WHAT ROUGH BEAST AWAITS? *GRAHAM*, *MILLER*, AND THE SUPREME COURT'S SEEMINGLY INEVITABLE SLOUCH TOWARDS COMPLETE ABOLITION OF JUVENILE LIFE WITHOUT PAROLE

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Things fall apart . . .
Mere anarchy is loosed upon the world . . .
The ceremony of innocence is drowned . . .
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?

—William Butler Yeats, *The Second Coming*

Tammy Mungin didn't die. That was good news for her. And it was good news for Michiah Banks.

On a warm May afternoon, exactly one month shy of his eighteenth birthday, Banks and his nephew drove twenty-year-old Tammy to a remote area in the woods where they handcuffed her.[1] Banks forced Tammy, a virgin, into the back seat of his car and raped her at knifepoint. As she screamed in pain, Banks began to choke Tammy and threatened to stab her to death unless she performed "various sexual acts."[2] Tammy complied.[3] After the rape, Banks handcuffed Tammy to a tree and left her there for thirty minutes to contemplate her fate.[4]

Banks returned and removed the handcuffs.[5] He took off his belt, wrapped it around Tammy's throat and tried to strangle her.[6] Tammy managed to free herself and run, but Banks caught her and began stabbing her.[7] The knife blade broke.[8] Banks began to scream profanities at Tammy, went to his automobile, removed a tire iron, and again attacked Tammy—beating her over the head fifteen to twenty times.[9] He then stuffed a rag in her mouth.[10] Believing her dead, Banks

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1. Banks v. State, 520 So. 2d 43, 47, 49 (Fla. Dist. Ct. App. 1987) (Nimmons, J., dissenting).

2. *Id.* at 47.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 44 (majority opinion).

10. Information obtained through a request made under the Freedom of Information Act, 55 U.S.C. § 552 (2006), and is on file with the author.

stopped his onslaught.[11] But when Tammy began to cry, Banks knew that he had not completed the job.[12] As Tammy listened, Banks and his partner discussed other ways that they might finish what they had started[13]: they considered tying her between two trees and running over her with the car;[14] they considered putting her in the trunk, driving her to the river, and drowning her there.[15] They considered roping her by the neck to a tree.[16] Eventually, they settled on the latter.[17] Banks tied a rope tightly around Tammy's neck, put the rope around a tree, and pulled it taut.[18] Thinking her dead or near death, Banks and his friend left Tammy tied to the tree.[19] They decided that they would return at ten o'clock the following morning to bury her body.[20] Astonishingly, Tammy freed herself from the noose and escaped.[21] She lived, and eventually she bravely testified to the horrific ordeal just described.[22]

The State of Florida "direct filed" against Banks, charging him as an adult with one count of armed kidnapping, two counts of sexual battery with a deadly weapon, and one court of attempted first-degree murder.[23] Banks pleaded guilty to all of the counts except one of the sexual battery charges.[24] The trial judge sentenced him to concurrent terms that equaled forty years in prison.[25] Banks was released eighteen years later.[26]

Should Banks have received a sentence longer than forty years? Should he have been eligible for parole after just ten years? Should he have been released after only eighteen years? These questions are certainly open to debate.

On the other hand what if the trial judge, in exercising his discretion, had concluded that Banks was such a danger to society, so irreparably depraved, and his crimes so horrific, that he had sentenced Banks to life in prison without the possibility of parole?[27]

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11. *Banks*, 520 So. 2d at 47 (Nimmons, J., dissenting).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 48.
22. *Id.*
23. *Id.* at 44 (majority opinion).
24. *Id.*
25. *Id.*
26. *Inmate Release Information Detail*, FLA. DEP'T OF CORRECTIONS, http://www.dc.state.fl.us/InmateReleases/detail.asp?Bookmark=132&From=list&SessionID=572285112 (last visited June 3, 2013).
27. With regard to persons sentenced under the Criminal Punishment Code, Florida abolished its parole system in 1983, thus requiring that all sentences be served in their entirety, unless

The Supreme Court has recently certified that such a sentence would be unconstitutional.[28] If a seventeen-year-old juvenile, one month shy of his eighteenth birthday, were to commit the same crimes today as Michiah Banks did twenty-seven years ago—indeed, if that juvenile were to torture his victim for days on end, maim her for life, leave her a quadriplegic, or beat her into a permanent coma—a judge could not constitutionally sentence that juvenile to life without the possibility of parole.[29] Moreover, according to the Court, even if that perpetrator's victim did not miraculously survive the onslaught, the perpetrator would still be ineligible for mandatory life without parole.[30] And, even in cases of rape, torture, and death, there is mounting evidence that the Court will soon do away with the *discretionary* imposition of life without parole in those cases as well.[31]

Yet, if Michiah Banks or the hypothetical perpetrator had been a mere thirty-one days older, the imposition of mandatory or discretionary life without parole would—according to the United States Supreme Court—be perfectly constitutional.[32]

INTRODUCTION

In 2010, the Supreme Court issued its groundbreaking decision in *Graham v. Florida*.[33] *Graham* held that sentencing a juvenile to life without the possibility of parole ("JLWOP") for a nonhomicide crime violates the Eighth Amendment's ban on cruel and unusual punishment.[34] Recently, in *Miller v. Alabama*,[35] the Court once again took up the issue of JLWOP, this time holding that *mandatory* JLWOP violates the Eighth Amendment under all circumstances, including intentional first-degree murder.[36] This Article argues that *Graham* and *Miller* are a portent of things to come—namely, the complete abrogation of *discretionary* JLWOP even for the most heinous premeditated murders, despite the advanced age of the juvenile offender. The Article demonstrates that the majority opinions in *Graham* and *Miller* are ambiguous and internally inconsistent. Yet, in spite of this discordance, and sometimes owing to it, the two opinions provide evidence that the Court is moving toward the wholesale

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abrogated by executive clemency. *See* FLA. STAT. § 921.002(1)(e) (2012); FLA. DEP'T OF CORRECTIONS, FLORIDA'S CRIMINAL PUNISHMENT CODE: A COMPARATIVE ASSESSMENT 6 (2011), *available at* http://www.dc.state.fl.us/pub/sg_annual/1011/sg_annual-2011.pdf.

28. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

29. *See* discussion *infra* Part I.

30. *See* discussion *infra* Part I.

31. *See* discussion *infra* Part I.

32. *See* discussion *infra* Part I.

33. 130 S. Ct. 2011 (2010).

34. *Id.* at 2034.

35. 132 S. Ct. 2455 (2012).

36. *Id.* at 2475.

prohibition of JLWOP.

Part I of the Article provides a comprehensive overview of *Graham* and *Miller*, explaining the reasoning of the majority in each case and the objections raised by the dissenters. This synopsis sets the stage for the remainder of the Article, which offers a comprehensive critique. Part II presents a critical analysis of the two decisions, focusing on specific aspects that are unclear or contradict other reasonings within the opinions. These difficulties include inconsistent statements regarding a sentencing authority's ability to discern the dangerousness of a defendant and an overall theoretical inconsistency within and between the two opinions. Part III of the Article explores evidence suggesting the Court will soon declare JLWOP unconstitutional. Among the indications are the easy choice of cases, the decision to invalidate *mandatory* JLWOP, the rejection of incapacitation as a sufficient penological goal, the categorical rejection of JLWOP for nonhomicide crimes based on rationales that equally apply to homicide offenses, the unnecessary defense of a national consensus against mandatory imposition of the sentence, and the Court's curious opining and corresponding lack of guidance regarding legitimate applications of JLWOP.

I. *GRAHAM*, *MILLER*, AND THE EROSION OF JLWOP

Is JLWOP ever appropriate in the nonhomicide context? Is *mandatory* JLWOP ever appropriate, even in cases of intentional first-degree murder? *Graham* and *Miller* addressed these questions squarely and answered both in the negative.

A. Graham's Prohibition of JLWOP for Nonhomicide Crimes

Terrance Jamar Graham, at the age of sixteen, participated in a botched robbery.[37] He was accompanied by three other juveniles.[38] One of Graham's accomplices hit a store employee over the head with a metal bar, and the juveniles fled the scene without taking any money.[39] Graham was later arrested and charged as an adult with armed burglary and attempted armed robbery.[40] Because the burglary involved "assault or battery," and because he was charged as an adult, Graham was eligible for a maximum sentence of life imprisonment without parole.[41] Graham entered a guilty plea and, under the terms of a plea agreement, was sentenced to concurrent three-year probationary periods.[42]

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37. *Graham*, 130 S. Ct. at 2018.

38. *Id.*

39. *Id.* The employee required a few stitches but was otherwise unharmed. *Id.*

40. *Id.*

41. FLA. STAT. § 810.02(1)(b), (2)(a) (2012) (defining burglary as a felony of the first degree when it involves assault or battery upon a person).

42. *Graham*, 130 S. Ct. at 2018. Technically, Graham's plea was not accepted by the court, which withheld adjudication of guilt pending satisfactory completion of probation. Order of Probation, State v. Graham, No. 16-2003-CF-11912-AXXX-MA, 2003 WL 25835975, at 1-4 (Fla. Cir. Ct. Dec. 18, 2003).

Approximately one year after pleading guilty, just shy of eighteen and during his probationary period, Graham reoffended.[43] Participating in a home invasion, Graham (along with two adult accomplices) allegedly held two victims at gunpoint, forced them into a closet, and blocked the door.[44] Graham was arrested later that night.[45] Following a request by the probation officer, the judge overseeing the case accepted Graham's deferred plea to the earlier crimes.[46] At sentencing, despite a recommendation by the State of Florida for a combined sentence of forty-five years, the judge imposed the maximum penalty under the law—life without parole.[47] After the trial court's effective denial of Graham's motion to set aside the sentence and the exhaustion of the state's appeals process, the United States Supreme Court granted Graham's petition for certiorari.[48]

1. Graham *Majority Opinion*.—In a 5-4 decision authored by Justice Kennedy, the Court categorically declared the imposition of JLWOP a violation of the Eighth Amendment in all nonhomicide cases.[49] Initially, the Court explained the two ways in which it had previously reviewed the proportionality of a sentence.[50] One method, applied to all non-capital sentences, involved an individualized inquiry.[51] In the other approach, the Court had categorically banned certain impositions of the death penalty.[52] In discussing these methods of sentence review, the *Graham* Court acknowledged that the Court had never

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43. *Graham*, 130 S. Ct. at 2018.

44. *Id.* at 2018-19.

45. *Id.* at 2019.

46. *Id.*

47. *Id.* at 2019-20.

48. *Id.* at 2020.

49. *Id.* at 2030-33. In his concurrence, Chief Justice Roberts narrowly sided with the majority decision, but only insofar as it related to Graham. *Id.* at 2036 (Roberts, C.J., concurring). Chief Justice Roberts rejected the majority's categorical ban on JLWOP. *Id.* at 2036-38.

50. *Id.* at 2021-22 (majority opinion).

51. In considering the constitutionality of the length of a "term-of-years sentence," the Court required that the lower court "begin by comparing the gravity of the offense and the severity of the sentence." *Id.* at 2022 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991)). If that initial inquiry suggested "gross disproportionality," the lower court was then to engage in a comparison of the defendant's sentence with other sentences in the same jurisdiction and other jurisdictions. *Id.* If the lower court's "comparative analysis 'validate[d] an initial judgment that [the] sentence [was] grossly disproportionate,' the sentence is cruel and unusual." *Id*. (second alteration in original) (quoting *Harmelin*, 501 U.S. at 1005).

52. These generally involved cases where either "the nature of the offense," e.g., nonhomicide crimes, or "the characteristics of the offender," e.g., juveniles or the intellectually impaired, lent itself naturally to categorization. *Id.* In determining whether a categorical ban was appropriate in the death penalty context, the Court first "determine[d] whether there [was] a national consensus against the sentencing practice at issue." *Id.* (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)). If such a consensus was found, the Court then exercised "its own independent judgment whether the punishment in question violate[d] the Constitution." *Id.* (citing *Roper*, 543 U.S. at 572).

before employed a categorical approach to invalidate a term-of-years sentence.[53] Nevertheless, because "[t]his case implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes . . . , a threshold comparison between the severity of the penalty and the gravity of the crime d[id] not advance the analysis."[54] The Court thus determined that in the context of JLWOP, "the appropriate analysis is the one used in cases that involved the categorical approach."[55]

Having concluded that this new categorical approach should be applied to review Graham's sentence, the Court first searched for a national consensus.[56] After considering the data, the Court announced that "[t]he sentencing practice now under consideration is exceedingly rare. And 'it is fair to say that a national consensus has developed against it.'"[57]

Once the Court identified a national consensus,[58] it embarked upon its second task—determining as a matter of first impression whether the imposition of JLWOP violated the Eighth Amendment. Declaring juvenile offenders less culpable than adults, nonhomicide crimes less serious than homicide crimes, and life without parole a severe punishment, the Court found that it did.[59]

The Court next discussed the possible penological justifications for nonhomicide JLWOP.[60] One by one, the Court was able to dispose of each rationale, finding none of them sufficient to support the sentence.[61] The Court

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53. *Id.*

54. *Id.* at 2022-23.

55. *Id.* at 2023.

56. *Id.* Relying first on state and federal legislation, the Court found that the laws of thirty-seven states and the federal government permitted JLWOP for nonhomicide offenders. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 312 (2002)). This, however, was not sufficient to demonstrate the necessary accord. *Id.* The Court continued its inquiry by examining "[a]ctual sentencing practices" and found that, across the country, JLWOP for nonhomicide crimes was "most infrequent," with only 123 juveniles serving the sentence. *Id.* at 2023-24. Moreover, the Court pointed out that "only [eleven] jurisdictions nationwide *in fact* impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while [twenty-six] States, the District of Columbia, and the Federal Government *do not impose them* despite apparent statutory authorization." *Id.* at 2024 (emphases added).

57. *Id.* at 2026 (quoting *Atkins*, 536 U.S. at 316).

58. *Id.* (explaining again that the consensus itself was insufficient to brand the sentencing practice cruel and unusual).

59. *Id.* at 2026-28.

60. *Id.* The Court recognized four "legitimate penological goals"—retribution, deterrence, incapacitation, and rehabilitation—and reiterated its earlier pronouncements that "'[t]he Eighth Amendment does not mandate adoption of any one penological theory'" and that "[a] sentence lacking *any* legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 2026, 2028 (emphasis added) (internal quotation marks omitted).

61. *Id.* at 2028-30. The Court found retribution to be inapplicable because a juvenile, by nature, is less culpable than an adult, and the punishment does not fit the crime. *Id.* at 2028. The deterrence justification met with a similar fate: the immaturity of juveniles renders them "less

also rejected two arguments advanced by the States: (1) that adequate safeguards were present in the very process of determining whether to charge a juvenile as an adult and (2) a categorical rule was unnecessary because a case-by-case approach could identify specific juveniles who deserved the sentence.[62] Finally, in support of its conclusions, the Court looked to international law and determined that "the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders."[63]

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susceptible to deterrence" because juveniles are "less likely to take a possible punishment into consideration when making decisions," and, even if the imposition of nonhomicide JLWOP deters a few juveniles, punishment must not be "grossly disproportionate in light of the justification offered." *Id.* at 2028-29. Because of the already established "diminished moral responsibility" of a juvenile nonhomicide offender, "any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.* at 2029. As for incapacitation, the Court recognized that while incapacitation "may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Id.* Incapacitation based on the rationale "that the juvenile offender forever will be a danger to society" is tenuous considering that "expert psychologists" have difficulty making such a determination, and thus incapacitation cannot serve as a sole rationale to support JLWOP in the nonhomicide context. *Id.* Lastly, in examining the rehabilitation justification, the Court found that JLWOP "forswears altogether the rehabilitative ideal." *Id.* at 2030. Echoing previous parts of the opinion, the Court stated that denying the juvenile nonhomicide offender the "right to reenter the community . . . is not appropriate in light of [his] capacity for change and limited moral culpability." *Id.*

62. The Court defended its adoption of a categorical rule by demonstrating that it had duly considered these two possibilities. *Id.* First, the Court rejected the argument, advanced by the State of Florida, that the process of up-charging juveniles into the adult criminal system provided adequate safeguards to ensure that only deserving juveniles could be sentenced to JLWOP. *Id*. at 2030-31. It reasoned that because a court could sentence a juvenile to life without parole "based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character,'" the practice did not pass constitutional muster. *Id.* at 2031 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)). Second, and similarly, the Court rejected the case-by-case approach—until then the exclusive means of evaluating a term-of-years sentence—because courts could not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032. According to the Court, "Here, as with the death penalty, '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'" *Id*. (alteration in original) (quoting *Roper*, 543 U.S. at 572-73). In a concluding defense of its categorical rule, the Court noted that such a "rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.*

63. *Id*. at 2034. Justice Kennedy noted that "only [eleven] nations authorize life without parole for juvenile offenders under any circumstances; and only [two] of them, the United States and Israel, ever impose the punishment in practice." *Id.* at 2033. Further, the Court found that Israel did not impose JLWOP for nonhomicide crimes because all of those serving the sentence in that country "were convicted of homicide or attempted homicide." *Id*. The confusing equation of "homicide" with "attempted homicide" is discussed *infra* Part III.A.

Concluding that JLWOP in nonhomicide cases violates the Eighth Amendment, the Court succinctly expressed its holding:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.[64]

2. Chief Justice Roberts's Concurrence in Graham.—Chief Justice Roberts concurred in the Court's judgment,[65] but he rejected the majority's "invent[ion] [of] a new constitutional rule of dubious provenance."[66] Rather, he argued that the Court should abide by its previous noncapital precedents and apply a "narrow proportionality review" using a "case-by-case" analysis.[67] The Chief Justice then applied the "narrow proportionality" framework and found that Graham's sentence violated the Eighth Amendment.[68] He confirmed this conclusion by reviewing sentences for similar crimes, inside and outside of Florida, and found that Graham's sentence was indeed extraordinary.[69] That being said, his opinion left no doubt that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution."[70] In the Chief Justice's mind, Graham's case did not rise nearly to such a heinous level. Thus, the Chief Justice concluded that the Court

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

65. *Id.* at 2036 (Roberts, C.J., concurring). Roberts' concurrence followed a concurrence by Justice Stevens, in which he took Justice Thomas to task for effectively ignoring the Nation's "evolving standards of decency." *Id*. (Stevens, J., concurring).

66. *Id*. (Roberts, C.J., concurring).

67. *Id*. at 2037 (internal quotation marks omitted). The Chief Justice's explanation of this type of review was entirely consistent with that of the majority. Like the majority, he set forth the accepted two-step analysis: a violation of the Eighth Amendment occurs if the gravity of the offense is "grossly disproportionate" to the severity of the penalty, and, only then, if a comparison of sentences within and outside the subject jurisdiction "confirm[s] the inference of gross disproportionality." *Id.* at 2037-38.

68. *Id*. at 2039-41. First, in considering the gravity of the crime, he determined that Graham's crimes, while serious, did not rise to the level of "murder or rape." *Id.* at 2040. With regard to the harshness of the punishment, the Chief Justice was troubled by the trial judge's imposition of life without parole despite the contrary recommendations of every party, including the State. *Id.* As for the ability of courts to engage in this proportionality analysis, Chief Justice Roberts reiterated the "justified assumption that courts are competent to judge the gravity of an offense, at least on a relative scale." *Id*. at 2042 (internal quotation marks omitted). And in discussing juvenile culpability, the Chief Justice expressed his belief that juveniles "are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes." *Id.* at 2038.

69. *Id*. at 2040-41.

70. *Id*. at 2042 (relying on descriptions of two particularly disturbing juvenile nonhomicide crimes).

was presented with an "exceptional case" in which an appellate court may overturn a term-of-years sentence based on gross disproportionality.[71]

3. The Graham *Dissent*.—The dissent was led by Justice Thomas, who derided the majority for extending the bounds of the Eighth Amendment by ignoring laws duly enacted by legislatures and, instead, basing the definition of cruel and unusual on "snapshot[s] of American public opinion."[72] He stated that "[f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."[73] Justice Thomas proclaimed that the majority's decision "eviscerate[d]" the distinction between homicide and nonhomicide cases. "Death," he declared, "is different no longer."[74]

According to Justice Thomas, the heart of the majority's argument was "its 'independent judgment' that this sentencing practice does not 'serv[e] legitimate penological goals.'"[75] "The Court begins that analysis," he said, "with the obligatory preamble that '[t]he Eighth Amendment does not mandate adoption of any one penological theory,' then promptly mandates the adoption of the theories the Court deems best."[76] Finally, Justice Thomas questioned the Court's decision

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71. *Id*.

72. *Id*. at 2045 (Thomas, J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)). Justice Thomas first took issue with the long line of Supreme Court precedents that had established proportionality as the lynchpin of Eighth Amendment jurisprudence. *Id.* at 2044. As for the "snapshot" of public opinion, he argued that the majority was not willing even to accept that snapshot but instead "reserve[d] the right to reject the evidence of consensus it [found] whenever its own 'independent judgment' point[ed] in a different direction." *Id.* at 2045-46 (quoting *Roper*, 543 U.S. at 561).

73. *Id*. at 2046.

74. *Id*. (internal quotation marks omitted). Justice Thomas noted that in the preceding twenty-eight years, the Court had considered three challenges to a term-of-years sentence and had "rejected them all." *Id.* at 2047. He also took the majority to task by refuting the existence of a national consensus against nonhomicide JLWOP. *Id.* at 2048-49. All of the majority's efforts to statistically prove the existence of a national consensus were, he declared, "merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat." *Id.* at 2053; *see also supra* text accompanying note 38.

75. *Graham*, 130 S. Ct. at 2053 (alteration in original) (quoting the majority opinion, *id.* at 2026).

76. *Id*. (alteration in original) (citations omitted) (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)). Justice Thomas noted that JLWOP "ensur[es] that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities." *Id.* Justice Thomas concluded that these observances "should settle the matter, since the Court acknowledges that incapacitation is an 'important' penological goal." *Id.* (quoting the majority opinion, *id.* at 2029). "A similar fate befalls deterrence," as the majority recognizes its occasional utility, but finds it "insufficient." *Id.* at 2053-54. Justice Thomas then ventured that rejection of retribution—"the notion that a criminal sentence should be proportioned to 'the personal culpability of the criminal offender'"—is the key to the majority's "independent

by arguing that it "does not even believe its pronouncements about the juvenile mind" because, "[i]f it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides."[77]

B. Miller*'s Prohibition of Mandatory JLWOP for Homicide*

Miller v. State,[78] and its companion case, *Jackson v. Norris*,[79] concerned two juveniles who committed their crimes at the age of fourteen and were convicted of murder and sentenced to *mandatory* JLWOP.[80]

In *Miller v. State*, Evan Miller, high on marijuana, attacked his mother's drug dealer, Cole Cannon, and severely beat him with a baseball bat.[81] Miller and his friend, who had also assaulted Cannon, later returned to Cannon's trailer and set it afire to conceal the crime.[82] Succumbing to the beating and smoke inhalation, Cannon died.[83] Miller was arrested and charged as an adult with "murder in the course of arson,"[84] a crime carrying the mandatory sentence of life without

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judgment" that nonhomicide JLWOP is unconstitutional. *Id.* at 2054 (quoting the majority opinion, *id.* at 2026, 2028).

77. *Id*. at 2055. Justice Thomas perceived an inconsistency in the majority's willingness to impose JLWOP on a seventeen-year-old who "pulls the trigger" and murders someone, and its unwillingness to impose the same sentence on "a [seventeen]-year-old who rapes an [eight]-year-old and leaves her for dead." *Id.* Justice Thomas did not spare the Chief Justice and his advocacy of a case-by-case "gross proportionality" review, arguing that the Court had previously upheld life without parole in less egregious cases and that the Chief Justice's rationale depended on "the same type of subjective judgment as the" majority's, even though it was cloaked in a case-by-case analysis. *Id.* at 2056. Concluding his dissent, Justice Thomas stated,

> The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

Id. at 2058. In a short, three-paragraph dissent, Justice Alito stressed that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Id*. (Alito, J., dissenting). Justice Alito also expressed his belief that the case-by-case proportionality question was not properly before the Court, and, therefore, he found no need to discuss the issue further. *Id.*

78. 63 So. 3d 676 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012).

79. 378 S.W.3d 103 (Ark. 2011), *rev'd*, *Miller*, 132 S. Ct. at 2455.

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

81. *Id.* at 2462.

82. *Id.*

83. *Id.*

84. *Id.* at 2462-63.

parole.[85] Miller was convicted and sentenced to the mandatory life term.[86] Subsequent to his unsuccessful appeal to the intermediate court and the Alabama Supreme Court's denial of his petition for review, the United States Supreme Court granted Miller's petition for certiorari.[87]

In *Jackson*, Kuntrell Jackson and two of his friends planned to rob a store.[88] Before arriving at the store, Jackson learned that one of his accomplices was carrying a weapon.[89] Jackson waited outside while the two other juveniles entered the store.[90] One brandished the weapon and ordered the store clerk to give them money.[91] The clerk resisted, saying that she did not have any money to give.[92] When the clerk threatened to call the police, Jackson's accomplice shot her in the face and killed her.[93] The prosecutor made the decision to try Jackson as an adult and charged him with felony murder.[94] Under Arkansas's sentencing guidelines, mandatory life without parole was the only available sentence.[95] Four and a half years later, the United States Supreme Court declared capital punishment for juveniles unconstitutional in *Roper v. Simmons*.[96] Subsequent to this opinion, Jackson filed a petition for habeas corpus. Despite the Court's holding in *Graham*, the Arkansas Supreme Court affirmed the denial of his petition.[97] The United States Supreme Court granted Jackson's petition for

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85. *Id.* at 2463. *See* ALA. CODE §§ 13A-5-40(a)(9), 13A-6-2(c) (2013).

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

87. *Id.*

88. *Id.* at 2461.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* This demand and refusal continued, during which time Jackson entered the store, viewed the scene before him, and stated either "[w]e ain't playin'," or "I thought you all was playin'." *Id.* (alteration in original) (internal quotation marks omitted).

93. Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004), *aff'd*, Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), *rev'd*, *Miller*, 132 S. Ct. at 2455. Following the shooting, Jackson and the two others then ran to Jackson's house. *Id.* Their robbery attempt was a bust—no money was taken. *Id.*

94. *Miller*, 132 S. Ct. at 2461. Technically, the prosecutor also charged Jackson with aggravated robbery in the course of which he or his accomplice caused death and manifested an "extreme indifference to . . . human life." *Id.* at 2477 (Breyer, J., concurring).

95. ARK. CODE ANN. § 9-27-318(c)(2)(A)-(B) (2010) (permitting a prosecutor to charge a fourteen-year-old in either the adult or juvenile system when the crime is capital or first-degree murder), *invalidated by* State v. A.G., 383 S.W.3d 317 (Ark. 2011). *See id.* § 5-4-104(b) ("A defendant convicted of capital murder, or treason, shall be sentenced to death or life imprisonment without parole . . . ." (citations omitted)), *amended by* H.R. 1993, 89th Leg., Reg. Sess. (Ark. 2013). Jackson did not file a petition for post-conviction relief, and the Arkansas Supreme Court affirmed his conviction. *Miller*, 132 S. Ct. at 2461.

96. 543 U.S. 551, 578 (2005).

97. Norris, 378 S.W.3d at 106. In dissent, two Arkansas justices argued that the sentence violated the Eighth Amendment because "Jackson did not kill and any evidence of intent to kill was

certiorari and joined his case with Miller's.[98]

1. Miller*'s Majority Opinion*.—Justice Kagan delivered the Court's 5-4 decision.[99] Describing *Graham* as the "foundation stone" of the analysis, Justice Kagan reaffirmed the overarching importance of "proportionality."[100] She explained that two lines of Court cases demonstrate the absence of proportionality in sentencing structures that mandate JLWOP for homicide crimes.[101] The first line of cases supports the categorical ban on the imposition of certain sentences "based on mismatches between the culpability of a class of offenders and the severity of a penalty."[102]

Second, because *Graham* "likened life without parole for juveniles to the death penalty," Justice Kagan concluded that the series of Court precedents prohibiting mandatory death sentences was implicated.[103] Again pointing to *Graham*, Justice Kagan explained that "because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."[104] With this equation thus established, she reviewed the Court's cases that had required "individualized sentencing when imposing the death penalty."[105] The Court had based those decisions on the rationale that "the death penalty is reserved only for the most culpable defendants committing the most serious offenses."[106] Because mandatory imposition of capital punishment gave a sentencing authority no opportunity to consider mitigating factors, it axiomatically could not assess the defendant's culpability.[107] Here, the majority found the practice even more egregious, because of "the mitigating qualities of youth"—the "signature qualities" of which "are all transient."[108] The Court was particularly concerned that under a mandatory JLWOP scheme for homicide crimes, "every juvenile will receive the same sentence as every other—the [seventeen]-year-old and the [fourteen]-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[109] The practice was also flawed because "[i]t neglects the circumstances of

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severely lacking." *Id.* at 109 (Danielson, J., dissenting).

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

99. *Id.* at 2460.

100. *Id.* at 2463, 2464 n.4.

101. *Id.* at 2463-65.

102. *Id*. at 2463. *Roper* and *Graham* figured heavily here. *Id.* at 2463-68. Justice Kagan reiterated the majority's oft explained belief that juveniles have "lesser culpability" and, therefore, cannot be subjected to the most severe punishments. *Id.* at 2463-64.

103. *Id.* The second strand of precedent relied upon by the Court included cases in which it had overturned laws that mandated imposition of the death penalty.

104. *Id.* at 2466.

105. *Id.* at 2467.

106. *Id.*

107. *Id.*

108. *Id*. at 2459, 2467 (internal quotation marks omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367-68 (1993)).

109. *Id.* at 2467-68.

the homicide offense."[110] Thus, the majority held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[111]

The majority then addressed the arguments raised by the States and the dissent. First, the majority considered the argument that the decision conflicted with the Court's previous Eighth Amendment jurisprudence.[112] Justice Kagan addressed the claim that a national consensus in favor of mandatory JLWOP for homicide crimes precluded a finding that the sentence was unconstitutional.[113] She explained that, unlike in *Roper* and *Graham*, the majority's holding in this case "does not categorically bar a penalty for a class of offenders or type of crime."[114] Rather, the holding simply bars "a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders."[115] Thus, the sentencing decision was individualized, and the inquiry into national consensus was of no moment.[116] Nevertheless, in a lengthy exposition, Justice Kagan addressed the dissent's suggested existence of a national consensus favoring mandatory JLWOP for homicide crimes, using essentially the same data and reaching the opposite conclusion.[117] Second, the majority assessed whether adequate safeguards already existed in the procedures used for upcharging juveniles into the adult system.[118] The Court dispensed with both arguments.

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110. *Id.* at 2468.

111. *Id*. at 2469. The majority acknowledged, but refused to "consider," the Petitioners' "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those [fourteen] and younger." *Id.* Nevertheless, it made the following statement:

> But given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

112. *Id.* at 2470. The majority dispatched this argument swiftly. *Id.* Responding to the assertion that its instant decision contravened an earlier holding that an adult convicted of possessing more than 650 grams of cocaine could constitutionally be sentenced to mandatory life without parole, *id.* (citing Harmelin v. Michigan, 501 U.S. 957, 995 (1991)), Justice Kagan stressed that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders." *Id.* Therefore, the Court's decision "neither overrules nor undermines nor conflicts with *Harmelin*." *Id.*

113. *Id.* at 2470-71.

114. *Id.* at 2471.

115. *Id.* at 2469 (emphasis added).

116. *Id.* at 2471-72.

117. *Id.* at 2471-73.

118. *Id.* at 2471. In considering whether state transfer statutes provide adequate safeguards against the permanent life imprisonment of undeserving juveniles, Justice Kagan initially pointed

In conclusion, the Court stated,

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.[119]

2. Justice Breyer's Concurrence in Miller.—In a concurring opinion, Justice Breyer focused on the importance of intent in determining whether JLWOP for a homicide crime is constitutional.[120] As an initial matter, he expressed his understanding that "[i]f the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson 'kill[ed] or intend[ed] to kill' the robbery victim."[121] Justice Breyer made clear that his immediate concern was with the potential eligibility of juvenile felony murder defendants for life without parole.[122] Recognizing that

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out that many such statutes are non-discretionary, depending upon only the age of the defendant and the nature of the offense, while others "lodge this decision exclusively in the hands of prosecutors"—in both instances there is no opportunity for judicial review. *Id.* at 2474. Additionally, according to Justice Kagan, even when the transfer statute gives discretion to a judge, often, the judge possesses neither a fully developed record nor the breadth of information necessary to make an informed decision. *Id.* Next, Justice Kagan distinguished the decision to try a juvenile as an adult with a decision regarding the appropriate sentence once the juvenile is in the adult system. *Id.* at 2474-75. In the former, the choice is between a relatively short juvenile sentence and a possibly lengthy adult sentence, making the decision one of "extremes." *Id.* But in the latter, the sentencing authority has wide latitude to sentence the juvenile to a term that it finds appropriate (so long as its hands are not tied by a mandatory life sentence without parole). *Id.* Noting this distinction, the majority perceived "a certain irony in [the dissents'] repeated references to [seventeen]-year-olds who have committed the 'most heinous' offenses, and their comparison of those defendants to the [fourteen]-year-olds here," and emphasized that "[o]ur holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." *Id.* at 2469 n.8 (quoting *id.* at 2477-78 (Roberts, C.J., dissenting)).

119. *Id*. at 2475.

120. *Id.* (Breyer, J., concurring).

121. *Id*. (second and third alterations in original) (quoting Graham v. Florida, 130 S. Ct. 2011, 2027 (2010)). Justice Breyer based that opinion on *Graham*'s statement that "a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." *Id.* (quoting *Graham*, 130 S. Ct. at 2027). Therefore, homicides in which a juvenile lacks the intent to kill "must [be] exclude[d]" from eligibility for JLWOP. *Id*. at 2475-76. By the same token, "if the juvenile either kills or intends to kill the victim, he lacks 'twice diminished' responsibility" and could, at least under the current state of the law, be sentenced to JLWOP. *Id*. at 2476.

122. *Id.*

the felony murder doctrine technically includes the element of intent, he expressed his opinion that "this type of 'transferred intent' is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole."[123] Justice Breyer made clear that for Jackson to be sentenced to life without parole, the prosecution must establish true formed intent.[124] Justice Breyer then concluded by suggesting his support for a possible extension of the majority's holding: "If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, *the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well*."[125]

3. The Miller *Dissent*.—Chief Justice Roberts led the dissenters.[126] For Roberts, the mandatory sentencing schemes of the States could not be labeled "unusual" because of the sheer number of juveniles incarcerated under such laws.[127] Therefore, in his view, the sentencing schemes could not violate the Eighth Amendment's prohibition.[128] The Chief Justice then engaged in a lengthy interpretation of the data regarding the prevalence of statutes imposing mandatory JLWOP and the frequency of their imposition, and he found that a consensus *in*

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123. *Id*. Even though felony murder based on such transferred intent may support a life sentence without parole for an adult offender, Justice Breyer echoed the Court's repeated statements regarding the juvenile mind and a juvenile's "[in]ability to consider the full consequences of a course of action and to adjust one's conduct accordingly." *Id.* Thus, the lynchpin of felony murder—"the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate"—is missing in the case of juveniles. *Id.*

124. *Id.*

125. *Id.* at 2477 (emphasis added).

126. *Id.* at 2477-82 (Roberts, C.J., dissenting). Acknowledging that "determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality," he advised that the Court's "role . . . is to apply the law, not to answer such questions." *Id.* at 2477.

127. *Id.*

128. *Id*. According to Chief Justice Roberts, the "objective indicia of society's standards" had been made clear "in legislative enactments and state practice." *Id*. (internal quotation marks omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2022 (2010)). He also explained his understanding of society's "evolving standards of decency":

> Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.

Id. at 2478. The evidence of societal evolution, he stated, was apparent in the nation's movement since the 1980s toward harsher sentences. *Id.*

favor of the sentence and its imposition was evident.[129] The Chief Justice next disposed of the majority's suggestion that legislatures had inadvertently imposed the sentence, unaware of the effect of the criminal statutes they enacted.[130] Noting the clear delineation in *Roper* and *Graham* between "[s]erious nonhomicide crimes" and "murder," Chief Justice Roberts pointed to statements in those prior decisions specifically reserving the right of legislatures to impose JLWOP for murder—statements of "reassurance" that proved hollow.[131] Finally, the Chief Justice was troubled by the majority's "unnecessary" statement that even discretionary life without parole for juvenile murderers should be "uncommon."[132]

Justice Thomas was next in dissent.[133] He first took issue with the majority's interpretation that the Eighth Amendment requires proportionality.[134] He then took on another issue previously decided by the Court—namely the prohibition of mandatory imposition of the death penalty.[135] Justice Thomas also argued that *individualized* sentencing had never been required outside the death penalty arena.[136] Finally, like Chief Justice Roberts, Justice Thomas was troubled by the

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129. *Id*. at 2477-79. In spite of his lengthy assessment, the Chief Justice concluded it may nonetheless be unnecessary because "[i]n the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual." *Id.* at 2480.

130. *Id.* at 2479-80. Distinguishing *Graham*, he pointed to the fact that the data in that case suggested that JLWOP for nonhomicide crimes was rare. *Id*. at 2480. The same could not be said here, as some 2000 juveniles were presently serving a sentence of mandatory JLWOP, and this was surely not adventitious. *Id.* at 2477, 2480. Moreover, the Chief Justice was "aware of no effort in the wake of *Graham* to correct any supposed legislative oversight." *Id.* at 2480.

131. *Id*. at 2481.

132. *Id.* (referencing the majority opinion, *id.* at 2469). As such, he opined, "the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits" the imposition of JLWOP under any circumstances. *Id.* "This process," the Chief Justice surmised, "has no discernible end point," because of the majority's declaration that "none of what [*Graham*] said about children . . . is crime-specific." *Id.* at 2481-82 (alterations in original) (quoting *id.* at 2465 (majority opinion)).

133. *Id.* at 2482-87 (Thomas, J., dissenting).

134. *Id.* at 2483. As in previous opinions, he made clear his belief that the framers of the Constitution prohibited cruel and unusual punishment in order to preclude "torturous *methods* of punishment . . . akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting) (internal quotation marks omitted)); *see also* Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in judgment).

135. *Id.* at 2484-85. Arguing that previous cases were "wrongly decided," he rejected the very foundation of the majority's argument that JLWOP equates with the death penalty and therefore cannot be mandatorily imposed. *Id.*

136. *Id.* at 2485-86. Justice Thomas maintained that, under the Court's decision in *Harmelin*, "the defendant's age is immaterial to the Eighth Amendment analysis." *Id.* at 2486 (citing Harmelin v. Michigan, 501 U.S. 957, 995 (1991)). "What *has* changed (or, better yet 'evolved')," he stated, "is this Court's ever-expanding line of *categorical* proportionality cases." *Id*. (second

Court's assertion that "appropriate occasions for sentencing juveniles to [life without parole] will be uncommon."[137]

Finally, Justice Alito added his dissenting voice.[138] He dramatically initiated his objection to the Court's decision by positing that "[e]ven a [seventeen-and-a-half]-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society."[139] Justice Alito questioned, as an initial matter, the Court's by now entrenched reference to society's "evolving standards of decency," challenging the assumption that societal evolution runs toward the decent.[140] Recounting an historic line of Court cases,[141] Justice Alito declared that, as the years went by, "evidence of a national consensus . . . became weaker and weaker,"[142] until *Graham* finally dispatched "any pretense of heeding a legislative consensus."[143] Moreover, he pointed out that "[t]he two (carefully selected) cases before us concern very young defendants . . . delicately call[ed] 'children,'" and, as such, they are "anomalies" who do not represent the vast number of "young men who are fast approaching the legal age of adulthood."[144]

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emphasis added). It is unclear from these statements whether Justice Thomas believed that the Court's decision required an *individualized,* case-by-case, approach to juvenile sentencing, or whether he thought that the Court had expanded its list of *categorically* banned sentences. Here, at least, he interpreted the majority's decision as creating a categorical ban, while Justice Kagan asserted that the decision was based on a case-by-case proportionality analysis because it did not "categorically bar a penalty for a class of offenders or type of crime." *See id.* at 2471 (majority opinion).

137. *Id*. at 2486 (alteration in original) (quoting the majority opinion, *id.* at 2469). Justice Thomas envisioned that lower courts influenced by that statement will "shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed." *Id.* As such sentences are rejected, he surmised, the Court will later be quick to cite "actual sentencing practices" as justification for further erosion of JLWOP imposition. *Id*. (internal quotation marks omitted).

138. *Id.* at 2487-90 (Alito, J., dissenting).

139. *Id.* at 2487.

140. *Id*. (internal quotation marks omitted). Nevertheless, having conceded that such precedent was firmly established, he reminded the Court that theretofore it had relied largely on "the positions taken by state legislatures" to reflect and define those standards. *Id.* at 2487-88.

141. *Id*. at 2487-89.

142. *Id*. at 2488.

143. *Id*. Noting that *Graham* forbade a trial judge from imposing JLWOP for a nonhomicide offense, Justice Alito speculated that "the Justices in the majority may soon extend that holding to minors who commit murder. We will see." *Id.* at 2489-90.

144. *Id*. at 2489. Justice Alito noted that "[s]eventeen-year-olds commit a significant number of murders every year," and many of them "are at least as mature as the average [eighteen]-year-old." *Id.* He asserted that "[twenty-eight] States and the Federal Government have decided that *for some of these offenders* life without parole should be mandatory." *Id*. (emphasis added). This statement is curious, however, because statutes that *mandate* life without parole do not impose the sentence only on *some defendants*. Rather, *all defendants,* regardless of their age or perceived

Justice Alito conceded that a judge or jury may still exercise discretion and "make an individualized decision" to impose JLWOP.[145] "[B]ut," he cautioned, "do not expect this possibility to last very long."[146] And, giving a nod to incapacitation as a valid penological justification for JLWOP, Justice Alito stated,

> If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. . . . [W]hat the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.[147]

II. INCONSISTENCY AND AMBIGUITY IN THE SUPREME COURT'S JLWOP JURISPRUDENCE

Could the Supreme Court of the United States, comprised of the greatest legal minds in the nation, inadvertently overlook fairly conspicuous instances of linguistic and theoretical incongruence in its decisions? Or do the Court's seemingly unintended lapses, in actuality, represent fully considered and even calculated measures to achieve some unstated purpose? Perhaps each could be the case.

A. The Ephemeral Capacity of Judges and Juries to Evaluate Immaturity and Culpability

Defending its categorical ban on JLWOP for nonhomicide crimes, the *Graham* majority explained the reasons for its determination that a "case-specific gross disproportionality inquiry," which "would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes[,]" would be unconstitutional.[148] Pointing to a need for "some boundaries" in juvenile sentencing, the Court explained,

> [E]ven if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity" to merit a life without parole sentence, it does not follow that courts . . . could with sufficient accuracy

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depravity, are required by law to serve a life sentence without parole. This echoes Chief Justice Roberts's equally odd statement that *Roper* and *Graham* do not stand for the proposition that legislators "may not require life without parole for *juveniles who commit the worst types of murder.*" *Id.* at 2480 (Roberts, C.J., dissenting) (emphasis added). Again, a mandatory sentencing scheme does not distinguish between types of murders or murderers.

145. *Id*. at 2489 (Alito, J., dissenting).

146. *Id*.

147. *Id*. at 2490. Envisioning that the Court is on an as-yet unrevealed "march toward some vision of evolutionary culmination," Justice Alito warned that "[t]he Constitution does not authorize [this Court] to take the country on this journey." *Id.*

148. Graham v. Florida, 130 S. Ct. 2011, 2031 (2010).

> distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.[149]

The Court expressed concern over three perceived risks associated with a case-by-case approach that could lead a sentencing authority to inappropriately impose JLWOP for a nonhomicide offender: (1) the risk "that the brutality or cold-blooded nature of [the] crime would overpower mitigating arguments based on youth"; (2) the risk that a judge would ignore the "special difficulties encountered by counsel in juvenile representation"; and (3) the risk that an individualized approach would deny some "juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[150]

And what of the argument that judges and juries can be guided by the considerable knowledge and expertise of seasoned mental health professionals? The Court made short shrift of that suggestion, determining that the "salient characteristics" of youth make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[151]

The Miller majority addressed the problem of mandatory JLWOP for homicide offenders, and began its opinion by expressing uneasiness that

> [i]n neither [Jackson's nor Miller's] case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence . . . more appropriate.[152]

Thus, while JLWOP could be an appropriate sentence for a homicide crime, the sentencing authority's inability to exercise discretion—by considering age, depravity, family circumstances, etc.—was the problem. According to the Court, "these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."[153] The majority then gave a clear admonition: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[154]

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149. *Id.* at 2031-32 (second alteration in original) (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

150. *Id.* at 2032.

151. *Id.* at 2026 (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 573).

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

153. *Id*. at 2466.

154. *Id.* at 2469. The Court further espoused, "At the least, a sentencer should look at [the attendant] facts before depriving a [fourteen]-year-old of any prospect of release from prison." *Id.* In a footnote, Justice Kagan detected "a certain irony in [the dissent's] repeated references to [seventeen]-year-olds who have committed the 'most heinous' offenses, and their comparison of

Thus, all of the *Graham* majority's pronouncements, purporting to establish, in the *nonhomicide* context, a sentencing authority's inability to distinguish between the incorrigible and the reformable juvenile (in a constitutionally sound way), are turned on their collective heads with the simple recognition that the Court permits imposition of JLWOP in homicide cases. Put simply, one cannot escape *Graham*'s glaring and supposedly indubitable truth that, in nonhomicide cases, judges, juries, and even expert mental health professionals are utterly incapable of determining whether a juvenile defendant is irreparably corrupt.[155] Therefore, per the Court, JLWOP in the nonhomicide context is inconsistent with providing the inherently transformable juvenile an opportunity for growth and change. Yet, under *Miller*, this supposed inability to recognize entrenched depravity inexplicably disappears when the juvenile has murdered. In such cases, sagacity suddenly materializes and the sentencer's capacity to identify ineradicable degeneracy magically emerges, rendering a sentence of JLWOP constitutional. This is an extraordinarily syllogistic fallacy. The Court simply cannot have its cake and eat it too. And, as we shall see, this absurd conclusion was not lost on the Chief Justice and Justice Thomas.

So why, once again, do we see ambiguity in the Court's decisions? Justice Kennedy, Justice Kagan, and the rest of the *Graham* and *Miller* majorities surely recognized that they had discordant theories on their hands. The only reasonable explanation is that the *Graham* Court wanted to impose the ban on JLWOP for nonhomicide offenses, needed the inability to determine juvenile maturity and depravity rationale to support that prohibition, was not yet ready (or able)[156] to declare a categorical ban on all JLWOP, and therefore had to ignore the glaring inconsistency. From there, the *Miller* majority made the easy jump to a ban on *mandatory* JLWOP[157] and offered its prescient statements about the rarity with which the sentence should be imposed. At the same time, *Miller* allowed Justices Sotomayor and Breyer to clarify where they were headed. Finally, an additional possible reason for *Miller*'s restraint, and its willingness to suffer the conspicuous ambiguity, is that Justice Kennedy may not have (at least at that time) joined the majority if it had imposed a full-out ban on JLWOP.[158]

B. The Upshot of Discordance

The theoretical inconsistencies in and between *Graham* and *Miller* are

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those defendants to the [fourteen]-year-olds here." *Id.* at 2469 n.8. She flatly stated that the Court's holding "requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." *Id.*

155. *See infra* note 190 and accompanying text.

156. *See, e.g.*, *Graham*, 130 S. Ct. at 2029. Possibly, the *Graham* majority would have fallen apart if an absolute ban had been imposed at that time.

157. *See infra* Parts III.A, D.

158. It is somewhat curious that Justice Kennedy, who had authored the Court's opinions in *Roper* and *Graham*, would (as the senior Justice in the majority) assign the duty of drafting the *Miller* opinion to Justice Kagan. *See Miller*, 132 S. Ct. at 2460.

startling. Despite all that it has said, the Court, at least for the time being, has not prohibited the imposition of *discretionary* JLWOP in the homicide context.[159] Two questions emerge from this tenuous allowance. First, given the repeated likening of JLWOP with the unconstitutional juvenile death penalty, how can JLWOP survive even in the homicide context? Second, as will be discussed in Part III.B.2, if no one can divine a juvenile's intractable depravity or his capacity for positive transformation in the nonhomicide context, then what possible rationale can exist for the imposition of JLWOP in homicide cases? The only answer is that this distinction appears to depend on something rather unsatisfying—whether, regardless of the attendant circumstances, the victim lives or dies.

1. If JLWOP Is Akin to the Death Penalty and Violates the Eighth Amendment in Nonhomicide Cases, Why Can it Still Be Imposed in Homicide Cases?—In *Graham*, Justice Kennedy began his comparison of the JLWOP with the death penalty with the fairly measured statement that "life without parole sentences share *some* characteristics with death sentences that are shared by no other sentences."[160] Acknowledging that a State's imposition of JLWOP does not result in execution of the juvenile, Justice Kennedy stressed that the sentence nevertheless "alters the offender's life by a forfeiture that is irrevocable" and extinguishes all "hope."[161] He concluded the analogy by noting that "[l]ife without parole is an especially harsh punishment for a juvenile"[162] because the juvenile will often have more years of incarceration than an adult given the same sentence.[163] Thus, the categorical ban on JLWOP for nonhomicide offenses was supported by the Court's death penalty jurisprudence.[164]

In *Miller*, Justice Kagan latched onto these statements and took them to the next level. As described previously in this Article,[165] her analysis hinged, in part, on a further extension of *Graham*'s comparison of previous death penalty cases to JLWOP. Specifically, she sought to employ the requirement of an individualized approach to capital sentencing, established in cases such as *Woodson v. North Carolina*[166] and *Lockett v. Ohio*,[167] thereby invalidating the mandatory schemes in a non-capital context.

How did Justice Kagan get there? She simply bootstrapped her way to the desired result. First, Justice Kagan rightly noted that *Graham* "likened life

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159. *See id*. at 2469 (noting that the ruling "d[id] not foreclose a sentencer's ability to [impose JLWOP] in homicide cases").

160. *Graham*, 130 S. Ct. at 2027 (emphasis added).

161. *Id.*

162. *Id.* at 2028.

163. *Id.*

164. *See* Roper v. Simmons, 543 U.S. 551, 567-68 (2005).

165. *See supra* Part I.A.1.

166. 428 U.S. 280, 303-04 (1976) (requiring sentencing authorities to consider characteristics of defendant and details of offense before sentencing to death).

167. 438 U.S. 586, 608 (1978) (holding death penalty statute violated the Eighth Amendment by precluding consideration of relevant mitigating factors).

without parole for juveniles to the death penalty itself."[168] Having established this parallel, Justice Kagan then declared JLWOP the successor to the juvenile capital punishment and the new "ultimate penalty for juveniles."[169] Awarded the formidable title of "ultimate penalty," mandatory JLWOP could clearly no longer stand because the juvenile death penalty did not stand.

This circular logic, while quite a thing to behold, was not lost on Chief Justice Roberts. Acknowledging that *Roper* prohibited imposition of the death penalty on juveniles, he admonished that "*Roper* also set itself in a different category than this case, by expressly invoking 'special' Eighth Amendment analysis for death penalty cases."[170]

What could Justice Kagan's intellectual gymnastics tell us about the fate of discretionary JLWOP? The answer appears simple. If JLWOP has replaced the death penalty as the "ultimate penalty" for juveniles, and if it is unconstitutional for the same reasons that the Court deemed juvenile capital punishment unconstitutional, then the fact that *Miller* was addressing the *mandatory* imposition of the sentence is of no moment. The *Miller* majority relied on *Roper*. But *Roper* not only banned *mandatory* imposition of the juvenile death sentence, it banned the sentence *in toto*. Therefore, the result that flows from Justice Kagan's reliance on *Roper* is this: the same wholesale ban should apply to the *discretionary* imposition of JLWOP. This logical extension would mean that the law's harshest punishment for juveniles is unconstitutional, and that a life sentence given to a depraved, sadistic seventeen-and-a-half-year-old murderer must include the opportunity for parole just in case the corrupt youth should become mature and reformed at some point in his life.

2. If a Juvenile's Capacity for Change Cannot Be Discerned in Nonhomicide Cases, How Can It Be Discerned in Homicide Cases?—And what of the fact that JLWOP remains constitutional *when the sentence is discretionary*, despite the Court's pronouncements about a juvenile's developing brain, a sentencer's supposed inability to reasonably forecast a juvenile's capacity for change, and the absence of a sufficient penological justification? The *Graham* dissenters could not allow these glaring inconsistencies to go unchallenged. Chief Justice Roberts pointed to "the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder."[171] Hence, he reasoned, "there is nothing *inherently* unconstitutional about imposing

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168. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); *see also id.* at 2466 ("*Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself.").

169. *Id.*

170. *Id*. at 2481 (Roberts, C.J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 568-69 (2005)). In *Graham*, Justice Thomas presaged this further extension of *Roper*, stating that "'[d]eath is different' no longer," and that "[n]o reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well." Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting) (quoting *Roper*, 543 U.S. at 568).

171. *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring).

sentences of life without parole on juvenile offenders."[172] "[R]ather," he stated, "the constitutionality of such sentences depends on the particular crimes for which they are imposed."[173] Likewise, Justice Thomas lamented that "the Court does not even believe its pronouncements about the juvenile mind," for "[i]f it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides."[174] Echoing the Chief Justice, Justice Thomas pointed out the logical conclusion "that there is nothing inherent in the psyche of a person less than [eighteen] that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence."[175] Thus, to the Chief Justice and Justice Thomas, the question is not whether JLWOP is constitutional, but "which *acts* are sufficient to demonstrate that moral agency."[176]

Yet, as the law stands now, the answer does not depend on the "particular crimes" or the "acts that are sufficient" to impose JLWOP. Rather, the determination whether a sentencer constitutionally may impose life without parole on a juvenile is based on nothing more than the *outcome* of the crime. It does not matter how intentional, how debased, how brutal, how heinous, or how sadistic the acts of the juvenile defendant are. Nor does it matter if the juvenile intended premeditated murder but failed in his task because the victim was especially resilient or the physicians particularly skilled. Instead, the Court's straightforward rule is this: if the victim dies, JLWOP is constitutional; if the victim lives, JLWOP is unconstitutional.[177]

That the Court can adhere to this questionable state of affairs much longer is doubtful. Indeed, there is clear evidence in *Graham* and, especially, *Miller* that the incongruity will not long survive.

III. SIGNS OF A *FAIT ACCOMPLI*

The previous part of this Article argued that the Court's decisions in *Graham* and *Miller* are anything but clear, and this ambiguity may be an indicator of the

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172. *Id*.

173. *Id.*

174. *Id.* at 2055 (Thomas, J., dissenting).

175. *Id.*

176. *Id.*

177. This point was not lost on Chief Justice Roberts. In describing a seventeen-year-old's horrific rape of an eight-year-old, and his burial of her under 197 pounds of rock in a landfill, the Chief Justice stated that "[t]he single fact of being [seventeen] years old would not afford [the defendant] protection against life without parole if the young girl had died—as [the defendant] surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?" *Id.* at 2042 (Roberts, C.J., concurring). Justice Thomas echoed this concern: "The Court is quite willing to accept that a [seventeen]-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a [seventeen]-year-old who rapes an [eight]-year-old and leaves her for dead does not." *Id.* at 2055 (Thomas, J., dissenting).

Court's move toward a wholesale abolition of life without parole for juveniles. But is there additional evidence that JLWOP is on its last legs? There are many aspects of the two decisions that seemingly presage this possibility.

A. The Poor (But Purposeful?) Choice of Cases

Reading *Graham* and *Miller*, one cannot help but be struck by the cases the Court selected to address the constitutionality of various JLWOP scenarios. At first glance, this selection of these cases appears deft. Indeed, in both cases, the majority erects straw men (dissenters who do not care about a sixteen-year-old accomplice who commits no assault or a fourteen-year-old who waits outside while his friends commit a robbery) and knocks them down. The exercise, while interesting, is ultimately unpersuasive.

Graham involved a crime committed by a sixteen-year-old juvenile and his later probation violations at the age of seventeen.[178] The primary charge was for assault and robbery, although it was Graham's accomplice that committed the assault.[179] The State recommended a combined sentence of forty-five years, but the trial judge imposed a life sentence (which, in Florida, did not provide an opportunity for parole).[180]

Miller and its companion case, *Jackson v. Norris*, were equally remarkable for their apparent ease of decision. In both cases, the defendant was fourteen-years-old when he committed the crime.[181] Jackson was a non-triggerman accomplice, charged with capital felony murder and aggravated robbery.[182] At least by one account, he was essentially along for the ride and was surprised by the violence that ensued.[183] Miller's case was more egregious. He was charged with murder in the course of arson for beating his victim and setting fire to the trailer in which the victim lay.[184] Despite the varying nature of their crimes, the fact of their age remains. Heinous murders committed by seventeen-year-olds abound,[185] yet the Court instead decided to use these two cases as the vehicles to confine the parameters of JLWOP.

Once again, in *Graham* and *Miller*, Chief Justice Roberts and the dissenters had a field day. In *Graham,* the Chief Justice remarked that the majority had used the case "as a vehicle to proclaim a new constitutional rule—applicable well

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178. *Id.* at 2018-19.

179. *Id.* at 2019.

180. *Id.* at 2019-20.

181. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

182. *Id.* at 2461.

183. *Id.* At worst, Jackson was a willing participant in the robbery, but there was no evidence that he had formed any intent to kill. *Id.* at 2461-62.

184. *Id.* at 2462.

185. *See Miller*, 132 S. Ct. at 2489 n.1 (Alito, J., dissenting) ("Between 2002 and 2010, [seventeen]-year-olds committed an average combined total of 424 murders and nonnegligent homicides per year." (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, § 4, *Arrests, Age of Persons Arrested* (Tbl. 4.7))).

beyond the particular facts of [the] case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional."[186] "This categorical conclusion," he stated, "is as unnecessary as it is unwise,"[187] and it "unsettl[es] our established jurisprudence and fashion[s] a categorical rule applicable to far different cases."[188] Justice Thomas took pains to point out that the cases in which JLWOP had been handed down for nonhomicide crimes were rare and reflected the severity of the crime, as "judges and juries have decided to use it in the very worst cases they have encountered."[189] Recounting the brutally violent acts of sixteen-year-old Keighton Budder, who "put [his victim's] head into a headlock and sliced her throat, raped her, stabbed her about [twenty] times, beat her, and pounded her face into the rocks alongside a dirt road," Justice Thomas remarked that "Budder's crime was rare in its brutality."[190] He noted that JLWOP is imposed sparingly, and usually reserved for defendants whose acts are "exceptionally depraved."[191]

Justice Alito most clearly articulated why the two cases in *Miller* were poorly chosen. Because the majority holding banned the mandatory imposition of JLWOP for all juveniles, "any category of murderers under the age of [eighteen]" was spared the sentence.[192] Thus, Justice Alito opined, "Even a [seventeen-and-a-half]-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society."[193] Justice Alito pointed out that the Court had "carefully selected" these two cases involving "very young defendants."[194] "It is hard," he suggested, "not to feel sympathy for a [fourteen]-year-old sentenced to life without the possibility of release."[195]

The Court's remarkably poor choice of cases could merely reflect inattention to detail. Perhaps, in granting certiorari, the Court neglected to recognize that these defendants were either quite young (*Miller*)[196] or not particularly culpable (*Graham*).[197] Of course, it is extremely doubtful that the Court did not consider these pertinent factors. Again, one must believe that the Court operates on a level unmatched by any other group of jurists, and little or nothing slips by the Justices.

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186. Graham v. Florida, 130 S. Ct. 2011, 2041 (2010) (Roberts, C.J., concurring).

187. *Id.*

188. *Id.* at 2042.

189. *Id.* at 2043 (Thomas, J., dissenting). Justice Thomas pointed to the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, 428 U.S. 153, 182 (1976), to establish that the "relative infrequency" of a verdict shows that it "should be reserved for a small number of *extreme* cases." *Id.* at 2051 (emphasis added).

190. *Id.* (internal quotation marks omitted).

191. *Id.* at 2052.

192. Miller v. Alabama, 132 S. Ct. 2455, 2487 (2012) (Alito, J., dissenting).

193. *Id.*

194. *Id*. at 2489.

195. *Id.*

196. *Id.* at 2469.

197. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

As such, why would the Court choose *these* cases to develop precedent or jurisprudence in this arena? Were there no other appeals involving older youths or premeditated (even depraved) juvenile murderers? That, too, seems unlikely. The only reasonable explanation is that a majority of the Court is headed down a road that ends with the complete abrogation of JLWOP. Using "easy" cases has made that journey more palatable because the Court has not had to confront the case of a brutal, premeditated murder or attempted murder by a seventeen-year-old defendant. By doing so, public support for the decisions is bolstered, while public outcry is diminished.

B. Picking the Low-Hanging Fruit of Mandatory Juvenile Life Without Parole

The Court's decision to grant certiorari in two cases involving the *mandatory* imposition of juvenile life without parole[198] suggests a move towards a complete ban on the *discretionary* imposition of the sentence. It may be that the Court simply wanted to invalidate JLWOP in cases where the sentencer had no choice but to impose the "ultimate penalty."[199] But that reason, while possible, seems unlikely on two counts.

1. Providing Courts with Some Measure of Discretion Seems More Humane.—First, while the dissenters focused heavily on the existence of a "national consensus" in favor of mandatory JLWOP,[200] the majority appealed to morality by invoking the nation's "evolving standards of decency."[201] In this battle of competing theories, the majority appears to prevail. Chief Justice Roberts and Justice Alito acknowledged the "moral" issues involved in the case, and attempted to allay any concern that their position was less ethical than the majority's.[202]

As for the Chief Justice, he questioned whether the benefits of the evolution of decency should always inure to defendants.[203] An alternative interpretation, he suggested, is that "[a] decent society protects the innocent from violence."[204] Justice Alito was more pessimistic when he asked, "Is it true that our society is

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198. *Id.* at 2020; *Miller*, 132 S. Ct. at 2462.

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

200. *See supra* Part II.A.

201. *Miller*, 132 S. Ct. at 2463 (internal quotation marks omitted) ("And we view that concept less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976))); *Graham*, 130 S. Ct. at 2021 ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Estelle*, 429 U.S. at 102)).

202. *See Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting) ("Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy."); *Id.* at 2487 (Alito, J., dissenting) ("[T]he Court looked for objective indicia of our society's moral standards and the trajectory of our moral 'evolution.'").

203. *Id.* at 2478 (Roberts, C.J., dissenting); *see also id.* at 2487 (Alito, J., dissenting).

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

inexorably evolving in the direction of greater and greater decency?"[205] The dissenters also tried to regain the moral high ground by suggesting that mandatory JLWOP was a reasonable societal response to particularly revolting murders.[206] The Chief Justice argued that "[a] mature society may determine that [protecting the innocent] requires removing those guilty of the *most heinous murders* from its midst, both as protection for its other members and as a concrete expression of its standards of decency."[207] He surmised that state legislators were fully aware of what they were doing when they "require[d] life without parole for juveniles *who commit the worst types of murder*."[208] Justice Alito echoed these sentiments, citing statistics demonstrating "[s]eventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal."[209] He concluded that "[twenty-eight] States and the Federal Government have decided that *for some of these offenders* life without parole should be mandatory."[210]

These claims are quite remarkable because the learned Justices either overlooked or, more likely, chose to ignore the fact that the laws at issue mandated that sentencers impose JLWOP for certain murders, regardless of whether the offense was the "most heinous"[211] or an "incredibly brutal"[212] murder. That lack of discretion and inability to consider degrees of depravity was the very problem with the mandatory scheme at issue. Therefore, despite the dissenters' admirable attempts to win the battle over morality, in the end, the majority's argument is more persuasive. Put simply, requiring the possibility of at least some measure of sentencing discretion, especially when the specific inquiry involves fourteen-year-old defendants, seems more humane. Harnessing this, the Court was able to whittle away at JLWOP rather easily.

2. Justice Kagan's Negative Portrayal of JLWOP in Miller *Is Telling*.—As discussed in detail in Part II.A, Justice Kagan, writing for the *Miller* majority, specifically took the opportunity afforded by these easily decided cases to make some blanket statements about JLWOP in general.[213] That the mandatory JLWOP sentence structure has survived for so long is, to say the least, surprising. That the Court used these easy cases to reaffirm its sweeping pronouncements, first made in *Roper* and *Graham*, regarding the intrinsic propensity of all juveniles to make positive change. They go so far as to suggest, in dicta, that even

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

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

207. *Id.* (emphasis added).

208. *Id.* at 2480 (emphasis added). The Chief Justice continued along this line of reasoning, forcefully arguing that "[i]n a classic bait and switch, the Court now tells state legislatures that . . . they do not have power to guarantee that *once someone commits a heinous murder*, he will never do so again." *Id.* at 2481 (emphasis added).

209. *Id.* at 2489 (Alito, J., dissenting) (footnote omitted).

210. *Id.* (emphasis added).

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

212. *Id.* at 2489 (Alito, J., dissenting).

213. *See generally id.* at 2455; *see supra* notes 65-68 and accompanying text.

discretionary JLWOP is highly suspect in homicide cases.

C. Penological Bases and the Transience of Sentencing Ability (Part Deux)

The *Graham* Court relied heavily on a methodical analysis of the conceivable penological justifications for a JLWOP sentence in nonhomicide cases.[214] Ultimately, the Court disposed of all of them.[215] Initially, the Court identified four "legitimate penological goals"—retribution, deterrence, rehabilitation, and incapacitation.[216] Setting forth some first principles of the penological inquiry, the Court explained that "[t]he Eighth Amendment does not mandate adoption of *any one* penological theory."[217] Moreover, "[a] sentence lacking *any* legitimate penological justification is by its nature disproportionate to the offense."[218] This, of course, suggests that a sentence adequately grounded on a single penological justification could support a finding of proportionality under the right circumstances. Having identified these criteria, the Court declared that "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals . . . provides an adequate justification."[219]

1. Retribution.—Systematically discounting these rationales, the Court first declared retribution inadequate because the juvenile defendant's "personal culpability" was less than that of an adult.[220] Although the Court did not go into detail here, its pertinent opinions have all based the lessened culpability of youth on an unformed character.[221] According to Justice Kennedy, the rationale for retribution in the juvenile context loses its punch when the victim does not die because JLWOP "is the second most severe penalty" surpassed only by death.[222]

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214. Graham v. Florida, 130 S. Ct. 2011, 2028-30 (2010).

215. *Id.*; *see also supra* notes 26-27 and accompanying text.

216. *Graham*, 130 S. Ct. at 2026, 2028.

217. *Id.* at 2028 (emphasis added) (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)) (internal quotation marks omitted).

218. *Id.* (emphasis added).

219. *Id.* (citation omitted).

220. *Id.*

221. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (stating that "a child's character is not as well formed as an adult's" (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005) (internal quotation marks omitted))); *Graham*, 130 S. Ct. at 2026 (noting that "juveniles have a lack of maturity . . . and their characters are not as well formed" (quoting *Roper*, 543 U.S. at 569-70) (internal quotation marks omitted)); Johnson v. Texas, 509 U.S. 350, 367 (1993) (finding "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young").

222. *Graham*, 130 S. Ct. at 2027 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment) (internal quotation marks omitted)). Justice Kennedy's equation of the death penalty and life without parole is questionable here. Although *Roper* declared that the death penalty was never an appropriate retributive response to juvenile murder, 543 U.S. at 571, it does not necessarily follow that imposition of life without parole would be equally at odds with a particularly heinous crime where the victim himself is left completely and

2. Deterrence.—Although the Court acknowledged a "limited deterrent effect provided by life without parole," this penological justification was also unpersuasive.[223] Once again, the majority relied on the "characteristics that render juveniles less culpable than adults," namely a "lack of maturity and underdeveloped sense of responsibility [that] often result in impetuous and ill-considered actions and decisions."[224]

3. Rehabilitation.—The Court easily dispatched rehabilitation as a possible penological justification for nonhomicide JLWOP because "[t]he penalty forswears altogether the rehabilitative ideal."[225]

4. Incapacitation.—So what of incapacitation as the basis for a JLWOP parole in nonhomicide cases? Here, Justice Kennedy appeared to struggle. He first acknowledged that incapacitation is "an important goal" and that "[r]ecidivism is a serious risk to public safety."[226] He conceded that "[sixty-seven] percent of former inmates released from state prisons are charged with at least one serious new crime within three years."[227] He even admitted that "incapacitation may be a legitimate penological goal sufficient to justify life without parole *in other contexts*."[228]

Yet, in the case of juveniles who did not commit murder, Justice Kennedy flatly declared incapacitation "inadequate" under any circumstances.[229] And what was the reason given for incapacitation's shortcoming? According to Justice Kennedy, the penological justification for incapacitation rests on the tenuous belief that a particular juvenile will always be dangerous and such a

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irreparably damaged. In *Miller*, Justice Kagan also likened JLWOP to the death penalty, with equally unpersuasive effect. *See supra* notes 182-86 and accompanying text.

223. *Graham*, 130 S. Ct. at 2029.

224. *Id.* at 2028 (quoting *Roper*, 543 U.S. at 571; *Johnson*, 509 U.S. at 367) (internal quotation marks omitted). It is interesting to note that the *Graham* Court relies on a comparison of juveniles with mentally retarded individuals, finding that they have many of the same mental and emotional characteristics. *Id.* at 2032. Yet, in spite of the acknowledged similarities, the Court has continued to allow the imposition of life without parole for mentally retarded persons. *See* Natalie Pifer, Note, *Is Life the Same as Death?: Implications of* Graham v. Florida*,* Roper v. Simmons*, and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1510-11 (2010) (Instead of "requiring that mental retardation be considered as either a complete bar to all extreme punishments . . . or as a mitigating factor, . . . the Court has so far left the treatment of mental retardation at sentencing to the discretion of individual jurisdictions."). Given the Court's admitted likeness between the two groups, one must conclude that mentally retarded persons cannot be deterred by life without parole. *See infra* note 190.

225. *Graham*, 130 S. Ct. at 2029-30.

226. *Id.* at 2029.

227. *Id.*

228. *Id.* (emphasis added).

229. *Id.* In case any doubt remained, Justice Kennedy made clear that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Id.*

determination is virtually impossible to make:[230]

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." . . . "[I]ncorrigibility is inconsistent with youth."[231]

Thus, according to the Court, a sentencing authority's determination that a juvenile is intractably depraved and is a permanent danger to society necessarily ignores a juvenile's presumed capacity for change.[232] So the Court forbids it—again, and inexplicably, only in the case of nonhomicide crimes.[233] Yet again, one is left to wonder: how can the *end result* of a crime, no matter how fortuitous, provide a sentencer with the capacity to divine whether a juvenile's character is fixed, while the *nature* of the crime cannot provide the same sentencer with a

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230. *Id.* In a scathing rebuttal, Justice Thomas points to the majority's incongruous assertion that no single penological justification is mandatory after which it "promptly mandates the adoption of the theories the Court deems best." *Id.* at 2053 (Thomas, J., dissenting). He states, "the Eighth Amendment does not mandate 'any one penological theory,' just the one the Court approves." *Id.* at 2054 (citation omitted) (quoting the majority opinion, *id.* at 2028).

231. *Id.* at 2029 (majority opinion) (citation omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)). In *Miller v. Alabama*, Justice Kagan echoed a similar sentiment. 132 S. Ct. 2455, 2465 (2012) (majority opinion).

232. The Court's contrary treatment of mentally retarded defendants is again curious. Given the similarities noted by the Court between juveniles and persons with mental retardation, it is arguably equally true that the mentally retarded have the capacity for growth and change and that the penological rationale of incapacitation is therefore insufficient. Yet, the Court must have approved of life without parole for the mentally retarded based on the incapacitation rationale. *See* Atkins v. Virginia, 536 U.S. 304, 317-21 (2002) (noting "the relationship between mental retardation and the penological purposes served by the death penalty" and finding retribution and deterrence were not adequate penological rationales for mentally disabled defendants). This is because, like juveniles, the mentally retarded are rarely *deterred* by a life without parole sentence. *Id.* at 319-20. Retribution is similarly inapplicable because of the comparably lessened culpability of the mentally retarded. *Id.* at 319. Moreover, the Court's rejection of *rehabilitation* as a sufficient penological justification for JLWOP equally applies to life without parole for the mentally retarded because rehabilitation is not meaningful in either case. This leaves only *incapacitation* as a valid penological justification for imposing life without parole on mentally retarded persons. If—having disposed of retribution, deterrence, and rehabilitation—the Court believes that incapacitation is a sufficient, stand-alone penological justification for life without parole in the case of the mentally retarded, then it should equally stand as a sufficient penological justification for JLWOP.

233. *See supra* Part I.B.

concomitant ability to evaluate the same juvenile?

The Court's evisceration of incapacitation as a legitimate, stand-alone basis for imposition of juvenile life without parole in the nonhomicide context is telling. If the barbaric nature of a juvenile crime and the resulting need to protect the public are never sufficient to support a life sentence without parole when the victim happens to survive (often despite the best efforts of the perpetrator), one can only imagine that incapacitation will become, at most, an impotent penological justification for JLWOP in murder cases.

D. The Unnecessary Defense of a National Consensus

How did the nation, as represented by its legislators, view the mandatory imposition of JLWOP in homicide cases? That question was hotly debated in *Miller*.[234] Indeed, in an argument that comprised the bulk of his dissent, Chief Justice Roberts took the majority to task for its "disregard[ ]" of evidence that purportedly established a national consensus in favor of mandatory JLWOP.[235] As discussed in Part II.A, however, the *Miller* majority had rejected the mandatory imposition of JLWOP for homicide cases and announced the adoption of an *individualized* sentencing approach in that context.

Justice Kennedy had previously explained this approach in *Graham*, where he stated that an individualized approach required a two-part analysis addressing the following: (1) Whether "the gravity of the offense" was proportional to "the severity of the sentence"; and (2) "[i]n the rare case" where that inquiry is answered in the negative, whether the sentence was in line with sentences imposed by other courts for the same crime.[236] By contrast, according to Justice Kennedy, a categorical approach to sentencing required a very different two-part analysis: (1) Whether "a national consensus against the sentence[e] at issue" exists, as determined by "objective indicia of society's standards"; and, if so, (2) whether the Court, "exerci[sing] its own independent judgment," finds the sentence unconstitutional.[237]

In *Miller*, Justice Kagan made it clear the Court was using the individualized approach, and that the determination of whether "a national consensus" existed was therefore unnecessary.[238] "[T]he cases here [*Miller* and *Jackson*]," she explained, "are different from the typical one in which we have tallied legislative enactments [because] [o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or

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

235. *Id.* at 2479 (Roberts, C.J., dissenting). At the very least, he stated, the majority could not point to evidence, like the data in *Graham*, to support the existence of a national consensus against the mandatory sentence. *Id.*

236. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

237. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)) (internal quotation marks omitted).

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

Graham."[239] And if any question remained whether the search for a national consensus was superfluous in the individualized approach, Justice Kagan reiterated that the Court had not "scrutinized or relied in the same way on legislative enactments" when applying a case-by-case analysis in the past.[240] "We see no difference here," she stated.[241] Therefore, the national consensus inquiry—advanced so forcefully by Chief Justice Roberts—was completely irrelevant to the approach that the Court was, by its precedents, bound to employ.

The fact that the *Miller* Court was employing the individualized approach should have settled the matter and disposed of the issue. Justice Kagan could have directly stated that Chief Justice Roberts was applying the wrong test in his attempt to show the imprudence of a categorical ban and that his search for a national consensus in favor of the sentence was inconsequential.[242] Despite her accurate description of the Court's established approach to individualized sentencing, Justice Kagan instead embarked on a six-page defense of the supposed existence of a national consensus against mandatory JLWOP. Her seemingly unnecessary dispute with Chief Justice Roberts remarkably consumes nearly one-quarter of the Court's opinion.[243]

Why would Justice Kagan proffer this lengthy and needless exposition in an attempt to disprove the existence of a national consensus? Perhaps, with no particular purpose in mind, she just wanted to prove a point, and was simply unwilling to let the Chief Justice's assertion go unchallenged. This, however, seems unlikely. By focusing so intently on the Chief Justice's misplaced national consensus argument, instead of summarily dismissing it as irrelevant, Justice Kagan actually drew attention to it. Moreover, it seems doubtful that Justice Kagan, and the four other Justices comprising the majority, would have devoted so much of the opinion to a meaningless issue.

In truth, the majority's argument with Chief Justice Roberts was anything but meaningless. A close reading of the Court's opinion suggests that its six-page

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239. *Id.* at 2471.

240. *Id.*

241. *Id.* Addressing the dissents' claim that the majority had ignored the distinction between nonhomicide and homicide crimes, Justice Kagan noted that the Court's decision "retain[ed] that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses." *Id.* at 2466 n.6.

242. Interestingly, had Justice Kagan chosen this narrow approach, it would have been much the same as Chief Justice Roberts's approach in the *Graham* concurrence. In deciding that Terrence Graham's sentence was unconstitutional, the Chief Justice summarily dismissed the majority's adoption of a new categorical ban on JLWOP for nonhomicide offenses. *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring). He did so by applying the established case-by-case approach that the Court had used for a term-of-years sentence. *Id.* at 2042. He found it unnecessary to address the lengthy arguments advanced by the majority to purportedly show a national consensus against JLWOP in the nonhomicide context, so he simply ignored it. It was enough for the Chief Justice to state that "[t]he Court errs . . . in using this case as a vehicle for unsettling our established jurisprudence . . . ." *Id.*

243. *See Miller*, 123 S. Ct. at 2470-73.

exercise served a critical purpose—namely, preserving the possibility of a complete ban on all JLWOP sentences. Justice Kagan, and the Justices who joined her opinion, absolutely could not let Chief Justice Roberts's interpretation of the data go unchallenged. This is because the Chief Justice made a forceful and compelling argument that *Miller*'s evidence of a national consensus against mandatory JLWOP in homicide cases was even weaker than *Graham*'s evidence of a national consensus against JLWOP in nonhomicide cases.[244] If the majority had left Chief Justice Roberts's argument uncontested, then future courts interpreting the *Miller* decision could easily interpret the Court's omission as a concession that a national consensus in favor of mandatory JLWOP existed (regardless of whether the majority had declared the national consensus inquiry inapplicable to the individualized sentencing inquiry).

That possibility was untenable to the majority because, when a future murder defendant inevitably challenged the imposition of a *discretionary* JLWOP sentence, evidence of a supposed national consensus supporting that sentence would be far more substantial than any evidence supporting a national consensus in favor of the *mandatory* sentence in *Miller*.[245] If the *Miller* majority, by ignoring the Chief Justice's interpretation of the data, had arguably conceded the presence of a national consensus in favor of mandatory JLWOP in the murder context,[246] it would be hard pressed to maintain, in a subsequent homicide case, the existence of a national consensus against discretionary JLWOP. Therefore, in an attempt to keep its powder dry, the *Miller* Court went to great lengths to refute the Chief Justice and provide an alternative interpretation of the data. There is simply no other reasonable explanation for the lengths to which Justice Kagan went to win this argument.

E. Death Is No Longer Different

Graham marked an extraordinary departure for the Court from its previous Eighth Amendment cases: an across the board ban on a term-of-years sentence for a distinct group of defendants was unique indeed.[247] Before announcing the Court's new categorical ban, Justice Kennedy acknowledged that "[a]nother possible approach would be to hold that the Eighth Amendment requires courts 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."[248] "This approach," he explained, "would allow courts to account for factual

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

245. Discretionary JLWOP for homicide is permitted in fifteen jurisdictions, while, prior to *Miller*, twenty-nine jurisdictions allowed mandatory JLWOP. *Id.* at 2471 n.10 (majority opinion). This means, at present, forty-three States permit the imposition of discretionary JLWOP. *Id.*

246. This argument would surely have been raised by the dissent in any future case challenging the discretionary imposition of JLWOP for homicide.

247. *Graham*, 130 S. Ct. at 2022-23. "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence." *Id.* at 2022.

248. *Id.* at 2031.

differences between cases and to impose life without parole sentences for particularly heinous crimes."[249] That "possible approach," of course, was the very one the Court had exclusively instructed lower courts to apply. Even Justice Kennedy found it difficult to intellectually purge this long-held approach from his creation of the new rule. In fact, prior to his declaration that a sentencer cannot ascertain a juvenile's capacity for growth and change,[250] Justice Kennedy made the following extraordinary statement: "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[251] But this is the very case-by-case analysis that he jettisoned one paragraph later.[252] Because a juvenile's culpability, crimes, and characteristics cannot be determined—except in the nonhomicide context—a categorical ban was necessary. Apparently, the incongruity was lost on Justice Kennedy.

In his concurrence in *Graham*, Chief Justice Roberts offered his interpretation of Court precedent.[253] In the noncapital context, he explained, reviewing courts have always been instructed to apply a "narrow proportionality principle" based on a "case-by-case" analysis.[254] Justice Thomas was not so diplomatic. "For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."[255] "Death," he stated, "is different no longer."[256]

Facially, it is difficult to argue with that statement. If true, would it be unreasonable to envision the Court's facile jump from the ban on JLWOP in the nonhomicide context to a wholesale ban on the sentence in all juvenile cases—including murder? After all, if death is truly no longer different and the Court can easily move from a categorical ban on the juvenile death penalty to a categorical ban on JLWOP for nonhomicide offenses, what stands in the way of extending this ban to all juvenile offenses? Consider this: Since the death penalty is no longer on the table, JLWOP now holds the title of the new "harshest penalty" for juveniles. With all the Court has said about the lessened culpability of juveniles and the inability of sentencers to recognize intractable depravity, it seems quite reasonable that the Court will one day find it difficult to allow the

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249. *Id.*

250. *See supra* Part I.B.

251. *Graham*, 130 S. Ct. at 2026 (citing Roper v. Simmons, 543 U.S. 551, 568 (2005)). Of course, those "crimes and characteristics" are unique to each defendant.

252. *Id.*

253. *Id.* at 2036 (Roberts, C.J., concurring).

254. *Id.* at 2037.

255. *Id*. at 2046 (Thomas, J., dissenting). *See Roper*, 543 U.S. at 575 ("holding that the death penalty cannot be imposed upon juvenile offenders"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that death penalty is unconstitutional for mentally retarded individuals). Indeed, prior to *Graham*, the Court had only invalidated one term-of-years sentence and that ban was not categorical. *See* Solem v. Helm, 463 U.S. 277, 278 (1983).

256. *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) (internal quotation marks omitted).

sentence to stand even in the face of murder.[257]

To be sure, the Court, implicitly in *Graham* and explicitly in *Miller*, affirmed its support for the continued use of individualized sentencing in juvenile homicide cases.[258] According to Justice Kagan, "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder . . . ."[259] Addressing the dissent's claim that the Court had abandoned the distinction between homicide and nonhomicide crimes, Justice Kagan defended the Court's decision: "*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."[260]

However, *Miller*'s allowance of discretionary JLWOP for homicide was tenuous at best.[261] Indeed, one need only listen to Justice Kagan to hear the echo of a future rationale for a complete ban on JLWOP: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[262] That, in and of itself, is a remarkable statement for *Graham* and *Roper* said no such thing.

Rather, each established a categorical ban on the imposition of a particular sentence, regardless of whether the sentencing authority had the discretion to account for individualized mitigating factors.[263] In *Roper,* it did not matter whether the sentencer had an "opportunity to consider mitigating circumstances before imposing" the death penalty on a juvenile.[264] Likewise, in *Graham*, it did not matter whether the sentencer had an "opportunity to consider mitigating circumstances before imposing" JLWOP for a nonhomicide crime.[265] In both cases, an inquiry into mitigating circumstances would have been completely unnecessary, because the invalidation of each sentence was categorical. And why was it categorical? One reason – because the offender was under the age of

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257. Indeed, the following statement, made by Justice Kennedy, should apply equally to JLWOP:

> The Court concluded [in *Roper*] that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."

Id. at 2032 (majority opinion) (quoting *Roper*, 543 U.S. at 573).

258. *Id.* at 2027 ("Serious nonhomicide crimes . . . cannot be compared to murder . . . ."); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("[W]e do not foreclose a sentencer's ability to [distinguish between reformable and irreparably depraved juveniles] in homicide cases . . . .").

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

260. *Id.* at 2466 n.6.

261. *See supra* Part II.A.

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

263. *See id.*

264. Roper v. Simmons, 543 U.S. 551, 572-73 (2005); *see Miller*, 132 S. Ct. at 2475.

265. Graham v. Florida, 130 S. Ct. 2011, 2032, 2034 (2010); *see Miller*, 132 S. Ct. at 2475.

eighteen.

The same, of course, can be said of the juvenile murderer sentenced to life without parole, even when the sentencer has discretion. And if that is not enough, perhaps the following sweeping statement by Justice Kagan will make the point: "Our decision flows straightforwardly from . . . the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments."[266] Youth mattered in *Roper* and *Graham*, and led to a categorical ban in both cases. So, are these statements a promise to the juvenile murderer of things to come? If not, as discussed below, then Justice Kagan wasted a great deal of ink in a superfluous sparring match with Justices Thomas and Alito.

F. Dramatic Foreshadowing

Standing alone, Sections A through E of this Part raise serious doubts about the future of *all* JLWOP sentences—even the discretionary imposition of the sentence for first-degree premeditated murder. If any doubt remained about the future demise of JLWOP, Justice Kagan and Justice Breyer laid those doubts to rest with their sweeping, and wholly unnecessary, statements about the continued viability of the sentence.

Justice Kagan's statements strongly suggest the majority's intent to expand its JLWOP rationale. Interpreting *Graham*, Justice Kagan made the expected pronouncements about the inadequacy of incapacitation as a penological rationale and the ephemeral characteristics of youth.[267] Having explained these two cardinal *Graham* tenets, however, Justice Kagan made this telling statement:

> To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.[268]

With this said, she refused to explicitly confine *Graham*'s categorical ban on JLWOP to the nonhomicide context. "*Graham*'s reasoning," she stated, "implicates *any* life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."[269]

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

267. *Id.* at 2458.

268. *Id.* at 2465 (citation omitted). Chief Justice Roberts jumped on this statement, lamenting that "[t]his process has no discernible end point . . . [a]fter all, the Court tells us, 'none of what [*Graham*] said about children . . . is crime specific.'" *Id.* at 2481-82 (Roberts, C.J., dissenting) (third and fourth alterations in original). "There is no clear reason," he ventured, "that principle would not bar . . . any juvenile sentence as harsh as what a similarly situated adult would receive." *Id.* at 2482.

269. *Id.* at 2465 (majority opinion) (emphasis added). Did Justice Kagan mean that *Graham*'s

Next, Justice Kagan clearly announced the Court's holding and mused about the holding's impact, demonstrating, at the very least, that the majority is not far from prohibiting JLWOP in all circumstances:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at ___, 130 S. Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").[270]

Addressing petitioners' alternative arguments, Justice Kagan declared that "[b]ecause that holding is sufficient to decide *these cases*, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles."[271] It was hardly necessary for the Court to make this statement. Indeed, by announcing its refusal to address the petitioners' "alternative argument" the Court effectively addressed it but found it unnecessary to reach a conclusion on those facts. Justice Kagan continued: "But given all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[272] Why did the Court think this the case? Because, Justice Kagan explained, it is so hard for a judge or jury to identify "the rare juvenile offender whose crime

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categorical ban was confined to the facts of that case? Or did she mean that, on its facts, *Graham* had addressed only the limited question of JLWOP for nonhomicide crimes? Her subsequent statements make clear that it was the latter and that *Graham*'s categorical ban could logically be extended.

270. *Id.* at 2469. One must wonder why the majority chose this particular excerpt from *Graham* to employ a signal indicative of support. "Cf." is used when the "[c]ited authority supports a proposition different from the main proposition *but sufficiently analogous to lend support*." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) (emphasis added). *Graham* was analogous to *Miller*—not because *Miller* established "some meaningful opportunity," *Miller*, 132 S. Ct. at 2469, for parole (it did not)—but because it established a categorical ban on JLWOP. That aspect of *Graham* would have been appropriate for a "Cf." signal. But, the *Graham* requirement that a State provide "some meaningful opportunity" for parole is not analogous to *Miller* because the *Miller* majority was purportedly only banning mandatory JLWOP for homicide crimes, not discretionary JLWOP for homicide crimes. Discretionary JLWOP, by definition, does not include the possibility of parole. Thus, *Miller*'s holding still allowed a sentencer to continue to impose discretionary JLWOP and still prevented the juvenile sentenced to discretionary JLWOP from being afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. Thus, the "Cf." was not only unnecessary, but also nonsensical. Nonsensical, that is, unless the Court intended to eventually apply *Graham*'s categorical rule to *discretionary* JLWOP in homicide cases.

271. *Miller*, 132 S. Ct. at 2469 (emphasis added).

272. *Id.*

reflects irreparable corruption."[273] Yet, that statement is equally applicable to *any* juvenile offender—whether being sentenced for a homicide or a nonhomicide crime.[274] Why, then, should the same reasoning not apply in the homicide context? The Court does not provide any guidance on this point: "Although we do not foreclose a sentencer's ability to make that judgment in *homicide* cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[275]

While Justice Kagan's intentions were arguably thinly veiled, Justice Breyer's concurrence was not so finessed. He first stated his objection to Jackson's sentence because Jackson, as a non-triggerman accomplice convicted of felony murder, did not necessarily "have intent to kill."[276] That finding, he argued, had to be made on remand before JLWOP could be imposed even discretionarily.[277] Justice Breyer then concluded with the following revealing statement: "If, on remand, however, there is a finding that Jackson *did* intend to cause the clerk's death, *the question remains open* whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well."[278]

Chief Justice Roberts did not let all of this go unchallenged. He found cold comfort in the "restraint" that *Roper* and *Graham* had promised in the application of their rationales.[279] Admitting that the majority was focusing its analysis "on the mandatory nature of" JLWOP in this case, the Chief Justice nevertheless found disturbing the Court's announcement "that discretionary life without parole for juveniles should be 'uncommon'—or, to use a common synonym, 'unusual.'"[280] He could discern "no clear reason that principle would not bar . . . any juvenile sentence as harsh as what a similarly situated adult would receive."[281] "Unless confined," Chief Justice Roberts stated, "the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults."[282]

Justice Thomas also attacked the majority's seemingly unnecessary excursion into the discretionary JLWOP inquiry. "Today," he stated, "the Court makes

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273. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) (internal quotation marks omitted).

274. *See supra* Part II.A.

275. *Miller*, 132 S. Ct. at 2469 (emphasis added). Later in the opinion, again without any explanation or instruction to sentencing authorities, Justice Kagan reiterated the point that a judge or jury must consider[ ] an offender's youth and attendant characteristics—before imposing [JLWOP]. And in so requiring, our decision flows straightforwardly from our precedents . . . that youth matters for purposes of meting out the law's most serious punishments." *Id.* at 2471.

276. *Id.* at 2477 (Breyer, J., concurring).

277. *Id.* at 2475.

278. *Id.* at 2477.

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

280. *Id.*

281. *Id.* at 2482.

282. *Id.*

clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it 'think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.'"[283] Justice Thomas then noted the clear future implication of the majority's admonition:

> That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. *And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by this case.*[284]

Thus, to Justice Thomas, a categorical ban on JLWOP for homicide cases was just a matter of time.

Finally, Justice Alito echoed the concerns of the Chief Justice and Justice Thomas. Acknowledging that "at least for now, the Court apparently permits a trial judge to" sentence a juvenile murderer to life-without-parole, he warned, "do not expect this possibility to last very long."[285] According to Justice Alito, "Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder."[286] Were the majority holdings in *Graham* and *Miller* auguries of a wholesale ban on JLWOP? In the words of Justice Alito, "We will see."[287]

CONCLUSION

A majority of the members of the United States Supreme Court are poised to abolish life without parole for juvenile offenders convicted of first-degree murder—regardless of whether the "child" is almost eighteen-years-old and regardless of whether the murder is particularly heinous. *Graham* began the journey down this path by banning JLWOP for all nonhomicide crimes. Under *Graham*, the juvenile perpetrator's advanced age, murderous intent, and extreme depravity do not matter. The only relevant factor is that the victim—through resilience, good medical treatment, or sheer luck—did not die. *Miller* extended the ban on JLWOP to homicide cases, but only where the sentence is mandated by statute. In doing so, however, the majority gave numerous indications that the JLWOP is on its last legs. Therefore, even where the trial judge has the discretion to consider the relative age and culpability of the juvenile murderer, it seems

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283. *Id.* at 2486 (Thomas, J., dissenting) (alterations in original) (quoting the majority opinion, *id.* at 2469).

284. *Id.* (emphasis added).

285. *Id.* at 2489 (Alito, J., dissenting).

286. *Id.* at 2489-90.

287. *Id.* at 2490.

evident that the United States Supreme Court will inevitably rule that JLWOP is unconstitutional. If a "rough beast" does await, to terrorize and murder the innocent, this Court appears bound and determined to afford him the opportunity for release.