

# LEGAL MEMORANDUM

No. 85 | AUGUST 22, 2012

## The Mysterious Disappearance of International Law Arguments from Juvenile Sentencing in *Miller v. Alabama*

Charles D. Stimson and Jonathan Levy

### Abstract

For almost a decade, activists have asserted that, through the mechanism of the Eighth Amendment's prohibition on "cruel and unusual punishments," international law either forbids or constrains states from exposing the roughest juvenile criminals to the toughest sentences. Relying in part on those arguments, the Supreme Court of the United States has diminished sentencing options, for adult and juvenile offenders alike, at every turn. However, in *Miller v. Alabama*, foreign and international law are conspicuous only for their absence. This may signal a welcome shift in the Court's jurisprudence. Activists will no doubt continue to cite foreign and international sources in making their cases against domestic sentencing practices, but *Miller* at least suggests that the Court has grown wary of such arguments.

This paper, in its entirety, can be found at <http://report.heritage.org/lm85>

Produced by the Center for Legal & Judicial Studies

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

It may be time to say a guarded goodnight to the argument that foreign law should dictate or influence the constitutional limits on sentences for juvenile killers and violent teens.

For almost a decade, activists have asserted that, through the mechanism of the Eighth Amendment's prohibition on "cruel and unusual punishments," international law either forbids or constrains states from exposing the roughest juvenile criminals to the toughest sentences. Relying in part on those arguments, the Supreme Court of the United States has diminished sentencing options, for adult and juvenile offenders alike, at every turn.

However, in *Miller v. Alabama*,<sup>1</sup> the Court's latest juvenile-sentencing case decided this summer, foreign and international law are conspicuous only for their absence. This may signal a welcome shift in the Court's jurisprudence.

Using foreign law to interpret the United States Constitution "is dangerous, because American law is unique—the constitutional protection of free speech, for example, is far more robust than in most other nations—and so relying on persuasive foreign authority could serve to undermine these key, and uniquely

### KEY POINTS

- Regrettably, foreign and international law seem to have had a lasting impact on the Supreme Court's Eighth Amendment jurisprudence and, in particular, on juvenile sentencing.
- However, *Miller v. Alabama*, the Court's latest juvenile-sentencing case decided this summer, might signal a welcome shift in the Court's jurisprudence.
- In *Miller v. Alabama* and *Jackson v. Hobbs*, a five-justice majority of the Court held that statutes that impose life without parole mandatorily are unconstitutional, but it made no mention whatsoever of the voluminous body of international and foreign materials that had been put before it. In fact, in the Court's five separate opinions, not even one mentions foreign or international law.
- No doubt litigants will continue to cite foreign laws in future Eighth Amendment cases, but it may be that the Court has become less receptive to such arguments. If so, then that is *Miller's* silver lining.

American, constitutional protections.”<sup>2</sup> According to Justice Samuel Alito, such use would confound the Framers. As he once explained, “The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time.”<sup>3</sup>

Early reliance on foreign sources would have doomed the American experiment in representative democracy subject to constitutional limitations. That risk remains.

Regrettably, foreign and international law seem to have had a lasting impact on the Court’s Eighth Amendment jurisprudence and, in particular, on juvenile sentencing. Activists will no doubt continue to cite foreign and international sources in making their cases against domestic sentencing practices, but *Miller* at least suggests that the Court has grown wary of such arguments.

### **A Growing International Consensus: *Roper v. Simmons***

Although the influence of foreign sources on the meaning and application of the Eighth Amendment can be traced back to the late 1950s, only in the past decade has foreign law exacted influence on the sentencing of juvenile offenders as a group. The Court’s current approach to juvenile sentencing was set in its 2005 decision in *Roper v. Simmons*.

The facts of the case are chilling. Having convinced his friends

that they could literally get away with murder because of their youth, 17-year-old Christopher Simmons broke into Shirley Crook’s house intent on murdering whoever was inside. He found Crook at home and bound her eyes, mouth, hands, and feet. He covered her face with a towel, removed her from her home, and threw her from a railroad trestle into a river, where she drowned. Simmons was charged in adult court and sentenced to death.<sup>4</sup>

---

#### **ALTHOUGH THE INFLUENCE OF FOREIGN SOURCES ON THE MEANING AND APPLICATION OF THE EIGHTH AMENDMENT CAN BE TRACED BACK TO THE LATE 1950S, ONLY IN THE PAST DECADE HAS FOREIGN LAW EXACTED INFLUENCE ON THE SENTENCING OF JUVENILE OFFENDERS AS A GROUP.**

---

Obviously, in challenging his sentence, Simmons was going to argue the law, not the facts. In a Supreme Court brief, Simmons asserted that sentencing a juvenile to the death penalty violated the Eighth Amendment’s prohibition on cruel and unusual punishment. Juveniles, he argued, have diminished culpability; therefore, the death penalty would be disproportionate even if an adult might be so sentenced for the same crime. Simmons claimed that

there was an emerging national consensus against the imposition of the death penalty on juveniles.

He also drew on international law and foreign domestic law to indicate that there was, in addition, a global “[r]evulsion” against executing juvenile criminals and that this repugnance provided conclusive evidence of the contemporary standard of decency. The 1989 Convention on the Rights of the Child was ratified by “[e]very country in the world, except the United States and Somalia—which has no organized government”; only seven countries worldwide had executed juveniles from 1990–2004; and the Inter-American Commission on Human Rights had declared that the proscription on executing juveniles was binding customary international law. Therefore, Simmons concluded, international law prohibited the death penalty for juveniles.<sup>5</sup> In response, the state objected to Simmons’s citation of international law, pointing out that the relevant treaties had not been ratified by the Senate.<sup>6</sup>

The Supreme Court held that, according to the Eighth Amendment, an offender who was under 18 years of age could not receive “the law’s most severe penalty.”<sup>7</sup> The five-justice majority focused on evidence of a widespread national consensus, both in absolute numbers and in a general trend of abolishing the death penalty for juveniles.

---

1. *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455 (2012).

2. Steven Groves, *Questions for Judge Sotomayor on the Use of Foreign and International Law*, HERITAGE FOUNDATION WEBMEMO No. 2525, July 6, 2009, available at <http://www.heritage.org/research/reports/2009/07/questions-for-judge-sotomayor-on-the-use-of-foreign-and-international-law>.

3. The Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Congress (2006) (statement of then-Judge Alito to Senator Thomas Coburn).

4. *Roper v. Simmons*, 543 U.S. 551 (2005) at 556–57.

5. Brief for the Respondent at 47–50, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

6. Brief for the Petitioner at 27–28, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

Although the Court indicated that this evidence was sufficient for its holding, it also acknowledged international law as a respected, if not controlling, source of meaning for interpreting the Eighth Amendment. International covenants, it found, had created a rule of international law.<sup>8</sup> Additionally, the United Kingdom's ban on the sentence was particularly relevant to the majority because of the Eighth Amendment's English roots. The United States stood "alone in a world that ha[d] turned its face against the juvenile death penalty."<sup>9</sup> Therefore, the Court concluded, the contemporary standards of decency proscribed the death penalty for juvenile murderers.

---

**WHETHER IT CONTROLLED THE OUTCOME OR NOT, THE COURT'S RELIANCE ON FOREIGN LAWS TO INTERPRET THE EIGHTH AMENDMENT WAS PART OF A CENTURY-LONG EFFORT TO INJECT FOREIGN LAW INTO THE INTERPRETATION OF THE CONSTITUTION.**

---

Whether it controlled the outcome or not, the Court's reliance on foreign laws to interpret the Eighth Amendment was part of a century-long effort to inject foreign law into the interpretation of the Constitution. Despite closing the door to most judge-made law in *Erie R. Co. v. Tompkins*, the Court opened

it a crack in *Trop v. Dulles* by interpreting the Eighth Amendment to reflect "the evolving standards of decency that mark the progress of a maturing society" and taking into account customary international law.<sup>10</sup>

However, the Court's more recent cases, including *Roper*, go well beyond *Trop* by relying on specific instruments of international law and the laws and practices of foreign countries. Had the Court relied on a treaty duly ratified by the United States Senate rather than laws to which the United States was not party, it would have been perfectly in keeping with the accepted role of the judiciary—although there are some limits to the scope of federal treaty law with respect to displacing otherwise constitutional state laws. But because the United States had rejected the treaty provisions cited in *Roper*, the Court's reliance on them was unjustifiable.

With the death penalty off the table for juvenile killers and violent teens, the anti-incarceration forces now set their sights on juvenile life without parole ("JLWOP") sentences for noncapital crimes.

**Unconvincing Logic Makes Bad Precedent: *Graham v. Florida***

Again, as in *Roper*, the facts of *Graham v. Florida* are shocking. Terrance Jamar Graham was one month shy of his 18th birthday

when he was released from a year-long stint in county jail for armed burglary. Almost immediately, he violated his parole, invading a home to commit one violent burglary and attempting a second before leading police on a high-speed chase.<sup>11</sup> For breaching his parole, Graham was sentenced to life without the possibility of parole, the maximum sentence for a criminal under 18 after *Roper*.

In his brief before the Supreme Court, Graham pointed to juveniles' diminished culpability and the purported lack of justification under traditional penological theories for such an extreme sentence. Graham attempted to establish that JLWOP for noncapital crimes is unusual because it is rarely imposed.

Turning to foreign practices, Graham noted that the fact that few countries actually impose JLWOP sentences is evidence of a rule of customary international law against the sentence. He also described the various United Nations resolutions and international conventions that counsel against JLWOP. In the United Nations General Assembly, 185 countries sought to abolish JLWOP, and only the United States objected. Finally, the United Nations Convention on the Rights of the Child, which Simmons had shown banned juvenile death sentences, also forbade JLWOP, as did the International Covenant on Civil and Political Rights.<sup>12</sup>

---

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

8. *Id.* at 578.

9. *Id.* at 577.

10. The precedent on which the Court relied to establish a basis for this practice was a plurality holding in *Trop v. Dulles*, 356 U.S. 86 (1958).

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

12. Brief for Petitioner at \*64, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (No. 08-7412) ("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.'").

In response, the State of Florida relied on research by The Heritage Foundation establishing that this supposed international consensus was irrelevant to the question before the Court. The United States had no international obligation that would prohibit states from imposing JLWOP sentences. In particular, the United States was not a party to the Convention on the Rights of the Child; thus, the convention was not binding. Likewise, the International Covenant on Civil and Political Rights did not specifically prohibit JLWOP, and the treaty was not self-executing; therefore, it could not be enforced without specific implementing legislation.<sup>13</sup> Finally, Florida argued that while international law might confirm an evolving standard of decency, at least according to the *Roper* Court, no such national consensus had emerged; therefore, international law was irrelevant.<sup>14</sup>

In another 5–4 decision, the Court held that JLWOP for non-homicide crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>15</sup> Unlike the *Roper* Court, which had arguably identified an emerging national consensus that rejected imposition of the death penalty for juveniles, the *Graham* Court strained to show that 37 states allowing JLWOP sentences did not constitute a national consensus in favor of JLWOP.

The Court was forced to develop other arguments to ban JLWOP for noncapital crimes. It came up with three: (1) no traditional penological theory supported the sentence; (2) juvenile offenders have limited culpability; and (3) the absolute severity of the sentence is disproportionate. It also relied on foreign and international law to bolster its conclusion:

[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.<sup>16</sup>

In short, the relevant treaties did not establish customary international law sufficient to prohibit JLWOP for juvenile offenders in countries that were not party to those treaties, but they could still provide support to the Court’s reasoning—a “distinction without a difference.”<sup>17</sup> If foreign sources were entirely irrelevant to its conclusion, the Court would not have cited or discussed them. Because it did, one must conclude that these sources played some role in the Court’s decision. This point was not

lost on activists seeking to further expand the Court’s conception of cruel and unusual punishments, particularly with respect to juvenile offenders.

### **Sudden Disappearance: *Miller v. Alabama* and *Jackson v. Hobbs***

Not surprisingly, foreign and international law made a prominent appearance in 2012 when the Court heard two more cases on juvenile sentencing: *Miller v. Alabama* and *Jackson v. Hobbs*.<sup>18</sup> Like 24 other states, Alabama and Arkansas permitted the imposition of JLWOP for specific types of homicide. Jackson’s capital felony murder conviction and Miller’s conviction for murder in the course of arson each carried a mandatory sentence of life without parole.

In *Miller v. Alabama*, 14-year-old Evan Miller attempted to steal the wallet of his neighbor, Cole Cannon, who had passed out from drinking, but Cannon regained consciousness, and Miller beat him with a baseball bat. Miller then set fire to Cannon’s home, leaving him to die of smoke inhalation. Miller was convicted of capital murder in the course of arson, a crime that carried a mandatory sentence of life without parole under Alabama law.<sup>19</sup>

In *Jackson v. Hobbs*, 14-year-old Kuntrell Jackson and two accomplices planned to rob a video store.

13. Florida fully adopted the position championed by Heritage. See Charles D. Stimson and Andrew Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, HERITAGE FOUNDATION SPECIAL REPORT No. 65, August 17, 2009, available at <http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens> (Chapter Five: The U.S. Has No International Obligation to Ban Juvenile Life Without Parole).

14. Brief of Respondent at 42, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412).

15. *Graham*, 130 S.Ct. at 2034. Despite the Court’s ruling, there remains serious doubt in the legal community about whether the Constitution actually forbids the JLWOP for non-capital crimes. See Stimson, *supra* note 13, at 23–39.

16. *Id.*

17. See Groves, *supra* note 2.

18. The Court consolidated the cases and issued one decision. *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455 (2012).

19. *Id.* at 2462.

One accomplice threatened the store clerk with a sawed-off shotgun, but when the clerk refused to give them any money, the accomplice shot and killed her. An Arkansas trial court found Jackson guilty of capital felony murder, which carried a mandatory sentence of life without parole.<sup>20</sup>

Whereas their predecessors had advanced a foreign law theory as a primary argument before the Supreme Court, Jackson barely addressed the issue in his brief. In an almost fleeting two-paragraph discussion, Jackson merely reiterated the points the Court had highlighted in *Graham* and *Roper*. Moreover, while Miller's brief incorporates the central constitutional arguments from Jackson's brief, it is unclear whether Jackson's international law argument is included in this incorporation. Nonetheless, several amicus briefs made the typical international and foreign law argument with great vigor and at great length, running through other nations' practices and the usual hodgepodge of treaties, U.N. resolutions, and other disparate materials.

Although a five-justice majority of the Court held that statutes that impose life without parole mandatorily are unconstitutional, it made no mention whatsoever of the voluminous body of international and foreign materials that had been put before it. In fact, in the Court's five separate opinions, not even one mentions foreign or international law. Instead, the majority relied

principally on the reasoning of *Roper* and *Graham*, as well as several other cases decided before it had prohibited the juvenile death penalty outright.

---

**THE COURT MAY HAVE GOTTEN THE RESULT WRONG IN JACKSON V. HOBBS, BUT AT LEAST ITS REASONING WAS NOT MARRED BY THE CITATION OF SOURCES THAT PROPERLY HAVE NO BEARING ON THE MEANING OF THE EIGHTH AMENDMENT.**

---

The Court may have gotten the result wrong, but at least its reasoning was not marred by the citation of sources that properly have no bearing on the meaning of the Eighth Amendment. In the scheme of things, this may seem to be a small victory, but it could also signal the Court's turning its back on a body of law that is both irrelevant and, in the way that it has been deployed, often misleading.

**Conclusion:  
*Miller's Silver Lining?***

It would be premature, at the least, to declare a lasting victory over the misuse of foreign law on the basis of a single decision. In *Roper*, the Court used foreign law as a confirmation of an emerging national consensus against the imposition of the juvenile death penalty. Unable to find a national consensus in *Graham*, the Court used foreign law to buttress

the conclusion that it said it had reached on other grounds. Having established its juvenile-sentencing precedents based on foreign law, the Court simply may not have felt the need to cite foreign sources in *Miller* and *Jackson*. The damage had already been done, and it was enough just to cite *Roper* and *Graham*.

But this might also mean that the march of foreign and international law is at an end and that the Court is just working through the implications of its previous decisions. Perhaps the many Senators who strongly objected to the use of foreign law in constitutional interpretation during the confirmation hearings of the three justices nominated since *Roper*—Justices Elena Kagan, Sonia Sotomayor, and Samuel Alito—influenced the Court. Or perhaps the scholarly criticism of the Court's arbitrary citation of foreign sources has had an effect.

No doubt litigants will continue to cite foreign laws in future Eighth Amendment cases, but it may be that the Court has become less receptive to such arguments. If so, then that is *Miller's* silver lining.

—**Charles D. Stimson** is Chief of Staff to the President and Senior Legal Fellow at The Heritage Foundation. **Jonathan Levy** is a student at Harvard Law School who contributed to the paper this summer while he worked in the Center for Legal & Judicial Studies as part of Heritage's Young Leaders Program.

---

20. *Id.* at 2461.