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From a Trilogy to a Quadrilogy: *Miller v. Alabama* Makes It Four in a Row For U.S. Supreme Court Cases That Support Differential Treatment of Youth

By Marsha Levick

For the fourth time in just seven years, the U.S. Supreme Court has ruled that juvenile status drives legal status under the Constitution, at least with respect to youth charged with or convicted of criminal activity. In its ruling in the companion cases of *Miller v. Alabama* and *Jackson v. Hobbs*,[1] the Supreme Court once more limited the authority of states to impose the most severe penalties—in these cases, mandatory life without parole sentences—on juvenile offenders convicted of homicide in adult criminal court. Since 2005, the court has also struck down the juvenile death penalty, *Roper v. Simmons*,[2] and juvenile life-without-parole sentences in nonhomicide cases, *Graham v. Florida*,[3] as well as imposed a requirement that law enforcement consider the youthful age of a suspect in determining whether *Miranda* warnings should be issued, *J.D.B. v. North Carolina*.[4] Collectively, these cases substantially alter the constitutional landscape for children involved in the justice system.

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Miller and *Jackson*

Evan Miller and Kuntrell Jackson were both convicted of murder for crimes they committed when they were 14 years old. Miller was convicted of first-degree murder; Jackson was convicted of felony murder (because he did not shoot the victim in the underlying robbery himself). Under prevailing Alabama and Arkansas law, both Miller and Jackson were mandatorily sentenced to life without parole. The sentencing courts had no discretion whatsoever to alter or impose lesser sentences. Both sentences were affirmed on appeal and, in the case of Jackson, affirmed as well in post-conviction proceedings. The Supreme Court granted review in both cases in November 2011, heard argument in March and issued its opinion on June 25.

Justice Elena Kagan wrote the majority opinion; she was joined by Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer, and Sonya So-

[1] 132 S. Ct. 2455, 91 CrL 413 (2012).
[2] 543 U.S. 551, 76 CrL 407 (2005).
[3] 130 S. Ct. 2011, 87 CrL 195 (2010).
[4] 131 S. Ct. 502, 89 CrL 463 (2011).

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tomayor. Breyer wrote a concurring opinion, in which Sotomayor joined. Chief Justice John G. Roberts Jr., as well as Justices Clarence Thomas and Samuel A. Alito Jr., filed dissenting opinions in which Justice Antonin Scalia joined.

Although the petitioners had asked the court to categorically prohibit all life-without-parole sentences for juveniles convicted of either murder or felony murder, the court limited its holding to proscribing only *mandatory* sentences of life without parole for juveniles. However, a close reading of Kagan's opinion suggests that the whole may be greater than the sum of its parts. From the outset of her opinion, Kagan made clear that the social science and other scientific research that had informed the court's decisions in *Roper*, *Graham*, and *J.D.B.* dictated a similar outcome in *Miller*.[5] Consequently, while affording narrow specific relief, *Miller* still provides a broad framework for rethinking our treatment of juvenile offenders.

The *Miller* Holding

Kagan wasted no time in setting forth the rationale for striking mandatory life-without-parole sentences for all juveniles, observing in the opening paragraph of her opinion that ''such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and 'greater capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties'' (quoting *Graham*).

Significantly, the language quoted above links the court's death-penalty jurisprudence with its cases reviewing juvenile sentences under the Eighth Amendment. Kagan specifically noted that *Miller* implicates ''two strands of precedent reflecting our concern with proportionate punishment.'' In the first ''strand,'' the court has adopted categorical bans on sentences reflecting a mismatch between the culpability of the offender and the severity of the punishment. This proportionality analysis drove the court to strike the death penalty for nonhomicide crimes in *Kennedy v. Louisiana*[6] and to similarly prohibit its imposition on mentally retarded defendants in *Atkins v. Virginia*.[7] Of course, this express concern with proportionality also led to the court's holdings in *Roper* and *Graham*.

The second ''strand'' of the court's precedents involves cases prohibiting the mandatory imposition of the death penalty, requiring instead individualized sentencing hearings in which the sentencer considers the offender's individual characteristics and attributes as well as the specific circumstances of the offense before sentencing the individual to death. See *Woodson v. North Carolina*.[8] Here, Kagan specifically acknowledged the court's recent analogy of juvenile life without parole to the death penalty itself in *Graham*,[9] providing the foundation for the court's requirement of individualized, *nonmandatory* sentencing hearings in the juvenile life-without-parole cases as well.

Looking to the first strand—proportionality of the challenged punishment to the blameworthiness of the offender—Kagan set forth the now-established governing principle that has implications for juvenile offenders beyond the specific facts of *Miller* itself: ''*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments' '' (quoting *Graham*).

The court reiterated its prior, core findings about adolescents: They are less mature and more prone to reckless, impulsive, and heedless risk-taking; they are particularly vulnerable to negative peer pressure; and, as adolescence is inherently a period of transition, they are less likely to be found ''irretrievably depraved'' (quoting *Roper*). The court acknowledged the uncontroverted body of research and social science confirming these findings, and it noted that the evidence of these unique attributes of youth had become even stronger since *Roper* and *Graham* were decided.

Importantly, in extending the rationale of *Graham* from nonhomicide cases to the homicide cases before it in *Miller* and *Jackson*, the court held that ''none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.'' In other words, the unique characteristics of youth are present and relevant whether the youth commits a robbery or a murder. And those characteristics matter in determining the constitutionality of a lifetime of incarceration, which will end only with the death of the juvenile in prison. Moreover, Kagan repeated a key corollary to the court's holding in *Graham*: ''An offender's age is relevant to the Eighth Amendment,'' and ''criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.''

The second relevant strand of the court's Eighth Amendment jurisprudence—the requirement of individualized sentencing in capital cases—was invoked by the majority specifically because of the *Graham* court's likening of life without parole to the death penalty. Looking back at its death penalty precedents, the court relied upon its reasoning in striking mandatory death penalty statutes to undergird its holding in *Miller*. As the court held in *Woodson*, mandatory death sentences violate the Eighth Amendment because they allow for no consideration of ''the character and record of the individual offender or the circumstances'' of the offense and ''exclude from consideration . . . the possibility of compassionate or mitigating factors.''[10]

The court also highlighted its repeated insistence in capital cases that the ''mitigating qualities of youth'' must be considered before a sentence of death may be imposed. Reviewing its prior holdings in *Johnson v. Texas*[11] and *Eddings v. Oklahoma*, Kagan stressed the striking similarity between the court's observations in those cases—e.g., ''youth is more than a chronological

[5] For ease of reference, *Jackson* and *Miller* will be referred to collectively throughout as ''*Miller*.''

[6] 554 U.S. 407, 83 CrL 511 (2008).

[7] 536 U.S. 304, 71 CrL 374 (2003).

[8] 428 U.S. 289 (1976) (plurality opinion). See also *Lockett v. Ohio*, 438 U.S. 586 (1976).

[9] In *Graham*, Kennedy wrote that life without parole sentences ''share some characteristics with death sentences that are shared by no other sentences.'' Kennedy further observed that sentencing a juvenile to die in prison alters the remainder of his life ''by a forfeiture of his life that is irrevocable.''

[10] *Woodson*, 428 U.S. at 304, quoted in *Miller*, slip op. at 13. See also *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982).

[11] 509 U.S. 350 (1993).

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fact''—to the question posed by the imposition of mandatory life without parole sentences on juvenile homicide offenders. She wrote:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater sentence* than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

In thus bringing together the two strands of the court's Eighth Amendment jurisprudence, Kagan concluded: ''So *Graham* and *Roper* and our individualized sentencing cases alike teach us that in imposing a State's harshest penalties, *a sentencer misses too much if he treats every child as an adult*.'' (emphasis added). What the court meant by treating children like *children* was also spelled out by the court:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . . . [T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Finally, Kagan addressed the court's decision to forgo a categorical ban on life-without-parole sentences for juveniles convicted of homicide. While the court viewed its requirement for individualized sentencing determinations that would take account of ''youth (and all that accompanies it)'' sufficient to address the challenges by *Miller* and *Jackson*, the court was also clear that *Miller* must be read in the context of *Roper* and *Graham*. Thus, though a state is not required to guarantee eventual release, it ''must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'' Kagan further observed, ''Given all we have said in *Roper* and *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.''

Breyer's Concurrence: What's Next for Felony Murder?

In a concurring opinion joined by Sotomayor, Breyer wrote separately to express his view that, at least in the case of Kuntrell Jackson, who was convicted of felony murder, *Graham* ''forbids sentencing Jackson to such a sentence'' of life without parole unless the state proved that Jackson ''kill[ed] or intend[ed] to kill'' the robbery victim. In Breyer's opinion, *Graham's* reasoning precludes the imposition of this sentence ''where the juvenile himself neither kills nor intends to kill the victim.''

Graham cited *Enmund v. Florida*[12] for the proposition that individuals who do not kill or intend to kill are categorically less deserving of the most serious forms of punishment than are murderers. The *Enmund* court held that, ''for the purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.'' Pursuant to *Enmund* and *Graham*, the criminal culpability of a juvenile convicted of felony murder should be limited to the juvenile's personal participation in the underlying felony.

Generally, if a person is killed during the commission of a felony, the killing is felony murder.[13] The felony-murder doctrine is often justified by a ''transferred intent'' theory, under which the intent to kill may be inferred from an individual's intent to commit the underlying felony because a ''reasonable person'' would know that death is a possible result of felonious activities.[14] Importantly, the crime of felony murder does not require an intent to kill.[15] Therefore, a person can be convicted of felony murder even if the killing was accidental, unforeseeable, or committed by another participant in the felony.[16] In its broadest application, any participant in a felony can be convicted of murder whether or not the participant committed a dangerous act or was even present when the act occurred.[17]

With respect to children, Breyer found this construct particularly inapt. Breyer wrote:

> At base, the theory of transferring a defendant's intent is premised on 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. [citation omitted] Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.

Breyer found the adult felony-murder doctrine inconsistent with the social and neuroscientific research that the court expressly relied upon in *Roper*, *Graham*, and *J.D.B*; the majority's analysis in *Miller* only underscored the relevance of that research to the felony murder question.

Collectively, these decisions preclude ascribing the same level of anticipation or foreseeability to a juvenile

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[12] 458 U.S. 782 (1982).

[13] Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 763 (1999).

[14] See, e.g., *Lowe v. State*, 2 So. 3d 21, 46 (Fla. 2008) (‘‘ ‘Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.’ ’’) (quoting *Adams v. State*, 341 So. 2d 765, 767-68 (Fla. 1976)).

[15] Id.

[16] Id. at 770.

[17] Id. at 776.

who takes part in a felony—even a dangerous felony—as the law ascribes to an adult.[18]

Certain key research findings illustrate this point. As a general matter, research confirms that adolescents do not assess risks and make decisions in the same manner as a ''reasonable adult,'' and it is therefore illogical to presume that an adolescent who takes part in a felony—even a dangerous felony—would anticipate or comprehend that someone may be killed as a consequence of the felony. Adolescents are less likely to perceive risks and are less risk-averse than adults.[19] The *Graham* court specifically recognized that adolescents' ''lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions''[20] and that adolescents have ''difficulty in weighing long-term consequences'' and ''a corresponding impulsiveness.'' Adolescents are thus likely to assess and weigh the risk that someone might get hurt or killed in the course of the felony differently than would adults.

Research also confirms the common perception that adolescents are highly susceptible to peer pressure and that ''juveniles are more vulnerable or susceptible to negative influences and outside pressures than adults.''[21] The influence of peers may be especially significant in felony-murder cases where the adolescent engages in the felony as an accomplice with other teenagers or adults. As in Jackson's case, the teen may make a spur-of-the-moment decision to participate in the crime, perhaps out of fear of social rejection or loss in social status if he refuses to join. An adolescent participating in a felony is driven more by pressures, impulses, and emotion than by a careful assessment of the risks to himself or others.

In his concurrence, Breyer turned to the oft-quoted sentence from Justice Felix Frankfurter's 1953 opinion in *May v. Anderson* to shore up his hesitation to impose a life-without-parole sentence on a juvenile convicted of felony murder. In *May* Frankfurter wrote, ''Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children.''[22] As Breyer cautioned, ''To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile to life without parole would involve such 'fallacious reasoning.' ''[23]

While Breyer and Sotomayor were unable to persuade a majority of their fellow justices to consider the felony-murder question, the felony-murder doctrine, as well as the harsh penalties imposed following convictions for felony murder, appear ripe for challenge going forward with regard to their applicability to children.[24]

Retroactivity of *Miller*

Unlike *Graham*, which implicated approximately 130 juveniles clustered primarily in just two states, Florida and Louisiana, the *Miller* court identified 29 states or jurisdictions in which juveniles have been subject to mandatory life-without-parole sentences. It is estimated that as many as 2,100 individuals nationwide are currently serving life-without-parole sentences for homicide crimes they committed when they were under the age of 18.[25] Given the huge number of people potentially affected by the *Miller* holding, lawyers began speculating as to its retroactivity even ''before the ink was dry'' on the decision.

The starting place for any discussion of retroactivity is the Supreme Court's decision in *Teague v. Lane*,[26] which laid out the framework for determining whether a rule announced in one of the court's opinions should be applied retroactively to judgments in criminal cases that are already final on direct review. *Teague* established a three-pronged test for retroactivity analysis. The *Teague* court held generally that ''new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,'' but it also created two exceptions.

First, a new constitutional rule is retroactive if it ''places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'' or ''addresses a 'substantive categorical guarantee[ ] accorded by the Constitution,' such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense.''[27] Second, *Teague* held that ''a new rule should be applied retroactively if it requires the observance of those procedures . . . that are implicit in the concept of ordered liberty.''

While these two exceptions in *Teague* are cited most often, the third prong in Justice Sandra Day O'Connor's opinion is most relevant here: ''Once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.'' O'Connor explained:

> Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated . . . . [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment ''hardly comports with the ideal of 'administration of justice with an

[18] See e.g., *J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the ''reasonable person'' standard does not apply to children).

[19] See generally, Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008).

[20] Quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

[21] *Roper*, 543 U.S. at 569.

[22] 345 U.S. 528, 536 (1953) (concurring opinion).

[23] Cases upholding the death penalty for adults convicted of felony murder do not undermine this conclusion. *Tison v. Arizona*, 481 U.S. 137, 152 (1987), upheld the death penalty in a felony-murder case in which the defendant's ''participation [was] major and whose mental state [was] one of reckless indifference.'' *Tison*, 481 U.S. at 149. *Graham* quoted *Tison* for the proposition that ''the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'' This proposition supports a conclusion that juveniles convicted of felony murder are less culpable than their adult counterparts because of their age and development, as held in *Roper* and *Graham*.

[24] Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 Conn. Pub. Int. J. 297 (2011-2012).

[25] See http://www.endjlwop.org/the-issue/stats-by-state.

[26] 489 U.S. 288 (1989) (plurality).

[27] *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989).

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> even hand.' " [citation omitted] See also *Fuller v. Alaska*, 393 U.S. 80, 82 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith*. "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." 479 U.S., at 327-328, 107 S. Ct., at 716.
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> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." [citation omitted] But there is a more principled way of dealing with the problem. *We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.* We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. *We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.*[28]

This third prong of the court's *Teague* holding answers the retroactivity question of *Miller*. While Miller himself filed a direct appeal from the Alabama Court of Criminal Appeals, Jackson's case was a post-conviction proceeding; Jackson sought review from a ruling by the Arkansas Supreme Court affirming the dismissal of his state habeas petition—initially filed following *Roper* and then amended in the wake of *Graham* to seek relief under *Graham* as well. In banning mandatory juvenile life-without-parole sentences in *Miller*, the court made no note of the different procedural postures of the two cases beyond its description of the cases themselves. In granting relief to both Miller and Jackson, the court's directive to the lower courts was identical: "We accordingly reverse the judgments of the Arkansas Supreme Court and the Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion."

Given the court's grant of relief to Jackson, arguments opposing retroactive relief to similarly situated juvenile lifers are baseless. *Teague*'s holding cannot be split up into severable parts. O'Connor was unambiguous in holding that a new rule could not be applied to the petitioner seeking the rule "unless [that rule] would be applied retroactively to all defendants on collateral review through one of the two exceptions [the court] articulated." The *Teague* holding mandates retroactivity of the *Miller* decision.[29]

Even beyond this obvious application of *Teague*, there are additional grounds for applying *Miller* retroactively. As discussed above, in banning juvenile life without parole, the *Miller* court relied upon two strands of precedent regarding proportionate punishment: cases adopting "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty" and cases "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."

Cases in the first category include *Atkins*, *Roper*, and *Graham*. Although the Supreme Court has not explicitly held any of these cases to be retroactive, all have been applied retroactively by federal courts of appeals.[30] In *In re Sparks*, the Fifth Circuit held that "*Graham* clearly states a new rule of constitutional law that was not previously available: the case was the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole on non-homicide offenders under age eighteen."[31] The decisions in *Atkins* and *Roper* have likewise been applied retroactively because they "prohibit[ ] a certain category of punishment for a class of defendants because of their status or offense."[32]

The second line of cases, including *Woodson v. North Carolina*, *Lockett v. Ohio*, *Sumner v. Shuman*, and *Eddings v. Oklahoma*, has also been uniformly held retroactive. *Sumner* struck down a mandatory death penalty statute; it was applied retroactively to cases on collateral review because it was decided on collateral review.[33] Although *Lockett* and *Eddings* were decided on direct appeal, they have also been applied retroactively to cases long after they became final.[34]

Finally, the Supreme Court has more recently focused on whether a new rule is "substantive" or "procedural" to determine its retroactivity. See, e.g., *Schriro v. Summerlin*.[35] A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law

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[28] 498 U.S. at 315-316 (emphasis added). See also *Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court.").

[29] Roberts, joined by Scalia, Thomas, and Alito, appears to concede the retroactivity of *Miller*. Roberts wrote: "Indeed, the Court's gratuitous prediction [that life without parole sentences will be 'uncommon'] appears to be nothing more than an invitation to *overturn* life without parole sentences imposed by juries and trial judges." *Miller*, 132 S. Ct. at 2480. (emphasis added).

[30] See, e.g., *Bell v. Cockrell*, 310 F.3d 330 (5th Cir. 2002) (*Atkins*); *Arroyo v. Quarterman*, 222 Fed. App'x 425 (5th Cir. 2007) (unpublished) (per curiam) (*Roper*); *In re Sparks*, 657 F.3d 258, 90 CrL 15 (5th Cir. 2011) (*Graham*).

[31] 657 F.3d at 260 (The court stated further, "By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*."). See also *Penry*, 492 U.S. at 330 (1989).

[32] *Horn v. Banks*, 536 U.S. 266, 271 n.5 (2002) (citing *Saffle v. Parks*, 494 U.S. 484, 494 (1990)).

[33] See also *Thigpen v. Thigpen*, 541 So. 2d 465, 466 (Ala. 1989).

[34] See, e.g., *Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985) (applying *Lockett* retroactively); *Harvard v. State*, 486 So. 2d 537, 539 (Fla. 1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively).

[35] 542 U.S. 348, 353, 75 CrL 287 (2004).

punishes.''[36] Generally, new substantive ''rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act the law does not make criminal' or faces a punishment that the law cannot impose upon him.''[37] While there may be debate about whether a ban on mandatory sentences of juvenile life without parole constitutes a substantive or procedural rule, it can reasonably be argued that *Miller* bans a ''category of punishment'' (mandatory sentencing) for a ''class of defendants'' (juveniles). This analysis is supported by the retroactive application given to the court's decision in *Sumner*, noted above, where the court invalidated a mandatory death sentence for an inmate who committed murder while serving life in prison without the possibility of parole. The court did not categorically ban the imposition of the death sentence, yet the rule has been applied retroactively to cases on collateral review.[38]

What Happens Now?

Courts must now grapple with applying *Miller* to individuals seeking resentencing—either on direct appeal or through collateral challenges, assuming the decision is deemed retroactive. Courts must also address the sentencing of juvenile offenders who are facing sentencing hearings currently and those who will enter the justice system in the future.

The immediate question in all affected jurisdictions is what sentence may be imposed in place of juvenile mandatory life without parole. If state law already provides for an alternative term of years or a life sentence with the possibility of parole, the sentencer likely can impose one of those options (as well as consider a non-mandatory life-without-parole sentence if such a discretionary sentence is already statutorily available.) However, in the absence of swift passage of new legislation, jurisdictions with only one current sentencing option—mandatory life without parole—or jurisdictions with no parole mechanism in place will lack an applicable, constitutional sentencing scheme for juveniles convicted of first- or second-degree murder.[39] Under these circumstances, there is precedent from the Supreme Court supporting the imposition of the next most severe statutory sentence available for that offense or the next most severe sentence for any lesser included offense if no other statutory sentence is available for the initial offense. In *Rutledge v. United States*,[40] the defendant was found guilty of both engaging in a criminal enterprise and conspiracy. The Supreme Court found that the conspiracy was a lesser included offense of the crime of engaging in a criminal enterprise, which required the vacation of that conviction and imposition of a sentence only on the criminal enterprise conviction. The *Rutledge* court opined that where a greater offense must be reversed, the courts may enter judgment on the lesser included offense. *Rutledge* cited with approval numerous decisions that authorized the reduction to a lesser included offense when judgment of sentence could not be imposed upon the greater offense. While the *Rutledge* scenario is not wholly analogous—convictions for first- or second-degree murder will not be vacated in the wake of *Miller* based upon that decision alone—the option to sentence for the lesser included offense approved in *Rutledge* is instructive.

Many states have adopted a similar approach to resentencing based on a lesser included offense when a sentence is deemed unconstitutional. For example, in *Commonwealth v. Story*,[41] the Pennsylvania Supreme Court ruled that once the state death penalty scheme had been declared unconstitutional, the only sentence that could be imposed was the next most severe sentence statutorily available at the time the defendant was convicted, life imprisonment. The court held, ''Because the death penalty had been unconstitutionally entered, the sentence of death must be vacated and a sentence of life imprisonment imposed.'' In *Commonwealth v. Bradley*,[42] the Pennsylvania court was presented with a similar sentencing challenge after the state death penalty statute had been declared unconstitutional pursuant to *Furman v. Georgia*,[43] which invalidated statutes that had ''no standards [to] govern the selection of the penalty [of death or imprisonment]'' and left the decision ''to the uncontrolled discretion of judges or juries.'' In *Bradley* as well, the court imposed the next most severe sentence available: life imprisonment.[44]

The North Carolina Supreme Court, in *State v. Davis*,[45] found that ''common sense and rudimentary justice demanded'' that the maximum permissible sentence of life imprisonment be imposed upon defendants convicted of first-degree murder or rape committed between the date of the *Furman* court's decision and the date of the enactment of a new state statute that rewrote the death sentencing provisions.[46]

Additionally, resentencing based on the lesser included offense is in line with the Supreme Court decisions in *Roper*, *Graham*, and now *Miller* that juveniles are categorically less culpable than adults who commit similar offenses. In other words, juveniles who commit murder are categorically less culpable than adults who commit murder. Therefore, it is logical to look to sentences for lesser included offenses because the legislature has consciously adopted sentences other than life without parole for those *adult* murderers whom they consider less culpable. This approach also resolves the Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age,

[36] Id.

[37] *Schriro*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

[38] *Sumner*, 483 U.S. at 68; see also *Thigpen v. Thigpen*, 541 So.2d 465, 466 (Ala. 1989).

[39] Courts are not required to wait for the legislature to act to implement the discretionary procedures required by *Miller*/*Jackson*. In an attempt to comply with *Atkins*, the Louisiana Supreme Court set forth guidelines for how to construct an evidentiary hearing to determine whether an inmate is in fact mentally retarded and thus eligible for resentencing. *State v. Williams*, 831 So. 2d 835, 858 (2002). The court remanded to the trial court to conduct the hearing based on the guidelines it set forth.

[40] 517 U.S. 292 (1996).

[41] 440 A.2d 488 (Pa. 1981).

[42] 295 A.2d 842 (Pa. 1972)

[43] 408 U.S. 238 (1972).

[44] See also *Commonwealth v. Edwards*, 411 A.2d 493 (Pa. 1979).

[45] 227 S.E.2d 97 (N.C. 1976).

[46] See also *Carey v. Garrison*, 452 F. Supp. 485 (W.D.N.C. 1978) (commuting an unconstitutional sentence down to the next harshest constitutional sentence made available by statute).

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serve longer sentences than adult murderers who receive the same sentence.[47]

One other point should be noted in considering what alternative sentences may be imposed on juvenile offenders. The imposition of any sentence higher than that available at the time the underlying felony or homicide was committed may well violate due process, ex post facto, and equal protection rights. In many jurisdictions within the purview of *Miller*, only one possible sentence for first- or second-degree murder—life imprisonment without the possibility of parole—may have been statutorily available. Under *Miller*, this mandatory sentence has now been struck down. These state codes therefore lack a constitutional sentence for first- or second-degree murder committed by a juvenile. It is well established that a juvenile's ex post facto rights would be violated, however, if the state were to inflict ''punishments, where the party was not, by law, liable to any punishment'' or to inflict ''greater punishment, than the law annexed to the offence.''[48] Thus, any sentence imposed that is greater than a statutorily established, constitutional sentence would amount to a judicially created, retroactive punishment that was not ''annexed to the offence'' at the time the crimes occurred. This further supports the argument that juveniles must be sentenced in accordance with the lesser included sentence then available.

For similar reasons, imposing a judicially created sentence—in the absence of an available, constitutional statutory alternative—that is greater than any statutorily established constitutional sentence would also violate juveniles' due process rights.[49] Likewise, a judicially created sentence, such as a sentence of life with parole, would violate equal protection by treating the *Miller* class of juveniles differently from those who are sentenced according to constitutionally sound statutes.[50] For example, in *Story*, the Pennsylvania Supreme Court refused to permit the defendant to be subjected to another capital sentencing proceeding under the then-new sentencing statute. The court explained that such an approach would ''violate equal protection and due process.''[51]

Of course, the devil is in the details. The next most severe sentence available, which may require looking to the statutory sentence for lesser included offenses, will vary from state to state. Again, in Pennsylvania, the next most severe sentence for first-degree murder is a maximum sentence of 40 years for the lesser included offense of third-degree homicide.[52] For second-degree felony murder, the lesser included offense would be the underlying felony, e.g., robbery, which would carry a maximum sentence of 20 years in Pennsylvania.[53]

Finally, *Miller* is quite prescriptive about what these sentencing hearings should look like. The fundamental premise behind the court's rejection of mandatory life-without-parole sentences for juveniles was its insistence that the factor of youth be taken into account before the imposition of a state's harshest penalties and that each juvenile receive an individualized sentence based upon the particular youth's age and the ''wealth of characteristics and circumstances attendant to it.''[54] Kagan identified particular characteristics or attributes that sentencers must consider. These include, at a minimum:

- the juvenile's age and developmental attributes, including immaturity, impetuosity, and failure to appreciate risks and consequences;
- the juvenile's family and home environment;
- the circumstances of the offense, including the extent of the juvenile's participation and the way familial and peer pressures may have affected his or her behavior;
- the juvenile's lack of sophistication in dealing with a criminal justice system designed for adults; and
- the juvenile's potential for rehabilitation.

Notably, Kagan did not frame these features as specifically mitigators or aggravators, suggesting that these sentencing hearings will be similar to—but not identical to—the penalty phase in death penalty cases. Because the question post-*Miller* is not life or death but whether the offender will someday have an opportunity for release from prison, an exact parallel to capital cases is not apt. Ideally, the criteria identified by Kagan will be just that—*criteria* that may be viewed positively or negatively on a case-by-case, individual-youth-to-individual-youth basis.

Conclusion

The core message of the Supreme Court that emerges from *Roper*, *Graham*, and *Miller* is that ''imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.''[55] From this foundational principle, all future constitutional decisions about juvenile sentencing must flow. Children and adults do not stand side by side in the justice system. While they may be perched on parallel ladders, children will always be at least one rung below adults as we sort out their place in any particular state's sentencing scheme. In *Miller*, the court was express about what was more implicit in *Roper* and *Graham*: In Eighth Amendment challenges involving juveniles, the court has forged a new and distinctive body of law that

[47] See, e.g., *Graham*, 130 S. Ct. at 2028 (''Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.'').

[48] *Stogner v. California*, 539 U.S. 607, 612, 73 CrL 363 (2003) (quoting *Calder v. Bull*, 3 Dall. 386, 389, 1 L.Ed. 648 (1798)).

[49] Cf. *Commonwealth v. Story*, 440 A.2d 488, 492 (Pa. 1981).

[50] Id. (''Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside.'').

[51] Of course, these other potential constitutional challenges to judicially imposed sentences might apply as well to any legislative sentencing scheme passed in the wake of *Miller*.

[52] See 18 Pa. Cons. Stat. § 1102.

[53] See, e.g., 18 Pa. Cons. Stat. § 1101(1). The Pennsylvania Supreme Court will hear argument on Sept. 12, in two cases, *Commonwealth v. Batts* and *Commonwealth v. Cunningham*, where it will consider the adoption of the lesser included offense sentencing scheme for both first- and second-degree murder, in the absence of an alternative, constitutional sentencing option.

[54] *Miller*, slip op. at 14.

[55] *Miller*, slip op. at 11-12.

combines the Eighth Amendment proportionality principle with the individualized sentencing requirements of capital cases to articulate a juvenile Eighth Amendment jurisprudence that turns on the unique attributes of youth. As Kagan stated, ''We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.''[56] And responding directly to the dissenter's claim that only ''death is different'' under the Eighth Amendment, Kagan declared, ''Children are different too.''

[56] Id. at 19.

The court has signaled a paradigm shift, and the state and federal justice systems must follow its lead. Where *Miller* and the court's prior cases take us will undoubtedly be the subject of litigation and scholarly writing for some time to come. Challenges to other mandatory sentencing schemes for juveniles and challenges to the transfer of youth to the adult system are both waiting in the wings, as are other policies and practices involving the treatment of youth in the justice system, but these are beyond the scope of this article.

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