

## ***Miller v. Alabama: Is Death (Still) Different?***

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“Death is different” has long been the mantra of capital defense attorneys. Some variant of that expression appears in many of the U.S. Supreme Court’s landmark decisions,<sup>1</sup> and it provides the central justification for doctrines affording special substantive and procedural protections for capital defendants. At the same time, it must be acknowledged that all comparisons are invidious in the sense that one of the things compared inevitably suffers by the comparison. “Death” is different from something else, and that something else is incarceration. From the perspective of constitutional limits and reform in the capital context, the “death-is-different” principle has been a useful, perhaps indispensable, means to circumvent the extraordinary deference afforded states in their choice and administration of punishment. But the principle carries with it the risk of shielding from review (as well as normalizing and legitimating) the “not-so-different” carceral sanctions states impose, including the increasingly harsh terms of imprisonment imposed for non-violent offenders and the now ubiquitous use of the penalty of life-without-possibility-of-parole (LWOP).<sup>2</sup>

On the other hand, increased scrutiny of state capital practices might also contribute to non-capital reform, by highlighting problems that might otherwise escape serious judicial attention (e.g., the risk of punishing the innocent)<sup>3</sup> or by

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<sup>1</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (stating that “[d]eath is a unique punishment”); *id.* at 306 (Stewart, J., concurring) (stating that the “penalty of death differs from all other forms of criminal punishment not in degree but in kind”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (stating that the “penalty of death is different in kind from any other punishment”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (stating that the “penalty of death is qualitatively different from a sentence of imprisonment, however long”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (stating that “this Court has consistently acknowledged the uniqueness of the punishment of death”); *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (stating that “a number of our decisions [have] relied on the premise that ‘death is different’ from every other form of punishment to justify rules minimizing the risk of error in capital cases”).

<sup>2</sup> Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 175–90 (2008) (discussing ways in which death penalty opponents have strengthened and normalized LWOP as well as risks of “death-is-different” doctrine insulating non-capital sanctions from proportionality review).

<sup>3</sup> Cf. Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 425–30 (2002) (describing modes of capital reform that could continue to shed light on deficiencies in criminal justice system).

allowing courts to gain experience in developing and implementing protective doctrines. This latter possibility was illustrated three years ago in *Graham v. Florida*<sup>4</sup> when the U.S. Supreme Court invalidated the imposition of LWOP as applied to juveniles convicted of non-homicidal offenses. Prior to *Graham*, the Court's proportionality doctrine had essentially no bite outside of the capital context, as the Court repeatedly had upheld extremely harsh punishments (including LWOP) even as applied to non-violent offenders.<sup>5</sup> Indeed, two members of the Court insisted that proportionality limits should be confined to capital cases, and states should be unrestrained in their choice and application of terms of imprisonment.<sup>6</sup> The divergence between the Court's approach to capital and non-capital proportionality challenges was evident in the Court's embrace of significant proportionality limitations on the death penalty side (prohibiting its imposition against juveniles,<sup>7</sup> offenders with intellectual disabilities,<sup>8</sup> and offenders convicted of non-homicidal ordinary offenses such as the rape of a child<sup>9</sup>) and its rejection of modest challenges in the non-capital context (upholding a twenty-five-years-to-life sentence applied to a repeat offender convicted of attempting to steal three golf clubs<sup>10</sup> and a LWOP sentence applied to a first-time offender convicted of mere possession of a large quantity of cocaine<sup>11</sup>). In the latter cases, the Court rejected the non-capital challenges in a cursory manner, imposing a threshold requirement of gross disproportionality that precluded any significant examination of state sentencing practices.<sup>12</sup> But *Graham* breached the capital versus non-capital divide, embracing a new methodology that lowered the bar for non-capital defendants seeking "categorical rules" against excessive punishment based either on the nature of the offender or the nature of the offense.<sup>13</sup> *Graham* essentially imported the proscription against disproportionate punishment from the Court's capital jurisprudence into its non-capital jurisprudence and transformed a "death-is-different" doctrine into a more general limitation on excessive sentences.

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<sup>4</sup> 130 S. Ct. 2011 (2010).

<sup>5</sup> Steiker & Steiker, *supra* note 2, at 184–89 (detailing limited protection afforded by the Court's non-capital proportionality jurisprudence).

<sup>6</sup> *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia & Rehnquist, JJ., concurring) (noting that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides" and declaring that "[w]e would leave it there, but [would] not extend it further").

<sup>7</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>8</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>9</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>10</sup> *Ewing v. California*, 538 U.S. 11 (2003).

<sup>11</sup> *Harmelin*, 501 U.S. 957.

<sup>12</sup> See, e.g., *Ewing*, 538 U.S. at 28–31 (summarily rejecting proportionality challenge to Ewing's sentence).

<sup>13</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2021–23 (2010).

Even though *Graham* undermined the significance of the “difference” of death, it ultimately turned on two new lines of difference: the juvenile status of the offender and the distinctiveness of LWOP as a punishment. Relying on recent developments in psychology and brain science, the Court observed that juveniles as a group lack the maturity and sense of responsibility to be deemed the “worst” offenders deserving of the most severe term of imprisonment.<sup>14</sup> The Court also likened LWOP to capital punishment in its imposition of an “irrevocable” forfeiture—denying the offender any hope of freedom.<sup>15</sup> *Graham* thus simultaneously opened the door to proportionality review of non-capital sentences but offered plausible grounds for distinguishing challenges brought by adults or by juveniles facing non-LWOP sentences.

Not surprisingly in light of the way *Graham* framed the issue, the Court’s most recent foray into the proportionality thicket again involves juvenile offenders. In *Miller v. Alabama*,<sup>16</sup> two fourteen-year-olds convicted of murder challenged the imposition of *mandatory* LWOP sentences. They argued that LWOP is an excessive punishment as applied to fourteen-year-olds regardless of the offense, and urged as well that the non-discretionary implementation of LWOP constitutes a separate constitutional deficiency. The Court declined to reach the proportionality challenge and instead invalidated the imposition of mandatory LWOP sentences on juvenile offenders, even in homicide cases where LWOP sentences for juveniles are theoretically permissible. In so doing, the Court again breached a longstanding capital/non-capital divide. Like *Graham*, *Miller* raises a host of questions about the potential reach of its decision, particularly the scope of the non-mandatory sentencing right that it establishes. *Miller* also further blurs the boundaries of capital and non-capital doctrine, perhaps pointing toward a unitary Eighth Amendment jurisprudence. The net-effect of “juveniles are different” and “LWOP is different” might be the functional end of “death is different.” Does this signal the ultimate but ephemeral success of “death is different” as a catalyst for improvements to the broader criminal justice system, in which the distinctiveness of capital punishment acts as lever of reform, only to be disclaimed when it is desirable to reform the non-capital side as well? Or should the death of “death is different” be worrisome to capital reformers because it will inevitably consign capital defendants to the same (often inadequate) protections afforded non-capital defendants? *Miller* also raises questions about the substance versus procedure divide. Will the procedural right *Miller* recognizes ultimately spell the end of juvenile LWOP sentences? Or will *Miller* lead to even broader changes in non-capital sentencing, introducing to the non-capital side the extensive punishment-phase regulation that is currently confined to capital cases?

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<sup>14</sup> *Id.* at 2026.

<sup>15</sup> *Id.* at 2027.

<sup>16</sup> 132 S. Ct. 2455 (2012).

## I. THE FUTURE OF JUVENILE LWOP

Until *Miller*, the Court had restricted mandatory sentencing only in capital cases. In fact, the requirement of “individualized” sentencing emerged in response to the unusual sequence of events beginning in the 1960s when the Court first addressed significant federal constitutional challenges to the prevailing administration of capital punishment.<sup>17</sup> The central claim against the death penalty at that time centered on its arbitrary and discriminatory application. State capital statutes cast a broad net of death-eligibility and offered virtually no standards as to who should live or die; at the same time, the exercise of prosecutorial and jury discretion resulted in extraordinarily few death sentences. In the Court’s landmark capital decision, *Furman v. Georgia*,<sup>18</sup> various opinions supporting the invalidation of prevailing statutes condemned the “standardless discretion” of the status quo. If the death penalty was to be preserved, states would be required to give meaningful guidance regarding the death-sentencing decision.

*Furman* generated an enormous backlash, as states decried the Court’s unprecedented intervention.<sup>19</sup> Many states sought to solve the problem of standardless discretion by turning to the Model Penal Code, which had recommended bifurcated proceedings (separate “guilt/innocence” and “punishment” phases in capital cases) and the use of “aggravating” and “mitigating” factors to guide the sentencing determination at the punishment phase.<sup>20</sup> Other states, though, read *Furman*’s condemnation of standardless discretion (as well as its critique of the states’ infrequent recourse to capital punishment) as best solved by removing discretion altogether, and those states made the death penalty mandatory upon conviction of certain offenses (primarily first-degree murder).<sup>21</sup>

The post-*Furman* turn to mandatory death sentences represented an odd resuscitation of a discarded practice. Mandatory death sentencing had been the norm at the time of our founding, but states gradually and then almost universally rejected the practice by the 1960s.<sup>22</sup> Permitting jurors to recommend “mercy” was

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<sup>17</sup> Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 231–33 (2012).

<sup>18</sup> 408 U.S. 238 (1972).

<sup>19</sup> Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 406–07 (1995).

<sup>20</sup> MODEL PENAL CODE § 210.6 (1981).

<sup>21</sup> See, e.g., *Roberts v. Louisiana*, 431 U.S. 633 (1977) (addressing Louisiana’s mandatory capital statute).

<sup>22</sup> *Woodson v. North Carolina*, 428 U.S. 280, 292–93, 292 n.25 (1976) (plurality opinion) (describing gradual repeal of general mandatory statutes, yet persistence of residual “obscure statutes scattered among the penal codes in various States that required an automatic death sentence upon conviction of a specified offense” like treason or perjury in a capital case).

seen as both necessary and humanizing—necessary because it prevented jurors from “nullifying” and returning not guilty verdicts in cases of manifest guilt, and humanizing because it permitted jurors to consider whether the circumstances of the offense genuinely called for the most extreme punishment. The return to mandatory sentences appeared to be a rash reversal inspired by judicial intervention and (mis)perceived necessity rather than a considered embrace of mandatory death-sentencing. In these circumstances, the same Court that condemned the *excess* discretion of the pre-*Furman* world refused to uphold the *absence* of discretion contemplated by the new mandatory statutes. In a collection of cases addressing five of the post-*Furman* statutes, the Court sustained the Model Penal Code-styled statutes that required sentencers to find at least one “aggravating” factor to render a defendant “death-eligible” and that permitted jurors to decline to impose death based on mitigating circumstances.<sup>23</sup>

In *Woodson v. North Carolina*,<sup>24</sup> the Court rejected the mandatory statutes on three grounds. First, the Court deemed the mandatory statutes to be inconsistent with American tradition and practice; states had turned away from the common-law rule imposing mandatory death sentences on convicted murderers, and jurors who had been afforded discretion in capital cases frequently exercised it to preclude the imposition of the death penalty.<sup>25</sup> In the Court’s view, the sudden revival of mandatory capital statutes reflected a desire to meet the Court’s constitutional demands “rather than a renewed societal acceptance of mandatory death sentencing.”<sup>26</sup> Second, although designed to cure the problem of excess discretion, mandatory statutes merely “papered over” the problem because discretion would still be exercised by jurors in deciding whether to convict defendants of first-degree murder.<sup>27</sup> Given that American juries “ha[d] persistently refused to convict” persons charged under mandatory capital statutes, the Court assumed that jurors would continue to exercise discretion even if not conferred by statute.<sup>28</sup> Worse still, the discretion so exercised would be arbitrary because the mandatory statutes “provide[d] no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die.”<sup>29</sup> Finally, the Court emphasized the importance of considering

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<sup>23</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). The Court also sustained the Texas capital statute against a facial challenge, *Jurek v. Texas*, 428 U.S. 262 (1976), though the Court later found the statute’s limited focus on mitigation to be constitutionally infirm in particular cases. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (statute failed to permit constitutionally adequate consideration of defendant’s evidence of intellectual disability and history of abuse).

<sup>24</sup> 428 U.S. 280 (1976).

<sup>25</sup> *Id.* at 294–97.

<sup>26</sup> *Id.* at 298.

<sup>27</sup> *Id.* at 302.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 303.

“more than the particular acts by which the crime was committed” in deciding the offender’s appropriate punishment.<sup>30</sup> Recognizing that such “individualized” consideration was a matter of “enlightened policy” rather than “constitutional imperative” outside of the capital context, the Court concluded that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”<sup>31</sup> Here, the Court offered its clearest and most unequivocal invocation of the death-is-different principle, stating that its “conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.”<sup>32</sup>

The rejection of mandatory death penalty statutes did not simply reinstate the jury’s prerogative to exercise mercy. As the Court elaborated the right to “individualized sentencing” over the ensuing three decades, it became the pillar of a fundamentally different capital system. In the pre-*Furman* regime, states often limited—sometimes severely so—the kinds of evidence defendants could offer in support of mercy. Indeed, many states established “unitary” proceedings with no separate punishment phase, such that defendants could offer “mitigation” only to the extent it bore on the question of guilt or innocence of the underlying offense.<sup>33</sup> Post-*Woodson*, the Court has insisted that capital defendants be permitted to present *any* evidence that could plausibly persuade the sentencer to withhold the death penalty. Moreover, state statutes must provide a meaningful vehicle to facilitate full consideration of such evidence.<sup>34</sup> State *non-mandatory* schemes that limited the focus of mitigation to certain factors, such as duress or mental illness, have been deemed unconstitutional because they precluded consideration of other factors potentially relevant to the decision of life or death.<sup>35</sup>

More important, though, than the change in law (the constitutionalization of a capital defendant’s right to essentially unbridled consideration of mitigating evidence) has been the change in practice. *Woodson* inaugurated a shift in which the punishment phase has become the most significant aspect of capital trials.<sup>36</sup> Capital defense lawyers now recognize that often the most realistic way to “win” a capital case is to achieve a life sentence. To that end, capital defenders must

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<sup>30</sup> *Id.* at 304 (quoting *Pennsylvania ex. rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

<sup>31</sup> *Id.* (internal citation omitted).

<sup>32</sup> *Id.* at 305.

<sup>33</sup> MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 68–69 (1973).

<sup>34</sup> *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 283–86 (2004) (rejecting doctrines permitting only limited or partial consideration of mitigating evidence).

<sup>35</sup> *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (granting habeas relief on the ground that Florida’s sentencing statute was understood to allow only for the consideration of mitigating circumstances specifically enumerated in the statute).

<sup>36</sup> *Steiker & Steiker, supra* note 17, at 232–33.

assemble a team of experts, including a professional investigator, a mitigation specialist, psychiatric and psychological consultants, and other pertinent professionals. The newly-emerging standard of practice requires thorough investigation into every aspect of a defendant's character and background, including medical history, educational history, special educational needs, military service, employment and training history, family and social history, and religious and cultural influences. Armed with such evidence, capital defense lawyers must approach the capital trial—including plea negotiations, voir dire, and the guilt-innocence phase—with a comprehensive mitigation strategy designed to avoid the imposition of a death sentence. These heightened expectations for capital defense counsel are reflected both in the detailed standards promulgated by the American Bar Association for the appointment and performance of counsel in capital cases<sup>37</sup> and in the U.S. Supreme Court's opinions elaborating a defendant's right to effective assistance of counsel in capital cases.<sup>38</sup> Indeed, though the Court has nominally asserted that the Sixth Amendment provides a single standard for representation applicable to both capital and non-capital cases,<sup>39</sup> the right to "individualized" sentencing has created a de facto divide with much more demanding expectations on the capital side. What began as a small difference in doctrine (no mandatory capital statutes) has produced a wide gulf on the ground. Capital trials are nothing like their non-capital counterparts, and intensive investigation and presentation of mitigating evidence are the primary distinguishing features.

What, then, does *Miller's* rejection of mandatory LWOP sentences for juveniles entail? Does it require something akin to the minimally protective pre-*Furman* capital practice—the opportunity for the sentencer to bestow "mercy" and avoid a LWOP sentence? Or does it require something more—a process that allows a juvenile defendant to develop and present mitigating facts tending to disprove his "irreparable corruption" or incorrigibility? *Miller* points toward a robust version of individualization with a broad range of constitutionally relevant sentencing factors. The Court holds that the sentencer should be permitted to consider not only a defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences" before imposing a LWOP sentence, but also "the family and home environment that surrounds him" and "the circumstances of the homicidal offense, including the extent of his participation in the conduct and the

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<sup>37</sup> The ABA issued its first guidelines in 1989. *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, AM. B. ASS'N, [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/National/1989Guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf). The ABA issued a more demanding and detailed revised set of guidelines in 2003. Am. Bar Ass'n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

<sup>38</sup> See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

<sup>39</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

way familial and peer pressures may have affected him.”<sup>40</sup> In recounting the circumstances of Miller’s case, the Court highlights as relevant sentencing considerations that he was “high on drugs” at the time of the offense, that his “stepfather physically abused him,” that his “alcoholic and drug-addicted mother neglected him,” that he had been “in and out of foster care,” and that he had attempted suicide four times, “the first when he should have been in kindergarten.”<sup>41</sup> It concludes that the sentencer in Miller’s case “needed to examine all these circumstances before concluding that life without possibility of parole was the appropriate penalty.”<sup>42</sup>

The Court does not indicate, however, how this full picture of a defendant’s culpability and mitigating circumstances will come before the sentencer. Perhaps such facts will be developed in the state forum deciding whether the offender’s conduct should be adjudicated in juvenile proceedings or adult/criminal court. But not all juveniles will be subject to such transfer or removal proceedings (many states have statutory exclusion laws that preclude juvenile court jurisdiction over homicide cases for juveniles over a certain age<sup>43</sup>), and in many jurisdictions those proceedings do not ordinarily entitle the defendant to the resources necessary to develop a full mitigating case given the limited focus of the transfer determination. Indeed, in Miller’s own case, the juvenile court denied Miller’s request for funds to hire his own mental expert for the transfer hearing.<sup>44</sup>

The only way such evidence will be reliably developed, then, is at the trial itself. Several adjustments to current practice, however, will likely be necessary. States would have to revise their statutes to provide an alternative punishment for murder or aggravated murder in cases involving juvenile offenders. As the Court noted in *Miller*, the punishment of LWOP is currently mandatory for offenders convicted in adult court of some type of murder in more than half the States and the Federal Government regardless of the offender’s age.<sup>45</sup> If some jurisdictions were to authorize the lesser form of punishment life imprisonment *with* the possibility of parole, they might have to make additional changes for administering a system of parole, since at least fourteen states and the federal government have abolished parole since the 1980s.<sup>46</sup> To date, some jurisdictions have given post-*Miller* relief by reforming juvenile LWOP sentences to parole-eligible life

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<sup>40</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

<sup>41</sup> *Id.* at 2469.

<sup>42</sup> *Id.*

<sup>43</sup> David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 666–69 (2002).

<sup>44</sup> *Miller*, 132 S. Ct. at 2462 n.3.

<sup>45</sup> *Id.* at 2471 n.9.

<sup>46</sup> Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 479 (1999).



sentences, with parole eligibility ranging from thirty-five years (Louisiana<sup>47</sup>) to as long as sixty years (Iowa<sup>48</sup>). This latter choice of parole-eligibility after sixty years appears to violate the spirit, if not letter, of *Miller* because it is likely the functional equivalent of a LWOP sentence.<sup>49</sup> Alternatively, states could make determinate term-of-years sentences the non-LWOP option, though, again, excessively lengthy sentences might run afoul of *Miller*. In Florida, for example, a juvenile offender who had received LWOP for non-homicidal offenses committed during a one-day crime spree was resentenced post-*Graham* to a total of one hundred years imprisonment via lengthy consecutive sentences;<sup>50</sup> under Florida law, his eligibility for release based on “gain time” is theoretically possible but unlikely in fact.<sup>51</sup>

If States want to preserve the LWOP option and provide for individualized sentencing at trial, they will also presumably need to provide indigent offenders with the resources to investigate and present mitigating evidence. States already have in place mechanisms for allowing some forms of mitigating evidence to come before the sentencer (pre-sentencing reports, etc.), but those mechanisms might be insufficient to facilitate the global assessment of moral culpability and capacity for redemption described in *Miller*. If *Miller* contemplates a standard of practice similar to current capital practice, trials involving juveniles facing LWOP would become strikingly more complex and expensive. For this reason, it seems likely that states will choose to forego LWOP in the juvenile context and opt out of “individualized sentencing” by simply tacking on parole eligibility to juvenile life sentences. Not only would such an approach avoid the cost and uncertainties associated with a dramatic change in practice, it would also avoid the inevitable proportionality challenges that would follow the successful imposition of juvenile LWOP sentences. The majority in *Miller* tipped its hand by declaring that the “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>52</sup> The Court’s view in *Roper*,<sup>53</sup> repeated in *Miller*,<sup>54</sup> that few juvenile crimes reflect “irreparable corruption” on the part of the offender may

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<sup>47</sup> Laura McGaughey, *Gov. Jindal Plans to Sign Bill to Allow Parole for Some Juvenile Lifers*, THE TIMES PICAYUNE, June 7, 2013, [http://www.nola.com/politics/index.ssf/2013/06/bobby\\_jindal\\_juvenile\\_lifers\\_1.html](http://www.nola.com/politics/index.ssf/2013/06/bobby_jindal_juvenile_lifers_1.html).

<sup>48</sup> William Petroski, *Harkin: Branstad Made Wrong Decision on Juvenile Killers*, DESMOINESREGISTER.COM, July 19, 2012, <http://blogs.desmoinesregister.com/dmr/index.php/2012/07/19/harkin-branstad-made-wrong-decision-on-juvenile-killers> (last visited Feb. 11, 2013).

<sup>49</sup> Given the relative novelty of LWOP, we simply do not know how many offenders will survive six decades or more of incarceration.

<sup>50</sup> John Barry, *Hillsborough Judge Gives “Juvenile” Offender 100-year-sentence*, TAMPA BAY TIMES (Aug. 9, 2012, 9:53 AM), <http://www.tampabay.com/news/courts/criminal/hillsborough-judge-gives-juvenile-offender-100-year-sentence/1244791> (last visited February 11, 2013).

<sup>51</sup> *Id.*

<sup>52</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

<sup>53</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>54</sup> *Miller*, 132 S. Ct. at 2469.

well become a self-fulfilling prophecy. Now that “juvenile LWOP is different,” states will not want to go to extraordinary lengths to secure juvenile LWOP verdicts that they know are likely to be revisited by a skeptical Court. And as more states withdraw LWOP as a juvenile sentencing option, the Court will find increasing “objective” evidence of society’s rejection of that practice.

If the requirement of individualized sentencing in the juvenile LWOP context runs this course and essentially ends juvenile LWOP as a practice, it will follow in an accelerated and more dramatic fashion the path of the individualization requirement in the capital context. On the surface, the current moment seems similar to 1976 in that Court-imposed individualization appears to be a less-intrusive reform than abolition of the punishment choice altogether. At the time of *Woodson*, though, individualization was likely regarded as less of a threat to the underlying practice, because it was widely understood that permitting “guided discretion” statutes to go forward would facilitate the reinstatement and use of the death penalty. It would have been hard to predict at that time that requiring individualized sentencing would so radically transform capital practice. Now, however, it is evident that individualized sentencing in its robust form—with mitigation specialists, extended voir dire, lengthy punishment-phase proceedings, and inevitable ineffective assistance of counsel claims when the mitigation case fails—poses enormous challenges to the continued use of the death penalty.<sup>55</sup> The costs associated with capital trials—the lion’s share of which is directly attributable to the new mitigation practice<sup>56</sup>—have contributed to the dramatic decline in death sentences over the past fifteen years.<sup>57</sup> Prosecutors are increasingly willing to forego the possibility of a death sentence to avoid the extensive cost of a capital trial. In addition, the evolution of mitigation practice has increased the likelihood that a full-blown punishment trial will in any case result in a life sentence, as jurors appear to be responsive to well-developed and presented mitigation cases, even where defendants have committed highly aggravated crimes.<sup>58</sup>

One irony is that the *other* major factor contributing to the remarkable decline in capital sentences is the widespread availability of LWOP. The sentence of LWOP has become the default punishment for murder in non-capital jurisdictions and virtually the sole alternative to death in capital jurisdictions.<sup>59</sup> LWOP is attractive because it ensures the incapacitation of the offender and avoids all of the

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<sup>55</sup> Steiker & Steiker, *supra* note 17, at 231–33.

<sup>56</sup> Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 139–43.

<sup>57</sup> See DEATH PENALTY INFO. CENTER, DEATH SENTENCES IN THE UNITED STATES FROM 1977 BY STATE AND BY YEAR, <http://www.deathpenaltyinfo.org/death-sentences-United-states-1977-2008> (last visited Feb. 11, 2013) (detailing sharp decline in sentences from 1996 to 2012).

<sup>58</sup> Steiker & Steiker, *supra* note 17, at 231–33.

<sup>59</sup> See DEATH PENALTY INFO. CENTER, LIFE WITHOUT PAROLE, <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Oct. 7, 2013).

costs imposed because of the procedural protections triggered by the difference of death. *Miller*, though, raises the possibility that the Court might ultimately view LWOP as sufficiently severe (an “irrevocable” forfeiture) to incur greater scrutiny as a practice even outside the juvenile offender context. Perhaps the Court would hold that the “difference of LWOP” requires an individualized sentencing proceeding regardless of an offender’s age. If the Court were to go down this road, and impose greater procedural protections for *all* defendants facing LWOP, prosecutors would have to rethink their use of LWOP. By breaching the capital/non-capital wall and making the imposition of LWOP more cumbersome and more expensive, the Court would disturb the prevailing incentives created via the “death-is-different” doctrine. Prosecutors in death penalty states might actually *increase* the number of cases in which they seek death to encourage pleas to LWOP. Otherwise, defendants would be entitled to individualized sentencing proceedings to determine whether LWOP should be imposed, with all of the additional costs that LWOP was designed to avoid. In short, the Court’s “death-is-different” approach has created an ecosystem with significant incentives favoring disuse of the death penalty. Increasing protections outside of the death penalty context, though motivated by concerns about excessive punishment, might ultimately be counter-productive if the newly-imposed “tax” on LWOP revives the attractiveness of capital punishment. “Individualized” sentencing is not the only difference of death. The next section examines other possible imports to the non-capital side.

## II. THE CRUMBLING EIGHTH AMENDMENT WALL

*Graham* breached the wall between the capital and non-capital regimes of Eighth Amendment regulation by recasting the line between the Court’s two distinct modes of proportionality review on other grounds entirely (categorical versus non-categorical challenges). *Miller* represents a further breach in its importation of the individualized sentencing requirement, born in the aftermath of *Furman*, from the capital context to the juvenile LWOP context. These are major and unprecedented assaults on what had long been assumed to be an impregnable barrier. Do these successful breaches portend further crumbling of the Eighth Amendment wall? Which, if any, other features of the distinctive regime of Eighth Amendment regulation of capital punishment might be pressed into service in the regulation of non-capital punishment practices? Should any such further breaches be welcomed or resisted? By whom?

The constitutional requirement of individualized sentencing has formed one major pillar of the Court’s distinctive Eighth Amendment capital jurisprudence. Indeed, as noted above, the Court has robustly construed this requirement, extending it far beyond the invalidation of mandatory capital sentences and thus transforming the nature of capital trials. But the individualization requirement followed, and indeed was a reaction to, the first pillar of the Court’s Eighth Amendment capital jurisprudence—the requirement of guided sentencing

discretion that was the product of the Court's landmark intervention in *Furman*. This first pillar was a response to the standardless capital sentencing discretion of the pre-*Furman* era, which produced death sentences that seemed as rare and random as being "struck by lightning"<sup>60</sup> and invited the influence of race and class biases in a fashion that seemed "pregnant with discrimination."<sup>61</sup> Will or should the Court consider importing some version of its guided discretion mandate into the non-capital sentencing context, at least with regard to juvenile offenders sentenced to LWOP?

There are good reasons to worry that the future distribution of juvenile LWOP sentences (or their functional equivalent) will raise many of the same concerns as the distribution of death sentences in the pre-*Furman* era. To the extent that juvenile LWOP survives as a practice in the post-*Miller* world, it will undoubtedly be imposed much more rarely than it has been in the past. After all, the vast majority—85%—of the approximately 2,500 juveniles serving LWOP sentences at the time of *Miller* were sentenced in mandatory jurisdictions, demonstrating that "when given the choice, sentencers impose life without parole on children relatively rarely."<sup>62</sup> Moreover, the Court's own admonition that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"<sup>63</sup> undoubtedly will render such sentences even rarer, even in states that continue to authorize them. Finally, many formerly "mandatory" states may prefer the simpler fix of adding parole eligibility for juveniles rather than attempting to inaugurate a new system of individualized sentencing. Thus, the number of juvenile LWOP sentences that will continue to be imposed after *Miller* will likely be exceedingly rare. Similarly, sentences that are the functional equivalent of juvenile LWOP—i.e., sentences with parole eligibility only after sixty years, or sentences to terms of years that will exceed a juvenile offender's projected lifespan—will also likely be rare in the post-*Miller* era of greater sentencing discretion.

While juvenile rights advocates may cheer this new scarcity as a victory, it seems reasonable to expect that decreased prevalence combined with increased discretion will produce greater arbitrariness and discrimination in the application of such sentences. Even in the pre-*Miller* era of more widespread and less discretionary use of juvenile LWOP, there were concerns about unchecked discretion and disparate racial effects. The *Miller* Court itself noted that states that entrusted the decision whether to transfer juvenile homicide offenders from adult to juvenile court were "usually silent regarding standards, protocols, or appropriate considerations for decisionmaking."<sup>64</sup> Nothing in *Miller* requires states to do

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<sup>60</sup> *Furman v. Georgia*, 408 U.S. 238, 309 (1971) (Stewart, J., concurring).

<sup>61</sup> *Id.* at 257 (Douglas, J., concurring).

<sup>62</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2472 n.10 (2012).

<sup>63</sup> *Id.* at 2469.

<sup>64</sup> *Id.* at 2474.

anything to address the standardless discretion that operates at this first sorting stage. Moreover, observers of the distribution of LWOP sentences in the pre-*Miller* world lamented the disproportionate representation of minority youth among those so sentenced, observing that black juvenile offenders comprised 60% of those sentenced to LWOP, and that a larger proportion of black juvenile offenders who killed white victims (and a smaller proportion of white juvenile offenders who killed black victims) received LWOP relative to the rate of such offenses.<sup>65</sup> Although there are no national studies that have controlled for non-racial factors that might explain such powerful disparate impacts, the disparities are widespread all over the United States. At least one state study (of Florida) found powerful race effects in multiracial groups matched by age, gender, seriousness of offense, and seriousness of prior record.<sup>66</sup> In states that elect to keep the option of juvenile LWOP or some functional equivalent, the influence of arbitrary or discriminatory factors will almost certainly increase in the post-*Miller* world of greater sentencing discretion. Indeed, in the analogous situation in the death penalty context, racial disparities increased when “mandatory” capital statutes were constitutionally invalidated and replaced with “guided discretion” statutes post-1976.<sup>67</sup>

In such a world, might the *Furman* concern about arbitrary and discriminatory sentencing arise and prompt a similar constitutional mandate of guided discretion, either for the juvenile transfer decision or for the sentencing decision itself? As a predictive matter, the answer is likely no. First, non-capital sentencing, unlike capital sentencing, is primarily the province of judges rather than juries, and judges’ professional norms and repeat-player status reduces (though it does not eliminate) concerns about lack of sentencing standards. The widespread reliance on judicial sentencing discretion throughout the twentieth century that continues in many states today and that is particularly strong in the juvenile context reflects this faith in judicial judgment. Second, in the last several decades, the United States has experimented as a matter of policy rather than constitutional mandate with standardizing judicial sentencing decisions across the board through federal and

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<sup>65</sup> See ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 15–16 (March 2012), [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=390&id=183](http://www.sentencingproject.org/detail/publication.cfm?publication_id=390&id=183).

<sup>66</sup> See HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES n. 68 (Oct. 11, 2005) (citing Donna Bishop & Charles Frazier, *A Study of Race & Juvenile Processing in Florida* (1990) (submitted to the Fla. Sup. Ct. Racial and Ethnic Bias Study Comm’n)), available at <http://www.hrw.org/node/11578/section/5>.

<sup>67</sup> See Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 109 (1984) (arguing that the jury discretion required by non-mandatory capital statutes “gave greater scope for the operation of unconscious biases,” as reflected in the fact that the percentage of black-victim homicides were substantially more rare in “guided discretion” capital sentencing regimes than in the “mandatory” regimes that had preceded them) (citing Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L. Q. 261, 282, 284–87 (1976)).

state guidelines regimes. These experiments have brought to light some of the difficulties and unanticipated consequences that can accompany such projects, including the constitutional constraints imposed by the Sixth Amendment right to a jury determination of all sentencing facts that function as elements of an offense.<sup>68</sup> These concerns make it unlikely that the Court would import a guided discretion requirement as a constitutional mandate.

As a normative matter, these concerns also counsel against the desirability of such a constitutional mandate. But the best argument against a constitutional mandate of guided discretion in the non-capital context is the proven impotence of such a mandate in the capital context. The requirement of guided discretion, though it was the first pillar of the Court's Eighth Amendment capital jurisprudence and though it represents the primary concern that led to the constitutional regulation of capital punishment in the first place, has turned out to be a relatively undemanding constraint. The guidance provided by the new generation of "guided discretion" capital statutes has turned out to be minimal in light of the proliferation of aggravating factors promulgated by state legislatures,<sup>69</sup> the breadth with which they have been interpreted,<sup>70</sup> and the open-ended quality of individualized mitigation.<sup>71</sup> Thus, the Eighth Amendment mandate of guided discretion presents more of a formality than a significant substantive restriction on the discretion of sentencers (or prosecutors). Unless it took an entirely different form, it is not a mode of constitutional regulation in the capital context that promises much regulatory bite if transplanted into the non-capital context.

The most disturbing problem that a mandate of guided discretion is meant to address is the problem of invidious discrimination in the use of our most severe sanctions. However, a decade after approving the new generation of capital statutes with guided discretion, the Court firmly shut the door on direct relief for claims regarding invidious discrimination in the imposition of capital punishment. In *McCleskey v. Kemp*, the Court rejected statistical proof of racial disparities as a

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<sup>68</sup> See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>69</sup> See Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81–83 (Austin Sarat ed., 1999) (describing the statutory proliferation of aggravating factors); DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 102 (1990) (concluding that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the aggravating factors in the post-*Furman* Georgia statute).

<sup>70</sup> See, e.g., *Arave v. Creech*, 507 U.S. 463, 468, 479 (1993) (concluding that asking whether the defendant acted as a "cold blooded pitiless slayer" was a sufficiently clear and objective construction of an otherwise vague aggravating factor regarding "utter disregard for human life").

<sup>71</sup> As the NAACP Legal Defense Fund argued in one its briefs challenging standardless capital sentencing discretion, "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language." Brief *Amici Curiae* of the NAACP Legal Defense and Educ. Fund, Inc. and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 71–203).

basis for a successful challenge under the Equal Protection Clause.<sup>72</sup> Interestingly, the Court's rejection of McCleskey's claim rested in part on the fear that something like what we are addressing in this paper might eventually come to pass—that claimants might raise statistical challenges regarding racial disparities with regard to *non*-capital offenses, a consequence that might call into question the entire criminal justice system. Justice Brennan in dissent called this concern a “fear of too much justice,”<sup>73</sup> suggesting that there must be a principled way to address statistical evidence of racial bias without forswearing the institution of criminal punishment altogether. Whether or not the *McCleskey* Court's fear was justified, the most potentially powerful constitutional doctrine to address invidious discrimination in punishment—the Equal Protection Clause—is essentially inactive in *both* the capital and noncapital realms and thus not a part of the “death-is-different” Eighth Amendment.

In addition to the (pre-*Graham*) separate track of proportionality review, and the twin pillars of guided discretion and individualized sentencing, the “death-is-different” Eighth Amendment has yielded one further mode of special constitutional regulation—the requirement of “heightened reliability” in capital cases. The Supreme Court itself has noted its frequent recourse to such a command: “This Court has repeatedly said that under the Eighth Amendment, ‘the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.’”<sup>74</sup> The Court has applied this principle not only to the sentencing stage of capital trials, but also to other phases of capital trials. For example, the Court held that voir dire on the issue of racial bias was constitutionally required in a capital case involving an interracial crime, even though such voir dire is not constitutionally required in noncapital cases absent special circumstances.<sup>75</sup> Similarly, the Court invoked the principle of heightened reliability at the guilt phase of a capital trial to hold that the capital defendant was constitutionally entitled to have the jury consider a verdict of guilty of a lesser included noncapital offense when the evidence would have supported such a verdict, while explicitly declining to decide whether consideration of lesser included offenses is required in noncapital cases. And naturally, the Court has invoked the principle of heightened reliability in capital sentencing proceedings, for example to overturn a capital sentence when the prosecutor inaccurately led the sentencing jury to believe that responsibility for determining the appropriateness of a death sentence rested with a reviewing court rather than squarely with the jury itself.<sup>76</sup>

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<sup>72</sup> 481 U.S. 279, 297 (1987).

<sup>73</sup> *Id.* at 339 (Brennan, J., dissenting).

<sup>74</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (citation omitted).

<sup>75</sup> *See Turner v. Murray*, 476 U.S. 28, 35 n.7 (1986) (distinguishing *Ristaino v. Ross*, 424 U.S. 589 (1976)).

<sup>76</sup> *See Caldwell*, 472 U.S. at 341.

Is importation of this special mode of constitutional regulation from capital to noncapital cases likely, or desirable? The likelihood that some version of heightened procedural regularity might make its way over to the noncapital side, for LWOP or other especially severe sentences, seems greater than for other aspects of the “death-is-different” Eighth Amendment because the principle of heightened reliability seems rooted as much in traditional notions of Due Process as in the Eighth Amendment. In a number of the Court’s heightened reliability cases, the Court has invoked *both* its Eighth Amendment precedents *and* the Due Process Clause to support its holdings.<sup>77</sup> This slide between the Eighth Amendment and Due Process Clause feels natural because the idea that procedural protection from state action should vary along a sliding scale based in part on the significance of the individual interest at stake is written into the text of the Due Process Clause with its descending scale of deprivations of “life, liberty, and property.” One might read this scale as setting deprivations of life in a separate category and thus conclude that the principle of heightened reliability is especially *unlikely* to cross over into the noncapital realm. However, the punishment of LWOP—unknown at the time of drafting of the Due Process Clause—can fairly easily be characterized as a “deprivation of life,” given that it is a deprivation *for* life, as reflected in its characterization (both by its proponents and its opponents) as “death-in-prison.”<sup>78</sup> Similarly, sentences of life *with* the possibility of parole (however remote), or sentences for terms of years extremely likely to constitute a lifetime, can also be characterized in this way. Moreover, even within the category of deprivations of “liberty,” the inherent sliding scale of the Due Process Clause renders plausible the claim that some heightened procedures may be called for at the very top of the “liberty” scale, even if one insists that these deprivations are distinct from deprivations of “life” itself.

At a practical rather than a conceptual level, the heightened reliability principle is relatively easy to apply in the noncapital context because it is inherently piecemeal and context specific. The requirement of heightened reliability does not require one big thing (like, say, the requirement of individualized sentencing). Rather, what it requires varies depending on the particular context. For example, in the voir dire case noted above, the Court explained that its requirement of voir dire on racial bias was informed by “a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the

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<sup>77</sup> See, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980) (invoking both Due Process Clause and Eighth Amendment precedents that “death is different” in holding that defendant is entitled to have jury consider lesser included noncapital offense when the evidence would support it); *Gardner v. Florida*, 430 U.S. 349, 362–65 (1977) (White, J., concurring in judgment) (invoking both Due Process Clause and Eighth Amendment precedents that “death is different” in holding that presentence reports may not ordinarily be withheld from defense counsel in capital cases).

<sup>78</sup> See Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 GA. ST. U. L. REV. 1085, 1087 (2012).



special seriousness of the risk of improper sentencing in a capital case.”<sup>79</sup> This ability to sculpt procedural requirements with a scalpel rather than axe may make the principle of heightened reliability more attractive as a crossover principle of constitutional regulation.

However, the very piecemeal quality of regulation under the heightened reliability principle has rendered that regulation relatively toothless on the capital side and thus a not very attractive or robust mode of Eighth Amendment/Due Process regulation from the perspective of noncapital claimants. The list of cases in which the Court has intervened to impose heightened procedural requirements in capital cases is ad hoc, marginal, and short. Some of the practices that the Court has forbidden in capital cases were rare to begin with (such as refusing instructions on lesser included offenses supported by the evidence) and others were relatively insignificant (such as refusing extra voir dire on the issue of racial prejudice in cases of interracial violence). The places in which heightened procedural reliability would really make a difference—such as a heightened standard for counsel competence or a lower prejudice standard for claims of ineffective assistance of capital counsel,<sup>80</sup> a lower materiality standard for claims of suppression of *Brady* material favorable to the defense,<sup>81</sup> or a more forgiving standard for procedural defaults barring federal habeas review in capital cases<sup>82</sup>—are areas in which the Court has declined to hold that death is in fact different. Thus, despite the frequency with which the “qualitative difference of death” has been intoned by the Court, the application of the heightened reliability principle has yielded a paltry harvest of differences that matter.

Indeed, in the capital context, it is clear that *the* most important issue to address under the principle of heightened reliability is the problem of wrongful conviction of the innocent. But just as the central problem of race discrimination was left essentially untouched by the Court’s regulation of standardless discretion,

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<sup>79</sup> *Turner*, 476 U.S. at 37.

<sup>80</sup> Some have argued that the Court’s decisions in a series of ineffective assistance of counsel cases regarding capital sentencing have de facto changed the standards governing such claims in capital cases by using the 2003 ABA Guidelines for capital defense counsel as the new source of duties for counsel in capital sentencing investigations. See, e.g., John H. Blume & Stacey D. Neumann, “*It’s Like Deja Vu All Over Again*”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007). However, more recent cases by the Court have called into question the degree or even existence of such a change. See, e.g., *Bobby v. Van Hook*, 558 U.S. 4, 8 n.1 (2009) (cautioning that the Court should not be read to have expressed a view on whether the 2003 ABA Guidelines for capital defense counsel are a legitimate means by which to evaluate counsel’s performance).

<sup>81</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>82</sup> Rather than allow greater access for capital defendants to a federal forum for their federal constitutional claims, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, specifically to address delays in capital cases caused by federal review. The Court has not invoked any of its equitable powers to establish rules regarding procedural defaults to privilege capital claimants.

the central problem of wrongful capital convictions is left essentially untouched by the Court's heightened reliability principle. The Court has held that while innocence may sometimes serve as a gateway for federal courts to consider claims that might otherwise be barred from federal habeas review (in both capital and noncapital cases), "bare" claims of factual innocence are not themselves constitutional claims and therefore are not cognizable on federal habeas review, barring exceptional circumstances,<sup>83</sup> with no exception for capital cases. In rejecting a defendant's claim that it would violate Due Process to execute someone with a substantial claim of innocence, the Court noted the oddity of the defendant's attack only on his death sentence rather than on his underlying conviction.<sup>84</sup> Just as in the race discrimination context, the Court appeared concerned that it could not logically confine an exception to capital cases and thus declined to create an exception in the first place. Hence, where capital cases are most different in fact—in the horror and irrevocability of executing a potentially innocent person—the Eighth Amendment treats death as not different at all.

A review of further potential candidates for importation from the Court's capital Eighth Amendment to the noncapital sides is thus revealing. It demonstrates that the doctrines that have already been imported—the Court's "categorical" proportionality review in *Graham* and its individualized sentencing requirement in *Miller*—are far more robust and demanding than the relatively weak doctrines that have thus far remained only on the capital side (the requirement of guided discretion and the principle of heightened reliability). Moreover, a canvassing of where death is different has highlighted the gaps in the Court's "death-is-different" Eighth Amendment and underscored the importance of those *lacunae*: race and innocence are two of the most pressing problems in the administration of the death penalty in the United States today, and yet in these two areas, death has failed to generate any special protection—at least in part *because* of concerns that such protections might not be able to be confined to the capital context.

### III. INTENDED AND UNINTENDED HARSHNESS: THE LIMITS OF THE EIGHTH AMENDMENT

The concerns about the use of LWOP for juveniles that led the Court to breach the Eighth Amendment's capital/noncapital wall were twofold. First, the Court in *Graham* addressed the disproportionate harshness of LWOP for nonhomicide juvenile offenders, and it questioned in *Miller* the appropriateness of LWOP for virtually *any* juvenile offenders, noting that such occasions will be

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<sup>83</sup> See *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

<sup>84</sup> See *id.* at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution [the defendant] could not be executed, but that he could spend the rest of his life in prison.").

“uncommon.”<sup>85</sup> Second, in both *Graham* and *Miller*, the Court questioned whether juvenile LWOP was actually intended or even explicitly contemplated by lawmakers, given that such sentences were often the product of the interplay of multiple independent statutory provisions and thus not necessarily an indication that the penalty was “endorsed through deliberate, express, and full legislative consideration.”<sup>86</sup>

The nature of these concerns dictated which parts of the Court’s capital Eighth Amendment jurisprudence would be called into play. Proportionality is the key aspect of the Eighth Amendment that deals with harshness or “excessiveness” relative to legitimate penal purposes. Thus, it is no surprise that proportionality review was first piece of the formerly capital Eighth Amendment jurisprudence to be called into service (and transformed in the process). Moreover, the Court could come to consensus in *Miller* short of wholesale invalidation of LWOP for any juvenile offenders by focusing on the mandatory aspects of the sentences in question and thus by importing its individualized sentencing mandate from its capital jurisprudence. In each case, there was an Eighth Amendment doctrine that was both well-suited to the Court’s concern and powerful enough to address it. Thus far, concerns about lack of guided discretion or insufficiently heightened reliability in the juvenile LWOP context have been less central concerns—and the doctrines that could possibly address such concerns are less robust in their requirements, at least as delineated thus far in the Court’s capital jurisprudence. Although we have canvassed some plausible reasons to think that such concerns may yet become more pressing, we ultimately think that the game will not be worth the candle—that is, that the ability of the remaining “death-is-different” Eighth Amendment to address these latter concerns is tenuous and therefore not likely to lead the Court to disregard *stare decisis* to tear down the rest of Eighth Amendment wall that remains.

Will the Court’s partial breach of the Eighth Amendment wall to address the excessive harshness of juvenile LWOP have any effect on the wider category of claims of excessive harshness in criminal punishment, such as the burgeoning use of LWOP for adults, rampant “three strikes and you’re out” legislation, and widespread heavy mandatory minimum sentences for drug (and other) offenders? The emphasis in both *Graham* and *Miller* on the specialness of juveniles and on the lack of contemplation of juvenile LWOP by legislators suggests that *contemplated* harshness by legislators toward *adults* may not generate the same sort of Eighth Amendment scrutiny.

However, the Court’s dramatic interventions with regard to juveniles may add yet another powerful voice for moderation (and the distant threat of a strengthening constitutional standard) to the political realm, where non-juvenile criminal defendants have had far more success recently than in the courts. While the Supreme Court upheld in 2003 a sentence of 25 years to life for the theft of three

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<sup>85</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

<sup>86</sup> *Id.* at 2473 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)).

golf clubs from a pro shop under California's "three-strikes" law,<sup>87</sup> a California initiative last year amended some of the harshest aspects of that law.<sup>88</sup> While the Supreme Court upheld in 1991 a life sentence for a first-time drug offender in Michigan,<sup>89</sup> the state of Michigan repealed the relevant portions of its drug laws in 1998.<sup>90</sup> More recently, New York amended its draconian Rockefeller-era drug laws in 2009,<sup>91</sup> and Congress amended the infamous 100:1 crack/powder ratio in the Fair Sentencing Act of 2010.<sup>92</sup> These recent readjustments in the political realm may suggest both to the Court and to reformers alike that the political realm may hold more promise for scaling back the excessive harshness of our current penal policies than the Court's slowly evolving Eighth Amendment jurisprudence.

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<sup>87</sup> *Ewing v. California*, 538 U.S. 11, 30–31 (2003).

<sup>88</sup> See Tracey Kaplan, *Proposition 36: Voters Overwhelmingly Ease Three-Strikes Law*, SAN JOSE MERCURY NEWS, Nov. 7, 2012, [http://www.mercurynews.com/crime-courts/ci\\_21943951/prop-36-huge-lead-early-returns](http://www.mercurynews.com/crime-courts/ci_21943951/prop-36-huge-lead-early-returns).

<sup>89</sup> *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>90</sup> See Linda Greenhouse, *Winds of Change*, N.Y. TIMES OPINIONATOR (Sept. 18, 2013), <http://opinionator.blogs.nytimes.com/2013/09/18/winds-of-change/>.

<sup>91</sup> See Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 25, 2009, available at [http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html?\\_r=0](http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html?_r=0).

<sup>92</sup> See *Obama Signs Bill Reducing Cocaine Sentencing Gap*, CNN POLITICS (Aug. 3, 2010), [http://articles.cnn.com/2010-08-03/politics/fair.sentencing\\_1\\_powder-cocaine-cocaine-sentencing-gap-sentencing-disparity?\\_s=PM:POLITICS](http://articles.cnn.com/2010-08-03/politics/fair.sentencing_1_powder-cocaine-cocaine-sentencing-gap-sentencing-disparity?_s=PM:POLITICS).