *Id.*

134. *Id.* at 2031-32.

135. *Id.* at 2032 (citing *Roper*, 543 U.S. at 573) ("[A]n '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"). See Ethan Bronner, *Sentencing Ruling Reflects Rethinking on Juvenile Justice*, N.Y. TIMES, June 27, 2012, at A14, available at <http://www.nytimes.com/2012/06/27/us/news-analysis-ruling-reflects-rethinking-on-juvenile-justice.html?pagewanted=all> (reporting on a study conducted by developmental psychologist Laurence Steinberg of 1,300 young convicted felons over a period of seven years, at the conclusion of which Steinberg was "unable to predict which ones would be the 10 percent" who become adult offenders). See also Brief of Former Juvenile Court Judges as Amici Curiae in Support of Petitioners *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (Nos. 10-9646 & 10-9647), 2012 WL 135044 ("Based on decades of experience sentencing juvenile offenders, amici simply do not believe it is possible to tell which youths will change and which will not at the time of their initial sentencing.").

Given that the differences between juveniles and adults are so “marked and well understood,”¹³⁶ a case-by-case approach presented too great a risk that a juvenile would receive a sentence of life without parole “despite insufficient culpability.”¹³⁷

Moreover, *Graham* reasoned, case-specific sentencing does not take account of the “special difficulties encountered by counsel in juvenile representation.”¹³⁸ The Court relied on *amici* for its recognition that “[j]uveniles mistrust adults”¹³⁹ and are “less likely than adults to work effectively with their lawyers to aid in their defense.”¹⁴⁰ The problems juveniles face in their lawyer-client relationships stem from “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects.”¹⁴¹ All of those difficulties likely “impair the quality of a juvenile defendant’s representation.”¹⁴² A categorical rule, the Court concluded, avoids the risk that those same difficulties will cause “a court or jury [to] erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.”¹⁴³

Finally, with a categorical rule, all juvenile nonhomicide offenders will have “a chance to demonstrate maturity and reform.”¹⁴⁴ The same concerns as in *Roper* applied to sentences of life without parole: “Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.”¹⁴⁵ A young person who knows he has no chance of leaving prison often is twice denied an opportunity

136. *Graham*, 130 S.Ct. at 2032 (quoting *Roper*, 543 U.S. at 572-73). Studies since *Graham* have confirmed the differences between juveniles and adults that were significant to the Court in both *Roper* and *Graham*. See Brief for J. Lawrence Aber et al. for Petitioners, *supra* note 55 (presenting the work and views of psychologists, social scientists, and neuroscientists).

137. *Graham*, 130 S. Ct. at 2032 (quoting *Roper*, 543 U.S. at 572-73).

138. *Id.*

139. *Id.* (citing Brief for NAACP Legal Defense & Education Fund et al. as Amici Curiae 7-12). See also Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272-73 (2005).

140. *Graham*, 130 S. Ct. at 2032.

141. *Id.*

142. *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel”)).

143. *Id.*

144. *Id.*

145. *Id.* See, e.g., *Smith & Cohen*, *supra* note 38, at 92 (“*Graham*’s most significant role may be its recognition of redemption as an Eighth Amendment constitutional principle, rejecting a legislative determination that entire classes of individuals were irredeemable.”).

to change. First, the very term of his imprisonment leaves him “little incentive to become a responsible individual.”¹⁴⁶ Second, the system itself often “becomes complicit in the lack of development” by denying counseling, education, and rehabilitation programs to those who will never leave prison.¹⁴⁷ To avoid “the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term,”¹⁴⁸ a categorical rule against life without parole for nonhomicide offenders was necessary.¹⁴⁹

The rationale that had led the Court in both *Roper* and *Graham* to adopt categorical rules and to reject case-by-case sentencing of juveniles was plainly before the *Miller* Court. Yet instead of adopting it or explaining why it did not hold in the cases before it, the Court in *Miller* took a decided detour, adopting its reasoning about adolescent differences from adults but not the necessary results of that reasoning, as counseled in both *Roper* and *Graham*. The harm that the unprincipled decision in *Miller*’s has (and will) wrought is not hypothetical. As *Roper* and *Graham* could have foretold, those who seek resentencing under *Miller* will face a head-on collision with everything those cases warned against. What that collision is likely to look like is the subject of the next section.

IV. UNSOUND

In addition to being unprincipled, the Court’s endorsement in *Miller*’s of case-by-case individualized sentencing for juvenile homicide offenders is unsound.¹⁵⁰ We need look no further than the facts of *Roper*, *Graham*, and *Miller* to understand just how unsound the ruling is.

Roper was the first Supreme Court opinion to recognize the dangers of individualized sentencing for juveniles. Christopher Simmons, the juvenile petitioner in *Roper*, had no juvenile charges or adjudications and no prior adult criminal convictions at the time he was tried for the

146. *Graham*, 130 S. Ct. at 2032.

147. *Id.* at 2032-33.

148. *Id.* at 2033.

149. *Id.*

150. Even the reliance of the Court in *Miller* on *Eddings v. Oklahoma*, *see supra* text accompanying notes 57-62, was a fool’s errand. Upon remand by the Supreme Court for consideration of all the mitigating factors in young *Eddings*’s life, he was resentenced to death. *Eddings v. Oklahoma*, 688 P.2d 342 (Okla. Ct. Crim. App. 1984). Ultimately, the Oklahoma Court of Criminal Appeals, citing statutory limitations on such remands, modified *Eddings*’ death sentence and remanded to the county district court to sentence him to life without parole, the only option under the controlling state law. *Id.* at 343.

murder that condemned him to death row.¹⁵¹ At his sentencing, Simmons's parents, his two young half-brothers, and two friends described their loving relationships with him and various acts of kindness he had performed.¹⁵² In closing argument, Simmons's counsel asserted that Simmons's kind acts, his lack of any prior criminal history, and his age at the time of the crime were mitigating factors that counseled against the death penalty.¹⁵³ Against that placid backdrop, the facts surrounding Christopher Simmons's crime were chilling. Before he committed murder, Simmons told his friends that he wanted to kill someone.¹⁵⁴ He outlined in detail what would become the actual crime: he would "commit burglary and murder, by breaking and entering, tying up a victim, and throwing the victim off a bridge."¹⁵⁵ Simmons, then seventeen, and his fifteen-year old accomplice did exactly that.¹⁵⁶ After entering the victim's home through an open window, they duct-taped her eyes, mouth, and hands, put her in her minivan, took her to a railroad trestle spanning the Meramec River, tied her feet and hands together with electrical wire, wrapped her entire face with duct tape, and threw her off the bridge, where they left her to drown.¹⁵⁷ By anyone's standards, this was a truly monstrous crime.

The fact that juveniles committed the murder could well draw a gut reaction of horror that anyone so young could do something so awful. But the Constitution does not permit subjective gut reactions to define the sentencing of our young. In explaining why the Eighth Amendment required a categorical rule disallowing the death penalty for juveniles, *Roper* recognized that "[i]n some cases a defendant's youth may even be counted against him."¹⁵⁸ In fact, the prosecutor at Christopher Simmons's trial had argued in rebuttal that his youth was aggravating rather than mitigating:¹⁵⁹ "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary, I submit. Quite the contrary."¹⁶⁰ It is precisely because of

151. Brief for Respondent at 4 *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1947812 at *2-5.

152. *Id.*

153. *Id.*

154. *Roper*, 543 U.S. at 556.

155. *Id.*

156. *Id.* at 556-57

157. *Id.*

158. *Id.* at 573.

159. *Id.* Simmons is not the only case in which prosecutors have portrayed youth as aggravating. See Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, 10 JUV. JUST. UPDATE 1, 14-15 (June/July 2004) (collecting examples).

160. *Roper*, 543 U.S. at 558.

the possibility of that kind of visceral appeal that rules requiring consideration of the mitigating effect of youth at sentencing were insufficient to address the *Roper* Court's "larger concerns" and required a categorical ban on the juvenile death penalty.¹⁶¹

Central to those concerns was the undeniable truth that even expert psychologists have great difficulty differentiating between "the juvenile whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."¹⁶² It is that difficulty, the Court went on to say, that has led to the "rule forbidding psychiatrists from diagnosing any patient under eighteen as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others."¹⁶³ The Court concluded that if trained experts feel constrained to refrain from labeling our youth with such a diagnosis, "States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."¹⁶⁴

Similarly, after explaining why the laws of the State of Florida did not meet Eighth Amendment requirements, the *Graham* Court illustrated the Eighth Amendment problem with the State's argument by referring to what had happened to Terrance Graham.¹⁶⁵ The judge who sentenced Graham imposed a greater sentence than the prosecutor had requested because he concluded that Graham was "incurable."¹⁶⁶ He stated: "[Y]ou decided that this is how you are going to lead your life and that there is nothing we can do for you. . . . We can't do anything to deter you."¹⁶⁷ The judge rendered this terminal decision despite evidence that Terrance Graham "most likely suffered a form of cocaine addiction at

161. *Id.* at 573.

162. *Id.* (citing Laurence B. Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014-16 (2003)).

163. *Id.* (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701-06 (4th ed. text rev. 2000)).

164. *Id.*

165. *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010). The Court also recited what the sentencing judge had said when he sentenced thirteen-year old Joe Sullivan to life without parole. *See id.* (citing Brief of Respondent at 6 *Sullivan v. Florida*, 129 S. Ct. 2157 (2009) (No. 08-7621), 2009 WL 2954164 at *6 (stating that Sullivan had been given "opportunity after opportunity to upright himself," but had demonstrated that he was "unwilling to follow the law and needed to be kept away from society for the duration of his life"). *Sullivan v. Florida* was argued the same day as *Graham*, but the Court later dismissed the writ of certiorari as improvidently granted. *Graham*, 130 S. Ct. at 2031. Nonetheless, the facts were significant to the Court. *See id.*

166. *Id.*

167. *Id.* (quoting *Graham v. State*, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. April 10, 2008)).

birth”¹⁶⁸ and was plagued by “long-term depression,”¹⁶⁹ while both of his parents were addicted to crack cocaine.¹⁷⁰ In elementary school, “Graham was diagnosed as suffering from ADHD, but his mother told him not to take the prescribed medication” (Ritalin).¹⁷¹ “Graham wanted to move out of his home as soon as possible so as not to be around his father, who was unemployed”¹⁷² and still smoking crack cocaine.¹⁷³ Aside from the drug addiction, Graham’s father and his siblings had a history of problems with the law, including time in prison and juvenile detention facilities.¹⁷⁴ Without the guiding hand of a beneficent court or a law that recognized all of the complexities involved in sentencing youth, Terrance Graham stood very little chance at becoming a productive and responsible citizen.

The judge’s subjective judgment that Terrance Graham was “irredeemably depraved”¹⁷⁵ strikes at the heart of what the Eighth Amendment prohibits in the sentencing of juveniles.¹⁷⁶ What the Court in *Roper* and *Graham* understood was that even all the advances in our understanding of youth from the social sciences and neuroscience could not prevent the power of a horrible murder from overwhelming the sentencing determination. The knowledge from MRI studies about brain development and the work of our best developmental psychologists about the stark differences between juveniles and adults, even when coupled with a mitigation story that would make one weep, would not, the Court knew, outweigh the often horrific facts of a terrible crime committed by juveniles. It was for these reasons that the Court in *Roper* and *Graham* wrested that decision from the sentencers and declared that certain sentences are cruel and unusual when imposed on juveniles as a categorical matter. Now *Miller*, with its mandate of individualized consideration at sentencing, reopens the door to all of the malignity of subjective decision-making and its fruits.

Just how wrong a sentencing process can go is evident in the stories that Evan Miller’s and Kuntrell Jackson’s resentencing hearings are

168. Brief for Petitioner at 11 *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2159655 at *11.

169. *Id.*

170. *Id.*

171. *Id.* at *11.

172. *Id.* at *11-12.

173. *Id.* at *11.

174. *Id.*

175. *Graham*, 130 S. Ct. at 2031.

176. *Id.*

likely to tell.¹⁷⁷ Miller's mitigation story is compelling. From an early age, he was the target of severe beatings by his father and made his first of six suicide attempts at the tender age of five, when he tried to hang himself.¹⁷⁸ Both of his parents were alcoholics, and Miller's mother also was addicted to illegal drugs.¹⁷⁹ By the time he was eight years old, Miller had begun drinking and using drugs.¹⁸⁰ From that age forward, he received mental health treatment intermittently at a number of treatment centers.¹⁸¹ At age ten, the state removed Miller and his siblings from their family home and placed them in foster care.¹⁸² Following his parents' divorce a few years later, the state returned Miller to the care of his drug-addicted mother, and Miller followed in her footsteps, becoming deeply drug addicted himself.¹⁸³

This was the setting into which their 52-year-old neighbor inserted himself when he came to Miller's home late at night to do a drug deal with Miller's mother.¹⁸⁴ Miller, then fourteen, and his sixteen-year old friend went with the neighbor back to his house for a night of drinking and drugs.¹⁸⁵ Considering all of the factors affecting adolescent decision-making and behavior as outlined in *Roper* and *Graham*, particularly when in the company of an older peer, what Miller would do that night can best be understood as the drug-addled, impulse-driven, peer-approval-seeking actions of a terribly misguided youth.

In its opposition to Miller's petition for a writ of certiorari, the State of Alabama focused on a distinctly different set of facts than Miller's mitigation story—the details of the crime of which Miller was convicted.¹⁸⁶ The State characterized the killing of Miller's neighbor as “among the most gruesome and intolerable crimes a human being can commit.”¹⁸⁷ The State described in detail Miller's hitting of the man with his fists and a baseball bat, and his continuing to beat him with the

177. See Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT (Mar. 2012), http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

178. Miller Petition, *supra* note 9, at 5.

179. *Id.*

180. *Id.* at 5.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 6.

186. Brief of Respondent in Opposition to Petition at 2-3 *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), 2011 WL 5322572 at *2-3.

187. *Id.* at 2.

bat “everywhere” as the man was screaming.¹⁸⁸ When he stopped hitting him with the bat, the State recites Miller’s friend’s testimony that Miller then put a sheet over the man’s head and said, “I am God, I’ve come to take your life,” before hitting him with the bat once more and then going home.¹⁸⁹ Miller and his friend soon returned and set two couches on fire, in words his friend attributed to Miller, “to cover up the evidence.”¹⁹⁰ A full autopsy revealed that the man died of smoke inhalation, with multiple blunt force injuries as a contributing factor making it more difficult for him to breathe in the fire.¹⁹¹ The State concluded by arguing, based on those facts, that this murder, while rare for a fourteen-year old, made appropriate the imposition of a life without parole sentence on someone so young.¹⁹²

Kuntrell Jackson, like Evan Miller, was fourteen on the evening in November 1999 when he and two other boys decided to rob a video store in Blytheville, Arkansas.¹⁹³ The boys never discussed bringing a weapon with them, but on the way to the store, Jackson learned that one of the boys had a sawed-off shotgun hidden in his coat sleeve.¹⁹⁴ When they arrived at the store, Jackson remained outside while the other two went in.¹⁹⁵ The gunman pointed his weapon at the store clerk and demanded money from the cash register; the clerk told him she did not have any money.¹⁹⁶ Shortly after that, Jackson entered the store and yelled out “we ain’t playin’” or “I thought you all was playin’” just in time to see his friend shoot the store clerk in the face after she refused to hand over the money and threatened to call the police.¹⁹⁷

It is hardly surprising that Jackson ended up at a robbery gone bad that night. He was raised in public housing projects in an impoverished community known for its drugs and violence.¹⁹⁸ His father abandoned the family before Jackson was born.¹⁹⁹ His mother went to prison for

188. *Id.* at 3.

189. *Id.*

190. *Id.*

191. *Id.* at 6.

192. *Id.* at 19.

193. Adam Liptak & Ethan Bronner, *Justices Bar Mandatory Life Terms for Juveniles*, N.Y. TIMES, June 25, 2012, available at <http://www.nytimes.com/2012/06/26/us/justices-bar-mandatory-life-sentences-for-juveniles.html>; Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004).

194. *Jackson*, 194 S.W.3d at 758.

195. *Id.*

196. *Id.* at 758-59.

197. *Id.* at 759-60.

198. Jackson Petition, *supra* note 9, at 4.

199. *Id.*

shooting and injuring a neighbor when Jackson was six,²⁰⁰ and seven years later, his older brother was also imprisoned for shooting someone.²⁰¹ Two of his sisters became pregnant in their teens, and several other relatives were incarcerated.²⁰² The presiding judge at Jackson's preliminary hearing described Jackson's mental capacity as "borderline or near borderline," placing his mental functioning "at the fourth percentile compared to children his age."²⁰³ Even the criminal justice system seemed to have conspired against him, for despite him not being the trigger-man, the jury convicted Jackson of capital felony murder, and the judge sentenced him to a mandatory term of life without parole.²⁰⁴

In the eyes of jurors, the telling of Miller's and Jackson's stories, replete with mitigating factors, likely will pale in comparison to the cold-blooded nature of the crimes they committed.²⁰⁵ One can well imagine the members of the jury recoiling with disgust from the facts of the crimes. No measure of mitigation or understanding of adolescent development is likely to overcome the raw, visceral repulsion that is the natural response to what Miller and his friend did or to what Jackson and his friends did.²⁰⁶ Thus, far from removing subjectivity from the sentencing process, *Miller* injects it into the very heart of sentencing. It was just that kind of subjectivity that *Roper* and *Graham* sought to exclude from sentencing determinations for juveniles by establishing categorical prohibitions against certain penalties. By paying lip service to the principles that drove the decisions in *Roper* and *Graham*, *Miller* does a disservice to all juvenile homicide offenders who received

200. *Id.* at 5.

201. *Id.*

202. *Id.*

203. *Id.* at 4

204. *Id.* at 6.

205. Even though he was not the trigger-man, Jackson's spontaneous shouting out of words that could be interpreted as "we ain't playin'" could also lead to the conclusion that it was those words that compelled the shooter to shoot. *Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004).

206. The stories of the juvenile offenders who were sentenced to death before *Roper* are to similar effect. Each case received the individualized sentencing required by *Woodson* and *Lockett* since the 1970s, and yet all were sentenced to death for crimes they committed before they were eighteen. See, e.g., *Hain v. Gibson*, 287 F.3d 1224, 1227 (10th Cir. 2002) (affirming death sentence despite mitigating factors including defendant's youth, his young emotional and mental age, his lack of blameworthiness, his domination by an older co-defendant, his history of drug usage, a "[f]ear reaction to finding himself in a fugitive/captive situation," his lack of personal participation in the criminal acts compared to his co-defendant, his attempts to physically absent himself from the scene of the crime, and his family history, where the state alleged three aggravating factors: knowingly creating a risk of death to more than one person, the especially heinous and cruel nature of the murders, and the probability that Hain would be a continuing threat to society).

mandatory sentences of life without parole. While *Miller* provides them the opportunity to seek a lesser sentence, it does nothing to ensure that the new sentencing determination is the product of sound and principled decision-making. It is an essentially hollow promise devoid of any moral meaning. One is left to wonder why the *Miller* Court ruled as it did.

V. MISGUIDED CAUTION

Perhaps the decision to take the narrower path of overruling only the mandatory imposition of life without parole on juveniles and not the sentence itself was the Court's exercise of its minimalist inclinations.²⁰⁷ It was those inclinations that had fueled Justice O'Connor's dissent in *Roper*²⁰⁸ and Chief Justice Roberts's concurrence in *Graham*,²⁰⁹ but somehow eluded Justice Kennedy and those who joined his majority opinions in both cases.²¹⁰ In the main, however, the Court has embraced

207. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 56, at xi; David Brooks, *Modesty and Audacity*, N.Y. TIMES, June 29, 2012, at A25, available at <http://www.nytimes.com/2012/06/29/opinion/modesty-and-audacity.html> (describing Justice Roberts's majority opinion in the health care law case as an exercise in "minimalism and self-control" that was a positive development for the law and the people). *But see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding, in sweeping terms, that the First Amendment prohibited the federal government from restricting independent political expenditures by corporations and unions).

208. See *Roper v. Simmons*, 543 U.S. 551, 602-03 (2005) (O'Connor, J., dissenting) (arguing that proportionality concerns raised in the case "may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth.").

209. See *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring) (agreeing that *Graham's* sentence violated the Eighth Amendment, but advocating reliance on existing precedents allowing for consideration of the particular defendant and particular crime at issue, rather than creating a new constitutional rule, as the majority had done).

210. See *Id.* at 2034 (majority opinion) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); *Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Of course, the minimalist preference of the Roberts Court has not carried the day in every case. The Court has had its perfectionist moments. Cass R. Sunstein, *Minimal Appeal: Minimalism v. Fundamentalism*, THE NEW REPUBLIC, Aug. 1, 2005, at 17, available at <http://www.tnr.com/article/politics/minimal-appeal#> (explaining that perfectionist judges want to interpret the Constitution to promote individual rights). Without that more expansive approach, we would not have *Roper* or *Graham*, or the new-found judicial attention to juveniles' distinctive characteristics. See David S. Tanenhaus, *The Roberts Court's Liberal Turn on Juvenile Justice*, N.Y. TIMES, June 27, 2012, available at <http://www.nytimes.com/2012/06/27/opinion/the-roberts-courts-liberal-turn-on-juvenile-justice.html> (tracing history of juvenile justice and expressing a pleasant surprise in the Roberts Court's resuscitat[on of] the juvenile court ideal of individualized justice for children).

judicial minimalism over the past two decades, generating decisions that answer the narrowest question before the Court, and nothing more.²¹¹

On the Roberts Court, all but the Court's two most conservative jurists have embraced judicial minimalism in one form or another.²¹² However, that does not mean that the seven remaining Justices embrace the same views. "[T]he minimalist camp is large and diverse. The point is that they greatly prefer nudges to earthquakes."²¹³ Rather than adopting theories, minimalists decide cases.²¹⁴ With judicial minimalism the Justices "hope to do no more than is necessary to resolve cases."²¹⁵ "[M]inimalists tend to favor decisions that are [both] narrow, in the sense that they do not want to resolve issues not before the Court . . . [and] shallow, in the sense that they avoid the largest theoretical controversies."²¹⁶ Chief Justice Roberts's own words may

211. See, e.g., Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (explaining that a resurgence in judicial minimalism has been endorsed by former and current judges and has sparked scholarly debate); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (explaining the virtues of judicial minimalism).

212. See SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 56, at 9 (writing that the "analytical heart" of the Court at the time—Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer—was cut of minimalist cloth); Joshua Dunn, *The Spirit Is Partially Willing: The Legal Realism and Half-Hearted Minimalism of President Obama*, in CAROL MCNAMARA & MELANIE M. MARLOWE, *THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER: A FIRST LOOK 101-02* (2011) (commenting on President Obama's selection of Sonia Sotomayor and Elena Kagan for the Supreme Court as reflections of a minimalist attitude); Ruth Bader Ginsburg, *Speaking in a Judicial Voice: Reflections on Roe v. Wade*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 194 (David M. O'Brien ed., 2003) (suggesting, in true minimalist fashion, that a less ambitious decision than *Roe v. Wade* simply striking down the Texas abortion statute would have avoided much of the post-*Roe* controversy); Sunstein, *Minimal Appeal*, *supra* note 210, at 17 (commenting on Justice Sandra Day O'Connor's recent retirement and the nomination of federal appeals judge John Roberts to replace her and concluding after examining Judge Roberts's record that he likely would continue in O'Connor's minimalist footsteps); Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. OF BOOKS, Sept. 24, 2009, available at <http://www.nybooks.com/articles/archives/2009/sep/24/justice-sotomayor-the-unjust-hearings/?pagination=false> (reacting to a sense of a missed opportunity at Justice Sotomayor's confirmation hearings to embrace and defend a more conventionally activist liberal form of judicial review); David D. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES, June 22, 2009, at A1, available at <http://www.nytimes.com/2009/06/22/us/politics/22mentors.html?pagewanted=all> (portraying Judge Sotomayor as a judicial minimalist and quoting former Yale Law Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor's approach in a controversial case as one of "judicial minimalism"); Scott Lemieux, *Standing for Me*, THE AMERICAN PROSPECT (June 25, 2007), <http://prospect.org/article/standing-me> (critiquing the Court's 5-4 decision in *Hein v. Freedom from Religion Association* and Justice Alito's preference for minimalism over overruling *Flast v. Cohen*, a preference that Justice Scalia did not share).

213. Sunstein, *Minimal Appeal*, *supra* note 210.

214. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 56, at 9.

215. Sunstein, *Minimal Appeal*, *supra* note 210.

216. Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2242

best sum up his Court's minimalism: "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."²¹⁷

Justice Kagan's majority opinion in *Miller* was not as narrow as it might have been. The Court could have decided, on the facts of the cases before it, informed by a "common sense" understanding of the limitations and pitfalls of adolescence,²¹⁸ that Evan Miller and Kuntrell Jackson did not deserve to die in prison, and reserved for another day any broader ruling. That would have been the narrowest of minimalist decisions as described above. But the Court's decision to limit its ruling to the mandatory nature of the sentencing, while leaving intact the sentence itself, also was a minimalist ruling. By steering clear of an outright prohibition on life without parole for juveniles convicted of homicide, the Court avoided larger questions of juvenile culpability and penal proportionality. Those questions are left to play out in the courtrooms of twenty-eight states and the federal government,²¹⁹ as those under mandatory life without parole sentences exercise their *Miller* right to an individualized determination of the appropriate sentence for each and every one of them. The enormous costs of all the decisions in the twenty-nine jurisdictions where mandatory life without parole was imposed on those under eighteen will be a direct consequence of the Court's failure to adopt a broader ruling like those in *Roper* and *Graham*. Minimalism has its costs, and they are calculable.²²⁰

It is in courtrooms across the country that the harsh mischief of minimalism will run its course, with outcomes uncertain and a life outside prison walls a mere hope. Predictability is an important value in our criminal law, and nowhere is predictability more important than in sentencing.²²¹ But "minimalist rulings make predictability impossible to

(2006).

217. Cass R. Sunstein, *The Minimalist*, L.A. TIMES, at B11 (May 25, 2006) (quoting Hon. John G. Roberts, Jr., Commencement Address, Chief Justice Roberts 2006 Commencement Address (Geo. U. L. Ctr. May 21, 2006) (webcast available at www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144)).

218. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

219. *Id.* at 2471 (twenty-eight states and the federal government make life without parole mandatory for some juveniles convicted of murder).

220. See Wexler, *supra* note 211, at 312-13 ("As the Court announces a greater number of minimalist decisions, the burden on lower courts and advocates rises, and one could speculate that at some point these costs begin having a serious effect on the work of these courts and practitioners. Perhaps more important, however, is the effect of excessive minimalism upon the public's and media's perception of the Court's legitimacy.").

221. See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1628 (2012) (critiquing state sentencing guidelines and

achieve.”²²² Indeed, when predictability is an important value, the narrowness of minimalism “can be a big mistake”²²³ and “in some domains, minimalism is a terrible blunder.”²²⁴ With its minimalist ruling, the *Miller* Court has made either a *big mistake* or a *terrible blunder*. Unfortunately, the lives of the two thousand prisoners²²⁵ serving mandatory life without parole sentences for murders committed when they were not yet old enough to vote depended on *Miller* to be neither a big mistake nor a terrible blunder. The system failed them once again.

VI. CONCLUSION

The Supreme Court had the opportunity in *Miller* to advance its “kids are different” Eighth Amendment jurisprudence by declaring all sentences of life without parole out of bounds for those convicted of crimes committed when they were under eighteen years of age. Rather than seize that opportunity, the Court squandered it, handing down a perfunctory ruling that takes the small step of outlawing mandatory sentences of life without parole for juvenile homicide offenders, while shying away from a bold stride like those in *Roper* and *Graham*. By detouring around a categorical ruling against all life without parole sentences for juveniles, the Court rejected a rule that would have afforded both uniformity and predictability to a process that is fraught with opportunities for prejudice and error. The worst of it is that those who were sentenced to die in prison when they were as young as fourteen may yet be re-condemned to live out that sentence.

remarking that “[a]s in the federal system, states have been able to increase the predictability and uniformity of their sentencing through guidelines”); Michael McNeill, *Crack, Congress, and the Normalization of Federal Sentencing: Why 12,040 Federal Inmates Believe That Their Sentences Should Be Reduced, and Why They and Others Like Them May Be Right*, 63 MERCER L. REV. 1359, 1360 (2012) (discussing the convergence of the fight against the “crack epidemic” and the United States Sentencing Commission’s adoption of federal sentencing guidelines to promote uniformity and predictability in federal criminal sentencing).

222. Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 825 (2008).

223. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1909-10 (2006) (discussing problems with narrowness).

224. Sunstein, *Beyond Judicial Minimalism*, *supra* note 222, at 825.

225. See Bronner, *supra* note 135.

