ARTICLES

THE MANDATE OF *MILLER*

William W. Berry III*

INTRODUCTION

It's a pity the law doesn't allow me to be merciful.

— Javert, from *Les Misérables*[1]

In applying the Eighth Amendment's prohibition against cruel and unusual punishments,[2] the United States Supreme Court has long abided by one core principle: death is different.[3] Because the consequences of an execution are unique in their severity and irrevocability, the Eighth Amendment requires that capital cases receive a heightened set of safeguards not available in non-capital cases.[4] In recent years, for instance, the Court has adopted categorical prohibitions against executions of offenders with mental retardation,[5] juvenile offenders,[6] and offenders whose criminal activity did not include homicide.[7] Likewise, the Court has

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1. LES MISÉRABLES (Universal 2012), *based on* VICTOR HUGO, LES MISÉRABLES (1862).

2. U.S. CONST. amend. VIII.

3. Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238, 286 (1972) is apparently the origin of the Court's death-is-different capital jurisprudence. *See Furman*, 408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004) (discussing the Court's death-is-different jurisprudence).

4. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row were erroneous is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (remarking that death differs from life imprisonment because of its "finality").

5. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

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

7. Kennedy v. Louisiana, 554 U.S. 407, 446 (2008).

historically refused to apply the Eighth Amendment to restrict disproportionate sentences in non-capital cases, even where the sentence imposed seems particularly excessive.[8]

Recently, however, the Court has twice breached this formerly impervious barrier between capital and non-capital cases.[9] In 2010, the Court held in *Graham v. Florida* that the Eighth Amendment barred imposition of life-without-parole sentences on juveniles in non-homicide cases.[10] And in 2012, the Court chipped away further at the bright-line distinction between capital and non-capital cases in *Miller v. Alabama*, holding that the Eighth Amendment barred mandatory life-without-parole sentences for juvenile offenders.[11]

To be sure, the outcomes in these cases rest upon the notion that, as a class, juvenile offenders[12] are unique.[13] Because juveniles are categorically different from other offenders, reasoned the Court, the Eighth Amendment proscribes certain juvenile non-capital sentences.[14]

By crossing this bright-line rule in *Graham*, however, the Court also implicitly

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8. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994, 996 (1991) (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming life-with-parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279–84 (1983) (reversing sentence of life-without-parole for presenting a no account check for $100, where defendant had six prior felony convictions).

9. *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (acknowledging the Court's different treatment of capital cases); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861, 861 (2008).

10. Graham v. Florida, 560 U.S. 48, 82 (2010). For more on the practical implications of *Graham*, see Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012) (exploring the consequences of *Graham*).

11. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012). The Court combined *Jackson v. Hobbs* with *Miller*, as both cases presented the same question: whether a state law imposing a mandatory life-without-parole sentence for a juvenile offender violated the Eighth Amendment prohibition against "cruel and unusual" punishment. *Id.* at 2460–66.

12. Here, as in all of the cases discussed herein, "juvenile" means an individual that had not reached the age of eighteen at the time the crime in question occurred.

13. *See, e.g.*, *Miller*, 132 S. Ct. at 2470 ("So if . . . 'death is different,' children are different too." (quoting *Harmelin*, 501 U.S. at 959)); *Graham,* 560 U.S. at 91 (Roberts, C.J., concurring) ("Graham's age places him in a significantly different category from the defendant[] in . . . *Harmelin* . . . ."); *see also* Elizabeth S. Scott, *"Children are Different:" Constitutional Values and Justice Policy* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 12-324, 2012), *available at* http://ssrn.com/abstract=2191711; Michael Barbee, Comment, *Juveniles are Different: Juvenile Life Without Parole After* Graham v. Florida, 81 MISS. L.J. 299, 300–01 (2011).

14. *Miller*, 132 S. Ct. at 2475; William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. (forthcoming 2014) (exploring the questions of *how* and *when* juveniles are different and their implications for the application of the Eighth Amendment).

raised the issue of whether life-without-parole sentences require heightened Eighth Amendment scrutiny based on their own inherent severity and finality.[15] And *Miller* arguably highlights an obvious application for such scrutiny: mandatory life-without-parole sentences.[16]

It is not the mandatory sentence itself, but the consequence of such a sentence—death in the custody of the state—that implicates the Eighth Amendment.[17] The principal constitutional problem with mandatory death-in-custody sentences is that they deny offenders their day in court by prohibiting individualized consideration of the offender and the offense by the court and by foreclosing introduction of mitigating evidence.[18]

This day in court—an offender's opportunity to plead for his life—is so crucial because it will likely be his only opportunity to avoid a sentence to die in state custody.[19] The Court has made it clear that such a right is available to capital defendants,[20] and now, in *Miller*, for juveniles facing life imprisonment without parole.[21]

This Article argues for an extension of this Eighth Amendment protection to all cases in which a defendant faces the possibility of a death-in-custody sentence—a death sentence, a life-without-parole sentence, or a sentence with a term of years

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15. *Graham*, 560 U.S. at 69. Many commentators on both sides of the political spectrum have been hesitant to advocate for a wholesale Eighth Amendment attack on life-without-parole sentences. For conservatives, the idea of expanding the Constitution to restrict the power of states to punish continues to raise objection in an age of penal populism. For liberals, particularly death penalty abolitionists, life-without-parole sentences create an interesting conundrum. On the one hand, limiting the power of states to impose unduly harsh penalties, particularly on non-violent offenders, is appealing. But, life-without-parole has arguably been one of the most successful tools in diminishing the use of the death penalty and moving it toward abolition. Attacking, then, the use of life-without-parole too aggressively has the potential to undermine the progress made toward death penalty abolition.

16. *Miller*, 132 S. Ct. at 2475; *see generally* Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (arguing that mandatory life-without-parole sentences are particularly egregious).

17. As discussed in Part III, one can conceptualize *Graham* and *Miller* not as exceptions to the death-is-different rule, but instead as an extension of the death-is-different principle to death-in-custody sentences, which are slow and extended forms of capital punishment. *See, e.g.*, William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010) (arguing that life-without-parole sentences are unique and deserve their own level of higher scrutiny).

18. Lockett v. Ohio, 438 U.S. 586, 608 (1978); Woodson v. North Carolina, 428 U.S. 280, 303–304 (1976); Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976). Certainly, such offenders are often unsympathetic and may deserve, at least from the perspective of the victims and their families, to spend the rest of their lives in prison. But, it is likewise true that such offenders also deserve an opportunity to explain why such a harsh sentence is not appropriate in their specific case, given its particular circumstances and their personal character.

19. It is certainly true that in many cases, this hearing will result in the same outcome. There exists, however, no other meaningful opportunity for someone who deserves a lesser sentence to argue for a different outcome. The legislature is unable to consider such a claim, prosecutors typically seek such a penalty as a lesser alterative to death, the appellate courts are unlikely to reverse a life-without-parole sentence on any grounds, and the likelihood of clemency in a non-capital case is miniscule.

20. *Lockett*, 438 U.S. at 608; *Woodson*, 428 U.S. at 304; *Roberts*, 428 U.S. at 335.

21. *Miller*, 132 S. Ct. at 2475.

approaching the life expectancy of the offender.[22] Accordingly, the mandate of *Miller* is that the Eighth Amendment should require courts to make individualized sentencing determinations and consider mitigating evidence before imposing a death-in-custody sentence.[23]

Part I of the Article briefly considers the virtues and vices of mandatory sentences to contextualize the case for expanding the holding in *Miller*. Part II describes the meaning of *Miller*, highlighting the core principles of the Supreme Court's Eighth Amendment mandatory sentencing cases. In Part III, the Article then advances its central argument—the mandate of *Miller*—claiming that application of these principles authorizes an expansion of the Eighth Amendment to bar mandatory sentences in all death-in-custody cases and to provide for an opportunity to present mitigating evidence in such cases. Part IV explains where *Miller*'s mandate matters, exploring the normative consequences of applying this approach. Finally, Part V demonstrates why *Miller*'s mandate matters, articulating the policy reasons for expanding the scope of the Eighth Amendment in mandatory sentencing cases.

I. CONSIDERING THE MERITS OF MANDATORY SENTENCES

Before assessing the propriety of broadening the Eighth Amendment to circumscribe the use of mandatory sentences in death-in-custody cases, it is instructive to consider the utility and propriety of mandatory sentences generally. At its core, the question of whether mandatory sentences are appropriate is one of institutional choice related to the allocation of sentencing discretion between the legislatures and the courts.

When a legislature assigns a mandatory penalty for violation of a criminal law, the result is the removal of discretion from a court to determine the appropriate sentence in a given case. The legislature can achieve this completely, or in part, as in the case of a mandatory minimum sentence. Thus, the adoption of a mandatory sentence is a decision to allow the legislature, and not the court, to choose the specific sentence for a certain crime.

Two theoretical juxtapositions are particularly useful to assess this institutional choice question: (1) bright-line rules versus case-by-case decisions, and (2) ex ante versus ex post decision-making.

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22. As explained below in Part III, there is no practical difference between a life-without-parole sentence and a term sentence that will likely result in the offender dying in prison. In applying *Miller* to strike down a 110-year sentence given to a juvenile offender, the California Supreme Court recently agreed there is no distinction between a life-without-parole and term sentence that extends beyond the life expectancy of the offender. People v. Caballero, 282 P.3d 291, 295 (Cal. 2012).

23. In this context, the concept of a mandate clearly does not refer to a fiat or a decree, but rather an implicit authorization or consent by the Court in *Miller* for future cases to pursue this line of reasoning.

A. Bright-Line Rules versus Case-by-Case Decisions

One presumed advantage of mandatory sentencing is its ability, as a bright-line rule, to create consistency in sentencing,[24] assuming the statute at issue is specific enough to identify similar conduct.[25] When the legislature removes the court's discretion in such a manner, offenders who violate the same criminal provision will receive the same sentence.[26] In the context of mandatory minimums, this goal of consistency aims to ensure all perpetrators of a particular crime receive a minimum sentence, placing a floor on the court's sentencing discretion.[27]

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24. Politicians often describe this perceived advantage of a mandatory sentence using the rhetoric of "truth-in-sentencing." Truth-in-sentencing laws seek to reduce the possibility of early release from prison for offenders, meaning that the sentence served is the same (or almost the same) as the sentence imposed. In practice, truth-in-sentencing laws have had mixed results. *See, e.g.*, Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002); Susan Turner et al., *Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75 (1999).

25. Felony murder statutes, for instance, do not succeed at doing this. Commentators have long criticized felony murder as an acceptable way of determining which offenders should be eligible for the death penalty and which should not. *See, e.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 447–48 (1985) (arguing that the felony-murder rule "makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide'" and that in addition to such "theoretical defects" the rule "contravenes due process and eighth amendment protections") (quoting John Calvin Jeffries Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1383 (1979)); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 750–52 (2007) (arguing that California's felony murder statute creates disproportionate outcomes in capital cases); William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 703 (2012). Indeed, the Court has questioned whether it is possible to group cases in such a way that results in the same sentence in every case. *See Woodson*, 428 U.S. at 296–97 ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.") (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

26. *See* Mirko Bagaric, *Consistency and Fairness in Sentencing—The Splendor of Fixed Penalties*, 2 CAL. CRIM. L. REV. 1, ¶ 1 (2000) (arguing that consistency is one of the benefits of mandatory penalties).

27. Indeed, commentators and politicians have long emphasized the virtues of mandatory minimum sentences. *See, e.g.*, *Public Hearing Before the U.S. Sentencing Comm'n* 160–66 (2010) (testimony of Maxwell Jackson, Chief of Police, Harrisville City, Utah), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Hearing_Transcript.pdf; *Id.* at 153–59 (testimony of David Hiller, National Vice President, Grand Lodge, Fraternal Order of Police), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Hearing_Transcript.pdf; *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 71–78 (2009) (statement of Michael J. Sullivan, Partner, Ashcroft Sullivan, LLC); *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 104 (2007) (statement of Richard B. Roper, United States Attorney, Northern District of Texas), *reprinted in* 19 FED. SENT'G REP. 352, 352–53 (2007); Jay Apperson, *The Lock-'em-Up Debate; What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994, at C1; Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167, 168 (1993); Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT'G REP. 230, 230 (1992); *cf. Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1284–85, 1296 (1999) (debate between Congressman Asa Hutchinson and United States District Court Judge Stanley Sporkin); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE

The cost of adopting such a bright-line rule is that it precludes case-by-case consideration of the offender and the offense. Where the sentence is death-in-custody, the consequences of this inflexibility are more significant, as the bright-line rule will mandate death in prison regardless of mitigating circumstances.[28]

Moreover, the actions of prosecutors and juries demonstrate that mandatory sentences may not provide the consistency or certainty they purport to, particularly it in death-in-custody cases. When a prosecutor deems a mandatory sentence to be excessive for a particular crime, he or she has the option to charge the offender with a lesser crime to avoid the mandatory sentence.[29] Similarly, a jury can choose to nullify the mandatory sentence it finds objectionable by finding the defendant innocent of the crime.[30] As a result, the purported bright-line consistency of mandatory sentences can become more theoretical than practical in nature.

B. Ex Ante Versus Ex Post Decision-making

Ex ante decisions, like the ones made by a legislature in adopting a mandatory sentence, have the advantage of careful consideration looking forward to determine the best approach to solving a problem. The legislature enjoys a degree of

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CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm (providing history of federal mandatory minimums and listing purported goals of mandatory minimums). Of course, many others have questioned the efficacy of such sentences and the likelihood of injustice. *See, e.g.*, John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 312 (2004) (listing reasons why judges oppose mandatory minimums); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 65 (1993) (arguing that mandatory minimums still cause unwarranted sentencing disparity and have untoward effects on the processing of criminal cases); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003) (arguing that the power shift from mandatory minimums has damaged the adversary system and ultimately wrought injustice).

28. *See, e.g.*, Cassia Spohn, *Criticisms of Mandatory Minimums*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 279 (Andrew von Hirsch et al. eds., 3d ed. 2009).

29. *Id.* at 279–80 (citing United States Sentencing Commission Study finding that federal prosecutors chose to charge lesser offenses in one-fourth of mandatory minimum cases).

30. *See, e.g.*, CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). Note that in many cases, the jury is not aware of the existence of jury nullification, making this less of a problem. While many courts have held jury nullification improper, courts have difficulty determining in some cases whether nullification has occurred. Others believe that jury nullification is part of the right to trial by jury. As Judge Wiseman explained:

> The drafters of the Constitution clearly intended [the right of trial by jury] to protect the accused from oppression by the Government . . . . Part of this protection is embodied in the concept of jury nullification: In criminal cases, a jury is entitled to acquit the defendant because it has no sympathy for the government's position. The Founding Fathers knew that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience. Although we may view ourselves as living in more civilized times, there is obviously no reason to believe the need for this protection has been eliminated. Judicial and prosecutorial excesses still occur, and Congress is not yet an infallible body incapable of making tyrannical laws.

United States v. Datcher, 830 F. Supp. 411, 413 (M.D. Tenn. 1993) (internal citations omitted).

insulation from any particular case and, as a result, may possess more objectivity in sentencing than does a court.[31] The representatives in the legislature also have a different kind of political accountability than elected state judges, perhaps making it less likely that personal political calculations might affect sentencing decisions.[32]

On the other hand, the exercise of making a determination through legislative debate results in a one-time judgment that may not appreciate many of the relevant ex post considerations that may later emerge during the commission of a crime.[33] It also assumes that ex ante decision-making of this type is practically achievable in that the cases that the legislature groups under the heading of a particular crime are fundamentally similar, or at least similar enough to warrant the same punishment.[34]

Further, mandatory sentences forego the ex post benefits that emanate from the judicial branch in the sentencing process. By relying solely on an a priori decision of the legislature to determine the appropriate sentence, a court is unable to account for important facts or considerations that the legislature did not foresee. Indeed, the fine-tuning of a sentence that a judge can engage in by considering various aggravating or mitigating circumstances is lost when mandatory sentences foreclose the exercise of judicial discretion. Thus, mandating a particular sentence for a particular crime is likely to result in unfairness in at least some cases.

Perhaps most troubling, though, is that in practice the ex post decision-making still persists in the office of the prosecutor.[35] Not only do mandatory sentences preclude judges from exercising discretion, but they also, in effect, shift the exercise of that discretion to the executive branch in its exercise of prosecutorial discretion to determine the appropriate sentence.

Often criticized by commentators for this reason, mandatory sentences allow prosecutors to decide what sentence an offender merits by choosing what offense to charge.[36] The plea bargaining process facilitates this transfer of sentencing

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31. *See* Louis B. Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 640 (1981).

32. *See id.* at 641–42 (emphasizing that legislative judgment related to sentencing adopts a broader, more philosophical approach than that of a judge or the community at large in responding to a particular criminal act).

33. One can imagine a number of circumstances that may contribute to the commission of a crime that might increase or decrease the culpability of the offender in a way that the statute cannot capture. This is particularly true in capital cases where it is impossible for the legislature to impose a mandatory death penalty that is not both over and under inclusive. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (finding that mandatory death penalties do not adequately replace arbitrary and wanton jury discretion with objective standards when juries are likely to consider the grave consequences of conviction in reaching a verdict).

34. *See supra* note 25.

35. *See, e.g.*, Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 12 (2010); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 81–82 (2009).

36. Certainly, there are also many other problems with mandatory sentences, particularly mandatory minimums. *See, e.g.*, Luna & Cassell, *supra* note 35, at 13; Tonry, *supra* note 35, at 83; Symposium, *Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303 (2004); Lowenthal, *supra* note 27, at 65; Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and*

discretion from the court to the prosecutor, meaning that in many cases a sentencing outcome depends more upon which defendant has more to offer the prosecutor than upon what the circumstances of a particular case dictate to a judge at sentencing.[37]

Despite their shortcomings from a policy perspective, mandatory sentences, on their face, comply with the requirements of the United States Constitution.[38] That is, there is nothing inherently unconstitutional about the mandatory sentence itself.[39] The Supreme Court has repeatedly emphasized that legislatures possess the power to determine the sentences of criminal offenders through mandatory sentences.[40]

Nonetheless, the Supreme Court has interpreted the Constitution to place limits on mandatory sentences when they constitute cruel and unusual punishment as prohibited by the Eighth Amendment.[41] The *Miller* case is the Court's latest attempt to delineate such a limit on mandatory sentences.[42]

II. *MILLER*'S MEANING

A. Mandatory Sentences under the Eighth Amendment

To understand the Supreme Court's holding in *Miller*, a brief overview of its applicable Eighth Amendment mandatory sentencing precedents is helpful. The Court first held, in *Woodson v. North Carolina* and *Roberts v. Louisiana*, that the

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Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 192–95 (1993). Judges have also been critical of mandatory sentences. *See, e.g.*, Marcia Coyle, *Judges Give Thumbs Down to Crack, Pot, Porn Mandatory Minimums*, NAT'L L.J., June 16, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462736591; *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 34–66 (2009) (statement of Hon. Julie E. Carnes, Chair, Criminal Law Committee of the Judicial Conference of the United States); David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 3 (2008) (basing argument for new sentencing policies on interviews of federal judges and judicial opinions disagreeing with mandatory sentences); Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 133 (2004) (discussing the confrontation between mandatory sentences and exercise of judicial independence); Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENT'G REP. 215 (2003); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547, 549 (2001) (focusing on the "routine and modest" injustices produced by mandatory minimums); Marc Miller & Daniel J. Freed, *Editors' Observations: The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 FED. SENT'G REP. 59, 59–60 (1993) (detailing historical judicial opposition to mandatory minimums); *cf.* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 799–802 nn.218–29 (2002) (providing citations to judicial criticisms of drug-related sentences).

37. *See, e.g.*, Luna & Cassell, *supra* note 35, at 12; Tonry, *supra* note 35, at 101 (discussing possible prosecutorial motivations).

38. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991).

39. *Id.*

40. Lockyer v. Andrade, 538 U.S. 63, 76–77 (2003); Ewing v. California, 538 U.S. 11, 24–28 (2003); Harris v. United States, 536 U.S. 545, 568–69 (2002).

41. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

42. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).