A barbarous dissent: The US Supreme Court in Miller v. Alabama

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The decay of liberalism and the rise of a fascistic ideology on America's highest court was highlighted again this week in the case of *Miller v. Alabama*, an appeal which considered the mandatory life sentencing of juveniles in cases of homicide.

Prior to the appeal, 29 states in the United States had legislation that provided for a mandatory life sentence without parole for minors convicted of homicide offences. As a result of the decision of the majority of the court, comprising Justices Kagan, Ginsberg, Sotomayor, Breyer and Kennedy, these statutes will be struck down as a violation of the Constitution's Eighth Amendment, which outlaws cruel and unusual punishment.

The appeal was decided along with a separate case from Arkansas involving mandatory life sentencing for minors, *Jackson v. Hobbs*. Both appellants were 14 years old at the time of the commission of the offences. The laws of Alabama and Arkansas mandated that the 14-year-olds die in prison, irrespective of whether a judge or jury, taking into account the individual circumstances of the children and the crimes, would have given a lesser sentence.

The histories of both boys showed lives of abuse and extreme social deprivation. Miller had attempted to commit suicide at the age of 6. Both cases involved a homicide in the course of a botched robbery. In the case of Jackson, the boy was not physically involved in the killing, but present amongst young accomplices.

The decision of the majority of the court was not radical and not especially enlightened relative to the decisions on crime and punishment made in liberal periods in the court's history. Drawing on several precedents and psychological evidence, including submissions *amicus curiae* from the American Psychological Association, the majority concluded, hardly surprisingly, that children were not the same as adults and the removal of discretion in sentencing by the imposition of mandatory life sentences, without consideration of age, was a cruel and unusual punishment.

The court did not decide that life in prison without parole for a child convicted of homicide was excluded in every instance. Its ruling was limited to the mandatory character of those sentencing laws.

Justice Kagan referred to various psychological studies and noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Accordingly, the offender's age would always have to be taken into account, which mandatory sentencing precludes.

Kagan continued: "... the mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole-sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."

Citing previous authority, Kagan added: "… just as the chronological age of a minor is itself a relevant mitigating factor of great import, so must the background mental and emotional development of a youthful defendant be duly considered in assessing his culpability."

The majority concluded that "mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features, among them immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account

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the family and home environment that surrounds him and from where he cannot usually extricate himself, no matter how brutal or dysfunctional."

In summary, the decision of the majority was, by the standards of general human decency, not at all exceptional or earth-shattering. It said a court must be permitted to take into account that the accused is a child before imposing sentence.

The unremarkable reasoning underlying the court's decision only places in sharper relief the barbarous character of the four dissenting judgments.

Justices Scalia, Alito and Thomas, along with Chief Justice Roberts, all were in agreement that whether or not the accused was a child did not matter. If the elected legislature wished to punish an offender by a sentence of life without parole, it was not for the court to strike down the law as cruel and unusual, they maintained.

Underpinning the criminal jurisprudence of the dissentients is a well advanced conception that the "will of the people" as expressed through state legislatures should take precedence in the area of punishment for criminal offences. Chief Justice Roberts took the fact that 29 legislatures had enacted laws imposing mandatory life sentences on young offenders as proof that such laws were not cruel and unusual.

Such a conception of law leaves no place for reason, humanity or mercy. The law is simply the will of "the nation."

Referring to how criminal law had, since the 1980s, expressed an "outcry against repeat offenders" and "broad disaffection with the rehabilitative model," Roberts concluded that "a mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency."

The obvious cruelty of a life-without-parole sentence imposed on a child, particularly in circumstances of profound deprivation, neglect and abuse, can be described only as barbaric. Chief Justice Roberts showed no mercy and no regard for science in his judgment, concluding, "Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they kill again. But that is not our decision to make. Neither the text of the Constitution nor precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole."

In a similar vein, Justices Scalia and Thomas declared: "The legislatures of Arkansas and Alabama, like those of 27 other jurisdictions, have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of parole. Nothing in our Constitution authorizes this Court to supplant that choice."

In Justice Thomas' opinion, taking an extreme literal position on constitutional interpretation, only torture would contravene the prohibition on cruel and unusual punishment. None of the dissenters consider proportionality to be a valid consideration for Eighth Amendment questions.

In many respects, the history of the Supreme Court is the history of the United States. In 1972, in a significant advance in democratic jurisprudence, the Supreme Court struck down the death penalty as cruel and unusual punishment in contravention of the Eighth Amendment (*Furman v. Georgia*).

Today, 40 years on, brutal executions are carried out regularly in the United States. Amidst the decay and decomposition of liberal culture and politics generally, the Supreme Court is incapable of a humane approach to social problems, and a substantial segment of it is steeped in a barbarous and even fascistic perspective on human affairs.

An advance in human consciousness in the sphere of jurisprudence and a halt to the drive toward police state rule sanctioned by a significant minority on the Supreme Court will require a vast transformation of social relations in America.

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