ROPER, *GRAHAM*, *MILLER* & THE MS-13 JUVENILE HOMICIDE CASES

*RAPHAEL A. FRIEDMAN**

INTRODUCTION

On April 11, 2017, five teenage males strolled into a wooded area behind the Central Islip Recreational Center on Long Island, New York.[1] They were lured there by two teenage females under the guise of smoking marijuana together. The male teenagers were quickly surrounded by over a dozen young males armed with clubs formed from tree limbs, knives, axes, and machetes. While one of the teens escaped, the other four were beaten, hacked, and stabbed to death. The victims' mutilated bodies were dragged a short distance and left in a pile. The attackers fled, planning to return to bury the bodies. However, the Suffolk County Police Department discovered the victims' bodies before the killers had a chance to return.

All of the attackers were members of the notorious street gang, La Mara Salvatrucha, better known as the MS-13, an extremely violent transnational criminal organization. The event that led to the murders took place a few months earlier when Josue Portillo, one of the attackers, was involved in a verbal altercation at a 7-Eleven convenience store with the sole teenager who managed to escape. Portillo believed that the teenager and his friends were members of the 18th'] Street gang (an MS-13 rival) and that they were falsely representing themselves to be MS-13 members. Portillo reported this to his superiors within the MS-13 and they decided to kill the teens as revenge. Together, they spent months developing a plan to lure the victims to the woods with the assistance of two female associates of the MS-13. Portillo stayed in contact with the two females

* J.D., 2021, N.Y.U. School of Law. I am deeply grateful to: Professor Martin Guggenheim for his insight and guidance throughout this project, the Editorial Board of Annual Survey and especially Harshil Mehta, who greatly enhanced this Note with brilliant editing, Professor Kim Taylor-Thompson whose passion and teaching shaped my thinking in matters of criminal and juvenile justice, and Faye Friedman whose work in a juvenile detention center first opened my eyes to these important issues.

1. The words "male" and "female" are used in this introduction in order to avoid labeling any of the parties as either "boy" or "man," "girl" or "woman," which would have unintended implications pertaining to the issues addressed in this Note. *See infra* note 2.

via text message, in order to prepare the weapons and strategically position himself and his co-conspirators to ambush the five teens in the woods. He also participated in the actual killings, using a machete to repeatedly strike the four victims. *Mr. Portillo was 15 years old at the time of the killings*.[2]

The majority of MS-13 suspects arrested for murder on Long Island in recent years have been minors.[3] In fact, "most youth who join gangs begin in their early teenage years, and as early as ages 10 and 11."[4] This shocking and tragic phenomenon raises vexing issues for law enforcement, the courts, politicians, educators, and all citizens in communities plagued by gang violence. This Note focuses on a single legal issue: in light of recent Supreme Court cases, beginning with the 2005 landmark ruling in *Roper v. Simmons*, how should judges impose sentences on persons convicted of committing homicide before their eighteenth birthday?[5] Although we will see that the holdings of the three leading Supreme Court cases addressing this question are reasonably clear, many challenging questions remain for sentencing judges who attempt to faithfully apply these decisions. This Note will explore some of these issues through

2. (This Note sometimes refers to juveniles using the prefix "Mr.," consistent with the practice used in legal documents and by courts when describing or addressing young defendants in the adult criminal justice system. The oddity of referring to a 15-year-old (or younger) as "Mr." is perhaps a microcosm of the larger issues at play within the field of juvenile justice and sentencing.) *See* Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Member Pleads Guilty to the Murder of Four Young Men in a Central Islip Park in 2017 (Aug. 20, 2018), https://www.justice.gov/usao-edny/pr/ms-13-gang-member-pleads-guilty-murders-four-young-men-central-islip-park-2017 [https://perma.cc/B77Q-SM6L]; Criminal Sentencing Memoranda at 3, United States v. Portillo, No. 2:17-cr-00366-JFB, 2019 WL 8128912 (E.D.N.Y. July 12, 2019); United States v. Juvenile Male, 327 F. Supp. 3d 573 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status); Liz Robbins, *MS-13 Gang Member Pleads Guilty in Quadruple Murder Highlighted by Trump*, N.Y. Times (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/nyregion/ms13-gang-murder-guilty.html [https://perma.cc/42LN-C8UV]. This case garnered national attention both because of its shocking brutality and because former President Trump highlighted the case during his visit to Long Island on May 23, 2018. *See* Liz Robbins & Michael D. Shear, *Trump, Visiting Epicenter of MS-13 Killings, Demands Tougher Immigration Laws*, N.Y. Times (May 23, 2018), https://www.nytimes.com/2018/05/23/us/politics/trump-immigration-gangs.html [https://perma.cc/4D9H-UAR5].

3. Barbara Demick, *Trump Heads to Long Island, Using Brutal MS-13 Murders to Justify Deportations*, L.A. Times (July 28, 2017), https://www.latimes.com/nation/la-na-ms13-trump-20170727-story.html [https://perma.cc/E467-5MX2].

4. Sam Houston State University, *Gang Life is Short-lived, Study Finds*, ScienceDaily (Sept. 24, 2014), https://www.sciencedaily.com/releases/2014/09/140924113523.htm [https://perma.cc/T36R-4GDX].

5. 543 U.S. 551 (2005).

the prism of MS-13 juvenile-homicide cases, using Mr. Portillo's sentencing as a case study.

This Note proceeds in three parts. Part I sets the stage for studying the Supreme Court's juvenile sentencing jurisprudence. It takes a step back in order to orient the landmark trilogy of cases—*Roper*, *Graham*, and *Miller*—within the broader legal framework of criminal and juvenile justice.[6] It is broken into three subcategories. Subpart (A) briefly explains the principal justifications for punishing criminality. After better understanding why we punish altogether, Subpart (B) analyzes why juveniles should be punished differently from adults. This is explored very briefly from a historical, political, and legal perspective. Subpart (C) explains in what circumstances juveniles in the justice system are treated like adults and why, again from a historical, political, and legal perspective. Part II examines how the Supreme Court limited in some measure the punishments that can be meaded out to juveniles, even if being sentenced within the adult criminal justice system. *Roper*, *Graham*, and *Miller* are explored in detail, as well as some of the preceding cases that paved the road to these landmark rulings, and some subsequent cases. Part III analyzes how judges should implement the guidance given by the Supreme Court in these cases. The analysis will trace Josue Portillo's case, but its implications apply across the field of juvenile justice.

I.
THE EVOLUTION OF JUVENILE JUSTICE

A. The Penological Justifications

In order to properly understand and evaluate any decision regarding sentencing, it is necessary to understand the underlying rationale for punishing citizens in the first place. Indeed, *Roper*, *Graham*, and *Miller* all discuss the "goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation."[7]

Retribution is a broad term that is used to describe many variations of a broad penological justification. Abstractedly, the term stands for the proposition that "criminals should be punished be-

6. Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

7. *Graham*, 560 U.S. at 71 (citing Ewing v. California, 538 U.S. 11, 25 (2003)); *see also Roper*, 543 U.S. at 571–73 (discussing retribution and deterrence); *Miller*, 567 U.S. at 472–74 (summarizing the Court's analysis of penological justifications as applied to youth in *Roper* and *Graham*).

cause they deserve it . . . ."[8] Why human beings should be the ones imposing this "deserved" punishment is less than clear. In Anglo-American jurisprudence retribution is often understood to be a valid rationale only insofar as it complements another justification. For example, we may wish to impose a punishment to deter others from the same wrongdoing, but this is only fair if the individual being punished also deserves the punishment. Viewed in this light, retribution is a limitation on punishment.[9] Two specific iterations of the theory are mentioned by the *Roper* court: "an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim . . . ."[10]

Deterrence is subdivided into two categories: general deterrence and specific deterrence. The latter is the idea that by punishing him we incentivize the convicted criminal to cease his criminal behavior, and the former is the idea of preventing *others* from committing like crimes.[11]

Incapacitation is the basic idea of imprisoning the convicted in order to protect society from that individual. Whether we are trying to prevent future rapes, murders, robberies, or drug crimes, the punishment is justified because it serves a most basic utilitarian purpose: protecting the public from potential harm.[12]

Finally, rehabilitation is the notion that punishment can "contribute to the reformation of the offender not only through fear of being punished again, but by a change in his character and habits."[13]

B. Juveniles Are Different: The History of Juvenile Court

The concept of adjudicating juveniles involved in the criminal justice system separate and differently from adults originated in the very last years of the 19th century. At that time, the Progressives

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8. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2 (1992).

9. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 65–66 (1968).

10. *Roper*, 543 U.S. at 571.

11. *See, e.g.*, BRAITHWAITE & PETTIT, *supra* note 8, at 2–3.

12. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 339 (C. K. Ogden ed., 1931) ("Taking away the power of doing injury. It is much easier to obtain this end than [to reform the offender]."); JAMES Q. WILSON, THINKING ABOUT CRIME 148 (rev. ed. 1983) (alteration in original) ("When criminals are deprived of their liberty, as by imprisonment . . . their ability to commit offenses against citizens is ended.").

13. BENTHAM, *supra* note 12, at 338.

conceived of "perhaps their greatest invention: juvenile court."[14] They were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals."[15] Instead, they

> believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial.[16]

A key feature of the original juvenile court system extended from the Progressives' vision of how juvenile delinquents should be treated. In focusing on the "best interests" of the child, they believed that procedural protections would harm, rather than help, children. In order for the state to properly function as "*parens patriae*," it was necessary for juvenile court to avoid an adversarial approach.[17] Procedural safeguards available to adult criminal defendants were to be discarded because they were unnecessary and, even worse, might prevent the state from helping a child in need.[18]

Gault was the first of a string of Supreme Court cases to challenge the denial of procedural rights to juveniles in the juvenile court system.[19] The court declared that juvenile court trials "must

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14. Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 464 (2012).

15. *In re* Gault, 387 U.S. 1, 15 (1967).

16. *Id.* (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)).

17. *Parens patriae*, Latin for "parent of his or her country," is the doctrine that gives the state power to act as guardian for citizens who cannot protect themselves. For an early example of the doctrine in a U.S. court case, see *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (recognizing the doctrine of *parens patriae* in rejecting legal challenges to confining children to "Refuge House" if their natural parents are "incompetent or corrupt").

18. *See In re Gault*, 387 U.S. at 15–16.

19. The other cases are: *In re* Winship, 397 U.S. 358, 368 (1970) (holding that children may be found delinquent only if proved guilty beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that children are protected by the double jeopardy clause); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (unsuccessfully arguing that children are entitled to a trial by jury); Fare v. Michael C., 442 U.S. 707 (1979) (unsuccessfully arguing that children should be allowed to speak with probation officers during interrogations); Schall v. Martin, 467 U.S. 253 (1984) (unsuccessfully challenging the practices of pre-trial detainment of juveniles).

measure up to the essentials of due process and fair treatment."[20] The court ruled that children are constitutionally entitled to adequate notice of the charges against them, to the right to counsel (as well as informing their parents of such right), to the right to confront and cross-examine witnesses, and to the right against self-incrimination.[21]

In short, the Court rejected the Progressives' belief that because the purpose of juvenile court was to focus on the best interests of the child, striving to provide rehabilitation rather than punishment, there was little need to ensure fundamental fairness. The Court regarded juvenile court largely as a failed experiment. Recognizing such, beginning in *Gault*, the Court started to formalize the juvenile courts' processes of adjudication. As Justice Fortas succinctly put it, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[22]

Although the immediate result of *Gault* was a victory for children's rights lawyers and activists, it also caused a shift away from treating children who commit crimes differently from adults.

C. The Adult Juvenile: Transfer to Adult Status

As Professor Guggenheim explains, when the Supreme Court guaranteed children procedural protections, it essentially acknowledged that juvenile court was not as different from adult court as the Progressives had hoped it would be.[23] "Transferring" juveniles to adult court for prosecution then became a less drastic measure.[24]And although the "transfer" of children to "adult status," as it is sometimes referred to, existed before *Gault*, it became more common in the years following the decision.[25] According to a study conducted by the National Center for Juvenile Justice in Pittsburgh, "in 1975, 10,400 [juveniles] were transferred [to adult courts] and in 1982, 13,000."[26] Incredibly, "an estimated 210,000–260,000 juveniles, or 20%–25% of all juvenile offenders, were prosecuted as

20. *In re Gault*, 387 U.S. at 30.

21. The court did not reach the questions of whether there is a constitutional right of a child to obtain a trial transcript or to appeal judgements. *Id.* at 58.

22. *Id.* at 28.

23. Guggenheim, *supra* note 14, at 472–73.

24. *Id.* at 472–74.

25. See 18 U.S.C. § 5032 (enacted in 1953).

26. Mary Jordan, *More Juveniles Being Tried as Adults*, WASH. POST (Dec. 30, 1984), https://www.washingtonpost.com/archive/politics/1984/12/30/more-juveniles-being-tried-as-adults/941b66df-27f8-4e97-829b-149e24eedfbc/ [https://perma.cc/2NQ5-7WM7].

adults in 1996."[27] Estimates remain at over 200,000 juveniles tried or sentenced in adult court in the U.S. each year.[28] In some measure then, *Gault* was both a victory and a loss for children.

The Supreme Court, however, is not entirely responsible for the prevalence of juveniles tried in adult courts from the 1980s until the present. Public opinion and politics (of both the Republican and Democratic parties) during the 1980s and 1990s adopted an exclusively "tough on crime" stance.[29] It was in this general climate of heightened fear of criminals and violence that the slogan "adult time for adult crime," became extremely popular.[30] The slogan represents the idea that if the crime is severe enough, children ought to be treated identically to adults.[31] This is based on beliefs that include: a child mature enough to commit a serious crime is mature enough to be punished as an adult (retributive), such a child is beyond hope and should be jailed for as long as an adult would be

27. Robert Hahn et. al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, CDC (Nov. 30, 2007) (emphasis added) (citations omitted), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm [https://perma.cc/6AN3-NW53] ("[T]he review indicates that use of transfer laws and strengthened transfer policies is *counterproductive* to reducing juvenile violence and enhancing public safety.").

28. *See* Jennifer L. Woolard et. al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 Int'l. J. Forensic Mental Health 1, 4 (2005).

29. *See* Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/CLK7-FCNG] ("[T]he [Democratic and Republican] parties began a bidding war to increase penalties for crime, trying to outdo one another.").

30. 7 Steven A. Drizin & Greg Luloff, Are Juvenile Courts a Breeding Ground for Wrongful Convictions?, 34 N. Ky. L. Rev. 257, 265 (2007) ("'Adult time for adult crimes' became the rallying cry for politicians across the country, leading to changes in the law in almost every jurisdiction between 1992 and 1999."). As an aside, effective slogans can have a remarkably strong effect on public policy. *See, e.g.*, Dennis A. Henigan, "Guns Don't Kill People. People Kill People" and Other Myths About Guns and Gun Control 8 (2016) (arguing that the NRA's use of "bumper-sticker slogans" has influenced public perception and severely inhibited advocacy and legislation in the gun violence prevention sphere).

31. However, children may be prosecuted as adults even for non-violent crimes. *See, e.g.*, 18 U.S.C. § 5032 (children may be transferred to adult status for certain drug offenses or crimes involving threats of the use of physical force or substantial risk of the use physical force, even if no force was actually used). Another example is felony murder, for which any conspirator can be tried for first degree murder if a co-conspirator committed murder in the scope of the conspiracy. Kuntrell Jackson, one of the two *Miller* defendants, was transferred to adult court and tried for murder even though he did not shoot the gun that killed the store clerk or perform any acts of violence. *See infra* note 84 and accompanying text.

(incapacitation), and it is the best way to deter youth from committing such crimes (deterrence).[32]

It would be sorely remiss to overlook the disparate impact that the "adult time for adult crime" sensation of the 1990s had on Black children. As Professor Kim Taylor-Thompson recently observed, "the overwhelming majority" of children in adult court are Black.[33] In 1996, political scientist, John DiIulio, coined the term "superpredator" when he wrote: "America is now home to thickening ranks of juvenile 'superpredators'—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys."[34] Taylor-Thompson explains that, although DiIulio's grim prediction of increased crime in America never materialized, the lasting effect of his theories is profound. "The superpredator lie went viral, infecting every single institution that touches children—courts, schools, law enforcement."[35] And this explosive label was "more often reserved for children of color who committed crimes . . . ."[36] Beyond the grossly disproportionate impact the theory had on the lives of Black children, it was deeply entrenched racism that "propelled the spread of this theory" in the first place.[37] "DiIulio insisted that this younger, more dangerous breed of offender would soon target 'upscale central-city districts, inner-ring suburbs, and even the rural heartland.' His warning was clear: White America was in danger."[38]

In a general sense, "the US criminal justice system reflects deep-rooted issues related to enduring economic, social, political, and racial/ethnic inequality."[39] However, these inequities have had

32. *See, e.g.*, Jordan, *supra* note 26 ("David Dunlap, the Alexandria prosecutor who handles most of the city's juvenile cases, said, 'Juveniles who commit adult crimes should be tried as adults. The kids who commit rape and murder are past help.'").

33. Kim Taylor-Thompson, *Op-Ed: Why America is Still Living with the Damage Done by the 'Superpredator' Lie*, L.A. Times (Nov. 27, 2020, 4:00 AM), https://www.latimes.com/opinion/story/2020-11-27/racism-criminal-justice-superpredators [https://perma.cc/RYU2-6VFM].

34. William J. Bennett, John P. Walters & John J. DiIulio, Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs 27 (1996).

35. Taylor-Thompson, *supra* note 33.

36. Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. Rev. L. & Soc. Change, 143, 154 (2014) (citing Perry L. Moriearty, *Framing Justice: Biased Decisionmaking*, 69 Md. L. Rev. 849, 851–52 (2011)).

37. Taylor-Thompson, *supra* note 33.

38. *Id.*

39. B.J. Casey et. al., *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 Ann. Rev. L. & Soc. Sci. 9.1, 9.5 (2020).

"especially tragic consequences for young people who are incarcerated."[40] And "these youth tend to be disproportionately poor, undereducated, and of color."[41] Studies and data reveal that children of color, and especially Black children, are more likely to be viewed as "older and less innocent" than White children of the same age.[42] The effects of racism, racial bias, and race-related rhetoric continue to be an indispensable part of meaningful and honest discussion regarding issues of juvenile justice.

Although the idea of transferring a juvenile to "adult status" is an issue that calls for great scrutiny, the Supreme Court has never addressed the issue.[43] Therefore, it is up to the legislature to limit the practice of transferring children to adult court for trial or sentencing. This, they have not done.

II.
JUVENILE SENTENCING

Thus far, we have explored why the state punishes anyone, why juveniles are punished in specialized juvenile courts, and why sometimes they are moved to an adult court. In a series of landmark cases, the Supreme Court placed limitations on the severity of punishments allowed to be imposed on youth, even if they are tried and sentenced "as adults." Part II explores these cases in some detail.

A. The Framework for Eighth Amendment Jurisprudence

The Eighth Amendment proclaims: "Cruel and unusual punishments [shall not be] inflicted."[44] The Supreme Court has developed a two-prong test for deciding whether a punishment meets that constitutional requirement. Whether a punishment is "cruel and unusual" is determined using a proportionality test that weighs the severity of the offense committed against the harshness of the punishment.[45] "The first step of that balancing test must accord

40. *Id.*

41. *Id.*; *see also*, Taylor-Thompson, *supra* note 36, at 163–69 (citing numerous studies showing that "youth of color have been disproportionally prosecuted and punished in the adult justice system").

42. Casey, *supra* note 39, at 9.6.

43. The Supreme Court case that came closest to addressing issues of transfer was *Kent v. United States*, 383 U.S. 541 (1966) (holding that a juvenile court must hold a formal hearing before waiving its jurisdiction). The Ninth Circuit expressly rejected contentions that mandatory transfer laws were unconstitutional. *See* United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000).

44. U.S. CONST. amend. VIII.

45. *See* Graham v. Florida, 560 U.S. 48, 59 (2010).

"the evolving standards of decency that mark the progress of a maturing society."[46] In determining the relevant standards of society, the Court has looked at a number of sources including, "relevant legislative enactments" and actual "jury determinations."[47] In step two, the Court must also "determine in the exercise of its own independent judgement, whether the punishment in question violates the Constitution."[48]

B. Pre-Roper Cases

Before getting to *Roper*, which declared the death penalty an unconstitutionally disproportionate penalty for those who committed murder before the age of 18, it is helpful to first discuss other cases in which the Supreme Court found the death penalty to be categorically disproportionate for an entire class of offenders.[49]

1. Thompson

In the early morning hours of January 23, 1983, William Wayne Thompson participated in the brutal murder of his former brother-in-law. The evidence showed that Thompson, then age 15, and three older people shot the victim twice, cut him, beat him, and broke his leg. They then threw the victim's body into a river, where it was discovered almost a month later.[50] At the penalty stage of the state trial, the jury found that there was an "aggravating circumstance" because "the murder was especially heinous, atrocious, or cruel."[51] Thompson was sentenced to death.[52]

The Court analyzed society's "standards of decency" by first recognizing that children are treated differently from adults in almost every area of the law. The Court noted that a 15-year-old may not vote or sit on a jury in any of the 50 states and, in nearly every state, may not drive a car or marry without parental consent. The Court then cited the fact that all 18 states that have established a minimum age for receiving the death penalty have set it at an age above 15.[53] The Court also referred to the opinions of legal schol-

46. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

47. Thompson v. Oklahoma, 487 U.S. 815, 822 (1988).

48. *Graham*, 560 U.S. at 61; *see also infra* note 73 (citing dissenting opinions of Justices Thomas and Scalia criticizing this prong of the test as beyond the scope of judicial authority).

49. Roper v. Simmons, 543 U.S. 551, 578 (2005).

50. *Thompson*, 487 U.S. at 819.

51. *Id.* at 820.

52. *Id.*

53. *Id.* at 823–30.

ars and other civilized countries, confirming that executing someone for a crime they committed at age 15 "would offend civilized standards of decency . . . ."[54] Finally, it looked to actual practice of juries and found it led "to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."[55] This framework for analyzing the "standards of decency" of "society" is used almost identically in *Roper*, *Graham*, and *Miller*.[56]

In exercising its own judgement, the *Thompson* Court declared that youth are more "susceptible to influence and to psychological damage" than adults, "generally are less mature and responsible than adults," "lack the experience, perspective, and judgement expected of adults," "are more vulnerable, more impulsive, and less self-disciplined than adults," and "have less capacity to control their conduct and to think in long-range terms than adults."[57] Furthermore, "offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."[58] However, the Court declined to "draw a line" at age 18, because, in deciding the case, it was sufficient to find "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."[59]

2. Other Cases

In *Coker v. Georgia*, the Court held that death was a disproportionate punishment for the rape of an adult woman and thus violated the Eighth Amendment.[60] In *Enmund v. Florida*, the Court held a death sentence for a getaway driver who did not kill anyone also violated the Eighth Amendment.[61] In *Kennedy v. Louisiana*, the Court held that the death penalty for child rape in which "the crime did not result, and was not intended to result, in death of the victim" was unconstitutional.[62] Finally, and most precedentially relevant to the *Roper* decision, was the 2002 *Atkins*' decision, in which

54. *Id.* at 830.
55. *Thompson*, 487 U.S. at 832.
56. Roper v. Simmons, 543 U.S. 551, 561–68 (2005); Graham v. Florida, 560 U.S. 48, 62–67 (2010); Miller v. Alabama, 567 U.S. 460, 483–87 (2012).
57. *Thompson*, 487 U.S. at 834 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (citations omitted)).
58. *Id.* (quoting *Eddings*, 455 U.S. at 115–16).
59. *Id.* at 838.
60. 433 U.S. 584 (1977).
61. 458 U.S. 782 (1982).
62. 554 U.S. 407, 413 (2008).

the Court held that death for the mentally disabled was a "cruel and unusual punishment" forbidden by the Eighth Amendment.[63]

C. Roper

In 1993, Christopher Simmons, a 17-year-old high school junior in Missouri, committed a horrific premeditated murder. Together with his 15-year-old friend, Simmons broke into the trailer home of 46-year-old Shirley Cook at 2 a.m., bound her eyes, mouth, and hands with duct tape, and placed her in the back of her own minivan. They then drove her to a state park where they wrapped her entire face in more duct tape, tied her hands and feet together with electrical wire, and threw her off a bridge into a river below, where she drowned.[64] The trial judge sentenced Simmons to death. The Missouri Supreme Court reversed, and the Supreme Court affirmed, holding that the Constitution forbids sentencing juveniles to death, regardless of the gravity of the crime the juvenile may have committed.[65]

The Court explained that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[66] Applying the well-established "evolving standards of decency" framework, the Court concluded that death is a "cruel and unusual" punishment for juvenile offenders.[67] The two-step analysis required the Court first to conclude that there was a "consensus, as expressed in particular by the enactments of legislatures," against the juvenile death penalty and then to "determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."[68]

The Court looked to the same indicia as it did in *Thompson*, *Penry*, *Stanford*, and *Atkins* in determining that "society views juveniles . . . as 'categorically less culpable than the average crimi-

63. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)).

64. Roper v. Simmons, 543 U.S. 551, 556–57 (2005).

65. *Id.* at 560. The Court first faced the issue presented in *Roper* in 1989 and held that executing offenders who committed murder at age 16 or 17 did not violate the Constitution. Stanford v. Kentucky, 492 U.S. 361 (1989). *Roper* expressly overruled that decision.

66. *Id.* at 578.

67. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

68. *Id.* at 564.

nal.'"[69] The Court found that States' legislative trends, jury practices, opinions of legal academics, and the practice of foreign countries all weighed in favor of abolishing the juvenile death penalty.[70] However, Justice Kennedy's conclusion for the Court that there was a national consensus against the practice was at best, very questionable. Although the Court relied on precedent in *Atkins*, it admitted that the evidence in that case was stronger than the evidence in this one.[71] Justice O'Connor pressed the distinction in dissent, arguing that whereas no state legislature had endorsed execution of the mentally disabled at the time *Atkins* was decided, "at least seven States have current statutes that specifically set 16 or 17 as the minimum age at which commission of a capital crime can expose the offender to the death penalty."[72] Moreover, as Justice Scalia argued in his dissent, over 50% of states with death penalty laws allowed the execution of those under age 18.[73] Perhaps it is self-evident that the *Roper* decision "had little to do with doctrine and much to do with the dramatically different extralegal context in which [it was] decided."[74]

The Court next exercised its "own judgment" in deciding that the juvenile death penalty was a "cruel and unusual" punishment. The Court summarized three "general differences between juveniles under 18 and adults." First, "a lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions." Second, they are more susceptible to negative influences, including peer pressure. Third, their character is "less fixed," making it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably

69. *Roper*, 543 U.S. at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

70. *See id.* at 564–67.

71. *Id.* at 565.

72. *Id.* at 595–96 (O'Connor, J., dissenting).

73. *Id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."). Justice Scalia went on to decry the majority's decision: "Of course, the real force driving today's decision is . . . the Court's 'own judgement' that murderers younger than 18 can never be as morally culpable as older counterparts." *Id.* at 615. "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" *Id.* at 616; *see also* Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) ("I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgements than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.").

74. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 54 (2007).

depraved character."[75] The Court also went on to explain that overall, the penological justifications for the death penalty are weaker as applied to juveniles.[76]

Five years later, relying heavily on its decision in *Roper*, the Supreme Court decided *Graham*.

D. Graham

In 2003, 16-year-old Terrance Jamar Graham partook in an armed burglary (and failed robbery attempt) of a restaurant in Florida. He pled guilty pursuant to a plea agreement and the court accepted the plea, withholding adjudication of guilt. While on probation, Graham was arrested for his alleged involvement in two more robberies. Although he denied his involvement in both robberies, he admitted to fleeing from the police, which was sufficient for the sentencing court to find that he violated the conditions of his parole. This time, he was sentenced to life imprisonment for his earlier crime. Because Florida abolished its parole system in 1983, Graham's sentence meant he was sentenced to die in prison.[77]

Building on its reasoning in *Roper* that juveniles are different from adults and that these differences must be taken into account if imposing the most extreme sentences on juveniles, the Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[78]

The analytical framework adopted in *Graham* exactly mirrored the *Thompson* and *Roper* decisions. Yet, the decision in *Graham* was revolutionary. The *Graham* case revealed a significant willingness by a majority of the Court to treat a life sentence as sufficiently similar to the death penalty and thus to warrant a level of scrutiny previously reserved for death penalty cases. It was the first time the Court had invalidated a punishment other than death for an entire category of offenders.[79]

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75. *Roper*, 543 U.S. at 569–70 (citations and quotation marks omitted).

76. *Id.* at 571–72.

77. Graham v. Florida, 560 U.S. 48, 53–58 (2010).

78. *Id.* at 74.

79. *Id.* at 60 ("The previous cases in this classification involved the death penalty."); *see also* Guggenheim, *supra* note 14, at 459 (describing the enormity of the *Graham* decision in light of its willingness to look beyond the established "death is different" limitations—a bedrock principle in Eight Amendment jurisprudence that holds that death sentences are to be reviewed with extremely careful scrutiny—in extending the *Roper* rationale). This is also Justice Thomas' strongest argument in his vehement dissent in *Graham*, criticizing the majority for the ease with which they decide that "[d]eath is different no longer." *Graham*, 560 U.S. at 103 (Thomas, J., dissenting); *see also* Woodson v. North Carolina, 428 U.S. 280, 305

To explain its decision, the Court noted that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences."[80] The Court also stressed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" because the "age of the offender and the nature of the crime each bear on the analysis."[81] The Court also drew confidence from the fact that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[82] Although the Court did not preclude the possibility of a youth spending the remainder of life in prison for non-homicidal crimes, it demanded that there be a possibility of release before the end of a life term.[83]

Just two years later, building on its decisions in *Roper* and *Graham*, the Court decided *Miller v. Alabama*, the final case in a trilogy of landmark cases protecting the rights of juvenile defendants.

E. Miller

Miller involved a companion case which began in November 1999, when 14-year-old Kuntrell Jackson robbed a video store along with two friends. One friend shot and killed the store clerk. And although the scope of Jackson's involvement was argued at trial, all parties agreed he did not kill anyone.[84] He was convicted of "capital felony murder" and sentenced to the state's mandatory life without parole (LWOP) sentence.[85]

One night in 2003, 14-year-old Evan Miller and a friend smoked marijuana and drank alcohol with an adult man, Cole Cannon. When Cannon passed out, Miller stole some money from his

(1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison terms differs from one of only a year or two.").

80. *Graham*, 560 U.S. at 48.

81. *Id.*

82. *Id.* at 68.

83. *Id.* at 75 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

84. *See* Miller v. Alabama, 567 U.S. 460, 465 (2021). From a doctrinal perspective, this fact is extremely important. Justice Breyer (joined by Justice Sotomayor) argued in a strongly worded concurrence that irrespective of the *Miller* holding, under *Graham*, if Arkansas were to seek imposition of a life without parole sentence, they would be required to prove that Jackson killed or intended to kill the store clerk. Despite the doctrine of "transferred intent," which underlies felony murder, it is not sufficient to "subject a juvenile to a sentence of life without parole." *Id.* at 491 (Breyer, J., concurring).

85. *Id.* at 466–67.

wallet, but Cannon woke up as Miller tried to place the wallet back in his pocket. After Cannon grabbed him by the throat, Miller grabbed a nearby baseball bat and struck Cannon repeatedly. He then placed a sheet over him and hit him again stating, "I am God, I've come to take your life." Miller and his friend then lit two fires causing Cannon to die from his injuries and smoke inhalation. Miller was convicted of "murder in the course of arson" and sentenced to the state's mandatory sentence of LWOP.[86]

Broadly extending the *Graham* holding, the Court in *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," even if applied to a juvenile who was convicted of murder.[87] Unlike *Graham*'s categorical bar on LWOP sentences for nonhomicidal crimes committed by juveniles, *Miller* allows the imposition of LWOP for homicide, so long as the judge first "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[88] Thus, statutes that *require* LWOP for any crime committed as a juvenile are per se unconstitutional but the discretionary imposition of such a sentence by a trial judge may not be.

Writing for the majority, Justice Kagan based her decision on two lines of precedent. First, the cases that categorically forbade certain punishments for certain offenders supported her conclusion. *Graham* had already extended these "proportionality" cases beyond the death penalty context, providing precedent for the notion that a life sentence is disproportionate for juveniles' crimes. Second, because *Graham* had already likened a life sentence to the death penalty in some respect, the cases that held that judges must consider the specific characteristics of a defendant before sentencing them to death were implicated.[89] For example, in *Eddings v. Oklahoma*, the Court invalidated the death sentence of a 16-year-old who killed a police officer because the judge "did not consider evidence of his neglectful and violent family background . . . and his emotional disturbance."[90] If a life sentence is similar to death, a

86. *Id.* at 468–69.

87. *Id.* at 479.

88. *Id.* at 480.

89. *Miller*, 567 U.S. at 470.

90. *Id.* at 476 (discussing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)); *see also id.* at 475–77 for the Court's full discussion of the individualized sentencings cases.

judge must be given the opportunity to consider the specific characteristics of youth before imposing such a sentence.[91]

F. Montgomery

In 2016, the Supreme Court issued its next juvenile sentencing decision in *Montgomery v. Louisiana*.[92] The question before the Court was whether *Miller*'s holding applies retroactively to pre-*Miller* cases in which LWOP sentences were imposed on defendants who committed murder before turning 18. Following the framework for retroactivity cases on federal collateral review set forth in *Teague v. Lane*, the Court held that *Miller* applies retroactively.[93] The Court held that *Miller* announced a new "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[94] As a consequence, LWOP sentences imposed pre-*Miller* without consideration of youth must be vacated and sentencing courts must impose a new sentence.

The *Montgomery* decision may be significant for a second reason as well. A reasonable reading of *Miller* is that a judge must consider a list of factors before sentencing a juvenile to LWOP.[95] Indeed, the Court in *Miller* explained that its decision "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[96] According to this understanding, a sentencer would be free to impose LWOP because the crime was particularly

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91. It is worth noting that this logic should foreclose *any* mandatory life sentence-schemes, even those imposed on adults. The "individualized sentencing" cases are not limited to juveniles. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976). If we take *Graham*'s comparison of life sentences to the death penalty seriously, it is unclear why we should stop at age 17. Granted, that issue was not before the Court, but it seems unlikely the Court would so hold, even had it been. Perhaps the salient part of the *Miller* opinion is the first line of precedent, i.e., the cases that established that juveniles deserve less punishment than adults. Only if combined with that, would the Court embrace the "individualized sentencing" cases in a context other than the death penalty. Additionally, *Graham* stressed the fact that "life without parole is an especially harsh punishment for a juvenile" because "a greater percentage of his life" will be spent in prison, than an adult sentenced to life in prison. Graham v. Florida, 560 U.S. 48, 70 (2010).

92. 136 S. Ct. 718 (2016).

93. 489 U.S. 288 (1989) (plurality opinion).

94. *Montgomery*, 136 S. Ct. at 735. The Court also noted that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734.

95. As will be explained later, this is the way the sentencing judge in Josue Portillo's case seemed to interpret the decision.

96. Miller v. Alabama, 567 U.S. 460, 483 (2012).

brutal, even if the other factors (for example, a defendant's brutal upbringing) weighed against such a harsh sentence. In contrast, *Montgomery* seemed to characterize *Miller*'s substantive holding as forbidding a *certain category* of punishment for a *certain category* of offenders: namely, LWOP for "juvenile offenders whose crimes reflect the transient immaturity of youth."[97] Unlike the simple reading of *Miller*, the Court in *Montgomery* seems to interpret all of the factors listed in *Miller* as ways for judges to answer one dispositive question: does the crime committed reflect "incorrigibility"?

This discrepancy between the *Miller* opinion itself and *Montgomery*'s apparent interpretation of *Miller*, was the question presented in the most recent juvenile sentencing case to reach the Court, *Jones v. Mississippi*.[98] The appellant argued:

> As with any rule that bans a penalty for a category of offenders, *Miller* and *Montgomery*'s permanent-incorrigibility rule requires a court to resolve the question of whether an offender is, or is not, a member of the eligible class. Courts resolve questions by making findings. Thus, to sentence a juvenile homicide offender to life without parole, a court must find him permanently incorrigible.[99]

Mississippi disagreed, writing: "If this Court intended that the sentencing court be required to make the finding of fact regarding the defendant being permanently incorrigible, it would have held that in either *Miller* or *Montgomery*."[100] The Supreme Court agreed with Mississippi holding that "Miller does not require trial courts to make a finding of fact regarding a child's incorrigibility" nor does it "require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility."[101] In a passionate dissent, Justice Sotomayor admonished the majority for a decision which "guts" *Miller* and *Montgomery* and lamented "[h]ow low this Court's respect for *stare decisis* has sunk."[102]

G. Does Miller Actually Contain Two Holdings?

Miller definitely held that mandatory sentencing schemes that require a sentence of LWOP are unconstitutional as applied to de-

97. *Montgomery*, 136 S. Ct. at 734.

98. 141 S. Ct. 1307 (2021).

99. Brief for Petitioner at 13–14, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

100. Brief in Opposition at 7, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

101. *Jones*, 141 S. Ct. at 1319, 1321 (citation omitted).

102. *Id.* at 1328, 1336 (Sotomayor, J., dissenting).

fendants who committed homicide before age 18.[103] But *Miller* seems to state a second holding: not only are statutes requiring sentences of LWOP "cruel and unusual punishment" for juveniles, but additionally, a judge who fails to consider a defendant's youth at sentencing violates the Eighth Amendment regardless of the given statute's flexibility. The Court wrote: "Although we do not foreclose a sentencer's ability to make that judgement [of imposing LWOP] in homicide cases, we *require it* to take into account how children are different."[104] Similarly, in *Graham*, the Court stated: "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."[105] 'In other words, because there is a substantive right that defendants' youth and its attendant features be considered at sentencing, statutes that preclude consideration are facially unconstitutional. To read *Miller* as standing solely for the proposition that statutes mandating LWOP are unconstitutional misses the forest for the trees.

The Court's holding in one of the earliest cases to consider youth in the context of sentencing is particularly helpful in determining the correct reading of *Miller*. In *Eddings v. Oklahoma*, the Court reversed a death sentence imposed on a 16-year-old who murdered a police officer.[106] The trial judge had stated during the sentencing that "'in following the law' he could not 'consider the fact of this young man's violent background.'"[107] The relevant Oklahoma statute actually *did* allow the sentencing judge to consider "any mitigating circumstances."[108] Citing *Locket v. Ohio*, which held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

103. Miller v. Alabama, 567 U.S. 460, 479 (2012).

104. *Id.* at 480 (emphasis added).

105. Graham v. Florida, 560 U.S. 48, 76 (2010); *see also* Guggenheim, *supra* note 14, at 492–93 (arguing that *Graham* created a new substantive constitutional right: the right for juvenility to be accounted for in sentencing).

106. 455 U.S. 104 (1982).

107. *Id.* at 112–13. Eddings' parents divorced when he was five; his mother, who may have been an alcoholic and a prostitute, could not "control" him, and he was sent to live with his father, who also could not "control the boy." His father physically abused him. There was also testimony at trial that Eddings was emotionally disturbed, his mental and emotional development was several years below his age, and that he had a sociopathic or antisocial personality. *See id.* at 107. One psychiatrist testified that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it." *Id.* at 108.

108. *Id.* at 106 (citing OKLA. STAT., tit. 21, § 701.10 (1980)).

basis for a sentence less than death," the Court reversed Eddings's death sentence.[109] *Locket* involved Ohio's statutory scheme, which allowed judges to consider only a list of three mitigating factors in deciding whether to impose death. On the other hand, the Oklahoma scheme allowed for consideration of "any mitigating circumstances."[110] Still, the *Eddings* Court held: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."[111] Therefore, although the judge had the statutory freedom under Oklahoma law to consider Eddings's troubled background, his failure to do so meant the imposed sentence violated the Eighth and Fourteenth Amendments. And although it is not dispositive, the logic of the *Eddings* Court is remarkably similar to the broader interpretation of *Miller*.

The Court's reading of *Miller* in *Montgomery* also supports the fact that there are two holdings in *Miller*. *Montgomery* explained that *Miller* announced a new substantive rule—a LWOP "sentence . . . violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[112] The rule announced in *Miller*, according to the *Montgomery* Court, was that a *certain category* of punishment is per se unconstitutional for a *certain category* of offenders: namely, LWOP for immature and transient youth. If all *Miller* held was that mandatory LWOP schemes were unconstitutional, *Montgomery* is incomprehensible. For example, suppose that a judge had discretion to impose a sentence less than LWOP but expressly refused to even consider a defendant's youth. Consequently, the juvenile defendant, who was in fact immature and transient, ended up receiving a life sentence. According to *Montgomery*, this result runs afoul of *Miller* because this kind of offender (an immature and transient youth) received an unconstitutional punishment (LWOP).[113] However, for this sentence to actually violate

109. *Id.* at 110 (citing Locket v. Ohio, 438 U.S. 586, 604 (1978)).

110. *Id.* at 106 (citing tit. 21, § 701.10).

111. *Eddings*, 455 U.S. at 113–14.

112. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (citations omitted).

113. Not only that, but even a judge who both had available discretion to impose a lesser sentence and *did* actually consider the defendant's youth can theoretically violate *Miller* if the judge erred. That is, if a judge assesses a juvenile as being "incorrigible," even though the juvenile is in fact just immature and transient, and therefore imposes life without parole, the judge inadvertently violates the Eight Amendment. *See id.* ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" (citations omitted)). This admittedly unrealistic hypothetical scenario is the

Miller, that case must have another holding beyond forbidding sentencing schemes that mandate LWOP for juvenile defendants. This hypothetical illustrates that *Montgomery* read *Miller* as stating two holdings.

The Second Circuit recently issued a decision consistent with this understanding of *Miller*.[114] In that case, which involved gang-related violent crimes committed by a juvenile, the district court sentenced the defendant to two concurrent terms of life imprisonment, plus an additional five-year sentence for a weapons possession conviction.[115] The Second Circuit vacated the sentence, noting that "while [the Defendant's] sentence was not mandatory and thus does not fall under the categorical ban of *Miller*, his sentence was nonetheless improper."[116] The court explained that "Miller requires the district court to undertake additional reflection on the special social, psychological, and biological factors attributable to youth," even if LWOP is not mandated by statute. Because "[t]he district court did not reference [the Defendant's] age at all, much less grapple with it," the sentence was set aside.[117] The Second Circuit clearly understands *Miller* as containing two holdings.

The Supreme Court itself came very close to directly addressing this issue. On October 16, 2019, it heard oral arguments in *Mathena v. Malvo*, in which the Virginian Warden appealed a Fourth Circuit decision granting convicted murderer Lee Boyd Malvo a resentencing before the Virginia state courts.[118] Malvo was sentenced to LWOP for his role in the "D.C. Sniper Attacks," a 2002 serial shooting spree in which he and another man shot and killed 10 people at random in the span of 20 days. Malvo was 17 years old at the time of the shootings and his lawyers argued that, because the Virginia sentencing court did not consider his youth and its attendant features, *Miller*, which applies retroactively under *Mont-*

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subject of Justice Scalia's sharply worded dissent in *Montgomery*. *See id.* at 744 (Scalia, J., dissenting) ("How wonderful. Federal and (like it or not) state judges are henceforth to resolve the knotty 'legal' question: whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incorrigible.' . . . What silliness. (And how impossible in practice . . . .)").

114. *See* United States v. Delgado, 971 F.3d 144 (2d Cir. 2020).

115. *Id.* at 151–52, & n.3.

116. *Id.* at 159.

117. *Id.*

118. Brief for Petitioner, Mathena v. Malvo, No. 18-217 (2019), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020).

gomery, gave Malvo a right to a resentencing.[119] Justice Kagan, who wrote the *Miller* opinion, clarified her view of *Miller*'s holding numerous times during oral arguments, at one point saying, "[I]n fact, *Miller* says several times, *not just requires an opportunity to consider but requires consideration*."[120] In contrast, Justices Kavanaugh, Alito, and Gorsuch and Chief Justice Roberts all indicated that, in their opinion, *Miller* has only one rule: mandatory LWOP sentencing schemes are unconstitutional.[121] They pointed to the fact that *Miller* stated its holding explicitly: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[122] However, the rest of the *Miller* opinion indicates that this is not the entirety of the holding. Regardless, we will have to wait for the Supreme Court's final determination on this issue, as *Mathena* was dismissed after the Virginia governor signed legislation which made juveniles sentenced to LWOP in the state eligible for parole after twenty years of incarceration.[123]

Although the Supreme Court did not squarely revisit this issue in *Jones*, one must wonder whether the court implicitly rejected Mr. Malvo's argument in one fell swoop. Perhaps the most troubling portion of the *Jones* opinion is the Court's insistence that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth" because "[f]aced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's

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119. Petition for Writ of Certiorari at 4–6, Mathena v. Malvo, No. 18-217 (2019), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020). *See supra* notes 112–113 and accompanying text (discussing *Montgomery*).

120. Transcript of Oral Argument at 26–27, Mathena v. Malvo, No. 18-217 (2019) (emphasis added), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020). This was also the opening point that counsel for Mr. Malvo made during oral arguments:

> "*Miller* is not limited to mandatory schemes where life without parole is the only possible punishment. It invalidated those schemes because they guarantee that courts won't consider whether youth warrants a lower sentence, which creates an unacceptable risk of excessive punishment, but when a court has the theoretical power to consider a lower sentence but doesn't do so, which is what happened here, it creates precisely the same risk . . . ." *Id.* at 34.

121. *Id.* at 37–70.

122. Miller v. Alabama, 567 U.S. 460, 479 (2012).

123. See William W. Berry III, *Mathena v. Malvo*, ABA (Feb. 25, 2020), https://www.americanbar.org/groups/public_education/publications/preview_home/volume/47/issue-1/article-9/ [https://perma.cc/262D-2UDR]. The legislation made the appeal essentially moot, and the parties stipulated that the case be dismissed. Stipulation of Dismissal Under Rule 46.1 Filed, Mathena v. Malvo, 140 S. Ct. 919 (2020) No. 18-217 (R46-11 / OT 2019).

youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor."[124] But *Miller* and *Montgomery* required a judge do more than merely have the defendant's youth float through their mind during sentencing. Unlike the Second Circuit which required the sentencing judge to "grapple" with a defendant's age, a majority of the Supreme Court was satisfied that mere discretion to consider youth assures that the sentencer will.[125]

III.
DID JUDGE BIANCO FOLLOW *MILLER* IN SENTENCING JOSUE PORTILLO?

On June 12, 2019, Josue Portillo was sentenced to 55 years in prison by Circuit Judge Joseph F. Bianco.[126] As the Second Circuit noted in affirming the sentence on appeal, "Judge Bianco provided an extensive explanation of his reasons."[127] Portillo's advisory guidelines range was calculated to be a sentence of life.[128] With the passing of the Sentencing Reform Act of 1984, Congress eliminated parole for federal prisoners convicted of crimes committed on or after November 1, 1987.[129] There remains, however, a system for the reduction of a federal prisoner's sentence: up to 54 days off for each year the prisoner exhibits "exemplary compliance with institutional disciplinary regulations."[130] Accordingly, Mr. Portillo will not leave prison until 2065, when he is 63-years-old.

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124. Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021).

125. *See* United States v. Delgado, 971 F.3d 144, 159 (2020) (highlighting Second Circuit sentencing approach).

126. Judge Bianco's nomination to serve as a judge on the Second Circuit was confirmed by the Senate on May 8, 2019. He presided over Portillo's sentence, as a "visiting judge," sitting by designation. Bianco handled many MS-13 murder cases while he was a district judge and opted to keep all of the MS-13 cases on his docket as a Circuit Judge. He has perhaps presided over more MS-13 cases than any judge in the country. *See* Zachary R. Dowdy, *Judge Who Presided over MS-13 Gang Cases Confirmed by U.S. Senate for Federal Appeals Court*, NEWSDAY (May 9, 2019, 1:05 AM), https://www.newsday.com/long-island/politics/judge-bianco-senate-second-circuit-1.30825785 [https://perma.cc/M8SB-228A].

127. United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021).

128. *See* Criminal Sentencing Memoranda, *supra* note 2, at 1 (his undisputed "total offense level" was 43).

129. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551).

130. *See* 18 U.S.C. § 3624(b)(1).

A. The Uncommon Sentence

Justice Kagan, writing for the majority in *Miller*, declared that cases in which the "appropriate" sentence is life in prison "will be uncommon."[131] Chief Justice Roberts, in dissent, characterized this as "an invitation to overturn life without parole sentences imposed by juries and trial judges."[132] A close reading of Justice Kagan's opinion reveals a deeply held belief that a LWOP sentence should be *very* uncommon. In explaining why such sentences should be uncommon, she wrote: "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[133] Additionally, her aforementioned comments during oral arguments in *Mathena v. Malvo* imply that she believes it is possibly correct for a judge resentencing Mr. Malvo to determine something less than LWOP is appropriate even as applied to Malvo who killed or assisted in the killing of 17 people in the span of a few months.[134]

Nonetheless, "uncommon" does not mean never. Based on the circumstances of Portillo's offenses, one would be hard-pressed to imagine a case in which the harshest punishment is more warranted, even for a juvenile.[135] In this light, Judge Bianco's decision is sound, and arguably compelled by the facts of the case. However, the seriousness of the crime is only one factor *Miller* considers important. Even if the defendant committed a vile, brutal set of crimes, the sentencing court is required to consider his "immaturity," "family and home environment," susceptibility to peer pressure, and ability to change into adulthood.[136] Judge Bianco addressed some of these factors in explaining his sentencing decision. A closer look at his analysis follows.

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131. Miller v. Alabama, 567 U.S. 460, 479 (2012).

132. *Id.* at 501 (Roberts, C.J., dissenting).

133. *Miller*, 567 U.S. at 479–80 (citations omitted). This is true "even for expert psychologists." *See* Roper v. Simmons, 543 U.S. 551, 573 (2005).

134. Admittedly, this is far from definitive. Justice Kagan may have wanted the case remanded for resentencing because it was flawed (retroactively) in the lack of consideration of youth, but not that the new sentence should actually be any different. This implicates a murky area of constitutional law: "harmless errors" in the context of the substantive rights of a criminal defendant. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (holding that denying a defendant's choice of counsel requires an automatic reversal because it is impossible to know whether the error was "harmless").

135. *See supra* note 2 and accompanying text.

136. *Miller*, 567 U.S. at 477.

B. What Judge Bianco Was Required to Consider: Does Miller Apply Here?

Before proceeding to examine Judge Bianco's sentence, whether or not *Miller* controls in this case needs to be examined. After all, Judge Bianco did *not* sentence Josue Portillo to LWOP and *Miller* only discussed LWOP sentences.

For why *Miller* should apply, it is important to note that a Portillo's 55-year sentence is awfully close to a life sentence. This is especially true in light of research indicating that imprisonment shortens life expectancy.[137] The Court's reasoning in *Miller* applies equally to sentences like this one, which will only let the defendant out of prison by the time he is old enough to collect social security payments.[138] The issue of very long sentences that are not LWOP is even more relevant in non-homicide cases. *Graham* categorically forbade a LWOP sentence for non-homicidal offenses committed by juveniles.[139] What if a judge sentences a 15-year-old defendant to a 55- or 70-year sentence for a nonhomicide crime—is this consistent with *Graham*? What if the juvenile is sentenced for separate offenses to consecutive term sentences that amount to life in prison? Numerous federal and state courts have considered this issue.[140] Consider this portion of a California Court of Appeals decision regarding a defendant sentenced for numerous non-homicidal crimes committed before he was 15 years old:

> J.A.'s sentence makes him ineligible for parole until he is 70 years of age. Although J.A.'s sentence is not technically a LWOP sentence, it is a de facto LWOP sentence because he is not *eligible* for parole until about the time he is expected to die.

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137. *See, e.g.*, Emily Widra, *Incarceration Shortens Life Expectancy*, Prison Pol'y Initiative (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [https://perma.cc/8DNZ-6R87] (summarizing two such studies).

138. Professor Guggenheim argues further that "after *Graham*, the Constitution requires consideration of the differences between children and adults when sentencing children *to terms of imprisonment*." Guggenheim, *supra* note 14, at 499 (emphasis added). However, for purposes of Portillo's argument in this case, one need not claim that *Graham* (and *Miller*) control whenever any term of imprisonment is imposed upon a juvenile. The modest argument Portillo made on appeal before the Second Circuit was "that *Miller* should be extended to require that a judge, exercising discretion to impose on a juvenile a sentence of such severity as fifty-five years without the possibility of parole, must consider the factors identified in *Miller*." United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021).

139. *See* Graham v. Florida, 560 U.S. 48, 74 (2010).

140. *See, e.g.*, Willbanks v. State Dep't of Corr., 522 S.W.3d 238, 244–45 (Mo. 2017) (tallying 17 states' high courts' decisions on the issue).

> The trial court's sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while incarcerated. Should J.A. spend the next half century attempting to atone for his crimes through education, rehabilitation, and introspection into why he committed the offenses knowing there is virtually no chance he will be released? Again recognizing J.A. was not sentenced to LWOP, his sentence nevertheless effectively "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." . . . [W]e conclude J.A.'s sentence is cruel and unusual punishment under *Graham* . . . .[141]

At least one federal court agreed and expanded this rationale to *Miller*. In 2018, the Third Circuit expressly addressed whether "the Eighth Amendment prohibit[s] term-of-years sentences for the entire duration of a juvenile homicide offender's life expectancy when the defendant's 'crimes reflect transient immaturity [and not] . . . irreparable corruption'."[142] The case involved the resentencing of Corey Grant, who, in 1992, was sentenced to LWOP for a slew of crimes he committed while he was 16. In light of *Miller*, Grant's sentence was set aside. The district judge said a life sentence would be inappropriate and instead imposed a sentence of 65 years without parole.[143] Grant argued the sentence was a "de facto LWOP" because "he will be released at age seventy-two at the earliest, which he purport[ed] to be the same age as his life expectancy."[144] The court agreed with him. Among other reasons, the court stated: "[I]t would make little sense if sentencing courts could circumvent Miller and eradicate this constitutionally required distinction [between adults and juveniles] simply by imposing extraordinarily high term-of-years sentences."[145] The panel's decision did not stand for long, however. Six months later, the court vacated the judgement and granted the government's motion for rehearing (en banc).[146]

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141. People v. J.I.A., 127 Cal. Rptr. 3d 141, 149–50 (Ct. App. 2011) (citations omitted), *vacated on other grounds*, 287 P.3d 70 (2012).

142. United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018) (citing Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)), *rev'd en banc*, 9 F.4d 186 (2021).

143. *Id.* at 134–35.

144. *Id.* at 135.

145. *Id.* at 143.

146. United States v. Grant, 905 F.3d 285 (2018) (granting rehearing en banc).

However, some courts believe that *Miller* should not be expanded to any non-LWOP sentences. For example, take the case *Willbanks v. State Department of Corrections*. Timothy Willbanks was convicted and sentenced for his gruesome kidnapping, robbing, and shooting of a female stranger when he was 17 years old.[147] "The trial court imposed prison sentences of 15 years for kidnapping, life imprisonment for first-degree assault, 20 years for each robbery count, and 100 years for each armed criminal action count, and set these terms to run consecutively."[148] In 2017, Wilbanks asked the Missouri Supreme Court, in light of *Graham*, to declare the state's parole statutes and regulations unconstitutional as applied to him. He argued that, as a result of his aggregate sentences, "he does not have a meaningful opportunity to obtain release because he does not become parole eligible until he is approximately 85 years old."[149] The Missouri Supreme Court denied Willbanks's request for resentencing, writing: "The [U.S.] Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole . . . . Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations by declining to extend Graham."[150] The Supreme Court then denied Willbanks's petition for certiorari.[151]

But regardless of whether *Miller* applied as a legal matter, Judge Bianco clearly felt compelled to consider the "*Miller* factors" even when imposing a sentence less than LWOP, saying at the beginning of sentencing "that he had reread the *Miller* opinion" and understood "his obligations."[152] Those obligations were, in his words, to

> consider, among other factors, the defendant's chronological age and characteristics, including any immaturity, impetuosity and failure to appreciate the risks and consequences. The

147. Willbanks v. State Dep't of Corr., 522 S.W.3d 238, 240 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017).

148. *Id.* at 240–41.

149. *Id.* Missouri has a parole system which enables Willbanks to get out of prison after completing a certain percentage of his sentences, but under Missouri's parole statues and regulations he will not be eligible for parole before he is 85 years old. *Id.*

150. *Id.* at 246.

151. Willbanks v. Mo. Dep't of Corr., 138 S. Ct. 304 (2017) (denying certiorari).

152. United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020) (citing sentencing transcript at A 245–46), *cert. denied*, 141 S. Ct. 2548 (2021).

> court should consider the family and home environment that surround the defendant. The court should consider the circumstances of the offense including the extent of the juvenile's participation and the conduct and the way familial and peer pressures may have affected him and the possibility of rehabilitation.[153]

While the Second Circuit declined to rule on whether *Miller* was binding in the case, the Court "assum[ed], for purposes of [the] appeal, that the District Court was required to consider the *Miller* factors." The Court noted that Bianco "gave thoughtful consideration to all of these factors."[154] This makes the Portillo's sentencing an ideal case study for examining how judges attempting to be faithful to the Supreme Court's directive in *Miller* should go about exercising their discretion when sentencing those who committed homicide before age 18.

C. "Miller Factors"

In *Miller*, the Court identified four factors that a judge must consider when sentencing a juvenile to a LWOP sentence.[155] (1)

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153. *Id.*

154. *Id.* at 184. Judge Bianco is unusually thorough when articulating his rationales for imposing a sentence. One of his summer law clerks told this author that Judge Bianco had spent days considering Portillo's sentence and had not slept the night before the sentencing. Whether or not one agrees with the sentence imposed in this case, Bianco is clearly acutely aware and sensitive to the fact that "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing." *See* Graham v. Florida, 560 U.S. 48, 77 (2010).

As an important aside, the sentencing transcript makes clear that Judge Bianco understood *Miller* as requiring careful consideration of a list of factors but not that an ultimate "finding" of incorrigibility had to be reached. In fact, Judge Bianco admitted that Portillo could "change or turn his life around" but "even assuming that [the danger he poses] would dissipate over some time prior to the 55 years, I believe the other factors that I pointed to warrant this sentence in any event." Redacted Brief and Appendix for the United States at 24, United States v. Portillo, 981 F.3d 181 (2d Cir. 2020) (No. 19-2158) (alteration in original) (citing transcript of Judge Bianco's sentencing at 248–49). As explained in Part II, a case pending decision before the Court debates whether *Miller* and *Montgomery* in fact mandate a judge to find a defendant "incorrigible" before imposing LWOP.

155. *See* Miller v. Alabama, 567 U.S. 460, 477 (2012). Per *Miller*, state and federal judges must consider a juvenile defendant's age and its attending features, before imposing a sentence of life without parole. Additionally, because the court explicitly listed the "*Miller* Factors," these must be specifically considered in determining the sentence because "portions of the opinion necessary to that result" are also binding on lower courts under the doctrine of stare decisis. *See* Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). Even the portions of an opinion that are mere dicta are "entitled to greater weight" if they constitute "an important part of

"Immaturity, impetuosity, and a failure to appreciate risks and consequences"; (2) "family and home environment"; (3) "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected him"; and (4) the possibility of rehabilitation.[156]

1. "Immaturity, Impetuosity, and a Failure to Appreciate Risks and Consequences"

In amicus briefs filed on behalf of the appellants in *Graham*, amici explained:

> Sound judgement requires both cognitive and social and emotional skills, but the former mature sooner than the latter. Studies of general cognitive capacity show an increase from pre-adolescence until about age 16, when gains in cognitive capacity begin to plateau . . . however, social and emotional maturity continues to develop throughout adolescence. Thus, older adolescents (aged 16–17) might have logical reasoning skills that approximate those of adults, but nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgement.[157]

In addition to describing psychosocial research regarding juveniles' maturity, amici bolstered their argument with "emerging research" in the field of neuroscience. "Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence."[158] Thus, the "brain science" is "consistent with the demonstrated behavioral and psychosocial immaturity of juveniles."[159]

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the Court's rationale for the result that it reached." Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring).

156. *Miller*, 567 U.S. at 477. Factors (b) and (c) are also stated, though more broadly, in 18 U.S.C. § 3553(a)(1) ("[Judge shall consider] the nature and circumstances of the offense and the history and characteristics of the defendant.").

157. Brief for the American Psychological Association et. al. as Amici Curiae Supporting Petitioners at 14–15, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter APA Graham v. Florida Brief].

158. *Id.* at 23.

159. APA Graham v. Florida Brief, *supra* note 157, at 27; *see also* Graham v. Florida, 560 U.S. 48, 68 (2010) (noting developments in psychology and "brain science").

The Court expressly adopted amici's findings in *Graham*, citing the portions of the American Psychological Association's and the American Medical Association's amicus briefs that discussed the new neuroscientific research.[160]

a. Portillo's Maturity Level

During Portillo's sentencing hearing, Judge Bianco expressed that he accepted the science and the Supreme Court's reasoning but that he does not "believe that [Portillo's] age, which was just under 16, or his immaturity was the driving issue in this case."[161] Judge Bianco then detailed the sophistication of Portillo's plan, describing him as one of the leaders of the group that committed the quadruple murder. This analysis of maturity oversimplifies both the scientific literature and the Court's adoption of those findings.

For example, under the reasoning accepted by the Court in *Miller*, although Portillo possessed the cognitive abilities to plan a quadruple murder, he almost certainly had not yet achieved social and emotional maturity. Perhaps, counterintuitively, the shocking brutality of Portillo's actions suggest as much. It is very likely, according to scientific studies, that he reached much, or all, of his cognitive development by age fifteen while still severely lacking in his social and emotional development.

The defense's retained expert psychiatrist, Dr. Eric Goldsmith, wrote in his report that the defendant "likely has executive functioning problems involving judgement and decision making."[162] He

160. *Graham*, 560 U.S. at 68. The fact that the Court cites the pages in the amicus briefs that discuss neuroscience, rather than the earlier pages detailing the psychosocial and behavioral research, supports Professor Kim Taylor-Thompson's assessment, revealed in conversation with the author in 2018, that that breakthroughs in neuropsychology heavily influenced the *Roper*, *Graham* and *Miller*, in a way that earlier research did not.

161. Redacted Brief and Appendix for the United States, *supra* note 154, at 13 (citing transcript of Judge Bianco's sentencing at 246). Judge Bianco wrote the same in his order granting the government's motion to transfer Portillo to adult status. *See* United States v. Juvenile Male, 327 F. Supp. 3d 573, 578 (E.D.N.Y. 2018) ("The Court does not believe that [Portillo's] immaturity, brain development, and excessive use of marijuana adequately explain his alleged violent tendencies in this case (including his alleged premeditated, pivotal role in the murders).").

162. *Juvenile Male*, 327 F. Supp. 3d at 590 (discussing and citing Dr. Goldsmith's report). Dr. Goldsmith also wrote: "His [Portillo's] manner did not indicate a full appreciation of the gravity of the charges against him, or of the life altering implications of those charges." Dr. Goldsmith attributed the poor decision making to the effects of marijuana on his teenage brain. *Id.* On the other hand, the prosecution argued that "the defendant's apparent apathy toward his situation is far more suggestive of a lack of remorse for the horrific crimes that he commit-

reported that Portillo "displayed very little emotional range" and also diagnosed Portillo with Oppositional Defiant Disorder, Adolescent Anti-Social Behavior, and Cannabis Use Disorder.[163]

In light of the above, Judge Bianco was too dismissive of the first "*Miller* Factor." He oversimplified the "immaturity" prong and ignored the "failure to appreciate risks and consequences" prong.

Judge Bianco highlighted the duration of the planning period in Mr. Portillo's case, as several months had passed between the initial altercation at a 7-Eleven convenience store and the murders. Clearly, Portillo had a long time to consider his actions—he hardly made an "impetuous" decision. Thus, the impulsivity and rash decision-making attributes repeated by the Court throughout the cases are not at all mitigating factors in Portillo's case. Still, the fact that these murders were not committed on the spur of the moment does not negate the other mitigating factors which do apply in this case. As a consequence of being 15 years old, Portillo was lacking social and emotional maturity and an appreciation for "risks and consequences" when he killed four people. It is therefore not clear that Judge Bianco really did "accept" all of the science embraced by the Court.[164]

2. "Family and Home Environment"

a. "But Not Everyone Like Him Commits Murder"

One argument proffered by the prosecutors in their case against Mr. Portillo is a standard one for the U.S. Attorney's Office for the Eastern District of New York, particularly in MS-13 murder cases (juvenile and otherwise). In their Pre-Sentencing Letter, they write: "[Portillo's] upbringing . . . is . . . indistinguishable from

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ted . . . ." Prosecution's Brief-Letter to The Honorable Judge Joseph F. Bianco Re: United States v. Josue Portillo at 4, United States v. Josue Portillo, No. 2:17-cr-00366-JFB (E.D.N.Y. July 12, 2018) (opposing defendant's submission in opposition to transfer to adult-status).

163. *Juvenile Male*, 327 F. Supp. 3d at 590 (citing Dr. Goldsmith's report). In order to be diagnosed with Anti-Social Personality Disorder, an individual must be at least 18 years of age. AM. PSYCHOLOGICAL ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.7B (5th ed. 2012). This is due to the difficulty in determining whether a juvenile's anti-social behavior is indicative of an irreparable condition or immaturity, which was exactly the Court's point in *Miller*.

164. That notwithstanding, Judge Bianco correctly highlighted in his order granting the motion to transfer Portillo to adult status, that "Dr. Goldsmith . . . agreed at the transfer hearing that 'the defendant's demeanor would also be consistent with not having remorse'." *Juvenile Male*, 327 F. Supp. 3d at 591. Additionally, Dr. Goldsmith found that Portillo "has no sign of any major mental illness." *Id.* at 578.

countless other immigrants from El Salvador, who encounter similar (or more challenging) issues of separation and hardship, but do not join the MS-13 and commit horrific acts of violence."[165]

At first glance, this argument is strong but closer scrutiny reveals its limitations. It maintains that because the vast majority of people with "similar issues" to this defendant never commit murder, the issues do not excuse the conduct. But who says it must? The overwhelming majority of people with mental disabilities never commit murder, yet *Atkins* held that such a person who does is categorically *less culpable* because of the mental disability.[166] A prosecutor would have a hard time convincing a judge or jury that a person with a mental disability should not be treated more leniently because "countless others" with "similar issues" do not commit murder. The argument against Mr. Portillo is equally unavailing. Nobody claims a difficult upbringing or undeveloped maturity level *necessarily* leads to murderous conduct; these are merely factors that *lessen the culpability* of such a defendant who does commit murder.

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165. *See* Criminal Sentencing Memoranda, *supra* note 2, at 6. The prosecution made a similar argument in respect to Portillo's journey as he was smuggled into the United States.

> "[D]espite his age at the time of the April 11 Murders, the defendant had significantly greater life experience than most other individuals his age. When he was 14 years-old, he traveled unaccompanied from El Salvador to the United States and illegally crossed the border, before traveling to New York. Thus, the defendant's age at the time of the murders should not be given significant weight." *Id.* at 6.

This argument is even more flawed.

> "The defendant described the trip as traumatic—at times, he was transported in hot shipping containers and trucks, *crowded to the point where he felt like he could not breathe*, and at one point he had to run from immigration officials and hide in a trough. After arriving in the United States, the defendant experienced frequent nightmares about his journey and had difficulty being in hot areas . . . ." *Juvenile Male*, 327 F. Supp. 3d at 584 (emphasis added).

During the sentencing hearing Portillo's attorney went further describing that Portillo almost died on the way into the U.S., traveling on the bottom of a pile of human bodies. I was present at the sentencing and this is paraphrased from the notes I took during the event.

It is one thing to argue that Portillo's difficult journey should not be considered a mitigating factor, but to argue that his significantly greater life experience actually makes him *more* culpable certainly goes too far. Yet, although he agreed that the defendant went through a trip that almost no one goes through, Judge Bianco still noted "that Portillo had certain life experiences that required a level of independence and maturity beyond those of a normal teenager, including making the difficult trip as an unaccompanied minor from El Salvador to the United States." Redacted Brief and Appendix of the United States, *supra* note 154, at 13 (citing transcript of Judge Bianco's sentencing hearing at 246).

166. Atkins v. Virginia, 536 U.S. 304, 317–19 (2002).

The prosecution's line of reasoning is relevant only insofar as it highlights that the defendant's upbringing was not *so* hideous as to make his conduct more understandable. For example, in *Miller*, "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten."[167] Under such awful circumstances, some (though by no means all) judges, may find that the heart-wrenchingly dysfunctional upbringing explains the behavior, or at least significantly mitigates its reprehensibility. The prosecution's comparison of Portillo to "countless other immigrants" can serve the legitimate purpose of highlighting that his upbringing was not uniquely "brutal or dysfunctional."[168] However, beyond that narrow point, the argument should have no influence on the sentencing judge.

b. Family Support: A Double-Edged Sword

Juvenile defendants with seriously troubled or dysfunctional family units or upbringings face a uniquely difficult dilemma: whether or not to highlight their lack of family support in regard to sentencing. If a young person does not have a loving and supportive family to rely on while in prison, nor upon release from prison, the fourth *Miller* factor ("the possibility of rehabilitation") likely weighs in favor of a longer (or life) sentence. However, the very same fact is also relevant in considering factors two ("family and home environment") and three (familial and peer pressure) as a mitigating circumstance. Thus, a conscientious defense attorney may legitimately hesitate to argue that a defendant's lack of family support mitigates culpability, out of fear the judge will hold this *against* the defendant at sentencing. A person lacking family support is more likely to become a recidivist upon being released into the community and a judge may therefore impose a harsher sentence.

Albeit in a very different legal context, Judge Bianco has endorsed this exact mode of thinking.[169] In a reported opinion on a

167. Miller v. Alabama, 567 U.S. 460, 479 (2012) (citations omitted). Evan Miller was six years old the first time he tried to kill himself. *Id.* at 467.

168. *Id.* at 477.

169. For the gruesome facts of this case, see Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Member Convicted of Murdering Mother and Two Year-Old Child (Sept. 9, 2013), https://www.justice.gov/usao-edny/pr/ms-13-gang-member-convicted-murdering-mother-and-two-year-old-child [https://perma.cc/YV3T-UPEX].

transfer-to-adult-status hearing, in the case of another horrific MS-13 (double) murder by a juvenile, he wrote:

> The court concludes that, under the circumstances of this case, the defendant's social background weighs in favor of transfer. Specifically, the court finds that defendant's chaotic and unstable home life . . . present exactly the type of unstable environment and social surroundings that will make it highly unlikely that defendant can rehabilitate himself and avoid criminal behavior.[170]

Admittedly, the legal question presented at a transfer hearing is drastically different from the one at an adult court sentencing hearing. Juvenile courts are limited to imposing a maximum sentence of 5-years imprisonment.[171] Considering the circumstances of the double murder, allowing the defendant to go free at that point would be most absurd by all accounts. Moreover, juvenile court is supposed to be about rehabilitation rather than punishment, so it is logical to consider a difficult family background as it pertains to likelihood of rehabilitation, rather than to mitigation of reprehensibility. Still, Judge Bianco's opinion supports the notion that there is a correlation between lack of family support and a low prospect of rehabilitation, which, in turn, may weigh in favor of a harsher sentence.[172]

Is this right? That is, should judges consider lack of family support to be a reason to impose a *higher* sentence? Normatively, it

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170. United States v. Juvenile Male No. 2, 761 F. Supp. 2d 27, 34–35 (E.D.N.Y. 2011).

171. *See, e.g.*, United States v. Juvenile Male, 754 F. Supp. 2d 569, 573 (E.D.N.Y. 2010) ("The juvenile justice system, including the limited sentencing options available in that system if the defendant is found guilty (such as the statutory maximum of five years' incarceration), is simply ill-equipped and woefully insufficient . . . to adequately address . . . these most grave charges . . . .").

172. The prosecution in Portillo's case also argued that his lack of family support weighs in favor of transfer. Prosecution's Brief-Letter, *supra* note 162, at 3 ("[G]iven the fact that, if released, the defendant would return to the same unsettled family situation, with no identifiable role models to positively influence him, it is highly likely that he would return to the same pattern of destructive behavior.") Another illustration can be seen in a defense attorney's pre-sentencing letter to Judge Bianco in yet a third MS-13 juvenile murder case. The attorney argued that his client should receive a lower sentence in part because "his family has attended each and every court appearance and done their best to visit him . . . Marlon has a safety net to fall into when this period of punishment is over. Unlike many people, he has a chance to meet the goals of rehabilitation." Pre-Sentencing Letter to The Honorable Joseph F. Bianco Re: United States v. Marlon Guevara at 3–4, United States v. Guevara, 2019 WL 8138158 (E.D.N.Y. July 30, 2019) No. 18-275 (S-1) (JFB).

seems unfair to hold one's family environment, "from which he cannot usually extricate himself—no matter how brutal or dysfunctional," against a young defendant.[173] More importantly, the Court in *Miller* rejected this line of reasoning. Rather than consider the "family background and immersion in violence" of Kuntrell Jackson or the "pathological background" of Evan Miller to be reasons to impose a harsher sentence, the Court weighed these factors in favor of leniency.[174] Home environment was a leading factor in the Court's analysis. Insofar as one is concerned with the ramifications of a lack of family support on a defendant's prospects for rehabilitation, the better response should be a policy choice to provide substitute support systems. Rather than foreclosing the defendant from ever receiving support, society should consider how to provide substitute support systems to deeply troubled juvenile defendants.

i. Portillo's Family Support

The tension explained above, between weighing lack of family support as either a factor in favor of a lesser sentence or against it, *may* have been at play in Mr. Portillo's case. It did not appear that there was *anyone* present in the courtroom on his behalf during the sentencing, other than his court-appointed attorney.[175] Nonetheless, his attorney drew no attention to this fact. One of the arguments by prosecutors was that "despite his mother's best efforts . . . [and] despite his supportive family, the defendant chose to join the MS-13 at an early age, and committed the . . . Murders."[176] But where was his "supportive family" at a hearing in which he was quite plausibly going to be sent to prison for the rest of his life?[177]

173. Miller v. Alabama, 567 U.S. 460, 477 (2012).

174. *Id.* at 478.

175. This author attended the sentencing and drew this conclusion from personal observation, but it has not been confirmed.

176. *See* Criminal Sentencing Memoranda, *supra* note 2, at 6. Judge Bianco adopted this reasoning at the sentencing hearing and in his order granting transfer. *See also* United States v. Juvenile Male, 327 F. Supp. 3d 573, 586 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status) ("[T]he defendant appears to have had a fairly stable and supportive family environment in both El Salvador and the United States.").

177. Additionally, Portillo's mother's letter to Judge Bianco prior to sentencing was all of three and a half lines long, with minimal substance. *See* Defense Counsel's Letter to Judge Bianco, Re: United States v. Josue Portillo, *United States v. Josue Portillo, No. 17-366 (JB)* [sic] (E.D.N.Y. July 12, 2019). These facts raise doubts about the alleged "fairly stable and supportive family environment" Judge Bianco concluded that Josue had. *Juvenile Male*, 327 F. Supp. 3d at 586. Ms. Portillo may well have made every effort to forge a connection with her son but the fact is that Josue Portillo had little connection to his mother and family.

Whether or not the defense attorney's omission of that point in this case was calculated, there is legitimate concern generally about raising similar arguments in mitigation of juvenile offenses, due to concerns that the judge will hold the lack of support against the defendant.

To be clear, I am in no way passing judgment on Portillo's mother's decision regarding whether or not to attend the sentencing hearing of her son. She was obviously in an unimaginably difficult position. Rather, my observation is that it seems to have been a plausible argument that Josue Portillo's counsel could have explored. Relatedly, despite his mother's best efforts, Portillo told Dr. Goldsmith that he felt estranged from her and "he did not know her." He said "it was weird" living with her.[178] This is not terribly surprising considering the circumstances: Portillo never met or spoke with his father, who left his mother before he was born; his mother left El Salvador when he was three years old; and he only "occasionally spoke with his mother via telephone." He told Dr. Goldsmith that the conversations were "infrequent, brief, and that he felt 'embarrassed' if he spoke with her for too long."[179] After not seeing his mother for eleven years, he was sent to live with her in her home together with his mother's partner, his mother's partner's grandmother, and his half-sister.[180] Again, defense counsel did not raise these points during sentencing.

At the same time, Portillo's mother and her partner did make sincere efforts to spend time getting to know him and cared for him. The reason his mother and grandmother decided he should leave El Salvador was "out of concern for his safety and well-being."[181]

Ultimately, Judge Bianco concluded that the second *Miller* Factor ("family and home environment") weighed in favor of a harsher sentence (and in favor of transferring him to adult status in the first instance). Although the opposite position certainly could have been taken, Judge Bianco's conclusion was reasonable under the totality of the circumstances.

c. Home Environment in El Salvador

There is an important but seemingly overlooked aspect of Portillo's case, relevant to other MS-13 members who emigrate from Central America. Josue Portillo's life while living in the U.S. was

178. *Juvenile Male*, 327 F. Supp. 3d at 584.
179. *Id.* at 583.
180. *Id.* at 584.
181. *Id.* at 586 (citations omitted).

fairly typical: he attended public school and lived in a home with his family in a quiet suburban area.[182]

Viewed in this way, his horrific cruelty and brutality shock our United States conscience. Nonetheless, it is critical to bear in mind that Portillo spent most of his young life in El Salvador.[183] He lived in a world drastically different from our privileged upbringing in the U.S. and it is critical to appreciate the implications of that in evaluating Josue Portillo's sentence.

One scholar recently wrote,

> El Salvador is widely regarded as the deadliest place on earth that is not a war zone, but it may as well be one. The gang culture that has evolved since the end of the 12-year-long civil war in 1992 is unmatched for its brutality and scale of violence. . . . El Salvador is characterized not only by widespread violence but also by the brutality with which the violence is carried out. After firearms, machetes are the most common murder weapon. Often, the aim is not just to kill, but to torture, maim, and dismember the victim. The emergence of an intricate gang culture with its own traditions, rules, and structures has transformed the act of killing into a ritual, filled with intentional references to sadism and satanism.[184]

In 2015, El Salvador had the highest homicide rate in the world and its Defense Ministry estimated that, in 2019, about 8 percent of the country was involved with gangs.[185] This culture of inhumane violence traces back to the twelve-year-long civil war that devastated El Salvador. "In the course of El Salvador's Civil War, kids as young as 11 and 12 years old were trained and used as soldiers."[186]

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182. *Id.* at 584.

183. *Juvenile Male*, 327 F. Supp. 3d at 584. In fact, he was already 14 when he moved.

184. Tariq Zaidi, A Nation Held Hostage, Foreign Pol'y (Nov. 30, 2019, 1:00 AM), https://foreignpolicy.com/2019/11/30/el-salvador-gang-violence-ms13-nation-held-hostage-photography [https://perma.cc/EST5-W5JX]; *see also* Int'l Crisis Grp., Life Under Gang Rule in El Salvador 2 (2018), https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador [https://perma.cc/NA3X-EC2E] ("Nearly 20,000 Salvadorans were killed from 2014 to 2017 [by gang violence]. That's more violent deaths than in several countries that were at war during those years, such as Libya, Somalia, and Ukraine.").

185. Zaidi, *supra* note 184.

186. Andrew M. Garscia, Abstract, *Gang Violence: Mara Salvatrucha —"Forever Salvador,"* J. Gang Res., Winter 2004, at 29, https://www.ojp.gov/ncjrs/virtual-library/abstracts/gang-violence-mara-salvatrucha-forever-salvador [https://

Although an in-depth analysis of El Salvadorian culture is beyond the scope of this Note, critical to the MS-13 juvenile cases is a recognition that, in El Salvador, "[t]he ubiquity of violence is devastating to regular psychological development—and this violence is normalized."[187] Treating immigrant MS-13 gang members as if they were raised in the United States runs contrary to the holdings and spirit of the Supreme Court's cases. This by no means suggests that individuals raised amidst cruelty are excused for their actions, nor that they did not appreciate the wrongfulness of their choices. Still, in Evan Miller's case for example, the Court held that "Miller deserved severe punishment for killing Cole Cannon," but still accounted for his youth and "pathological background" as mitigating factors.[188] The same balancing act is required with regard to immigrants raised in Central America.

Perhaps the greatest weakness in Judge Bianco's analysis is his failure to give due consideration to Portillo's life before coming to the United States and its possible impact on his behavior. When Portillo turned 12, the MS-13 established its strong presence in Portillo's small rural town.[189] Portillo told Dr. Goldsmith that this was when his town became extremely violent.[190] In that first year alone, the gang killed Portillo's cousin's husband, a member of his soccer league suddenly went missing, and he witnessed several violent fights in the street between the MS-13 and police.[191]These experiences led directly to his decision to join a gang, having reasoned that doing so was the safest choice he had.[192] "*Roper*, *Graham*, and *Miller* Courts were all concerned with research on brain development. Research demonstrates how trauma can disrupt healthy brain development."[193] But Judge Bianco may have misunderstood that "communities as a whole can experience trauma," particularly if "vi-

perma.cc/EZZ2-G3ME] (full article available for purchase upon request from the publisher).

187. Zaidi, *supra* note 184.

188. Miller v. Alabama, 567 U.S. 460, 478–79 (2012).

189. United States v. Juvenile Male, 327 F. Supp. 3d 573, 584 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status).

190. *Id.*

191. *Id.*

192. *Id.* As he expressed it to Dr. Goldsmith, "joining a gang was going to be inevitable, as those who didn't join were victimized." *Id.*

193. Gene Griffin & Sara Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD. LEGAL RTS. J. 1, 8–9 (2013) (presenting studies showing physical differences in the brains of children who experienced trauma as compared with children who did not).

olence . . . happens regularly in their neighborhood."[194] This is precisely the story of Portillo's life.

Glossing over the potential impact that witnessing pervasive violence in his hometown at 12 years of age may have had on Portillo, Judge Bianco concluded that Portillo "appears to have had a fairly stable and supportive family environment in both El Salvador and in the United States."[195] Even if, *arguendo*, that is true, the *community* in which he grew up was neither stable nor supportive. Even though the *Miller* Court did not explicitly mention "community environment" as a factor judges should consider, if the environment did impact a youth's upbringing, it is only sensible for a sentencing court to take that into account. This is especially true if the community was ridden with violence, as "the ubiquity of violence is devastating to regular psychological development."[196]

3. "Circumstances of the Homicide Offense, Including the Extent of His Participation in the Conduct and the Way Familial and Peer Pressure May Have Affected Him"

The third *Miller* factor is comprised of a few parts. Judge Bianco evaluated the extent of Portillo's participation as extremely significant. Portillo was the one who brought the initial altercation to the attention of his superiors and who communicated with the female associates throughout the night of the murders, and he partook in the actual killings, using a machete to repeatedly strike the victims. Furthermore, the record does not indicate any familial pressures to join a gang or partake in any criminal activity. To the contrary, Portillo's mother allegedly called for him to come to America in order to extricate him from MS-13 involvement in El Salvador and be reunited with him.[197]

a. Peer Pressure

There are two kinds of peer pressure recognized in the literature. As the American Psychological Association explained in its amicus brief in *Graham*, "[r]esearch has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior . . . peaks at around age 14, and then

194. *Id.* at 12.

195. *Juvenile Male*, 327 F. Supp. 3d at 586.

196. Zaidi, *supra* note 184. On the other hand, the prosecution and Judge Bianco correctly considered the fact that *upon coming to the United States* Portillo actively sought out the MS-13 to become a member as a factor weighing against a more lenient sentence. *See Juvenile Male*, 327 F. Supp. 3d at 586.

197. *See Juvenile Male*, 327 F. Supp. 3d at 586.

declines."[198] But this pressure is not limited to a certain form. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, *affect their choices even without direct coercion*. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[199]

The *Miller* Court recognized that studies "indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency."[200]

i. Judge Bianco's View

Judge Bianco felt that peer pressure was also not a mitigating factor here. According to Judge Bianco "Portillo joined the gang quickly within months of arriving [on Long Island], knowing what the gang was about. There was no indication in the record of any pressure."[201] Judge Bianco also noted that Portillo played "a key role in the prompting, in the planning and in the execution of this quadruple homicide."[202]

Again, Judge Bianco considers only portions of the science. Judge Bianco referred to Mr. Portillo's own words, that he joined the gang because he wanted "respect, as well as . . . friends, women, and marijuana," as proof that his joining was not the result of peer pressure.[203] But even if Portillo was never explicitly pressured to join the gang, his desire for "respect" should be viewed in the context that "[a]dolescents are . . . more likely than adults to alter their

198. APA Graham v. Florida Brief, *supra* note 157, at 16. Brief for the American Psychological Association et. al. as Amici Curiae in Support of Petitioners at 16, Miller v. Alabama, 576 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter APA Miller v. Alabama Brief].

199. Brief for the American Psychological Association et. al. as Amici Curiae in Support of Petitioners at 18, Miller v. Alabama, 576 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter APA Miller v. Alabama Brief] (emphasis added) (citations omitted).

200. Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012) (citing APA Miller v. Alabama Brief, *supra* note 199, at 26–27).

201. Redacted Brief and Appendix of the United States, *supra* note 154, at 14 (citing transcript of Judge Bianco's sentencing hearing at 247).

202. *Id.* at 22 (citing sentencing transcript at 241); *see also* United States v. Juvenile Male, 327 F. Supp. 3d 573, 588 (E.D.N.Y. 2018).

203. Redacted Brief and Appendix of the United States, *supra* note 154, at 14 (citing transcript of Judge Bianco's sentencing hearing at 247–48); *see also Juvenile Male*, 327 F. Supp. 3d at 586 (citing Dr. Goldsmith's report).

behavior . . . by engaging in antisocial behavior . . . to achieve respect and status among their peers."[204]

4. "The Possibility of Rehabilitation"

Miller differentiates between serious crimes that are the product of "immaturity" and those indicative of "incorrigibility."[205] A juvenile's actions are "less likely to be evidence of irretrievable depravity."[206] Indeed, "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior."[207] But isn't murder in cold blood more than just "illegal activity"? The scientific research, largely accepted by the *Miller* Court, says no. Certainly, the worse the offense, the more likely it is to be a sign of "incorrigibility," but the severity of the crime is not dispositive. "[E]ven within a sample . . . limited to those [juveniles] convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small."[208] As one court put it: "We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."[209]

The question this final *Miller* factor asks is essentially whether the defendant is likely to be able to return to society at some point without posing a danger to the community. As the Supreme Court has stressed, "[i]t is, of course, not easy to predict future behavior" under any circumstance.[210] And the *Miller* Court cautions that the nature of youth makes predicting their future behavior acutely challenging.

Trying to predict what a person will do in the future is obviously an imperfect and uncertain endeavor, and in many ways seems inherently inequitable. However, our criminal justice system cannot avoid trying to do so. In that vein, *Roper*, *Graham*, and *Miller*

204. APA Graham v. Florida Brief, *supra* note 157, at 17.

205. Miller v. Alabama, 567 U.S. 460, 473 (2012).

206. *Id.* at 471 (citations and alterations omitted).

207. *Id.* at 472 (citing Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003))) (alterations and quotation marks omitted).

208. APA Miller v. Alabama Brief, *supra* note 199, at 24.

209. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (holding an LWOP sentence for a 14-year-old convicted of rape unconstitutional); *see also* Graham v. Florida, 560 U.S. 48, 73 (2010).

210. Jurek v. Texas, 428 U.S. 262, 274 (1976).

caution that judges should think long and hard before deciding that a young person won't change.[211]

a. Portillo's Future Behavior

Although it is impossible to predict whether or not Portillo will commit future crimes, there are factors that may indicate the likelihood of his rehabilitation. These include his demonstration of regret, his involvement with the MS-13, and his likely deportation upon completion of his sentence.

i. Statement During Sentencing

At the sentencing hearing, Portillo made a brief statement apologizing for his actions, and saying he would always pray for the victims' families. He asked to be given a chance to prove himself later in life and not be sentenced to life in prison. He also said it was "selfish" to be lured into this "terrible gang." He said he wanted to return to El Salvador and be reunited with his sister before he dies. His defense attorney stressed that after meeting with Josue over a dozen times, it was clear that he was remorseful, even if he may not know how to show it, and that his personality was passive.[212] This all weighs in favor of a lesser sentence as it shows hope for rehabilitation. However, these statements were obviously self-serving, and it is impossible to know how genuine they were.

Judge Bianco told Portillo that, in deciding not to impose a life sentence, he considered his age, admission of guilt, and *remorse*.[213]

ii. Gang Membership

Both the prosecution and Judge Bianco pointed to Portillo's continued involvement with the MS-13 while in prison as evidence that he is unlikely to change. Portillo was involved in two violent assaults against other inmates, including one in which he assaulted another inmate associated with a rival street gang.[214] Judge Bianco

211. *See* APA Graham v. Florida Brief, *supra* note 157, at 21 n.43 (citing studies demonstrating the "difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed").

212. I was present at the sentencing and this is paraphrased from the notes I took during the event.

213. *See* Redacted Brief and Appendix of the United States, *supra* note 154, at 12 ("[T]he defendant's 'age, his acceptance of responsibility . . . [and] his expression of remorse' . . . warranted a sentence of 55 years.") (citing transcript of Judge Bianco's sentencing hearing at 244–45).

214. *See* Criminal Sentencing Memoranda, *supra* note 2, at 4–5.

noted that these incidents show that Portillo is unwilling to extricate himself from the MS-13 and cease his violent behavior.[215]

This highlights a serious issue that gangs present to the criminal justice system. The nature of gang structures, with often complex and strictly enforced internal rules, makes leaving them difficult. In the case of the MS-13, this is especially true as "in principle, gang members are not allowed to leave under any circumstances."[216] Portillo's case is a prime example. He sat in prison surrounded by fellow MS-13 members, many of whom were his associates in the months prior to his incarceration.[217] In such an environment, it is indeed hard to imagine a major change in Portillo's lifestyle. In similar indictments in the Eastern District of New York, there are sometimes over twenty MS-13 members charged together. In these cases, not only are the gang members in custody together, but they also sit together in federal court at hearings, sometimes as many as ten at a time.[218]

We can certainly see the need for structural overhaul in this system of imprisonment and adjudication. However, and unfortunately, for now, the system is what it is. Judge Bianco's assessment that Mr. Portillo's continued loyalty to the MS-13 makes the possibility of rehabilitation unlikely, although profoundly tragic, is correct.

Unlike the juvenile defendants in *Roper*, *Graham*, and *Miller*, Portillo is a member of a dangerous gang, one in which members generally do not leave alive. Therefore, the factors that generally weigh heavily against determining a young person is incorrigible are complicated by the realities of gang-life.[219]

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215. *Id.* (detailing Portillo's violent behavior while incarcerated).

216. InSight Crime, Ctr. for Latin Am. & Latino Stud., MS13 in the Americas 27 (2018), https://www.justice.gov/eoir/page/file/1043576/download [https://perma.cc/8E65-MCHJ].

217. *See* Criminal Sentencing Memoranda, *supra* note 2, at 4–5 ("[O]n July 30, 2017, the defendant and . . . a fellow MS-13 member and co-conspirator in the April 11 Murders, assaulted another inmate who was associated with the rival Bloods street gang.").

218. *See, e.g.*, Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Members Indicted in New York for Murder of Four Young Men in Park and Killing of Rival at Deli (July 19, 2017), https://www.justice.gov/usao-edny/pr/ms-13-gang-members-indicted-new-york-murder-four-young-men-park-and-killing-rival-deli [https://perma.cc/RC7C-UHMF] (17 person indictment; several defendants arraigned together before Judge Bianco).

219. *See supra* pp. 32—33 (analyzing lack of family support as a factor in regard to likelihood of rehabilitation).

iii. Deportation

As in almost all cases in which illegal aliens are convicted of crimes in the United States, Portillo will most likely be deported to El Salvador at the conclusion of his long sentence. This raises an aspect of juvenile sentencing unique to undocumented immigrants. As a matter of normative notions of justice and decency, whether a convicted criminal poses a danger upon release from prison within the Unites States or in a foreign country should be of no moment.[220] The public safety of people in a foreign country should be of equal concern to us, if it is our criminal justice system allowing the convict to go free. Nonetheless, deportation upon completion of a prison sentence may be relevant in another way. In assessing risks for recidivism, the fact that a juvenile will be removed immediately from the United States upon completion of a prison term may increase the chances that the individual will integrate back into society safely and productively. Separate from his old community and friends, it may be easier for the individual to create a new identity back in his or her home country. Obviously, predicting this with certainty is not possible, but it is a factor a judge may wish to consider.

Unfortunately, in Mr. Portillo's case, as a member of a transnational gang, this factor is far less compelling. The MS-13 has its largest presence in El Salvador and there is a link between gang members in the United States and those in El Salvador.[221] Therefore, the fact that Portillo will be deported upon release from prison provides little assurance of his ability to reestablish himself in El Salvador. This is especially true because he will likely remain imprisoned alongside other MS-13 members for decades.

CONCLUSION: JOSUE PORTILLO'S SENTENCE

Josue Portillo was sentenced by a federal judge to 55 years in prison and will spend nearly all his life incarcerated.

On the one hand, the crimes he committed are difficult to even fathom. He murdered four innocent young people in the

220. The Second Circuit squarely addressed this point in United States v. Wills, 476 F.3d 103, 107–08 (2d Cir. 2007), *abrogated on other grounds by* Kimbrough v. United States, 552 U.S. 85, 128 (2007). The Court noted "that even assuming that the 'public' protected under § 3553(a)(2)(C) is only the American public, *see Small v. United States*, 544 U.S. 385, 388 (2005) (remarking on the 'commonsense notion that Congress generally legislates with domestic concerns in mind' (quoting *Smith v. United States*, 507 U.S. 197, 205 n.5 (1993))), criminal conduct committed abroad is capable of harming Americans." *Id.*

221. *See* InSight Crime, *supra* note 216, at 58–62.

most barbaric fashion. He played an essential role in the detailed planning of the murders over the course of several months. Rather than being pressured into partaking in this scheme, he was the one who initially brought the targeted victim to the attention of his superiors within the gang. Portillo did not claim to suffer a particularly difficult upbringing, lived in a stable home environment, and had no diagnosis of mental illness. While in custody for the murders he committed, he maintained his fidelity to the MS-13. The structure of the MS-13 gang makes leaving difficult and unlikely.

On the other hand, it is now accepted, both as a scientific fact and as constitutional doctrine, that the brain of a 15-year-old is different from that of an adult. A 15-year-old lacks self-control, is less able to appreciate consequences, is more susceptible to influence and psychological damage, and has an undeveloped sense of responsibility. The scientific literature indicates that even indirect peer pressure is a powerful force in the decision-making of young people, and Portillo was in fact motivated by his desire for "respect." Although his living arrangements in the United States were not of the sort we would imagine can breed such violence, Portillo spent his formative years in El Salvador, "the deadliest place on earth," where "violence is normalized" and where "the emergence of an intricate gang culture with its own traditions, rules, and structures has transformed the act of killing into a ritual, filled with intentional references to sadism and satanism."[222] Portillo never met his father and was separated from his mother at age 3 for 11 years. He began smoking marijuana at age 12, and joined the MS-13 while still too young to obtain a driver's permit.[223] Finally, even the most serious crimes committed by a 15-year-old are likely to be signs of immaturity rather than incorrigibility.

In imposing a near-life sentence, Judge Bianco concluded that immaturity was not the key factor driving Josue Portillo, but his analysis conflated cognitive and emotional development. The judge also did not seem to pay sufficient consideration to the *indirect* peer pressure that heavily influences adolescents. Most concerning was Judge Bianco's complete disregard for the corrupt and brutally violent culture that permeates El Salvador, where Portillo spent most his life. Under these circumstances, a sentencing court ought to be more sensitive to a 12-year-old who came to believe that "joining a

222. Zaidi, *supra* note 184.

223. *See* United States v. Juvenile Male, 327 F. Supp. 3d 573, 584 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status).

gang was going to be inevitable, as those who didn't join were victimized."[224]

Manifestly, the main reason Judge Bianco imposed this harsh sentence was the nature and circumstances of the crimes Portillo committed.[225] Judge Bianco also summarized his reasoning during the sentencing saying that anything less than the 55-year sentence "would not adequately account for all the . . . factors . . . seriousness of the offense, the loss of life, the need to promote respect for the law and to provide deterrence, including general deterrence."[226] *Miller* cautioned that LWOP should be "uncommon" for juvenile defendants, in part because of the great difficulty in identifying "the rare juvenile offender whose crime reflects irreparable corruption."[227] Judge Bianco's analysis had its share of flaws by which he did not properly adhere to the Court's directives in *Miller*. Nonetheless, his determination that Josue Portillo should be one of the rare 15-year-olds to receive a near-life (but still not LWOP) sentence, after weighing the totality of the circumstances, was not inconsistent with *Miller*.[228] The brutal nature of the crime, the quadruple loss of life, the extent of Portillo's participation, and his continued affiliation with the MS-13 all weigh in favor of an extremely long sentence.

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224. *Id.*

225. Judge Bianco stressed the "unbelievably violent nature of this crime and the extreme harm it caused" and explained that "the sentence has to reflect the devastating and the senseless act of evil of the loss of four lives and . . . the emotional lifelong suffering that all of the loved ones of these four young men continue to experience and will experience for the rest of their lives." Redacted Brief and Appendix of the United States, *supra* note 154, at 9 (citing transcript of Judge Bianco's sentencing hearing at 240).

226. *Id.* at 15 (citing transcript of Judge Bianco's sentencing hearing at A 249).

227. Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (citing Roper v. Simmons, 543 U.S. 551, 573 (2005)).

228. The Second Circuit affirmed, writing "the sentence is not unreasonable in any legally cognizable sense" despite fifty-five years being "fairly deemed especially harsh for a defendant fifteen years of age at the time of the crime." United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021). *But see supra* pp. 16–21 (discussing *Montgomery* and *Jones*). Theoretically, if the Supreme Court had ruled in favor of Mr. Jones, requiring that sentencing courts make a finding of "incorrigibility," Judge Bianco's sentence may have been challenged because he failed to do that. Instead, he weighed the *Miller* factors, more generally. Of course, for such an appeal to have succeeded, Portillo would also have had to argue that 55 years is the equivalent of LWOP for purposes of *Miller*. *See supra* pp. 23–36 and accompanying footnotes (explaining why *Miller* should apply to a 55-year sentence).

"Few, perhaps no, judicial responsibilities are more difficult than sentencing."[229] Indeed.

229. Graham v. Florida, 560 U.S. 48, 77 (2010).