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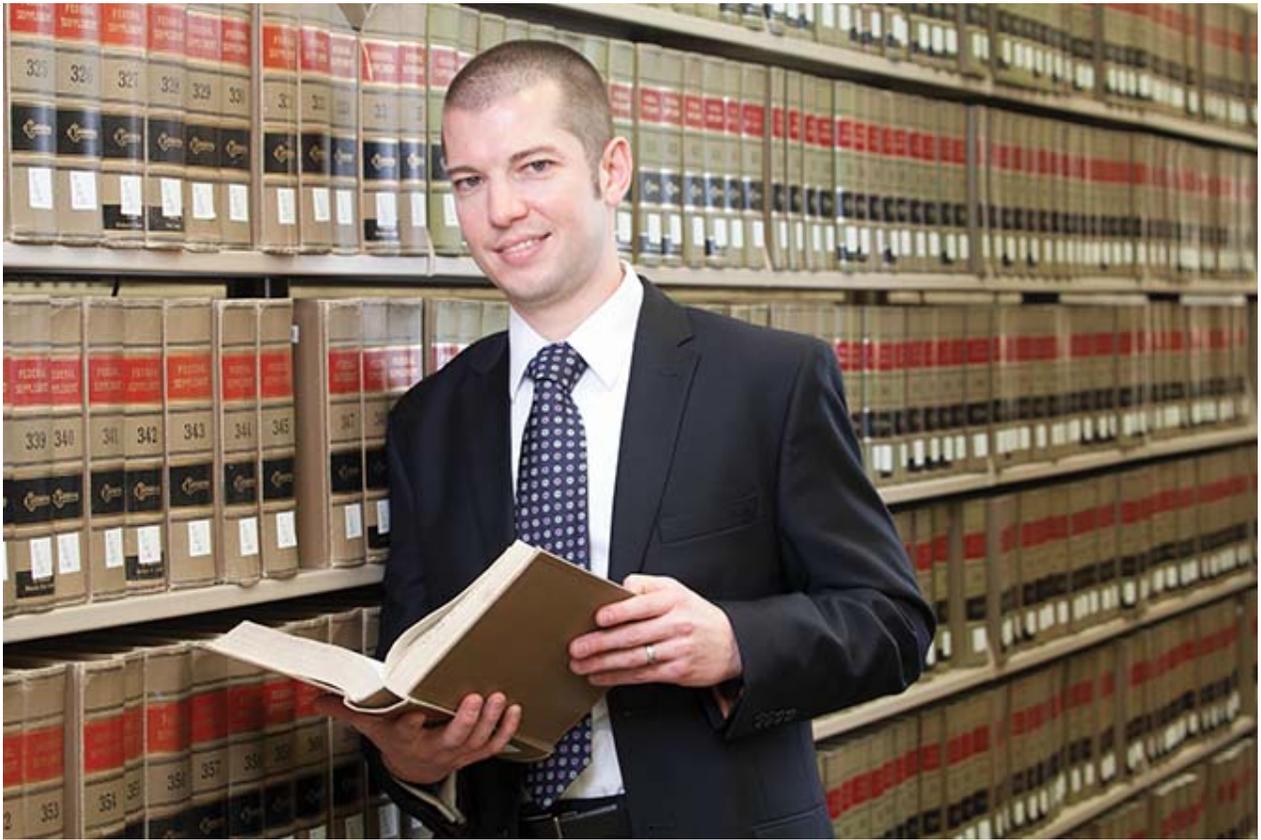
Cruel & Unusual Equal Sentences for Unequal Actions

By Matt McGowan

These facts are the same: They were both 14 years old, and they were both present when the murders happened. Everything else is different.

In 1999, Kuntrell Jackson, after initially serving as a lookout, was standing next to his friend when the latter shot and killed Laurie Troup, the Blytheville, Ark., video store employee who refused to give the boys money during a robbery. In Alabama in 2003, Evan Miller, also 14, bludgeoned Cole Cannon with a baseball bat and then set Cannon's trailer on fire.

But there is one more similarity. Convicted of capital murder, both boys were sentenced to life in prison without parole.



Brian Gallini

Photo by Russell Cothren

"I can't think of a better example, a better contrast of cases, in terms of the facts, to illustrate this problem," says Brian Gallini, associate professor at the University of Arkansas School of Law.

For the past several years, Gallini's research has focused on the sentencing of juveniles, specifically those convicted of murder and sent to prison without an opportunity for parole. More specifically, his work has examined how courts have handled the complicated issue of juvenile murder accomplices who played a minimal role in the crime and yet still received life without parole. On this warm December afternoon, he is sitting in his sun-drenched office on the third floor of the law school, and he is poring over the facts from the original *Jackson* and *Miller* filings.

"Here you have one kid who was essentially the lookout," he says. "I'm not saying he wasn't culpable for the shopkeeper's death. But the other kid, Miller, before he took one more swing with the bat, looked down on the victim and said, 'I am God. I've come to take your life.' So I think it's really important that the court consolidated these two cases, because the facts are radically different."

This consolidation, as Gallini puts it, refers to the U.S. Supreme Court's packaging and review of the two cases in 2012. The court used *Miller* and *Jackson* as an opportunity to decide whether mandatory sentences of life in prison without parole for juvenile murderers constitute a violation of the cruel and unusual punishment clause of the Eight Amendment. The court had already abolished the death penalty for those under 18 who had been convicted of murder. That decision came in 2005.

On June 25, 2012, upon review of *Miller* and *Jackson*, the justices ruled that judges and juries in lower courts must consider a defendant's youth and the nature and circumstances of the crime before sentencing the defendant to life in prison without parole. The 5-4 decision struck down laws in 28 states, including Arkansas, that had mandated life terms for all convicted murderers, including those under 18. These mandatory laws, the court decided, were in fact cruel and unusual punishment and therefore violated the Eighth Amendment of the U.S. Constitution.

But the ruling applies only to the use of *mandatory* life sentences without parole for juveniles; it does not address the constitutionality of those sentences more broadly. The justices merely stated that states must consider the age and nature of the crime before handing down a life sentence. In other words, lower courts now must individualize sentencing based on the defendant's age and nature and circumstances of the crime. Therefore, Gallini says, it is reasonable to expect sentencing of life without parole for juvenile killers regardless of age – those such as Miller who actually commit the act of murder – and perhaps for others with a high level of culpability in a victim's death.

This distinction, that of limiting use of the sentence instead of abolishing it, is significant, says Gallini, who monitored *Miller* and *Jackson* as they moved up through the appellate process. Historically the Supreme Court and lower courts have struggled with what to do with juveniles convicted of murder. If this problem were not enough, the courts have wrestled even more mightily with juvenile murder accomplices or co-conspirators.

A 40-year survey of cases demonstrates that the Supreme Court, the highest tribunal in the United States and the judicial entity that lower courts look to for direction on matters such as federal law, constitutionality, jurisdiction and sentencing, among others, is primarily responsible for the confusion and ambiguity. In "Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?" published in the *Oregon Law Review*, Gallini argues that the Supreme Court and the Eighth Amendment – the section of the U.S. Constitution that addresses "cruel and unusual punishment" – have failed to provide direction to lower courts on sentencing juvenile accomplices in murder cases.



The court itself has stated that the 8th Amendment's scope "is not static" and "must draw its

meaning from the evolving standards of decency that mark the progress of a maturing society."



"Eighth Amendment standards, as interpreted by the court, have not provided sentencing courts with the analytical tools necessary to account for stark differences in fact scenarios," Gallini says. "Simply put, the court's Eighth Amendment jurisprudence has not resolved a juvenile non-killer's constitutional challenge to a life-without-parole sentence."

To illustrate the problem, Gallini studied many cases in which sentences were similar or identical for juveniles whose roles were dramatically different in their respective crimes. For example, one juvenile defendant, not entirely unlike Kuntrell Jackson, participated in the killing of a shop employee by helping the shooter enter the shop under false pretenses (the defendant's father owned the shop), robbing the shop after the shooter killed the victim and manipulating the crime scene so that it appeared that someone had forcibly entered the shop. In a different case, a 14-year-old defendant, who had a history of physical and sexual abuse, was forced by her boyfriend to lure a man into their house to rob him. After doing so, the defendant left a room in which the boyfriend stabbed the man to death. In both cases, the defendants received sentences of life without parole.

It is important to understand how often this occurs, Gallini says. "The prevalence of this phenomenon cannot be underestimated. This can happen with any number of juvenile defendants waived into adult court. These are not exceptions."

The Gallini article covers the history and evolution of the Supreme Court's interpretation of the Eighth Amendment's cruel and unusual clause and its application to juveniles. Originally, the clause – "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" – had a narrow application, only to prohibit barbarous forms of punishment. Fortunately, the authors of the U.S. Constitution deemed torture a bad thing. However, as Gallini explains, the meaning of the clause and the court's interpretation of it evolved over time to mirror modern standards of decency for a changing society. The court itself has stated that the 8th Amendment's scope "is not static" and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

One way the court has done this is through proportionality, a simple test that asks this basic question: Is the sentence commensurate with the crime for which a person was convicted. As early as 1910, the court recognized that "it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense." But since then and especially in the past 40 years, the court has vacillated on the proportionality analysis. For example, in 1977 the court ruled that a

death sentence is not proportionate to a conviction of rape of an adult woman. But after that, in 1980, the court upheld a sentence of life in prison *with* the possibility of parole for a Texas man who was convicted of credit card fraud, forgery and theft involving a total sum of \$229.11. (The severity of this sentence was based on a Texas recidivist statute.) Then, three years later, the court demonstrated favor for the proportionality analysis when it affirmed an appellate court's holding that a sentence of life without parole for a man who was convicted of his seventh nonviolent crime constituted cruel and unusual punishment. The court reasoned that the crime – the man had tried to cash a \$100 hot check – was "one of the most passive felonies a person could commit" and that the original conviction had violated the Eighth Amendment. Through all of this, Gallini says, the court has never precisely defined "cruel and unusual."

Gallini discusses many other cases in which sentencing was identical but the participation of the defendants varied greatly. Examining three legal rules that deal with juvenile sentencing – felony-murder doctrine and both accomplice and co-conspirator theories of liability – he found no precedent clarifying whether it is cruel and unusual punishment to impose life in prison on juvenile offenders with minimal involvement in a victim's death. The felony-murder rule imposes first-degree murder liability on a defendant who causes a death while committing a felony, and accomplice and co-conspirator theories of liability address degrees of participation, from minimal to substantial.

This lack of direction, Gallini argues, has eroded the ideals underlying punishment of juveniles in the United States. It subverts the conventional ideology that juveniles, who presumably are too young and immature to understand the gravity of their behavior, deserve a shot at rehabilitation. Lack of guidance from the highest court also reflects a growing trend over the past 25 years of trying and sentencing juveniles as adults.

"The determinate sentencing of juvenile accomplice non-killers is inconsistent with the rehabilitation-based approach to juvenile criminal justice," Gallini says. "And the trend of punishing more minors like adults for a growing number of crimes reflected a philosophical shift in juvenile punishment ideology from rehabilitative to punitive. This shift, I think, inappropriately exposed less-culpable juvenile non-killers to mandatory life without parole."

Gallini says it's too early to understand all of the ramifications of the Jackson/Miller decision. He and many other legal scholars are waiting to see how states will implement the ruling procedurally. At the very minimum, the holding will affect three areas: charging, sentencing and transfer, which is the process of moving juveniles from juvenile court to adult court. With charges, the ruling could change whether prosecutors pursue capital, first-degree or felony murder. Also, relevant to Gallini's scholarship, the decision goes a long way toward drawing constitutional lines between murderers, co-conspirators and accomplices. And finally, the Supreme Court's decision with Jackson/Miller is a clear indication that the pendulum is swinging, Gallini says, that the court is saying it is time to move away from a deterrent, punitive mode and back toward a more rehabilitative approach to juvenile criminal justice.

Juvenile Defense Clinic pursues Life Without Parole project



*From left to right, law students Kristin Ries, Timothy Alexander, Celeste Kinney and Kendra Pruitt prepare their cases for the Life Without Parole project.
Photo by Russell Cothren*

The Supreme Court's Miller/Jackson ruling gives hope to Kuntrell Jackson and more than 2,000 other inmates nationwide who, as juveniles, were convicted of a crime and given a mandatory sentence of life without parole. But that's all it gives them. There is no guarantee that they will leave prison.

So what does the court's ruling mean for states and inmates already convicted and sentenced to life without parole? Procedurally, each state will handle the issue differently, says D'Iorah Hughes, associate professor and director of the School of Law's Juvenile Defense Clinic. It is likely that most inmates will be given an opportunity for re-sentencing.

In Arkansas, however, the path to re-sentencing is more complex because Jackson originated here. The U.S. Supreme Court remanded the case back to the Arkansas Supreme Court with the specific instruction that determinate sentencing for juveniles convicted of murder and sentenced to life without parole is unconstitutional. Determinate sentences are generic sentences that do not consider youth and the individual facts and circumstances of the crime. Now the Arkansas Supreme Court must decide whether Kuntrell Jackson's sentence was appropriate and whether it deems his case retroactive.

If his case is deemed retroactive, as Hughes and other legal experts expect it will be, then Jackson-eligible inmates can ask the court to rule that the original sentence was not valid.

"So it's complicated," Hughes says, "but it's entirely possible that they will be eligible for

re-sentencing. Everyone's waiting for the court's decision."

Hughes is talking about the 55 men and one woman, who range in age from 21 to 56, living in Arkansas state prisons for crimes they committed as juveniles. There may be more, she says.

In November, Hughes and several students traveled to four Arkansas prisons and talked to the inmates about the possibility of re-sentencing. She said most of them understand the stakes, and many of them agreed to be represented by the Juvenile Defense Clinic.

"Many of these clients, especially the older ones, just aren't the same person they were when they committed their crimes," Hughes says. "Some could provide closure to victims' families, closure that they weren't able to provide as juveniles."



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"Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient."

– *Miller v. Alabama* (2012)

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