

Justice Thomas and the dissent compounded the problems of *Williams* through their categorical and unqualified rejection of the plurality's not-for-truth rationale⁸⁶ — a rejection that is the only true “holding” in *Williams*.⁸⁷ Categorically holding that basis facts are always introduced for their truth goes too far, because there are circumstances in which such facts may truly be introduced only for a “legitimate nonhearsay purpose”⁸⁸: for example, when an expert witness discloses the basis for his opinion only in general terms and without relying on a key piece of inadmissible hearsay evidence.⁸⁹

To some extent, all the Justices thus contributed to the confusion likely to result from *Williams*. The Court could have avoided such a confusing outcome, if only a single additional Justice had either joined the Justices in the plurality to write a majority opinion overruling *Melendez-Diaz* and *Bullcoming* or joined the dissent and thereby strengthened and clarified the requirements of *Melendez-Diaz* and *Bullcoming*.

E. Eighth Amendment

Mandatory Juvenile Life Without Parole. — The twenty-first-century Supreme Court has issued a flurry of juvenile Eighth Amendment opinions. In *Roper v. Simmons*¹ and *Graham v. Florida*,² the Supreme Court declared that two *categories* of punishments (first the death penalty, and then juvenile life without parole (JLWOP) for non-homicide offenders) amounted to Eighth Amendment “cruel and unusual punishment” when imposed on minors.³ Last Term, in *Miller v. Alabama* and *Jackson v. Hobbs*,⁴ the Court extended the Eighth

will be barred, under *Melendez-Diaz* and *Williams*, from changing their laws to allow presenting even informal forensic evidence without a testifying analyst; the latter, as illustrated by *Williams*, will not. Under this view, Justice Thomas's opinion, like the plurality's, works as a retreat from *Crawford*, by tying Confrontation Clause doctrine to state (and federal) rules of evidence.

⁸⁶ See *Williams*, 132 S. Ct. at 2256–57 (Thomas, J., concurring in the judgment) (“[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose.”); *id.* at 2268 (Kagan, J., dissenting) (“[W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is then dependent on its truth.”).

⁸⁷ “Holding” is used in the sense that five Justices affirmatively agreed on this point.

⁸⁸ *Williams*, 132 S. Ct. at 2240 (plurality opinion).

⁸⁹ See Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791, 826–27 (2007) (“When only the general nature of the sources is described, the argument that the information is introduced strictly to help the factfinder assess the expert's testimony is stronger, especially when the expert has relied on an array of different kinds of sources, only some of which are even arguably testimonial.”).

¹ 543 U.S. 551 (2005).

² 130 S. Ct. 2011 (2010).

³ *Simmons*, 543 U.S. at 568; *Graham*, 130 S. Ct. at 2033.

⁴ 132 S. Ct. 2455 (2012). The Court issued a joint opinion, referred to here as *Miller v. Alabama*.

Amendment “kids are different” principle⁵ to the sentencing *process* by requiring that sentencers consider mitigating circumstances of a child’s crime before imposing JLWOP.⁶ Despite referencing death penalty cases, which require only individualized sentencing, *Miller* requires markedly different sentencing procedures. The Court cannot intend for sentencers applying *Miller* to differentiate between children who may reform and those who cannot, a task *Graham* declared to be impossible.⁷ Instead, the Court must mean for sentencers to sort children from adults, reserving JLWOP only for those minors who cannot demonstrate age-related “diminished culpability and heightened capacity for change.”⁸ Lower courts implementing *Miller* must be mindful of how this approach to mitigation differs from death penalty precedent.

At midnight on a 2003 summer night in a northern Alabama trailer park, fifty-two-year-old Cole Cannon called on Susan Miller to make a drug deal.⁹ Miller’s fourteen-year-old son Evan and a sixteen-year-old friend followed Cannon back to his trailer, where they all smoked marijuana and played drinking games.¹⁰ When Cannon passed out, the youth stole about \$300, but Cannon awoke and grabbed Evan by the throat.¹¹ After his friend hit Cannon with a baseball bat, Evan Miller wrested free, took the bat, and beat Cannon repeatedly.¹² He put a sheet over the man’s head, told him “I am God, I’ve come to take your life,” and took a final swing.¹³ The boys lit fires to destroy evidence.¹⁴ Cannon died from his injuries and smoke inhalation.¹⁵

At the District Attorney’s request, the juvenile court transferred Miller’s case to adult court.¹⁶ The appeals court affirmed the transfer, citing the nature of the crime, Miller’s “mental maturity,” and his prior offenses (truancy and “criminal mischief”).¹⁷ A jury convicted Miller of murder in the course of arson, a crime carrying mandatory life without parole (LWOP).¹⁸ That jury could not consider mitigating factors like his abusive father, his addict mother, or his four suicide at-

⁵ *E.g.*, Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 48–61 (2011).

⁶ *See Miller*, 132 S. Ct. at 2460.

⁷ 130 S. Ct. at 2032.

⁸ *Miller*, 132 S. Ct. at 2469.

⁹ *Id.* at 2462; Brief for Petitioner at 6, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647).

¹⁰ *Miller*, 132 S. Ct. at 2462.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; *see also* ALA. CODE § 12-15-203(a) (2011).

¹⁷ *Miller*, 132 S. Ct. at 2462 (quoting *E.J.M. v. State*, No. CR-03-0915, slip op. at 5–7 (Ala. Crim. App. Aug. 27, 2004)) (internal quotation marks omitted).

¹⁸ *Id.*; *see also* ALA. CODE § 13A-5-39-40.

tempts beginning at age six.¹⁹ The appeals court affirmed the sentence, and the Alabama Supreme Court denied certiorari.²⁰

Walking through a Blytheville, Arkansas, housing project on a November 1999 evening, fourteen-year-old Kuntrell Jackson and two friends — one carrying a sawed-off shotgun — bantered about robbing a nearby video store.²¹ When they arrived at Movie Magic, Jackson stayed outside while the armed boy unsuccessfully demanded money from the clerk.²² Jackson entered, either telling the clerk “[w]e ain’t playin’” or the other boys “I thought you all was playin’.”²³ When the clerk mentioned the police, the gun-wielding youth fatally shot her.²⁴ The boys fled without any money.²⁵

The prosecutor charged Jackson as an adult.²⁶ After considering the charges, a psychiatric evaluation, and Jackson’s juvenile record (shoplifting and car theft), the trial judge denied his motion to transfer the case to juvenile court, and an appellate court affirmed.²⁷ Applying felony murder’s transferred intent doctrine, a jury convicted Jackson of capital murder and aggravated robbery.²⁸ The judge imposed the mandatory LWOP sentence.²⁹ After the Supreme Court decided *Simmons*, Jackson filed a state habeas corpus petition, which the appellate court dismissed.³⁰ The Arkansas Supreme Court affirmed,³¹ but two dissenters would have found Jackson’s JLWOP unconstitutional under *Graham*.³²

In a joint opinion, the Supreme Court reversed both decisions.³³ Writing for the Court, Justice Kagan³⁴ held that the Eighth Amendment prohibits mandatory JLWOP when a sentencer cannot consider mitigating circumstances.³⁵ Justice Kagan drew a broad principle from *Simmons* and *Graham*: “[C]hildren are constitutionally different

¹⁹ See *Miller*, 132 S. Ct. at 2462.

²⁰ *Id.* at 2463.

²¹ *Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004).

²² *Id.* at 758–59.

²³ *Miller*, 132 S. Ct. at 2461 (alteration in original).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; see also ARK. CODE ANN. § 9-27-318(c)(2) (1998).

²⁷ *Jackson v. State*, No. 02-535, 2003 WL 193412, at *1, *3 (Ark. Ct. App. Jan. 29, 2003).

²⁸ *Miller*, 132 S. Ct. at 2461.

²⁹ *Id.*; see also ARK. CODE ANN. § 5-4-104(b) (2011). Jackson did not challenge his sentence on appeal, but the Arkansas Supreme Court affirmed the convictions. *Miller*, 132 S. Ct. at 2461.

³⁰ *Miller*, 132 S. Ct. at 2461.

³¹ *Jackson v. Norris*, No. 09-145, 2011 WL 478600, at *5 (Ark. Feb. 9, 2011).

³² *Id.* at *11 (Danielson, J., dissenting) (“[C]riminal procedure laws that fail to take defendants’ youthfulness into account at all [are] flawed.” (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010) (internal quotation mark omitted))).

³³ *Miller*, 132 S. Ct. at 2460.

³⁴ Justice Kagan was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor.

³⁵ *Miller*, 132 S. Ct. at 2475.

from adults for purposes of sentencing.”³⁶ Juveniles are prone to “recklessness [and] impulsivity,”³⁷ “are more vulnerable . . . to negative influences and outside pressures,”³⁸ and possess a character “less fixed” or “well formed.”³⁹ Science supporting these findings has only grown stronger since *Simmons* and *Graham*.⁴⁰ For children, then, LWOP does not serve the same interests of retribution, deterrence, incapacitation, or rehabilitation that it does for adults.⁴¹

Justice Kagan identified a number of mitigating characteristics possessed by the defendants: Jackson’s youth could have affected his calculation of the risks in accompanying a gun-toting friend or his willingness to walk away,⁴² and Miller had consumed copious drugs and alcohol with the adult victim.⁴³ Histories of violence, addiction, or abuse colored each child’s young life.⁴⁴

Doctrinally, Justice Kagan explained that the decision “flow[ed]”⁴⁵ from two lines of precedent⁴⁶: *Graham* “liken[ed] JLWOP] to the death penalty itself” when applied to juveniles,⁴⁷ and *Woodson v. North Carolina*⁴⁸ required that sentencers weigh mitigating factors before imposing the death penalty.⁴⁹ Ergo, sentencers must consider mitigation before handing down JLWOP.⁵⁰

Though counsel briefed and argued the issue, the majority did not decide whether the Eighth Amendment requires a categorical ban on JLWOP.⁵¹ Still, Justice Kagan remarked that, given “children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”⁵² Sentencers handing down this rare punishment must “take into account how children are different, and how

³⁶ *Id.* at 2464.

³⁷ *Id.*

³⁸ *Id.* (alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

³⁹ *Id.* (quoting *Simmons*, 543 U.S. at 570) (internal quotation marks omitted).

⁴⁰ *Id.* at 2464 n.5; see Brief for the American Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 3, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647) (“[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions.”).

⁴¹ *Miller*, 132 S. Ct. at 2465.

⁴² *Id.* at 2468.

⁴³ *Id.* at 2469.

⁴⁴ See *id.* at 2468–69.

⁴⁵ *Id.* at 2471.

⁴⁶ *Id.* at 2466–67.

⁴⁷ *Id.* at 2466 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010)).

⁴⁸ 428 U.S. 280 (1976).

⁴⁹ *Miller*, 132 S. Ct. at 2467 (citing *Woodson*, 428 U.S. at 304).

⁵⁰ *Id.* at 2467–68.

⁵¹ *Id.* at 2469.

⁵² *Id.*

those differences counsel against irrevocably sentencing them to a lifetime in prison.”⁵³

Turning to the States’ arguments, Justice Kagan first distinguished *Harmelin v. Michigan*⁵⁴ as having “nothing to do with children.”⁵⁵ Second, evidence that twenty-nine jurisdictions⁵⁶ imposed mandatory JLWOP mattered little because the decision “flow[ed] straightforwardly” from precedent and did not create a categorical bar.⁵⁷ Further, in many states, JLWOP had not “been endorsed through deliberate, express, and full legislative consideration” because the combination of separate juvenile-transfer and general sentencing statutes could result in even a six-year old receiving LWOP.⁵⁸ When afforded discretion, judges and juries rarely imposed JLWOP.⁵⁹ Finally, pretrial transfer processes could not adequately substitute for sentencing discretion.⁶⁰

Justice Breyer concurred,⁶¹ adding that he believed felony murder’s transferred intent doctrine could never justify JLWOP.⁶² This doctrine presumes that felony participants foresee the risk of death, but juveniles possess a lesser capacity to consider consequences and adjust conduct.⁶³ Because the state did not need to prove intent to convict Jackson of first-degree felony murder, Justice Breyer would require on remand that a court find Jackson “kill[ed] or intend[ed] to kill”⁶⁴ the victim before he could be sentenced to LWOP.⁶⁵

Chief Justice Roberts dissented,⁶⁶ arguing that mandatory JLWOP was far from statistically “unusual.”⁶⁷ Because almost 2500 prisoners currently serve LWOP sentences for crimes committed as juveniles, the punishment in question was far more prevalent than that in *Graham*, as at the time *Graham* was decided, only 123 prisoners nationwide

⁵³ *Id.*

⁵⁴ 501 U.S. 957 (1991) (upholding mandatory LWOP for possession of 672 grams of cocaine as consistent with the Eighth Amendment).

⁵⁵ *Miller*, 132 S. Ct. at 2470.

⁵⁶ Twenty-eight states and the federal government imposed the sentence. *Id.* at 2471 n.9.

⁵⁷ *Id.* at 2471. Justice Kagan found that the States’ argument was weaker than it was in *Graham*, as at the time *Graham* was decided, thirty-nine jurisdictions allowed nonhomicide JLWOP. *Id.* (citing *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010)).

⁵⁸ *Id.* at 2473 (quoting *Graham*, 130 S. Ct. at 2026) (internal quotation mark omitted).

⁵⁹ *Id.* at 2471 n.10.

⁶⁰ *Id.* at 2474. Justice Kagan argued that transfer decisions rely on an underdeveloped record, do not provide protections and services afforded at trial, and “often present a choice between extremes: light punishment as a child or standard sentencing as an adult.” *Id.*

⁶¹ *Id.* at 2475 (Breyer, J., concurring). Justice Sotomayor joined Justice Breyer’s concurrence.

⁶² *Id.* at 2475–76.

⁶³ *Id.* at 2476.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2477.

⁶⁶ *Id.* (Roberts, C.J., dissenting). Justices Scalia, Thomas, and Alito joined the Chief Justice.

⁶⁷ *Id.*

served LWOP for nonhomicide juvenile crimes.⁶⁸ Chief Justice Roberts also observed no “objective indicia” of societal standards to support the majority’s position.⁶⁹ Citing the sentence’s widespread use, its recent rise in popularity, and the absence of post-*Graham* corrective legislation, he dismissed any notion that lawmakers inadvertently tolerated mandatory JLWOP.⁷⁰ To the contrary, society’s “outcry against repeat offenders” deserved deference.⁷¹

Nor did the Chief Justice see any precedent that compelled the majority’s result. *Graham* specifically exempted homicide offenders, and *Simmons* applied only to the death penalty.⁷² He read “the Court’s gratuitous prediction” that JLWOP sentences will be “uncommon” (synonymous with “unusual”) as a sign that *Miller* is “merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime.”⁷³ He worried that the majority’s motivating principle — “because juveniles are different from adults, they must be sentenced differently” — could even prohibit states from trying juveniles as adults.⁷⁴

Justice Thomas filed a separate dissent,⁷⁵ denouncing the majority’s melding of prior cases (already inconsistent with the original understanding of the Eighth Amendment) to match “its own sense of morality.”⁷⁶ Leaving nary a precedent unquestioned, he reiterated that the Eighth Amendment prohibits only “torturous *methods* of punishment”⁷⁷ and does not contain a “proportionality principle.”⁷⁸ Justice Thomas bemoaned the “jettison[ing of] *Harmelin*’s clear distinction between capital and noncapital cases.”⁷⁹ He closed by warning of an “objective indicia” feedback loop: the majority’s suggestion that

⁶⁸ *Id.* at 2478–79. Justice Kagan discounted these figures because judges were required to impose LWOP, a move the Chief Justice thought “st[ood] precedent on its head” by suggesting “a sentence may be considered unusual *because* so many legislatures approve it.” *Id.* at 2479 (citing *id.* at 2471–72 n.10 (majority opinion)).

⁶⁹ *Id.* at 2478 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (internal quotation mark omitted).

⁷⁰ *Id.* at 2480.

⁷¹ *Id.* at 2478.

⁷² *Id.* at 2481.

⁷³ *Id.*

⁷⁴ *Id.* at 2482. “Learning that an Amendment that bars only ‘unusual’ punishments requires the abolition of this uniformly established practice would be startling indeed.” *Id.*

⁷⁵ *Id.* (Thomas, J., dissenting). Justice Scalia joined Justice Thomas.

⁷⁶ *Id.* at 2486 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2058 (2010) (Thomas, J., dissenting)) (internal quotation mark omitted).

⁷⁷ *Id.* at 2484 (quoting *Graham*, 130 S. Ct. at 2044 (Thomas, J., dissenting)) (internal quotation marks omitted).

⁷⁸ *Id.* at 2483 (quoting *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment)) (internal quotation marks omitted).

⁷⁹ *Id.* at 2486.

JLWOP “will be uncommon” would influence judges, “shaping the societal consensus of tomorrow.”⁸⁰

Justice Alito also dissented.⁸¹ He was troubled by the majority’s “arrogation of legislative authority” to punish seventeen-year-old mass murderers and denounced its decision as divorcing already-wayward Eighth Amendment analysis from objective indicia.⁸² Justice Alito was particularly distressed because juvenile murderers were “overwhelmingly . . . young men . . . fast approaching the legal age of adulthood.”⁸³ He lamented that “Eighth Amendment case law is now entirely inward looking”; the majority had untethered proportionality doctrine from everything but its as-yet-undisclosed “vision of evolutionary culmination.”⁸⁴

The Court’s limited ruling fell far short of the categorical ban on JLWOP that observers predicted,⁸⁵ advocates hoped for,⁸⁶ and states vigorously resisted.⁸⁷ But the extension of the central principle of *Simmons* and *Graham* — that children, like death, are different for purposes of the Eighth Amendment⁸⁸ — must be read expansively to provide procedural protections that result in sentences other than LWOP for an overwhelming number of juveniles convicted of homicide. Unlike with the *Woodson* line of death penalty procedure cases, which demand only individualized sentencing, courts crafting and applying *Miller* sentencing procedures must be mindful of the exceptionality of JLWOP implicit in the Court’s logic.

Simmons and *Graham* banned specific juvenile sentencing *outcomes*.⁸⁹ Partly because juvenile offenders lacked requisite culpabili-

⁸⁰ *Id.*

⁸¹ *Id.* at 2487 (Alito, J., dissenting). Justice Scalia joined Justice Alito.

⁸² *Id.* Justice Alito more broadly disapproved of the “evolving standards of decency” analysis as straying from the Eighth Amendment’s original meaning. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation mark omitted).

⁸³ *Id.* at 2489.

⁸⁴ *Id.* at 2490.

⁸⁵ See, e.g., *The Supreme Court, 2009 Term — Leading Cases*, 124 HARV. L. REV. 179, 209 (2010) (“Applying *Graham*’s logic, it is doubtful that [JLWOP sentences for homicide offenders] could survive a constitutional challenge.”); see also Alison Siegler & Barry Sullivan, “‘Death Is Different’ No Longer”: *Graham v. Florida* and the Future of Eighth Amendment Challenges to Noncapital Sentences, 2010 SUP. CT. REV. 327, 360–70 (tracing doctrinally how the Court might extend *Graham*’s ban to homicide JLWOP).

⁸⁶ See, e.g., Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioners at 1, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647).

⁸⁷ See, e.g., Brief of Amici Curiae State of Michigan et al. at 14, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647) (“The facts of countless teenage murderers demonstrate, in graphic fashion, why this Court should eschew the categorical approach in favor of a more nuanced, case-by-case determination.”).

⁸⁸ See Brief of Juvenile Law Center et al. as Amici Curiae in Support of Petitioners at 5, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647); Berkheiser, *supra* note 5, at 48–61.

⁸⁹ Outcome-banning analogues from the death penalty context include *Coker v. Georgia*, 433 U.S. 584 (1977), barring the death penalty as punishment for rape of adult women; *Enmund v.*

ty,⁹⁰ and partly because the sentencing system could not appropriately apply the punishments,⁹¹ death and nonhomicide JLWOP were off limits. Judges had fewer options, but adjudication would proceed as before. *Miller*, for the first time, addressed the juvenile sentencing process. Instead of automatically sentencing juveniles to LWOP, judges must now consider a host of mitigating factors when sentencing.⁹² *Miller*, then, resembles *Woodson* and the line of death penalty cases instituting procedural safeguards to enforce the “constitutional mandate of individualized determinations in capital-sentencing proceedings.”⁹³ On its face, *Miller* “mandates only that a sentencer follow a certain process — considering an offender’s youth and attendant characteristics — before imposing a particular penalty.”⁹⁴

But the *Miller* procedure must be different from that specified in procedural death penalty cases like *Woodson* and *Lockett v. Ohio*.⁹⁵ Recognizing that some, but not all, offenders deserve leniency, those cases require that sentencers “treat[] each defendant in a capital case with that degree of respect due the uniqueness of the individual.”⁹⁶ It is the task of legislatures to describe the types of crimes that warrant the death penalty, but their removed role makes them incapable of

Florida, 458 U.S. 782 (1982), prohibiting death for felony murder when the defendant did not personally kill, attempt to kill, or intend a killing; and *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), banning death for child rape.

⁹⁰ See *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (“[C]ompared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”).

⁹¹ See *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation — that a juvenile offender merits the death penalty.”).

⁹² *Miller*, 132 S. Ct. at 2475.

⁹³ *Sumner v. Shuman*, 483 U.S. 66, 75 (1987).

⁹⁴ *Miller*, 132 S. Ct. at 2471. This focus on procedure lays groundwork for further challenges to the process of trying juveniles as adults. As the Chief Justice was quick to point out, *Miller*’s logic extends to all juvenile crimes: if it is unconstitutional to sentence a child to mandatory LWOP as an adult, future courts may forbid any mandatory juvenile sentences — or even trying a juvenile as an adult. *Id.* at 2482 (Roberts, C.J., dissenting).

Extending *Miller* to preclude criminal courts from handling juveniles would be revolutionary. See *id.* During the 1990s, legislation in all but one state gave teeth to a “get tough on kids” movement that pressed for children to be handled, tried, and sentenced as adults. See JESSICA SHORT & CHRISTY SHARP, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005), available at <http://www.cwla.org/programs/juvenilejustice/Disproportionate.pdf>. But in recent years, juvenile advocates, alongside psychologists and neuroscientists, have advocated against punitiveness. See, e.g., Brief for the American Psychological Ass’n. et al. as Amici Curiae in Support of Petitioners at 6–35, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647). These voices have not been heeded in state capitals, but *Simmons*, *Graham*, and *Miller* leaned heavily on the science touted by this resistance.

⁹⁵ 438 U.S. 586 (1978).

⁹⁶ *Id.* at 605.

sorting offenders who do and do not deserve death.⁹⁷ When facing the death penalty, defendants may seek “individualized” mercy by presenting an array of mitigation, which sentencers weigh as they see fit.⁹⁸ Death penalty procedure features no evidentiary threshold sufficient for leniency; instead, it provides only a meaningful chance to be heard by sentencers giving “independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation.”⁹⁹

Miller’s underlying premises instead require a process that produces near-categorical outcomes: with *Miller* applied faithfully, (nearly) all juveniles avoid LWOP. *Graham* relied on science’s inability to sort unredeemable juvenile criminals from children capable of rehabilitation.¹⁰⁰ Because a juvenile’s character is “not as well formed” as an adult’s,¹⁰¹ “[i]t 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.”¹⁰² Children change; because science cannot tell which ones will improve, they must have a “chance to *later* demonstrate that [they are] fit to rejoin society.”¹⁰³

Miller, adopting *Graham*’s child psychology,¹⁰⁴ cannot expect judges and juries to perform *ex ante* sorting of redeemable from hopeless children when differentiation is a daunting task even for experts. *Miller* must imagine categorical sorting, different entirely from the process envisioned in *Woodson* and *Lockett*, with sentencers separating children from adults, not kids from kids.¹⁰⁵ Only the rare juvenile who closely resembles an adult could warrant LWOP.¹⁰⁶ Of course, it is possible that the Court *did* intend for sentencers to sort among

⁹⁷ See *McGautha v. California*, 402 U.S. 183, 204 (1971); *The Supreme Court, 1977 Term — Leading Cases*, 92 HARV. L. REV. 57, 104 (1978) (“Under [*McGautha*], the legislature can describe the types of crimes for which the death penalty is appropriate, but it cannot identify the criminals who deserve execution.”).

⁹⁸ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 389–90 (1995).

⁹⁹ *Lockett*, 438 U.S. at 605.

¹⁰⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

¹⁰¹ *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)) (internal quotation marks omitted).

¹⁰² *Id.* at 2029 (quoting *Simmons*, 543 U.S. at 573) (internal quotation marks omitted); accord Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 678 (1993).

¹⁰³ *Graham*, 130 S. Ct. at 2033 (emphasis added).

¹⁰⁴ *Miller* incorporates *Graham*’s “central considerations,” including its psychological conclusions. 132 S. Ct. at 2466.

¹⁰⁵ See *id.* at 2469 (“[W]e require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”).

¹⁰⁶ See *id.*

children.¹⁰⁷ But then *Miller* would contradict *Graham* and the weight of science.¹⁰⁸

Lower courts would be mistaken to graft procedures from death penalty cases like *Woodson* onto *Miller*'s critically different sentencing regime. In requiring the consideration of mitigation before the imposition of death, *Woodson* contemplates the use of mitigating factors as differentiation, to determine which adults deserve that awesome penalty.¹⁰⁹ *Miller*'s logic instead requires sentencers to withhold JLWOP for all offenders who exhibit age-related "diminished culpability" or "heightened capacity for change."¹¹⁰

A burden-of-proof analysis better fits *Miller*. In such a sentencing inquiry, a minimal showing of age-related diminished culpability or heightened capacity for change would block JLWOP.¹¹¹ That sentence would be off-limits upon a showing that an offender's developmental state affected her "immaturity, impetuosity, and failure to appreciate risks and consequences" or "the possibility of rehabilitation."¹¹² Because juveniles, much more so than adults, lack the ability to shape their circumstances, JLWOP also would be inappropriate when an offender's culpability was diminished by the surrounding "family and home environment" or "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."¹¹³ In death penalty proceedings, a trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence."¹¹⁴ Such a finding of an age-related mitigating circumstance in *Miller* sentencing should

¹⁰⁷ See *Miller*, 132 S. Ct. at 2467–68 (disapproving generally of mandatory sentencing schemes, in which "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").

¹⁰⁸ See, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 28–60 (2008); YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000); Donald R. Lynam et al., *Longitudinal Evidence that Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORMAL PSYCHOL. 155, 162 (2007); Moffit, *supra* note 102, at 678.

¹⁰⁹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[Mandatory death sentences] treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.").

¹¹⁰ *Miller*, 132 S. Ct. at 2469.

¹¹¹ See *id.*

¹¹² *Id.* at 2468.

¹¹³ *Id.*

¹¹⁴ *Hurst v. State*, 819 So. 2d 689, 697 (Fla. 2002) (quoting *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990)).

foreclose JLWOP.¹¹⁵ On remand, Kuntrell Jackson and Evan Miller would meet this bar easily.

And, because *Miller* presumes that some or all of these mitigating factors affect the vast majority of juveniles, a faithful procedural application could shift the burden to the State to demonstrate that the offender lacks mitigating factors typical among children. With this approach, an offender's age would establish a presumption of diminished culpability and enhanced capacity for change, rebutted only if the State demonstrated the absence of any relevant age-related considerations.¹¹⁶

At heart, an implementation of procedural safeguards true to *Miller*'s underlying premises amounts to something close to a de facto substantive holding: children should be sorted from adults and, except when indistinguishable from adults, be spared LWOP. Considering the underlying psychological premise, Justice Kagan's suggestion that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"¹¹⁷ sounds less like dicta.

F. Copyright Clause

Restoring Copyright to Public Domain Works. — The only clause in the body of the Constitution to contain both a prefatory and an operative clause,¹ the uniquely structured Copyright Clause² has generated debate about the scope of powers that it confers upon Congress.³ While most scholars acknowledge that the prefatory clause is

¹¹⁵ A critic might charge that this burden-of-proof system, which would foreclose JLWOP for any children with age-related reduced culpability or enhanced capacity for change, is not supported by objective indicia of community standards. Cf. *Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting). Under this view, the *Miller* opinion would be trapped, necessarily conflicting either with the logic of *Graham* or with the Eighth Amendment. The critic would be perceptive but mistaken: the same strong arguments made in support of an Eighth Amendment categorical JLWOP ban apply here with even greater force because the burden-of-proof system allows for the rare case when chronological age does not match developmental maturity. See sources cited *supra* note 85.

A critic might also complain that the burden-of-proof system does not allow for the consideration of the severity of an offense. But it does: parole boards can weigh the qualities of crimes. States could also use death penalty-like sentencing — which calls for consideration of offense-related aggravating factors — if final sentencing of juvenile offenders is deferred until after children have time to mature; courts could issue provisional sentences but delay a final JLWOP determination until after an offender's maturation allows experts to assess more accurately her incorrigibility.

¹¹⁶ Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (detailing burden shifting to a defendant when a plaintiff establishes a prima facie case of discrimination).

¹¹⁷ *Miller*, 132 S. Ct. at 2469.

¹ See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1774 (2006).

² U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

³ See, e.g., Oliar, *supra* note 1, at 1775–76, 1781–88.