

**PROHIBITING YOUNG ADULT LIFE WITHOUT
PAROLE:
EXAMINING DIMINISHED CAPACITY AND
DIMINISHED CULPABILITY**

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ABSTRACT

Using neurological development evidence, in Miller v. Alabama, the US Supreme Court determined that automatically sentencing juveniles (under 18) to life without the possibility of parole is unconstitutional. This article argues that the minimum age for eligibility of a life without the possibility of parole sentence should be 25, because the neurocognitive evidence used in Miller establishes that the still developing prefrontal cortex (PFC), and corresponding executive functions of planning, decision-making, and impulse control, in young adults (18-24) causes a diminished capacity that should result in a diminished criminal culpability.

A 2021 study focusing on the use of life imprisonment in the United States led Ashley Nellis of The Sentencing Project to label life sentences “the lifeblood of mass incarceration.”¹ The study argues for mass incarceration reform that starts with addressing sentences of mandatory imprisonment for life, or life without parole (LWOP).² This recommendation stems from two factors: the use of this sentence has become commonplace in the American justice system and this, the longest, sentence sets the boundaries of the broader criminal sentencing framework.³ In the 2012 *Miller v. Alabama* decision, the US Supreme Court determined it unconstitutional to automatically sentence juveniles (under 18) to life without the possibility of parole based on neurological evidence pertaining to brain development.⁴ Did the Supreme Court overreach in its limitation of mandatory LWOP or err in the emphasis given to neuroscientific evidence? Or should the

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¹ ASHLEY NELLIS, *The Sentencing Project, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT* 8 (2021).

² *Id.*

³ *Id.* (“The commonplace use of life imprisonment in the U.S. places it at odds with practices in other industrialized nations... Their mainstream use in the American justice system...perpetuates a system of extreme punishment across the entire sentencing spectrum.”).

⁴ *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

same neuroscientific evidence lead the Court to extend the minimum age? Should the same conclusions about criminal culpability reshape criminal sentencing on a large scale? What should be the minimum age for eligibility of LWOP based on neurological developmental age of maturation? The minimum age for eligibility of LWOP should be 25 because the prefrontal cortex (PFC)—and consequent executive functions (EFs) of planning, decision-making, and impulse control—do not reach maturation until the mid-20's.⁵ In young adults (18-24), these still developing EFs create a diminished capacity and, therefore, a diminished criminal culpability.

James Kilgore describes mass incarceration as *the* “key Civil Rights struggle” of the current era.⁶ America makes up just 5 percent of the world’s population but 25 percent of the world’s prisoners.⁷ Despite the substantial numbers, mass incarceration—America’s extreme use of imprisonment—refers as much to a strategy as to a system: incarceration has been the “predominant mode of crime control for the past [fifty] years.”⁸ Mass incarceration is much more than the number of people in jails and prisons:

Mass incarceration is actually one of this country’s key strategies for addressing problems of poverty, inequality, unemployment, racial conflict, citizenship, sexuality, and gender, as well as crime. Hence, when we talk about mass incarceration, we are not speaking only of prison cells or the War on Drugs. A philosophy, a history, and a trail of profit and investment lurk behind the statistics. Ultimately, mass incarceration is about opportunity—new opportunities for profit and political power for some and the denial of opportunity to others, largely poor people of color. During the past three decades, the urge to punish and incapacitate the most vulnerable sectors of the population has replaced the desire to nurture and develop.⁹

Common approaches to mass incarceration reform have started, and often ended, with addressing nonviolent sentences, but this approach fails definitively because the majority of people in prison are serving time for a violent offense. As Nellis’s “lifeblood” analogy depicts, mass incarceration reform must begin from the top of the criminal sentencing structure, with the most severe sentences.¹⁰

In *Miller*, the US Supreme Court ruled it unconstitutional to permit mandatory LWOP for juveniles, deciding it a violation of the Eighth Amendment guideline of proportionality.¹¹ The Eighth Amendment protects from “cruel and unusual punishments,” which means the sentence must be proportional to, or fit,

⁵ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 179 (2015).

⁶ JAMES KILGORE, *UNDERSTANDING MASS INCARCERATION* 2 (2015).

⁷ *Id.* at 1.

⁸ MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 1 (2002).

⁹ KILGORE, *supra* note 6, at 1.

¹⁰ NELLIS, *supra* note 1, at 8.

¹¹ *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

the crime.¹² A key word in the ruling is *mandatory*, meaning that juveniles can still receive LWOP, but the sentence cannot be invariably attached to any particular crime. The ruling used neuroscientific evidence as a key part of its decision.¹³ In particular, the Court recognized the arguments of brain scientists and psychologists “that children and teenagers should not be considered fully culpable for the crimes they commit, however heinous or violent, because their brains are not fully developed.”¹⁴ Specifically, “the prefrontal cortex of the brain, which regulates impulse control, is not fully developed until people are in their twenties.”¹⁵ As a consequence of not having a fully developed PFC, “teenagers have greater trouble controlling their impulses and resisting peer pressure.”¹⁶ In other words, their diminished capacity to control impulses and make decisions diminishes their culpability, or degree of accountability, for the crime, regardless of the nature or details of the crime.

In legal matters, culpability refers to the degree of liability, or blameworthiness, ascribed to a defendant and the consequent extent to which the defendant is subject to penalties.¹⁷ Buffalo Law School Professor Guyora Binder’s *principle of dual culpability* “assesses blame for harm on the basis of two dimensions of culpability,” requiring both a cognitive dimension of culpability and a normative dimension of culpability.¹⁸ The cognitive aspect denotes the expected harm, meaning “the actor’s expectation of causing harm.”¹⁹ This dimension of culpability hinges on the defendant’s capacity to connect potential choices and consequential outcomes, weighing the costs and benefits for self and others, then acting on an optimal course. The normative aspect designates “the moral worth of the actor’s ends.”²⁰ This dimension designates the importance of evaluating the actor’s intent. The presence of a “distinct malicious purpose” creates normative culpability.²¹ This moral assessment influences the examination of the criminal behavior. Each aspect of culpability impacts the degree of criminal culpability and, therefore, the degree of punishment for a defendant.

A defendant’s capacity affects culpability. Capacity describes the “mental ability to understand the nature and effect of one’s acts,” and criminal capacity delineates the “mental ability that a person must possess to be held accountable for a crime; ability to understand right from wrong.”²² A diminished capacity—impairment of mental functions—reduces legal culpability, because it presumes one’s ability to act with criminal intent is also diminished, thus decreasing the

¹² *U.S. Const. amend. VIII*; *Solem v. Helm*, 463 U.S. 277, 285 (1983).

¹³ *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

¹⁴ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 179 (2015).

¹⁵ *Id.* at 179.

¹⁶ *Id.* at 179.

¹⁷ Culpability, *BLACK’S LAW DICTIONARY* (9th ed. 2009).

¹⁸ Guyora Binder, *Felony Murder*, 9-10 (2012).

¹⁹ *Id.* at 9.

²⁰ *Id.* at 9-10.

²¹ *Id.* at 10.

²² Capacity, *BLACK’S LAW DICTIONARY* (11th ed. 2019).

“degree of the offense or the severity of the punishment.”²³ The *Miller* ruling determined juveniles exhibit a diminished capacity due to their immature neurocognitive development compared to adults, which reduces their culpability.²⁴ This culpability reduction prompted the Court’s decision to lessen the severity of juvenile punishment by prohibiting mandatory LWOP sentencing.²⁵

In juveniles and young adults, the still developing prefrontal cortex (PFC) and corresponding executive functions (EFs), significantly diminish capacity enough to reduce culpability. Located in the frontal lobe, the PFC serves as the primary driver of EFs such as “planning and organization, impulse control, adjusting behavior in response to rewards and punishments, and...decision making.”²⁶ The PFC and EFs involve “advanced cognitive processes employed in planning, controlling impulses, and weighing the consequences of decisions before acting.”²⁷ These capacities make the PFC and EFs “critical for rational thought” and “important for many aspects of human social life, such as the ability to follow social norms.”²⁸ Planning, decision-making, and impulse control are essential capacities in everyday functioning, and determine not only daily effectiveness, but also life success.

Miller used this relationship between brain function and behavior to rule on the constitutionality of mandatory LWOP for juveniles, but the prohibition should be extended to young adults because development of the PFC and EFs does not reach maturation at the age of 18. EFs are the last cognitive abilities to mature due to the late development of the PFC and related systems compared to other brain areas.²⁹ Maturation of the PFC extends beyond adolescence and into early adulthood, typically culminating in the mid-20’s.³⁰ Due to the age of PFC-maturation, maturation of executive functioning “control capabilities only fully emerge as an individual achieves adult maturity.”³¹ This maturation proves essential to an individual’s capacity.

Observation of people with PFC damage illuminates the immense impact of underdevelopment of this key structure: “People with prefrontal damage often engage in behavior that normal individuals readily recognize will get them into trouble,” display an inability “to learn from reward and punishment and to control impulses,” and “have reduced behavioral flexibility with respect to choosing possible actions based on a particular situation.”³² The PFC clearly and definitively affects a person’s capacity to plan, make decisions, weigh consequences, control

²³ *Id.*

²⁴ *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

²⁵ *Id.* at 473.

²⁶ BOB GARRETT & GERALD HOUGH, *BRAIN & BEHAVIOR: AN INTRODUCTION TO BEHAVIORAL NEUROSCIENCE* 53 (5th ed. 2018).

²⁷ Richard J. Bonnie & Elisabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 *CURRENT DIRECTIONS IN PSYCH. SCI.* 158, 159 (2013).

²⁸ SARAH GRISON & MICHAEL GAZZINGA, *PSYCHOLOGY IN YOUR LIFE* 69 (4th ed. 2019).

²⁹ *RESEARCH TRENDS IN BEHAVIOR AND EXECUTIVE FUNCTION* 7 (Miao-Kun Sun ed., 2016).

³⁰ Bonnie & Scott, *supra* note 27, at 159.

³¹ SCOTT J. HUNTER & ELIZABETH P. SPARROW, *EXECUTIVE FUNCTION AND DYSFUNCTION: IDENTIFICATION, ASSESSMENT AND TREATMENT* 12-13, 17 (Scott J. Hunter & Elizabeth P. Sparrow eds., 2012).

³² GARRETT & HOUGH, *supra* note 26, at 53.

impulses, react to external stimuli, and respond in any situation. Therefore, the diminished capacity resulting from a less than mature PFC should diminish a person's legal culpability.

The diminished capacities exhibited by young adults related to PFC obviously diminish their cognitive culpability, and diminish their normative culpability, as well. A diminished capacity for considering consequences, inhibition, and other executive abilities decidedly decreases the ability to consider expected harm. This diminished capacity decreases accountability related to the cognitive dimension of culpability, which requires the defendant's capacity to think consequentially and act optimally. Consequently, young adults also demonstrate a diminished capacity related to normative culpability because moral reasoning "depends on cognitive processes," meaning a young adult's ability to articulate a distinct malicious intent in many situations is diminished because "the ability to consider questions about morality develops during childhood and continues into adulthood."³³ Many young adults are at the first of three moral reasoning levels, "the preconventional level," at which "self-interest and event outcomes determine what is moral."³⁴ Such determinative criteria in decision-making helps explain the selfish nature of many young adults, particularly in the thinking and behavior that leads to criminal activity or outcomes. This still maturing moral reasoning results in a diminished capacity to think and act according to just and balanced moral ends. Such diminished moral-reasoning capacity and the diminished consequential-thinking capacity significantly reduces expectations for young adults related to criminal culpability, both cognitively and normatively.

As with juveniles, young adults (18-24) experience a diminished capacity for cognitive processing because the PFC and EFs continue to develop into the mid-20's. This diminished capacity of young adults must be taken into consideration when sentencing people in this age group. Regrettably, this consideration has not happened. Young adults should be considered similarly, though not equally, to adolescents concerning criminal culpability. The diminished capacities of young adults due to the still developing PFC and corresponding EFs result in diminished criminal culpability. Due to this diminished culpability, young adults should be afforded the same Eighth Amendment protection from "cruel and unusual punishment" as extended to juveniles in the *Miller* ruling. The minimum age for eligibility of a life without the possibility of parole sentence should be raised to 25, the normal age of PFC maturation.

Objections to this conclusion emerge from two main thrusts. Yale law professor Jamie D. Brooks argues that the Supreme Court overreaches in the *Miller* decision. Brooks claims the Court goes too far in connecting diminished capacity, due to having an immature PFC, to diminished culpability in adolescents.³⁵ Brooks also asserts the need for an "alternative means of reconciling the burgeoning role

³³ GRISON & GAZZINGA, *supra* note 26, at 155.

³⁴ *Id.* at 156.

³⁵ Jamie D. Brooks, 'What any Parent Knows' But the Supreme Court Misunderstands: Reassessing Neuroscience's Role in Diminished Capacity Jurisprudence, 17 NEW CRIM. L. REV. 442 (2014).

of neuroscience with the established tenets of the criminal doctrine.”³⁶ Brooks is right to be concerned by the role and weight of neuroscientific evidence in the courtroom, but is incorrect in his assessment in this particular case. This evidence did not solely, or even mostly, shape the *Miller* decision but merely tipped the proverbial scales of justice. The view that making such critical and sweeping decisions based on neuroscientific evidence bestows too large a role to brain science performs the strawman fallacy by depicting neuroscientific evidence as the only piece of evidence. Although this neuroscientific evidence is key, this contribution merely adds to the overall case by corresponding with already existing information.³⁷

Neuroscientific research does not suddenly appear in a knowledge-void; instead it reflects “psychological models of cognitive and affective processes, experimental paradigms, various behavioral and psychophysiological measurements and functional brain imaging techniques.”³⁸ The information on neurocognitive development used in the Court’s decision confirmed existing information on adolescent behavior. This corroboration verified the other components that influenced the Court.

From the perspective of simple observation, a person is more mature at the age of 20 than at 17, and more mature at 25 than 20. Statistically, data associated with crime commission reveals a high correlation between criminality and age, “with 25 years of age considered the peak of one’s criminal career.”³⁹ Understanding the role and age of maturation of the PFC and EFs helps explain and clarify aspects of the overall puzzle, but does not singly or even majorly form the picture.

Brooks wrongly concludes that the Court overextended its reliance on neuroscientific evidence and its ruling. In fact, the Supreme Court did not go far enough in connecting diminished capacity to diminished culpability. His “alternative” role of neuroscience is actually a significant lessening of the weight given to these findings. This lessening essentially leaves the weight of neuroscientific evidence minimal to null.

Another objection comes from the “just deserts” camp of LWOP sentence proponents: LWOP is fitting the sentence to the crime or giving the offender their just deserts.⁴⁰ This group considers the sentence of LWOP a just punishment for the most severe crime of murder. Contemplating the class of “most severe” should apply not just to the offense, but also to the penalty. A sentence that ensures a person dies in prison is the most severe. Therefore, considerable caution should be employed when levying this ultimate punishment. The severity of the crime of

³⁶ *Id.*

³⁷ *Miller*, 567 U.S. at 471 (quoting *Roper v. Smith*, 543 U.S. 551, 569 (2005)) (noting that the court relied “not only on common sense--on what ‘any parent knows’--but on science and social science as well”).

³⁸ Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, PHIL. TRANSACTIONS: BIOLOGICAL SCI., 359, 2004, at 1713.

³⁹ Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadid & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. 279, 286 (2020).

⁴⁰ *Id.* at 287.

murder does deserve a severe penalty, and, indisputably, sentencing a 20-year-old to 20 years in prison is severe.

In addition to increasing the age of eligibility for a LWOP sentence to 25, acknowledging the diminished culpability of young adults should prompt several other criminal sentencing reforms. A young adult legal category (18-24) should be created. The creation of this category should induce the formation of three separate criminal sentencing categories: juveniles (under 18), young adults (18-24), and adults (25 and over). Compared to full adults, young adults have a diminished capacity, thus diminished culpability, and therefore a lesser degree of accountability should be reflected in sentencing. Juveniles experience an even further diminished capacity and corresponding diminished culpability, and therefore an even lesser degree of accountability should be reflected in sentencing. Furthermore, the *Miller* ruling did not go nearly far enough. The *mandatory* language allows courts to continue to sentence juveniles to LWOP. Neither juveniles nor young adults should even be eligible for LWOP. A 20-year sentence-cap should be set for juveniles, with parole eligibility for lifers at 15 years. A 25-year cap on sentences should be set for young adults, with parole eligibility for lifers at 20 years.

Ashley Nellis rightly assesses life sentences as the lifeblood of mass incarceration and the starting point for reform. The diminished capacity of the PFC and corresponding EFs of planning, decision-making, and impulse control diminishes the culpability of not only juveniles, but also young adults. The PFC and EFs reach maturation in the mid-20's, so the age for eligibility of LWOP should be 25. Additionally, a young adult legal category should be created, which offers a lesser degree of accountability compared to general adults. Brooks rightly warns on the need for caution in matters of criminal sentencing reform. Caution should be exercised—caution in sentencing young adults to die in prison.