THE CASE OF THE MISSING ARGUMENT: THE MYSTERIOUS DISAPPEARANCE OF INTERNATIONAL LAW FROM JUVENILE SENTENCING IN *MILLER V. ALABAMA*, 132 S. CT. 2455 (2012)*

Last term, the United States Supreme Court took a bold step away from a half century of jurisprudence by refusing to cite international law to interpret the Eighth Amendment's ban on cruel and unusual punishments. In the past, the Court has tended to shield violent teen criminals from the toughest sentences, such as life without the possibility of parole, by using international law to find certain juvenile sentences unconstitutional. This practice made an end run around the democratic desire of the States to proportionately punish juvenile criminals. Despite this tendency to look to international law for guidance, however, in *Miller v. Alabama*[1] the Court nevertheless ignored the international community's stance against juvenile life without parole (JLWOP). Although facially this appears to be a laudable effort to return to a more democratic Eighth Amendment jurisprudence, this disregard is not a victory for state sovereignty.

In *Roper v. Simmons*,[2] *Graham v. Florida*,[3] and *Miller v. Alabama*, the Court continually held that the law's harshest punishments are cruel and unusual with respect to juvenile offenders. In *Roper*, the Court removed the possibility of the death penalty for juvenile murderers and used international law as persuasive authority.[4] In *Graham*, the Court held that JLWOP for noncapital crimes also violated the Eighth Amendment, but the Court's logic depended more heavily on international law than it had

---

* A version of this note, coauthored with Charles D. Stimson, was published by The Heritage Foundation. Charles D. Stimson & Jonathan Levy, The Heritage Found., *The Mysterious Disappearance of International Law Arguments from Juvenile Sentencing in* Miller v. Alabama, LEGAL MEMORANDUM, no. 85, Aug. 22, 2012.

1. 132 S. Ct. 2455 (2012).

2. 543 U.S. 551 (2005).

3. 130 S. Ct. 2011 (2010).

4. 543 U.S. at 575–78.

previously in *Roper*.[5] Despite this international law precedent, the argument that international law prohibits tough sentences for juveniles completely disappeared in *Miller*. What happened?

Put simply, the magic of *stare decisis* happened. The Court did not need international law because the argument's early successes had a lasting impact on juvenile sentencing jurisprudence. The Court infused the Eighth Amendment with foreign laws in *Roper* and *Graham*, both of which served as domestic precedent in *Miller*. Even though these opinions are detrimental to state sovereignty in juvenile sentencing, the full implication of the *Roper-Graham-Miller* pattern is far worse. Emboldened by the success of this subversive archetype, it will be no surprise when the "international law prevents . . ." argument reemerges to drive a new domestic cause.

I. THE FACE ON THE MILK CARTON: THE PROBLEMATIC INTERNATIONAL LAW ARGUMENT

Using international law to interpret the Eighth Amendment, though not unconstitutional, undermines the rule of law. Some national charters require judges to use international law as an interpretive lens,[6] but United States federal judges have no such constitutional mandate. Because there are no limits to or guidelines for the use of international law, a judge may invoke it arbitrarily to promote his policy preferences. Under the Constitution, international law can be a source of law in appropriate instances, but when a judge or justice divines international law only when it conveniently supports his policy preferences, he is substituting his own judgment for that of the democratic legislature under the guise of legal interpretation.[7]

The Constitution features three explicit references to international law or the law of nations. First, Congress has the power "[t]o define and punish . . . Offences against the Law of Na-

5. *See* 130 S. Ct. at 2033–34.

6. *E.g.*, Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 198 (2011) (discussing the interpretive mandate in the Constitution of South Africa).

7. Justice Antonin Scalia put it this way: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry." *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

tions."[8] This enumerated power "grew out of the Founders' concern that the states might not adequately punish infractions of the law of nations (such as attacks on ambassadors)" and might individually precipitate international conflict.[9] Thus, where Congress establishes international law according to its legislative prerogative, the Court may adjudicate claims arising under such Congressional mandates.

The second and third references concern treaties, or conventional international law. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ."[10] Administrations of all political stripes have taken on obligations under conventional international law.[11] Third, subordinate to the Constitution itself and federal laws made "in Pursuance thereof," treaties "shall be the supreme Law of the Land."[12] Hence, where the President establishes a rule of international law by treaty, under the Supremacy Clause, the Court must adjudicate claims arising from that treaty.[13]

In addition to the three ways that the Constitution and international law are tied together, the Framers might have implied others. For example, because the Eighth Amendment Framers borrowed the "cruel and unusual punishments" clause from the 1689 English Bill of Rights, they incorporated the English commentary and judicial opinions that define the phrase.[14] Absent more recent American precedent, these opinions may therefore be controlling. But while the Constitution may allow for the use of nondomestic sources of law, it contains no explicit requirement to interpret the Eighth Amendment via modern international law.

---

8. U.S. CONST. art. I, § 8, cl. 10.

9. EDWIN MEESE III ET AL., THE HERITAGE FOUND., THE HERITAGE GUIDE TO THE CONSTITUTION 126 (2005).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *See, e.g.*, John B. Bellinger III, *Without White House muscle, treaties left in limbo*, WASH. POST, June 11, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004356.html (citing George W. Bush's record number of ratified treaties); Phyllis Schlafly, *The Legacy of Clinton's Web of Treaties*, CLARE BOOTHE LUCE POL'Y INST., May 04, 2001, http://www.cblpi.org/resources/speech.cfm?ID=17.

12. U.S. CONST. art. VI, cl. 2.

13. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801).

14. Solem v. Helm, 463 U.S. 277, 285–86 (1983).

Without a constitutional mandate to consider international law in interpreting the Eighth Amendment, the decision to do so is questionable policy. Foreign experiences are inappropriate in constitutional interpretation because constitutions are generally "unique expressions of national character."[15] As Justice Samuel Alito has explained,

> [T]he Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The Framers . . . wanted [Americans] to have the rights of Americans . . . .[16]

And the disparity between many uniquely American rights and those of foreign citizens has not diminished since 1789. A paradigm example is "the constitutional protection of free speech . . . [which] is far more robust than in most other nations—and so relying on persuasive foreign authority could serve to undermine [this] key, and uniquely American, constitutional protection."[17]

The use of international law in judicial opinions subverts not only traditionally conservative but also traditionally liberal policy goals. For example, United Nations figures show that in seventy-one percent of countries a woman must prove some mitigating circumstance such as rape or incest to receive a legal abortion.[18] Were this apparent international consensus to drive a reconsideration of the constitutionality of abortions, the Court would in-

---

15. Louis J. Blum, Comment, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 163 (2002) (citations omitted).

16. *Nomination of Samuel A. Alito, Jr., to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006) (statement of then-Judge Alito to Sen. Thomas Coburn).

17. Steven Groves, *Questions for Judge Sotomayor on the Use of Foreign and International Law*, THE HERITAGE FOUND., Jul. 6, 2009, at 2, http://www.heritage.org/research/reports/2009/07/questions-for-judge-sotomayor-on-the-use-of-foreign-and-international-law; *see also* Noah Feldman, *Should the Internet age change free speech?*, NEWSDAY, Sept. 28, 2012, http://www.newsday.com/opinion/oped/feldman-should-the-internet-age-change-free-speech-1.4054058 (describing the global animosity towards American free speech).

18. *World Abortion Policies 2011*, UNITED NATIONS DEP'T OF ECON. AND SOCIAL AFFAIRS POPULATION DIV., http://www.un.org/esa/population/publications/2011abortion/2011abortionwallchart.pdf (last visited Nov. 9, 2012).

evitably restrict the right of abortion. Or consider gay rights: The vast majority of countries have institutionalized sexual orientation based discrimination.[19] Additionally, the Fourth Amendment's exclusionary rule, a landmark Warren Court reform, does not exist abroad.[20] Thus, international norms can adversely affect U.S. policies across the ideological spectrum. It would behoove all political ideologies to abstain from international consensuses.

When judges are left to use customary international law—laws arising from the general practice of nations—without objective guidelines, there is a strong temptation to abuse the judicial power arises. By arbitrarily appealing to international law, judges may apply their own policy preferences to rewrite democratically enacted legislation and undermine the local rule of law.[21] The judiciary should not be making such bare policy determinations; rather, only Congress can implement these policy choices, and it can only do so through the required gauntlet of bicameralism and presentment.[22] An arbitrary government with no limiting principle was "the ugly thing that this country was founded to repudiate."[23]

International law is particularly worrisome when applied to juvenile sentencing given the greater prevalence of juvenile crime in the United States. The premise that the United States should conform to an international consensus "overlooks the qualitative differences between the United States and other countries" in the area of juvenile crime.[24] In 1998, for example,

---

19. *See* DANIEL OTTOSON, STATE-SPONSORED HOMOPHOBIA 11–21 (2009), http://ilga.org/historic/Statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf.

20. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 343 (2006) ("The exclusionary rule as we know it is an entirely American legal creation.").

21. This topic was covered in depth not too long ago in this Journal. *See generally* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653 (2009).

22. *See* INS. v. Chadha, 462 U.S. 919, 954–55 (1983).

23. Robert E. Moffit, Senior Fellow, The Heritage Foundation, Address During First Principles Luncheon for The Heritage Foundation Summer 2012 Interns (Jul. 31, 2012) (on file with author).

24. CHARLES D. STIMSON & ANDREW M. GROSSMAN, THE HERITAGE FOUND., ADULT TIME FOR ADULT CRIME: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 19 (2009), http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens.

United States jurisdictions prosecuted over one million juveniles.[25] This total represents the same number as in England, Thailand, Germany, China, Canada, Turkey, and South Korea combined.[26] According to 2002 World Health Organization statistics, the youths in the United States commit the third most murders absolutely, and the fourteenth most murders per capita.[27] In these lists, the United States is the only nondeveloping Western nation on the list of the top thirty-seven countries with the highest homicide rates among youths aged 10–29.[28] "In terms of youth killers per capita, the United States is much more like Colombia or Mexico than the United Kingdom, which ranks 52 on the list."[29] Considering the gross disparity in violent juvenile crimes between the United States and its international peers, it is particularly egregious for judges to use international law as a guide for juvenile sentencing policy.

II. THE THRILL OF THE CHASE: HOW INTERNATIONAL LAW SUDDENLY DISAPPEARED FROM JUVENILE SENTENCING JURISPRUDENCE

The Court laid the foundation to fold foreign laws into the Eighth Amendment[30] in *Trop v. Dulles*.[31] A plurality of the *Trop* Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[32] In *Gregg v. Georgia*, the Court further explained that to judge these evolving standards, the Court will "look to objective indicia that reflect the public atti-

25. *Id.* at 21.

26. *Id.*

27. *Id.* at 22. It should be noted, however, that the World Health Organization defines "youths" as people aged 10–29, an age range that might be more expansive in scope than the definition of "juvenile" as it is used in the United States. *See* UN WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 25 (2002), http://whqlibdoc.who.int/hq/2002/9241545615.pdf.

28. *Id.*

29. *Id.*

30. The Eighth Amendment's ban on cruel and unusual punishments was incorporated through the Fourteenth Amendment to apply to the States in *Robinson v. California*, 370 U.S. 660, 667 (1962).

31. 356 U.S. 86 (1958).

32. *Id.* at 101 (plurality opinion).

tude toward a given sanction."[33] In *Thompson v. Oklahoma*,[34] however, the questionable doctrine of looking to international law for jurisprudential guidance became a catastrophe when the Court seemed to define the "maturing society" as an international one. The *Thompson* Court held that juvenile murderers under sixteen could not be executed, citing international law in passing to affirm its holding.[35] Fifteen years later, the international law action in juvenile sentencing began in *Roper v. Simmons*.[36] First, the Court found "objective indicia" in a national consensus that the *Thompson* bar should be raised from sixteen to eighteen.[37] But the *Roper* Court also found a concordant international consensus.[38] Such use of international law seemed innocuous at the time because the domestic consensus was solid. In contrast, the Court's opinion in *Graham v. Florida*, proscribing JLWOP for noncapital crimes—otherwise a structural photocopy of *Roper*—depended more on international law because there was no national consensus. Finally, in *Miller v. Alabama*, the Court ignored the international law argument altogether, but the Court's refusal to allow any mandatory JLWOP sentences in fact stemmed from the poisonous *Graham* tree.

---

33. 428 U.S. 153, 173 (1976). The wisdom of this standard is questionable as it allows the branch of government not directly elected by the people to mark the boundaries of societal morality, a job best suited for the legislature. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) ("[W]e possess neither the expertise nor the prerogative to make policy judgments."). This topic is, however, beyond the purview of this discussion.

34. 487 U.S. 815 (1988).

35. *Id.* at 830–31 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community . . . . Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.").

36. 543 U.S. 551 (2005).

37. *Id.* at 552.

38. *Id.*

A. Baited: Roper v. Simmons *establishes a favorable attitude toward international law*

Convincing his friends that they could literally get away with murder because they were under eighteen, seventeen-year-old Christopher Simmons and his accomplices broke into a house with the intent to murder whomever they found inside.[39] The home happened to be that of Shirley Crook, a woman with whom Simmons had previously been in a car accident.[40] He bound her eyes, mouth, hands, and feet, covered her face with a towel, and threw her from a railroad trestle into a river where she drowned.[41] Simmons was charged in adult court with burglary, kidnapping, stealing, and murdering in the first degree.[42] He was duly convicted, and sentenced to death, but the Missouri Supreme Court reversed the sentence in Simmons's *habeas corpus* proceedings against Superintendent of Potosi Correctional Center, Donald Roper.[43] Arguing that in so doing, the Missouri Supreme Court had misinterpreted United States Supreme Court precedent, Roper appealed to the United States Supreme Court for reinstatement of the death penalty.[44]

In his Supreme Court brief, Simmons asserted that the contemporary standard of decency counseled against the juvenile death penalty.[45] Simmons showed that thirty-one states proscribed the death penalty for juveniles, including seven that had done so recently.[46] Furthermore, of the remaining nineteen states, only three states had actually executed a minor in the preceding decade.[47] Thus, Simmons argued, there was a national consensus that (1) the diminished culpability of juvenile criminals makes the death penalty a disproportionate sentence, even if an adult might be so sentenced for the same crime, and

---

39. *Id.* at 556.
40. *Id.*
41. *Id.* at 556–57.
42. *Id.* at 557.
43. *Id.* at 559–60.
44. Brief for Petitioner at 8, 11–14, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).
45. Brief for the Respondent at 38, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).
46. *Id.*
47. *Id.* at 11.

(2) no penological theory justified the death penalty for juvenile killers.[48] Simmons then highlighted a concordant consensus in the international community. Framing the argument in moral tones, Simmons maintained that global "revulsion" toward juvenile executions provided independently conclusive evidence of contemporary standards of decency.[49] Simmons's global consensus was derived from the recent dearth of juvenile death sentences handed down in international courts; the inclusion in the United Nations' Convention on the Rights of the Child of an article prohibiting the execution of juvenile offenders; and the statement by the Inter-American Commission on Human Rights that executing juveniles was essentially a violation of binding customary international law.[50] In his own brief, Roper denied the existence of a national consensus, pointed out that the Senate did not ratify the treaties cited by Simmons, and objected to the existence of any binding rule of customary international law.[51]

The Supreme Court held that according to the Eighth Amendment, "the law's most severe penalty"—death—could not be levied against a juvenile offender.[52] Writing for a five-person majority, Justice Kennedy focused on finding a national consensus. He found that the abolition of juvenile executions in a majority of states (thirty-one), including the recent abolition of the juvenile death penalty by seven states, and the infrequency with which state courts actually issued the sentence, evinced a national consensus that executing juveniles was a disproportionate punishment and could not be justified by traditional penological theories.[53] Although the Court indicated that this evidence was sufficient for its holding,[54] the majority

48. *Id.* at 23.

49. *Id.* at 37–38.

50. *Id.* at 47–50. To this day, the United States has still not ratified the United Nations Convention on the Rights of the Child. *E.g.*, Ted R. Bromund, *This Halloween, Undead (Treaties) Haunt the Halls of the Senate*, THE FOUNDRY (Oct. 29, 2010, 6:00 PM), http://blog.heritage.org/2010/10/29/this-halloween-undead-treaties-haunt-the-halls-of-the-senate/.

51. Brief for Petitioner, *supra* note 44, at 41.

52. Roper v. Simmons, 543 U.S. 551, 571 (2005).

53. *Id.* at 567.

54. *Id.*

gave due consideration to international law, arguing that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[55] The Court spoke almost as though the international covenants had created a rule of customary international law. Also, the United Kingdom's recent ban on the death penalty for juveniles proved particularly relevant to the Court because of the Eighth Amendment's English roots.[56] The Court found that the United States stood "alone in a world that ha[d] turned its face against the juvenile death penalty."[57] The international consensus agreed with national opinion; therefore, the Court decided that the contemporary standard of decency had been well established and proscribed the death penalty for juvenile murderers.[58] Having established that international law could be important in Eighth Amendment jurisprudence, the Court turned to the law's next harshest penalty: life without parole for noncapital crimes.

B. Switched: How Graham v. Florida *established international law as an essential piece of the precedential puzzle*

At sixteen, petitioner Terrance Jamar Graham and a friend donned masks and entered a restaurant at closing time through a rear door that a third accomplice, a restaurant employee, had left unlocked.[59] Graham's accomplice bludgeoned the restaurant manager with a steel bar in a failed attempted robbery.[60] Graham pled guilty in adult court, and the trial judge gave him

---

55. *Id.* at 578.

56. *Id.* at 577. This use of English law must not be confused with the acceptable uses of international law outlined in Part I. Writing for three dissenters, Justice Scalia explained the difference:

> [T]he Court undertakes the majestic task of determining . . . *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own.

Id. at 626–27 (Scalia, J., dissenting).

57. *Id.* at 577.

58. *Id.* at 578.

59. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

60. *Id.*

three years of probation, including twelve months in jail.[61] Soon after Graham began his post-incarceration probation, and one month shy of his eighteenth birthday,[62] Graham violated his probation: Graham and his friends manhandled their way into the home of Carlos Rodriguez Lopez, held a pistol to his head and demanded money, eventually taking a gold crucifix, and locking Lopez and a neighbor in a closet.[63] In a second robbery attempt just minutes later, one of Graham's accomplices was shot, and when Graham dropped his injured friend off at a local hospital, he almost crashed into a sheriff's detective whom Graham then led on high-speed chase through residential streets.[64] The police eventually apprehended him and found three guns in his car—one .38 revolver and two semiautomatics, a .380 and a .45—another violation of Graham's probation.[65] Graham was sentenced to life without parole for violating his probation,[66] the maximum sentence for a criminal under eighteen after *Roper* had taken the death penalty off the table for juvenile criminals.[67]

Structurally, Graham's Supreme Court brief closely resembled Simmons's brief from four years prior. Graham first pointed to a national consensus both that the diminished culpability of juveniles barred JLWOP for noncapital crimes and that the sentence was not justified under traditional penological theories.[68] Graham then argued that international law prohibited JLWOP for noncapital crimes,[69] but his hand-me-down argument showed some early signs of fading as it had lost the moral indignation that Simmons had advanced in his own brief. In *Roper*, the Court had looked for global "revulsion" towards the juvenile death penalty,[70] but Graham posited that JLWOP was merely "un-

61. *Id.* The judge withheld adjudication on Graham's plea, so although he was sentenced, he was never found guilty for attempted robbery. *See id.*

62. *Id.* at 2019.

63. Brief of Respondent at 8–9, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412).

64. *Id.*

65. *Id.* at 9.

66. *Graham*, 130 S. Ct. at 2020.

67. Justice Kennedy noted, "The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday." *Id.* at 2019.

68. Brief for Petitioner at 43–44, *Graham*, 130 S. Ct. 2011 (No. 087412).

69. *Id.* at 64–66.

70. Brief for the Respondent, *supra* note 45, at 37–38.

usual."[71] Like Simmons, Graham tried to establish that rules of both customary and conventional international law prohibited JLWOP.[72] Graham argued that the same treaties that had blocked the juvenile death penalty according to Simmons also blocked JLWOP for noncapital crime.[73] Furthermore, he cited statistics showing the rarity with which international courts issue the sentence.[74] In response, the State of Florida attacked Graham's national statistics, citing flaws in the methodology of Graham's studies.[75] Florida presented its own data to show that JLWOP sentences for noncapital crimes had actually increased fourfold since 1985.[76] As for the international consensus, Florida argued that: (1) The treaties cited by Graham were not binding, not self-executing, or not applicable;[77] and (2) the numerical data Graham provided to show an emerging rule of customary international law was unverified because it relied on nations' self-reporting.[78] Finally, Florida argued that although international law could confirm a national standard of decency, at least according to the *Roper* Court, no such national consensus had emerged, and therefore international law was irrelevant.[79]

Writing for almost the same 5-4 majority as in *Roper*,[80] Justice Kennedy held that life without parole for nonhomicidal teens, like the death penalty for juvenile murderers, violates the Eighth Amendment.[81] Unlike the *Roper* Court—which could at

---

71. Brief for Petitioner, *supra* note 68, at 64.

72. *See id.*at 65–66. ("Article 24(1) of the International Covenant on Civil and Political Rights . . . requires that every child have 'the right to such measures of protection as are required by his status as a minor.' The United Nations Human Rights Committee has held 'that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant.'") (citations omitted).

73. *See Id.*

74. *Id.* at 63–64.

75. Brief of Respondent, *supra* note 63, at 32.

76. *Id.* at 38–39.

77. *Id.* at 17.

78. *Id.* at 44.

79. *Id.* at 43.

80. The only difference between the *Roper* and *Graham* majorities was the replacement of Justice David Souter with Justice Sonya Sotomayor.

81. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010). Despite the Court's ruling, at least one legal scholar seriously doubts the Constitution actually forbids JLWOP for noncapital crimes. *See, e.g.*, STIMSON & GROSSMAN, *supra* note 24, at 23–39.

least plausibly argue that a national consensus had formed in opposition to the death penalty for juvenile offenders—the *Graham* Court strained to show that the approval of the sentence by thirty-seven states did not constitute a consensus *in favor* of JLWOP for noncapital offenders because many of those states rarely issued the sentence.[82] Nevertheless, the Court held, a national consensus was not necessary to define the evolving standards of decency.[83] The Court even did *sua sponte* research to fill in gaps it perceived in Graham's data.[84] Moreover, the *Graham* Court embarked upon a social science excursion examining why the various penological justifications for sentencing practices were not served by JLWOP.[85] This type of empirical examination is the proper realm of legislatures, not courts.

In summation, the Court linked three arguments to reach its conclusion that JLWOP for noncapital crimes was unconstitutional: (1) the fact that no traditional penological theory supported the sentence; (2) juvenile, noncapital offenders have limited culpability; and (3) such sentences are unusually severe. The Court, thus far largely deficient in legal reasoning, then turned to foreign legal authority to bolster its argument. The Court insisted that "[t]he debate . . . over whether there is a binding *jus cogens* norm against [JLWOP] is . . . of no import," and that the controlling question was whether the sentence constituted cruel and unusual punishment.[86] As to that question, the Court declared that

> [t]he laws and practices of other nations and international agreements [are] relevant to the Eighth Amendment not because those norms are . . . controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.[87]

Although the *Roper* Court had a clear, objective, and domestic consensus counseling against juvenile death sentences with

---

82. *Graham*, 130 S. Ct. at 2024.
83. *Id.* at 2026.
84. *Id.*
85. *Graham*, 130 S. Ct. at 2026–30.
86. *Id.* at 2034.
87. *Id.*

which the international community agreed, the *Graham* Court had none. The sole legal argument the Court presented was that a murky international quasi-consensus prohibited JLWOP for noncapital crimes. The *Graham* Court thus showed the integral nature of international law in juvenile sentencing holdings. The existence of this norm, however, made the next development surprising, if not entirely baffling.

C. Vanished: How the international law argument disappeared from Miller v. Alabama *and* Jackson v. Hobbs

The Supreme Court heard two JLWOP cases from Alabama and Arkansas in its 2011 term. Like twenty-four other states with mandatory life without the possibility of parole sentences for juveniles, Arkansas mandated the sentence for Kuntrell Jackson's felony murder conviction, and Alabama required the same of Evan Miller's murder in the course of arson.[88]

In *Miller v. Alabama*, fourteen-year-old Evan Miller, together with Colby Smith, joined their neighbor Cole Cannon to smoke marijuana and play drinking games in Cannon's home.[89] When Cannon passed out, Miller and Smith stole his wallet, but he regained consciousness before they could complete the job.[90] Cannon retaliated, but Miller and Smith beat Cannon with a baseball bat.[91] Covering Cannon's face with a sheet, Miller declared, "I am God, I've come to take your life," and delivered a final blow to Cannon.[92] Lighting Cannon's trailer home on fire, they left Cannon to die of smoke inhalation.[93] Miller was convicted of capital murder in the course of arson, which carried a

88. Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012) (Arkansas); *id.* at 2463 (Alabama). Alabama's statute was technically not mandatory, according to the respondents, because the sentencer had the option of giving either a death sentence or life without parole. The Supreme Court rejected this argument because it had not been argued in any court below. Still, the Court's decision in *Roper* to ban the death penalty for juveniles made life without parole in the Alabama statute *de facto* mandatory. *Id.* at 2462 n.2 (2012).

89. *Id.* at 2462.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

mandatory sentence under Alabama law of life without parole.[94] The Supreme Court of Alabama declined Miller's invitation to examine the constitutionality of mandatory JLWOP sentences,[95] but the United States Supreme Court heard the case together with *Jackson v. Hobbs*.

In *Jackson v. Hobbs*, fourteen-year-old Kuntrell Jackson, Derrick Shields, and another young man planned to rob a video store.[96] Shields concealed a sawed-off shotgun in his coat sleeve as they entered the store.[97] Jackson initially waited outside but eventually entered the store to find Shields wielding the shotgun and threatening the store clerk, Laurie Troup.[98] When the clerk refused to give Shields any money, Shields shot and killed Troup.[99] The jury found Jackson guilty of capital felony murder, which carried a mandatory sentence of life without parole under Arkansas law.[100] Jackson was content with his sentence until after the decisions in *Roper* and *Graham*.[101] Inspired by those opinions, Jackson petitioned for *habeas corpus*,[102] but his request was denied by the Arkansas Supreme Court, which held that *Roper* and *Graham* were narrowly tailored to death sentences and JLWOP for noncapital crimes respectively, and that their logic could not be extrapolated to apply to JLWOP for capital offenses.[103] The United States Supreme Court accepted Jackson's case.

Although his predecessors had advanced an international law theory as a major and independent theory of unconstitutionality before the Supreme Court, Jackson touched on the issue only briefly in his Supreme Court brief.[104] In his two-paragraph discussion, Jackson reiterated the points the Court highlighted in

---

94. *Id.* at 2463.
95. *Id.*
96. *Id.* at 2461.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See supra* Part II.
102. *Miller*, 132 S. Ct. at 2461.
103. *Id.*
104. Brief for Petitioner at 50–51, Jackson v. Hobbs, 132 S. Ct. 2455 (2012) (No. 10-9647).

Graham and *Roper* and quoted extensively from Justice Kennedy's opinions, but Jackson did not add any new arguments in support of following international law.[105] And although Miller's brief incorporated "[t]he central constitutional arguments" from Jackson's brief, it is unclear whether Jackson's international law argument was included in this incorporation.[106]

Writing for an almost identical 5-4 majority to those in *Roper* and *Graham*,[107] Justice Elena Kagan ignored the international law question altogether.[108] In fact, in the five majority, concurring, and dissenting opinions, there is not one mention of international law. Rather, the *Miller* majority focused on *Graham*, *Roper*, *Thompson*, and the social science that led the Court to restrict juvenile sentencing options in those cases. Still, the Court held that statutes that mandatorily impose life without parole, that is, without regard to youth as a mitigating factor, are unconstitutional.[109]

III. APPREHENDED

Given the Court's reliance on international law in *Roper* and *Graham*, it is surprising that the *Miller* Court did not refer at all to international law in its decision. But the Court's purported silence is misleading. Over the course of less than a decade, a razor thin Supreme Court majority successfully folded international law into domestic precedent. In *Roper*, the Court used international law as persuasive, but logically unnecessary, authority. In *Graham*, the Court again used international law, but this time the international community's consensus played a crucial role in the majority's reasoning. Yet when the litigants in *Miller* advanced the international law argument, the Court no longer needed international law to restrict juvenile sentencing options because it could simply rely on the domestic prece-

105. *Compare id.*, *with* Graham v. Florida, 130 S. Ct. 2011, 2033 (2010), *and* Roper v. Simmons, 543 U.S. 551, 575 (2005).

106. Brief for Petitioner at 2, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646).

107. The only difference between the *Graham* and *Miller* majorities was the replacement of Justice John Paul Stevens with Justice Elena Kagan.

108. *See generally Miller*, 132 S. Ct. 2455–90.

109. *Id.* at 2469.

dent of *Roper* and *Graham*. Far from a victory for democratic legitimacy, by importing international law through the Trojan horse of domestic precedent, the Court's decision in *Miller* actually impeded state sovereignty.

The decision in *Roper* was, in a way, innocuous. By counting the thirty-one states that had individually banned the death penalty for murderers under eighteen, and noting the seven that had done so since *Thompson*, the Court used a well-established, if questionable, standard for interpreting the Eighth Amendment rooted in the enactments of domestic legislatures. This method showed that the States generally agreed that putting minors to death was disproportionate to any crime, and that no penological theory could justify the death penalty for juveniles. International consensus was an afterthought. Because both the domestic and international opinion pointed to the same conclusion, it is possible that international law made no difference in the holding. Yet lurking in the opinion was a temperamental precedent that international law had a part to play in interpreting the Eighth Amendment, opening the door for the destructive opinion in *Graham*.

In *Graham*, unlike *Roper*, the national and international opinion diverged and may even have pointed in opposite directions. The Court obfuscated a thirty-seven states majority allowing JLWOP for nonhomicides by showing that many of those thirty-seven rarely issued the sentence. Bereft of any national consensus, the Court arrived at its holding by cobbling together social science data, penological theory, and, of course, international law. Social science data and penological theory may be relevant to the Court's teaching function,[110] but to base a holding on such reasoning is unconvincing and a potential misuse of the judicial power.[111] As for international law, although Justice Kennedy emphasized that it did not control the

---

110. *See* Gerard E. Lynch, *Constitutional Law As Moral Philosophy: the Constitution, the Courts, and Human Rights*, 84 COLUM. L. REV. 537, 551 (1984).

111. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 351 (2009) (Kennedy, J., dissenting) (stating that "[s]tate legislatures, . . . unlike Members of this Court, have the power and competence to determine whether scientific tests are unreliable"); Dale Carpenter, *A Maximalist Decision, Raising the Stakes*, THE VOLOKH CONSPIRACY (Aug. 4, 2010, 7:54 PM), http://www.volokh.com/2010/08/04/a-maximalist-decision-raising-the-stakes/.

Court's opinion, it was still the only *legal* basis that the Court articulated for its holding. As such, despite Justice Kennedy's claim to the contrary, international law was logically necessary to the *Graham* holding. This reliance on international law is dangerous because it appears to permit justices to decide arbitrarily when and how to use international law. If national and international law agree, the Court may focus on national law, using international law as support. If national and international law disagree, a justice can choose among her options, citing international law when it supports her political preference, but ignoring it where she disagrees.

No matter the controlling reasoning in *Roper* or *Graham*, the Court relied to some extent on foreign laws to interpret the Eighth Amendment. Had the Court relied on a duly-ratified treaty, rather than international agreements to which the United States was not party, the argument may have been perfectly in line with the proper role of the judiciary—although even then there are some limits to the scope of the federal treaty power to displace otherwise constitutional state law. Nevertheless, once the United States rejected the treaty provisions cited in *Roper* and *Graham*, the Court's reliance on them became inexplicable.[112] Still, it would seem that these two decisions would allow the continued assertion of international law in juvenile sentencing opinions. It is curious, therefore, that in *Miller*, the Court ignored international law entirely.

Despite the Court's silence on international law in *Miller*, the opinions were not completely devoid of international law. Rather, the *Miller* Court's consideration of international law was veiled by the Court's reliance on the *Roper* and *Graham* precedents. In *Roper*, the Court used international law as a confirmation of a national revulsion to the death penalty for juvenile offenders. In *Graham*, international law buttressed otherwise insufficient reasoning. Having established the precedent that JLWOP could be a "cruel and unusual punishment" in *Graham*, Justice Kagan's heavy reliance on the authority of *Graham* and *Roper* necessarily required international law. Without the international law domino, *Graham* would have no legal basis and

112. STIMSON & GROSSMAN, *supra* note 24, at 41.

would fall. And without that essential precedent, *Miller* might fall, as well. Petitioners Miller and Jackson no longer needed the international law argument. The damage had already been done, and the Court needed to rely only on the reasoning and result in *Roper* and *Graham*.

Taken together, the opinions in *Roper*, *Graham*, and *Miller* palpably weaken state sovereignty in sentencing juvenile killers and violent teens.[113] As the Court removes state sentencing options, it may be increasingly difficult to combat the astronomical juvenile crime rates that plague the United States. Even though the Court did not explicitly rely on international law in *Miller*, there is no indication that its value as an interpretive tool has diminished. Perhaps the myriad senators who strongly objected to the use of foreign law in Constitutional interpretation during the confirmation hearings of Justices Sotomayor, Kagan, and Alito,[114] the three Justices nominated since *Roper*, influenced the Court. No doubt other litigants will cite foreign law in future cases in which it is equally inappropriate.

It is too early to determine the future role of international law in juvenile sentencing decisions, but to attempt to read the tea leaves on that issue misses the true danger in the *Roper-Graham-Miller* trifecta. Supreme Court watchers would do well to find those practices in the United States that contradict international practice—such as abortion issues, LGBT rights, and the exclusionary rule—and observe as a *Roper*-esque Court begins by establishing a favorable attitude toward international law as a corollary to domestic law over the course of one or a handful of opinions. A *Graham*-like Court will then take on the mantle and buttress a weak opinion with international law. The game will conclude when the Court ignores international law but relies on the international law-infused precedents.

If we have finally bid farewell to the international law argument in Eighth Amendment jurisprudence, it is because that

---

113. *See, e.g.*, *id.* at 3–12, 25–30.

114. *See, e.g.*, *The Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. 125–27 (2010) (question of Sen. Chuck Grassley to then-Solicitor General Elena Kagan), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf.

argument begot domestic case law which performed the same function. Whether juvenile murderers should be put to death, whether noncapital juvenile criminals should receive life without parole, and whether JLWOP can be a mandatory sentence are all legitimately debatable issues. Whether the judiciary ought to be deciding these issues based on international law is a simpler question, and allowing such use has broad implications for individual rights and state sovereignty. So although the case of international law's disappearance in juvenile sentencing may be closed, it is essential to prepare for its reemergence in some other court, in some other case, advanced for some other cause, ready to squeeze past United States sovereignty and into constitutional law.

Jonathan Levy