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SENTENCED TO CONFUSION: *MILLER V. ALABAMA* AND THE COMING WAVE OF EIGHTH AMENDMENT CASES

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INTRODUCTION

In *Miller v. Alabama*,[1] the Supreme Court held unconstitutional roughly 2,000 life-without-parole sentences, which had been imposed on juveniles by twenty-eight states and the federal government.[2] The nominal license for the exercise of this power was the Constitution's Eighth Amendment,[3] which proscribes "cruel and unusual punishments." The astute (or perhaps naïve) reader will wonder: how can 2,000 sentences imposed by a majority of U.S. jurisdictions be unusual? For that matter, is it possible that a majority of U.S. jurisdictions countenance a "cruel" punishment?

These questions are premised on the now-quaint idea that the phrase "cruel and unusual punishments" was relevant to the Court's decision in *Miller*. Although the Court has touted adherence to the Constitution's text and its historical understanding as a basic interpretive principle in decisions examining the Second,[4] Fourth,[5] and Sixth Amendments,[6] this even-numbered originalism collapses at "eight." The jurisprudence of the Eighth Amendment was long ago untethered from its text, and as a consequence, the decision in *Miller* came as little surprise.

A prime example of this untethering is found in the Court's recent decision in *Graham v. Florida*,[7] which is in many ways the predecessor case to *Miller*. In *Graham*, the Court held that the Eighth Amendment prohibits the imposition of a sentence of life without parole ("LWOP") on a juvenile

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1 132 S. Ct. 2455 (2012).

2 *See id.* at 2471. There is a question as to whether the decision applies retroactively. As this Essay was in the final stages of publication, the Pennsylvania Supreme Court heard arguments in a case that raises this issue. *See* Dana DiFillipo, *Pa.'s High Court Grapples with Federal Decision on Sentencing Juveniles*, PHILA. DAILY NEWS (Sept. 13, 2012), http://articles.philly.com/2012-09-13/news/33818431_1_mandatory-life-without-parole-sentences-juvenile-lifers-lengthy-sentences. I predict that many courts will apply the decision retroactively, but there is a solid legal argument for not doing so. *See infra* note 32.

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

4 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008).

5 *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

6 *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004).

7 130 S. Ct. 2011 (2010).

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for any crime other than homicide.[8] To be sure, thirty-seven states, the District of Columbia, and the federal government permitted such a sentence, but the Court finessed these facts by noting that there were only 123 juveniles serving an LWOP sentence for a nonhomicide offense.[9] The Court further reasoned that "when compared to an adult murderer, a juvenile [nonhomicide] offender . . . has a twice diminished moral culpability," thus rendering LWOP cruel and unconstitutional.[10]

Just two years later, in *Miller v. Alabama* and a related case from Arkansas, *Jackson v. Hobbs*,[11] two fourteen-year-old murderers were sentenced to LWOP in jurisdictions that deprived the court of any discretion in sentencing: Alabama and Arkansas law provided that the mandatory sentence for first-degree murder was LWOP.[12] The Court could have distinguished *Miller* and *Jackson* from *Graham* on the basis of the crime and upheld the offenders' sentences. After all, the Court in *Graham* had rhapsodized on the distinction in culpability between homicide and all other crimes.[13] Instead, the Court in *Miller* emphasized the commonality—that all the cases involved juveniles.[14] And juveniles, the *Graham* Court had observed, are more immature than adults, and their crimes are less reflective of a heinousness meriting the most severe of punishments.[15] The holding in *Miller* is said to reflect this "common sense" about youth. The Court therefore permitted the imposition of LWOP on juveniles (or "JLWOP") convicted of murder, but only after what it airily calls an "individualized sentencing."[16]

Justice Elena Kagan, writing for the majority, presents the decision as a modest one. As an exercise of the judicial craft, she is rhetorically successful in deflecting some of the criticisms of the dissenting Justices, and in portraying the majority opinion as following ineluctably from precedent, principally *Graham*. Yet as I have argued elsewhere, *Graham* suffers from the faulty premises that juveniles who commit heinous crimes are typical juveniles, and that they are categorically less culpable than young adult offenders.[17] The *Miller* Court adopts and then compounds these errors. In

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8 *Id.* at 2034.

9 *Id.* at 2024.

10 *Id.* at 2027.

11 132 S. Ct. 548 (2012) (mem.).

12 Miller v. Alabama, 132 S. Ct. 2455, 2460-63 (2012).

13 *Graham*, 130 S. Ct. at 2027 ("[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.").

14 *Miller*, 132 S. Ct. at 2464 ("[C]hildren are constitutionally different from adults for purposes of sentencing.").

15 *Graham*, 130 S. Ct. at 2026.

16 *See Miller*, 132 S. Ct. at 2470.

17 *See generally* Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309 (2011).

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this Essay, I argue that the suggestion that *Miller* is a narrow decision is either obtuse or disingenuous. The opinion is riddled with uncertainties that will spawn more litigation.

A brief roadmap will suffice. Part I sketches the exchange between Justice Kagan and dissenting Justices John Roberts and Samuel Alito. Part II considers Justice Clarence Thomas's originalist approach. Parts III and IV ask whether juveniles, as opposed to other offenders, and LWOP, as opposed to other harsh sentences, are really so distinct as to merit special constitutional treatment. The conclusion explores possible responses to *Miller* in the states. Along the way, the Essay draws attention to some of the areas of potential confusion after *Miller*: the uncertainty of what is meant by "individualized sentencing"; the possible expansion of *Miller*'s exemption from mandatory sentencing to offenders who are not juveniles; and unresolved questions about the constitutionality of long prison sentences that are the practical equivalent of LWOP.

I. THE OPINIONS

This section considers the facts of the cases (corresponding roughly to Part I of the Kagan opinion); the majority's legal conclusion (Part II of the opinion); the objections of the dissenting Justices; and Kagan's responses (Part III of her opinion).

A. *The Facts*

Here is a summary of the crimes committed by Miller and Jackson:

* On July 15, 2003, Evan Miller and a friend robbed and assaulted a neighbor, Cole Cannon. After battering Cannon to the point that he was unable to rise from the floor, Miller set fire to Cannon's trailer, announced, "I am God, I've come to take your life," and left his victim to die of smoke inhalation.[18]

* On November 18, 1999, Kuntrell Jackson accompanied two friends to a video store, where he remained at the door to serve as a lookout. One of the friends pulled out a shotgun and ordered the clerk, nineteen-year-old Laurie Troup, to produce the money from the register. After she hesitated, Jackson entered, walked to the counter, and said, "We ain't playin'." Troup insisted there was no money and was shot dead.[19]

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18 Miller v. State, 63 So. 3d 676, 683 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012).

19 Jackson v. State, 194 S.W.3d 757, 758-60 (Ark. 2004), *rev'd*, 132 S. Ct. 2455 (2012).

Justice Kagan's summary of the facts is longer and more nuanced. To her credit, she begins with the crimes themselves, and not, as Justice Kennedy did in *Graham*, with a heart-wrenching account of the offender's childhood.[20]

I would assign a respectable grade to Kagan's account of Miller's crimes, although one quibble is that she fails to note that Miller and his friend returned to the burning trailer because his friend wanted to rescue Cannon, but Miller prevented his friend from doing so.[21] I would assign a lower grade to Kagan's account of Jackson's crime. She writes that there was a dispute at trial as to whether Jackson said to the victim, "'We ain't playin',' or instead told his friends, 'I thought you all was playin.'"[22] She fails to note that the jury, by convicting of capital murder, resolved the dispute in favor of the prosecution, and no appellate court ever questioned that conclusion.[23]

Even more problematic is Kagan's attempt to downplay the seriousness of Jackson's crime by calling it "a botched robbery."[24] If a law professor, to make a point about intentional torts, throws an eraser at a student, and the student swallows the eraser and chokes to death, that is a "botched" class demonstration. By contrast, when three men, armed with a shotgun, confront a lone clerk at night, demanding money, and when, at the end of the confrontation, the clerk lies dead in a pool of blood, this may or may not be the precise outcome desired, but it is a robustly foreseeable outcome, and one to which moral responsibility is justly attached.

B. *The Majority's Holding*

After a perfunctory burial of orginalism as an interpretative tool,[25] Justice Kagan invokes the now-familiar core of Eighth Amendment jurisprudence: "'evolving standards of decency.'"[26] The typical entry point in assessing these standards is "'objective indicia'" in the form of state laws and practices.[27] Postponing this discussion, Kagan looks to the Court's own precedents, and in particular, what she identifies as two lines of precedents:

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20 *Graham*, 130 S. Ct. at 2018 ("Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine . . . .").

21 *Miller*, 63 So. 3d at 683.

22 *Miller*, 132 S. Ct. at 2461 (alteration in original) (quoting *Jackson*, 194 S.W.3d at 760).

23 *Jackson*, 194 S.W.3d at 760.

24 *Miller*, 132 S. Ct. at 2465. Still more egregious, but in the same vein, is Justice Stephen Breyer's sentence in his concurring opinion: "Jackson *simply* went along with older boys to rob a video store." *Id.* at 2477 (Breyer, J., concurring) (emphasis added).

25 *Id.* at 2463 (majority opinion) (noting that the Eighth Amendment should not be viewed "through a historical prism").

26 *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

27 *Id.* at 2470 (quoting Graham v. Florida, 130 S. Ct. 2011, 2022 (2010)).

the first, "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; and the second, the likening of LWOP to the death penalty, and the insistence on individualized sentencing in death penalty cases.[28]

Of the first line of precedents, the most relevant cases are *Roper v. Simmons*[29] and *Graham*, which reasoned that juvenile criminals' immaturity, vulnerability to peer pressure, and less-fixed character rendered them less deserving of severe punishment than their adult counterparts.[30] This reasoning could culminate in a categorical prohibition of JLWOP, but the Court pauses, grasping the second line of precedents, which require "individualized sentencing" in death penalty cases.[31] Likening JLWOP to the death penalty, the Court apparently invalidated 2,000 of the 2,500 JLWOP sentences nationwide—that is, those imposed by states with mandatory sentencing.[32] The majority then casually speculates that discretionary JLWOP will be (or should be?) "uncommon."[33]

This vague dicta aside, *Miller* is a more concise and legalistic opinion than *Graham*: the majority drapes itself in the mantle of humility, and at every opportunity presents itself as the true follower of precedent.[34] Obedi-

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28 *Id.* at 2463-64 (citing *Graham*, 130 S. Ct. at 2022-23).

29 543 U.S. 551 (2005) (holding the death penalty unconstitutional for all juveniles).

30 *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569-70.

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

32 It is unclear whether *Miller* applies to all juvenile murderers mandatorily sentenced to LWOP, even those whose direct appeals are complete. *Cf.* Laurie Levenson, *Retroactivity of Cases on Criminal Defendants' Rights*, NAT'L L.J. (Aug. 13, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202566954548 (noting disagreements in the lower courts as to whether to apply *Graham* retroactively). With narrow exceptions, only substantive, not procedural rules, are applied retroactively. *See* Teague v. Lane, 489 U.S. 288, 310-11 (1989). Although new rules that exempt a class of persons from punishment are deemed substantive, *Miller* does not foreclose JLWOP, but simply modifies the procedure that can produce such a sentence. *See* Schriro v. Summerlin, 542 U.S. 348, 354 (2004). Yet the Supreme Court applied *Miller*'s rule to Kuntrell Jackson, whose case was before the Court on a habeas petition, apparently indicating an intent to apply the rule retroactively. *See Miller*, 132 S. Ct. at 2461. Or perhaps the Court was oblivious to the retroactivity issue. In any event, I, like others, assume the Court intends to apply *Miller* retroactively. *See* Jamie Markham, Miller v. Alabama: *Implications for North Carolina*, N.C. CRIMINAL LAW BLOG (June 28, 2012), http://nccriminallaw.sog.unc.edu/?p=3701 (adopting the above reasoning in arriving at this conclusion). If *Miller* is construed retroactively, the state courts will have to figure out how to resentence juveniles long ago sentenced to mandatory LWOP. *See* State v. Lockhart, 820 N.W.2d 769, 2012 WL 2814378 at *4 (Iowa Ct. App. July 11, 2012) (unpublished table decision) (vacating mandatory JLWOP sentence imposed for a murder that occurred twenty-nine years ago and remanding for an "individualized resentencing"); DiFillipo, *supra* note 2.

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

34 *Id.* at 2472 ("So we are breaking no new ground in these cases."). Justice Breyer takes a similar tack in his separate concurring opinion, arguing that Kuntrell Jackson's LWOP sentence was foreclosed by *Graham*, because Jackson himself never "'kill[ed] or intend[ed] to kill.'" *Id.* at 2475 (Breyer, J., concurring) (alterations in original) (quoting *Graham*, 130 S. Ct. at 2027). Breyer's concurring opinion

ence to precedent is much admired in Supreme Court Justices today,[35] and the majority thus lays claim to this virtue.

However, Supreme Court Justices are also expected to pronounce clear rules, and in this regard the majority falls short.[36] The "rule" announced in *Miller* is that JLWOP resulting from "individualized sentencing" is permissible; but what does the Court mean by "individualized sentencing"? On the one hand, the Court suggests in its conclusion that any sentencing proceeding that allowed defendants to draw attention to "their age and age-related characteristics and the nature of their crimes" might be sufficient;[37] on the other hand, in the body of the opinion, the Court cites precedents in the death penalty context that have formalized guidelines for the sort of sentencing hearings necessary to fully ventilate mitigating conditions.[38] Does the Court intend to import those precedents here?

This is left for lower courts to mull over, and the Supreme Court, at its Olympian distance, is serenely unaware of the problem, and how often it may arise. The majority assumes that it will be easy to distinguish JLWOP sentences that are valid—imposed by the fifteen states with discretionary sentencing—from those that are invalid—imposed by the twenty-eight states with mandatory sentencing.[39] But this is wrong. The majority apparently counts Florida as a "mandatory" JLWOP state, for example.[40] Although some juveniles were sentenced to LWOP for first-degree murder, which under state law resulted in a mandatory LWOP sentence, others were sentenced to LWOP for second-degree murder, which does *not* mandate LWOP.[41] The case of Thomas Daugherty is illustrative. After a conviction for second-degree murder committed at the age of seventeen, the trial judge "considered extensive evidence of appellant's age and other factors that lessened his culpability . . . [and] nonetheless concluded that appellant's

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would apply *Graham* to foreclose LWOP for any juvenile convicted of felony murder where there was no finding that the defendant intended to cause the victim's death.

35 *See* Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1258 (2010).

36 *See generally* Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 206-07.

37 *Miller*, 132 S. Ct. at 2475; *see* Conley v. State, 972 N.E.2d 864, 877-80 (Ind. 2012) (upholding LWOP sentence imposed on seventeen-year-old, where the trial court had exercised discretion).

38 *Miller*, 132 S. Ct. at 2467-68.

39 *See id.* at 2472 n.10.

40 Justice Kagan never bothers to specify in her opinion all of the twenty-eight states. *Compare* Graham v. Florida, 130 S. Ct. 2011, 2034-36 (2010) (providing an appendix). She apparently adopts the twenty-six states listed in Table 1 of the brief of the State of Alabama, which listed jurisdictions with mandatory LWOP for fourteen-year-old aggravated murderers, and then adds Louisiana and Texas, which have mandatory LWOP for, respectively, fifteen-year-olds and seventeen-year-olds. *Miller*, 132 S. Ct. at 2471 n.9. Florida is included in Table 1 of Alabama's brief. Brief of Respondent at 17, *Miller*, 132 S. Ct. 2455 (No. 10-9646).

41 *See, e.g.*, Daugherty v. State, No. 4D08-4624, 2012 WL 1859025, at *1 (Fla. Dist. Ct. App. May 23, 2012), *withdrawn*, No. 4D08-4624, 2012 WL 3822108 (Fla. Dist. Ct. App. Sept. 5, 2012).

diminished culpability was outweighed by his heinous conduct."[42] Depending on what the Supreme Court means by "individualized sentencing," this may pass muster under *Miller*.[43] If so, Daugherty, convicted of second-degree murder, is worse off than another offender convicted of first-degree murder, whose JLWOP sentence is now invalid.

C. *Dissenting Opinions*

Chief Justice Roberts assigned himself the dissenting opinion, and was joined by Justices Scalia, Thomas, and Alito.[44] How, Roberts wondered, could mandatorily imposed JLWOP possibly be regarded as "unusual" given that it is authorized in twenty-nine jurisdictions?[45] Roberts, and even more forcefully Alito in his separate dissenting opinion, argue that the majority's decision is the culmination of a line of precedents effectively disregarding "objective criteria" of actual state sentencing laws and practices.[46] As Alito writes, the majority now makes it impossible to sentence any defendant, "[e]ven a 17 ½-year-old who sets off a bomb in a crowded mall," to mandatory LWOP.[47] And if the majority dares to follow its reasoning in *Miller*—that is, the need to take into account a juvenile's peculiar characteristics before imposing punishment—to its logical culmination, *all* mandatory sentences for juveniles will be prohibited.[48] Roberts adds that the majority's dicta that even discretionary JLWOP sentences will be "uncommon" may obviate the need for future Supreme Court intervention, because lower courts will take this comment as an invitation to overturn such sentences.[49]

This last suggestion may overstate the Court's importance and power. Some lower courts will, citing *Miller*, overturn JLWOP sentences, but whether the *Miller* dicta will operate as cause or cover is uncertain. After all, even before *Miller*, lower courts have, citing state constitutional analogs to the Eighth Amendment, overturned JLWOP sentences.[50] My prediction is

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42 *Daugherty*, 2012 WL 1859025, at *2.

43 Upon reconsideration, after *Miller* was decided, the Florida appellate court held that Daugherty's sentence did not violate *Miller* because "the trial judge in his case had discretion to impose a different punishment"; nonetheless, the court ordered a resentencing in light of the Supreme Court's admonition that JLWOP should be "uncommon." *See Daugherty*, 2012 WL 3822108, at *2. The appellate court concluded that "[o]ur decision does not preclude the trial court from again imposing a life term without possibility of parole should the court upon reconsideration deem such sentence justified." *Id.* at *3.

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

45 *Id.* at 2477-78.

46 Justice Thomas's originalist dissenting opinion is discussed *infra* Part II.

47 *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting)

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

49 *Id.* at 2481.

50 *See, e.g.*, Naovarath v. State, 779 P.2d 944 (Nev. 1989) (reversing thirteen-year-old's LWOP sentence under both the state and federal constitution).

that many trial and appellate courts, far more conversant with the actual facts of cases, which will typically involve sixteen- and seventeen-year-old murderers, will not be moved to question discretionary JLWOP sentences.[51] The evidence after *Graham* was decided is telling; lower courts have generally read *Graham* narrowly, not extending it to homicide offenses, and even, in some instances, trumpeting their disregard for the *Graham* decision.[52] Furthermore, it seems likely that legislative reaction to *Miller* will cabin the practical reach of the decision, as I discuss in the conclusion to this Essay.

Roberts's other suggestion—that *Miller* throws into doubt the constitutionality of all mandatory juvenile sentences—is correct, although one wonders whether it is prudent to state the obvious. What, after all, is accomplished by including such language in a dissenting opinion? It can hardly be expected to shame the Justices in the majority into changing their minds. For that matter, many legal elites doubtless support the abandonment of mandatory juvenile sentencing, and will therefore applaud precisely what Roberts presumes will be regarded with dismay.

Here, then, is another reckless prediction: this language in Roberts's dissenting opinion, which is echoed in the other dissenting opinions, will find its way into a majority opinion a year or two from now, overturning yet another mandatory juvenile sentence. Justice Kagan will even do Chief Justice Roberts the courtesy of quoting him for the proposition that *Miller* sweeps more broadly than JLWOP sentences, and that she is bowing to the *Miller* precedent. Is it possible that the dissenting Justices would have better advised to include language, perhaps less truthful to the spirit of the majority opinion, but more rhetorically devious, suggesting that *Miller* is focused exclusively on JLWOP sentences, and has no application outside this context?

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51 For a recent example of an appellate court unmoved by *Miller*'s dicta that JLWOP should be "uncommon," consider State v. James, No. 02-08-2875, 2012 WL 3870349 (N.J. Super. Ct. App. Div. Sept. 7, 2012) (per curiam). Technically, the case involved a 315-year sentence, rendering the seventeen-year-old offender eligible for release in 268 years. *Id.* at *1. The appellate court noted that the trial judge exercised discretion in imposing fifty-year sentences for each of the separate homicide offenses, and then in running those sentences consecutively: "consecutive terms recognize that each victim was an individual whose life defendant extinguished or severely altered." *Id.* at *14; *see also* Conley v. State, 972 N.E.2d 864, 880 (Ind. 2012) (affirming JLWOP sentence, where the trial court had exercised discretion, and concluding that "[t]he heinous facts of this crime are difficult to comprehend").

52 *See, e.g.*, Alexandra Zayas, *No Life Term? Then 65 Years*, ST. PETERSBURG TIMES, Nov. 18, 2010, at 1B. In sentencing a thirteen-year-old rapist to sixty-five years in prison, the trial judge mocked his lawyer's argument (and implicitly that of the *Graham* Court): "Is it not cruel and unusual punishment for the victims to have endured the rage, the brutality, the terror that your client exacted upon them?" *Id*; *see also* Lerner, *supra* note 17, at 365-73.

D. *The Majority's Responses*

As we turn to Kagan's responses to the dissenting opinions, of particular note is her deft use of Roberts's concurring opinion in *Graham*. In that case, Roberts did not join in the majority's creation of a categorical rule, but instead concluded that Terrance Graham's sentence was cruel and unusual on the facts.[53] In so doing, Roberts labored under certain misimpressions about Graham that the sentencing judge did not.[54] In any event, his concurring opinion contained language that Kagan effectively deploys against him in *Miller*. For example:

> [Graham] was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that *should* be considered in deciding whether his punishment was unconstitutionally excessive.[55]

Or:

> Graham's age places him in a significantly different category from the defendants in [cases in which the Supreme Court affirmed LWOP sentences], all of whom committed their crimes as adults. Graham's youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure.[56]

To be sure, the language above is pulled out of context, and Roberts's concurring opinion in *Graham* did not foreclose his dissenting opinion in *Miller*. But as Kagan points out in the majority opinion, his apparent insistence that youth *requires* judicial attention in a criminal case cuts against the propriety of mandatory JLWOP.

Kagan is also rhetorically successful in some of her responses to Justices Thomas and Alito, emphasizing their unwillingness to accept precedent.[57] Moreover, Kagan reasonably notes, Justice Alito's example of a seventeen-year-old setting off a bomb cuts in favor of, not against, discre-

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53 Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring).

54 *See infra* notes 55-56.

55 *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring) (emphasis added). In fact, Graham was sixteen years old when he committed his *first* armed robbery, or at least the first one to result in a conviction. He was seventeen years, eleven months old when he committed the pair of armed home invasions for which his probation was revoked. *See* Joint Appendix at 50, 407, 426, *Graham*, 130 S. Ct. 2011 (No. 08-7412).

56 *Graham*, 130 S. Ct. at 2040 (Roberts, C.J., concurring). There was no evidence that Graham's age "enhanced his susceptibility to peer pressure"; if anything, the evidence heard by the sentencing judge suggested that Graham was the leader, not a follower, in a roving gang of armed home invaders. Joint Appendix, *supra* note 55, at 317-18. Roberts seemed to be indulging in precisely the kind of "categorical" assumptions about youth he criticized in the majority in that case.

57 Miller v. Alabama, 132 S. Ct. 2455, 2464 n.4 (2012).

tionary sentencing.[58] After all, the majority's "holding requires factfinders to attend to exactly such circumstances," as opposed to mandatory sentencing, which disregards the specifics of the crime and criminal.[59]

Less successful are Kagan's responses to the dissenters' use of "objective criteria" from the states. How can one regard a sentencing practice in twenty-nine jurisdictions as unusual? Kagan's answer is that the *Graham* Court pronounced a practice that was lawful in thirty-nine jurisdictions "unusual."[60] The risible logic seems to be that the decision in *Miller* is defensible because it is not as outrageous as *Graham*. The majority's pronouncement that legislatures have failed to appreciate that the effect of their laws is to sentence juveniles to LWOP is implausible given the number of mandatory JLWOP sentences and the clear evidence that, if there has been any "evolution" over the past two decades, it has been towards more, not less, harsh juvenile punishment.[61]

Notably, Kagan does not invoke foreign sources of law, as Justice Kennedy had in *Graham*.[62] Data from abroad could support the proposition that JLWOP is "unusual," given that no other peer nation appears to countenance it.[63] One could argue that the "unusual" in "cruel and unusual" should be understood with reference to the community of civilized nations to which the Declaration of Independence was addressed. Yet Kagan makes no mention of foreign law, making the astute calculation that such references trigger outrage, inspire hearings, and galvanize opposition. So why bother? *Miller* is perhaps best understood as an exercise of political power: Kagan had the votes, and the rest is, as a Danish prince observed, "[w]ords, words, words."[64]

II. AN ORIGINALIST ALTERNATIVE

Justice Thomas's dissenting opinion, joined by Justice Scalia, offers the promise of a principled alternative to the methodology adopted by the seven other Justices: the Constitution's original meaning. Thomas argues that, so understood, the Eighth Amendment merely prohibits methods of punishment deemed tortuous in 1791; whether an acceptable punishment was imposed mandatorily or after an individualized sentencing is irrelevant.[65] Even if one were inclined to pursue this inquiry, America's early

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58 *Id.* at 2487 (Alito, J., dissenting)

59 *Id.* at 2469 n.8 (majority opinion).

60 *Id.* at 2471.

61 *See id.* at 2478 (Roberts, C.J., dissenting).

62 Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

63 *See generally* Molly C. Quinn, Comment, *Life Without Parole for Juvenile Offenders: A Violation of Customary International Law*, 52 ST. LOUIS U. L.J. 283 (2007).

64 WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

65 *Miller*, 132 S. Ct. at 2485 (Thomas, J., dissenting)

history, Thomas argues, indicates a *preference* for mandatory punishment: "[E]ach crime generally had a defined punishment."[66]

One oddity to the Thomas opinion is that it contains only a three-sentence treatment of *juvenile* punishment from an originalist perspective; this discussion is not only buried in a footnote, but itself cites a footnote (from Scalia's dissenting opinion in *Roper*).[67] As both of those footnotes suggest, at common law a rebuttable presumption of incapacity expired upon one's fourteenth birthday; and one was then treated—in criminal law, but not in contract law—as an adult. The original meaning of the Eighth Amendment, to which Justices Thomas and Scalia profess allegiance, would pose no barrier to the execution of a fourteen-year-old, and would not even confer upon such a defendant the legal right to assert youth as a mitigating factor.

Neither of respondents' briefs cited William Blackstone, presumably because it was taken for granted that an interpretation of the Eighth Amendment informed by his Commentaries would interest only two Justices. And given those Justices' brief and buried treatment of the "common law," one wonders whether even those Justices are sheepish in their embrace of this interpretation. In his much-cited article, Justice Scalia wrote, "I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case's arising either."[68]

How does flogging compare to the execution of a fourteen-year-old, mandatorily imposed upon conviction for capital murder? On the one hand, both Scalia and Thomas regard the latter punishment as historically rooted; on the other hand, at least Justice Scalia has stated he would invalidate it because of the "national consensus" against it.[69] No state permits the mandatory execution of a juvenile, but mandatory JLWOP cannot be dismissed as an academic issue. If the originalist Scalia recoils from the mandatorily imposed execution of a fourteen-year-old, it is reasonable to ask why mandatory LWOP does not likewise evoke a horror that overwhelms his professed attachment to the Eighth Amendment's original meaning. The answer would seem to be not because such a practice is historically rooted, but because there is no national consensus against it. If so, then there is not

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66 *Id.*

67 *Id.* at 2483 n.2 (citing Roper v. Simmons, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting)).

68 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

69 Thompson v. Oklahoma, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting) ("If the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment.").

much to distinguish this brand of originalism from the interpretation of the Eighth Amendment adopted by the other dissenting Justices.

III. BRAINS: YOUNG AND OLD

The dissenting Justices predict that the reasoning in *Miller*—emphasizing the immaturity and malleability of young people—will soon sweep away all juvenile mandatory sentencing. Yet why just *juvenile* sentencing? What is so special about the young? The majority alludes to historical differences in legal treatment between juveniles and adults, but it cannot expect much traction here, given that the historical treatment of juveniles over fourteen, as discussed above, cuts against the argument for special treatment in the criminal law. Kagan also invokes "common sense,"[70] which is the perennial refuge of those without good arguments; and finally there is the now-expected allusion to "'brain science,'" which supposedly illustrates a sharp divide between juveniles and adults which undercuts ordinary rationales for punishment.[71]

If this last point is intended seriously, all persons with brain abnormalities should be exempt from mandatory sentencing. Furthermore, anyone claiming mental retardation should be entitled to an *Atkins*-like hearing, in which evidence of a low IQ is cited to exempt one from an otherwise mandatory sentence.[72] In *Roper*, the Court drew upon its decision in *Atkins*, likening the young to the mentally retarded;[73] equally compelling is the claim that the rule announced in *Miller* (exempting juveniles from mandatory LWOP) should be extended to the mentally retarded.

The Court may also be required to think through the implications of its brain argument. The premise is that at some point in adulthood one achieves a mature brain and only then does moral responsibility fully attach to one's acts. Yet our brains evolve throughout our lives; there is no terminal point. If the benchmark is the brain of a person in his mid-twenties, then it is likely that the brains of seventy- and eighty-year-olds show greater differences than the brains of sixteen-year-olds.[74] And if the immature

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

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

72 *Atkins v. Virginia*, which prohibited states from executing the mentally retarded, has given rise to "Atkins" hearings to determine whether a defendant is mentally retarded. 536 U.S. 304 (2002).

73 Roper v. Simmons, 543 U.S. 551, 564-75 (2005).

74 A recent article in *Discover* magazine included brain scans of a twenty-seven-year-old and an eighty-seven-year-old, showing dramatic differences. Robert Epstein, *Brutal Truths About the Aging Brain*, DISCOVER, Oct. 2012, at 48, 49 ("The sad truth is that even normal aging has a devastating effect on our ability . . . to reason."). One recent study reported brain decay (with respect to the "integrity of myelination") as early as age thirty-nine. *See generally* GEORGE BARTZOKIS ET AL., LIFESPAN TRAJECTORY OF MYELIN INTEGRITY AND MAXIMUM MOTOR SPEED (2010), *available at* http://www.ncbi.nlm.nih.gov/pubmed/18926601. Other studies suggest that cognitive decline meaning-

brains of sixteen-year-olds exempt one from mandatory sentencing, shouldn't the (generalizing wildly) impaired brains of octogenarians do so as well?

IV. WHAT IS SO SPECIAL ABOUT LIFE WITHOUT PAROLE?

Life without parole is a severe sentence, but the American criminal justice system dispenses many severe sentences, both in an absolute sense and relative to the crime. What is so different about LWOP? Justice Kagan suggests that the difference is that LWOP "mandate[s]" that the defendant "die in prison."[75] But this ignores the possibility, albeit remote, of executive clemency. Furthermore, many prison sentences effectively mandate an offender die in prison. It is, in fact, commonplace to refer to long prison sentences as "life" sentences, especially in jurisdictions that foreclose the possibility of release until one has served 85 percent of sentenced time.

Along the spectrum of punishment, the death penalty is fairly characterized as a discontinuity. When the Court began crafting rules to govern the death penalty, it was reasonable to think those rules were exclusive to that punishment. But there can be no such assurance when rules are developed for LWOP. *Graham* foreclosed JLWOP for nonhomicide offenses, and courts have puzzled over whether this prohibition extends to sentences of fifty-two,[76] fifty-four,[77] eighty,[78] eighty-four,[79] eighty-nine,[80] 110,[81] and 120[82] years. As this Essay was in its final stages of publication, the California Supreme Court held that a 110-year sentence denied a juvenile offender an "opportunity to 'demonstrate growth and maturity'" and precluded a

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fully begins at age forty-five and accelerates markedly after age sixty. *See generally* INSTITUT NATIONAL DE LA SANTÉ ET DE LA RECHERCHE MÉDICALE, THE ONSET OF COGNITIVE DECLINE BEGINS AT 45 (2012), *available at* http://www.eurekalert.org/pub_releases/2012-01/ind-too010912.php.

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

76 *See, e.g.*, People v. J.I.A., 127 Cal. Rptr. 3d 141 (Cal. Ct. App.) (fifty year sentence, plus two life-with-possibility-of-parole sentences, which meant under state law a fifty-two year sentence; foreclosed by *Graham*), *superseded by* 260 P.3d 283 (Cal. 2011).

77 *See, e.g.*, Bell v. Haws, No. CV09-3346-JFW (MLG), 2010 WL 3447218 (C.D. Cal. July 14, 2010) (upheld under *Graham*).

78 *See, e.g.*, Floyd v. State, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (per curiam) (foreclosed by *Graham*).

79 *See, e.g.*, People v. Mendez, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (foreclosed by *Graham*).

80 *See, e.g.*, Bunch v. Smith, No. 1:09 CV 901, 2010 WL 750116 (N.D. Ohio Mar. 2, 2010) (upheld in anticipation of *Graham*), *aff'd*, 685 F.3d 546 (6th Cir. 2012).

81 *See, e.g.*, People v. Caballero, 119 Cal. Rptr. 3d 920 (Cal. Ct. App. 2011) (upheld under *Graham*), *rev'd*, 282 P.3d 291 (Cal. 2012).

82 *See, e.g.*, People v. Ramirez, 123 Cal. Rptr. 3d 155 (Cal. Ct. App.) (upheld under *Graham*), *superseded by* 255 P.3d 948 (Cal. 2011).

"'realistic opportunity to obtain release' from prison during his or her expected lifetime," in contravention of *Graham*.[83]

How will *Miller* be interpreted? The beginning of the opinion suggests that the "requirement of individualized sentencing" extends to "defendants facing the most serious *penalties*."[84] Note the plural, which might be interpreted to extend to long prison sentences. However, at the end of *Miller*, the Court restricts its requirement to the "impos[ition of] the harshest possible *penalty* for juveniles."[85] Note the singular, that is, LWOP. At some point the Supreme Court may condescend to clarify whether long prison sentences should be deemed LWOP for purposes of *Graham* and *Miller*. Until then, we can expect the issue to fester (or "percolate," in the Court's preferred nomenclature) in the lower courts.

CONCLUSION

It is perhaps the majority's hope that the benighted legislatures and governors of America will take the hint of *Graham* and *Miller* and reform their laws in a more humane direction. In this drama, the Court is cast as the nation's schoolmaster and politicians as wayward juveniles.

Yet children—and really none of us—respond well when told they are idiots and then slapped on the head. For whatever reason, moral suasion of this kind rarely produces the desired result. Consider the response of Iowa Governor Terry Branstad to *Miller*. He has indicated that the decision has prompted him to think hard about "justice" and those reflections have caused him to commute all JLWOP sentences: Iowa juvenile offenders will now be eligible for parole after they have served sixty years in prison.[86] Juvenile murderers residing in Iowa prisons are doubtless sending notes of appreciation to Justice Kagan, now that they can expect an audience with a parole board sometime in their late seventies. Other jurisdictions are likely to take their cue from Colorado, which makes juveniles sentenced to LWOP eligible for parole after serving forty years in prison.[87]

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83 People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (quoting Graham v. Florida, 130 S. Ct. 2011, 2029, 2034 (2010)). The opinion holds that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy" violates the Eighth Amendment. *Id.* Assuming a life expectancy of seventy years, then, a sixteen-year-old offender can be sentenced a term of years with parole eligibility after fifty three years, 364 days, because this gives the offender an "opportunity to demonstrate [his] rehabilitation" and perhaps even obtain release, on the final day of his expected natural life. *See id.*

84 Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (emphasis added).

85 *Id.* at 2475 (emphasis added).

86 Steve Eder, *Iowa Governor Reduces Juvenile Killers' Terms*, WALL ST. J. (July 17, 2012), http://online.wsj.com/article/SB10001424052702303612804577531242880353760.html.

87 COLO. REV. STAT. § 18-1.3-401(4)(b) (2011). The Colorado Court of Appeals recently indicated that this statute complies with *Miller*. In *People v. Banks*, No. 08CA0105, 2012 WL 4459101 (Colo.

When the Supreme Court pronounces upon politically contentious issues, the decision is less likely to change the median voter than to polarize the debate.[88] At least in some jurisdictions, a possible development from *Graham* and *Miller* is to retard, rather than spur, the movement toward a justice system more sympathetic to juveniles. The Supreme Court will eventually need to clarify whether sentencing schemes such as those adopted in Iowa and Colorado afford juveniles a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[89]

The larger question raised by *Graham* and *Miller* is whether the Court, having twice invalidated noncapital sentences, is prepared to embark upon an invigorated Eighth Amendment jurisprudence outside the juvenile context. After all, why are capital murder statutes that mandatorily impose LWOP on juveniles more "cruel and unusual" than statutes involving nonhomicide offenses that have the practical effect of imposing mandatory life sentences on young adult offenders? Consider two statutes and two young offenders, both dispatched to prison for essentially the entirety of their lives by judges who had no discretion in the matter:

* 18 U.S.C. § 924(c)/Wayne Angelos, age twenty-four. A first-time offender, Angelos was convicted of three small drug deals while possessing a firearm. Convicted of three 924(c) violations, the mandatory statutory penalty was fifty-five years in prison, which means he will not be eligible for release until he turns seventy years old.[90]

* Ark. Code Ann. § 5-10-101/Jason Baldwin, age sixteen. Along with two other young men, Baldwin abducted, sexually assaulted, castrated, and murdered three eight-year-old boys. Convicted of capital murder, under Ark. Code Ann. § 5-10-101, he was mandatorily sentenced to LWOP.[91]

App. Sept. 27, 2012), the minor defendant was sentenced, under rules no longer in effect, to mandatory LWOP. The court found this older statute to be unconstitutional under *Miller*, severed that provision, engaged in some statutory analysis, and when the dust had settled, discovered that the appropriate sentence was life with the possibility of parole after forty calendar years—that is, the sentence under currently existing law. *Id.* at *19-21. California has just adopted a more lenient law, allowing some juvenile murderers to apply for parole after serving fifteen years in prison and to be eligible for release after twenty-five years. Act of Sept. 30, 2012, ch. 43, § 27, 2012 Cal. Stat. __, *available at* http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=26594024200+45+0+0&WAISaction=retrieve.

88 *Cf.* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989).

89 *Miller*, 132 S. Ct. at 2469 (quoting Graham v. Florida, 130 S. Ct. 2011, 2030 (2010)).

90 *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

91 *See* Echols v. State, 936 S.W.2d 509, 516 (Ark. 1996); Misskelley v. State, 915 S.W.2d 702, 707 (Ark. 1996).

It might be said that I have cherry-picked a sympathetic 924(c) offender, but the same could be said of the petitioners in *Miller*; and at least in my view Angelos is a vastly more sympathetic defendant that either Evan Miller or Kuntrell Jackson. So the puzzle is why Angelos's mandatory sentence, which effectively denies him a "meaningful opportunity to obtain release" until long after he is a member of AARP, is constitutional, but Baldwin's (and Miller's and Jackson's) are not. It's a bit confusing, at least to me, but perhaps someday soon the Supreme Court will provide enlightenment.