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## Awesome Punishments

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# Awesome Punishments

Richard Thaddaeus Johnson\*

*In 1972, Justice Brennan noted that “[d]eath is truly an awesome punishment.”<sup>1</sup> But this was no compliment; rather, it was an indictment. And although it took nearly 200 years for the Supreme Court to place any serious constraint on imposing this awesome punishment, the Court has since carved out many restrictions. In this process, an animating rationale has been that the worst punishment available should be doled out in only exceptional circumstances and only after overcoming exceptional procedural hurdles. Recently, the Court has used this—seemingly narrow—principle and layered it onto juvenile-sentencing schemes. To start, the Court barred juvenile capital punishment entirely, rendering “life without parole” the de facto highest juvenile punishment available. The Court then began carving out the same restrictions on juvenile-life-without-parole-sentencing schemes as it did with adult capital punishment-sentencing schemes. This move, however, is quite recent. And as a result, the Court is not finished harmonizing the two lines of jurisprudence. But taking the Court at its word—that a juvenile-life-without-parole sentence is equally awesome as an adult-capital punishment sentence—this Comment frames what additional restrictions we should expect.*

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<sup>1</sup> *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

## I. INTRODUCTION

In 2016, the Supreme Court was asked to continue its decade-long process of using the Eighth Amendment to cut back the constitutional scope of juvenile punishment in *Jacobs v. Louisiana*.<sup>2</sup> In this process, the Court has construed life without parole (“LWOP”) as the juvenile equivalent of the death penalty for adults—the harshest constitutionally permissible form of punishment.<sup>3</sup> With the adult-death penalty analogue in its peripheral, the Court has shaped juvenile-life-without-parole (“JLWOP”) jurisprudence to mirror adult-death penalty jurisprudence. The JLWOP jurisprudence, however, is a relatively recent—albeit rapidly evolving—doctrine. As a result, many unresolved questions persist. This Comment uses the full scope of the Eighth Amendment’s adult-death penalty jurisprudence to predict how JLWOP jurisprudence should evolve in the coming years.

Part II of this Comment provides an overview of adult-death penalty jurisprudence. Part III briefly surveys the evolution of JLWOP jurisprudence. Part III.A discusses the overlap. Finally, Part III.B predicts how JLWOP jurisprudence should evolve to fully mirror adult-death penalty jurisprudence.

## II. ADULT-DEATH PENALTY JURISPRUDENCE: FROM *FURMAN* TO *KENNEDY*

In 1972, the Court erected the first significant limitation on imposition of the death penalty, declaring several states’ death penalty statutes constitutionally infirm under the Eighth and Fourteenth Amendments.<sup>4</sup> The statutes at issue in *Furman v. Georgia* allowed for death penalty sentences, yet failed to explain when their imposition was warranted.<sup>5</sup> And although Justices Brennan<sup>6</sup> and Marshall<sup>7</sup> argued that capital punishment itself violated the Constitution, the remaining members of the per curiam opinion only grounded constitutional

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<sup>2</sup> *Jacobs v. Louisiana*, 136 S. Ct. 1362 (2016), *vacating and remanding* State v. Jacobs, 165 So. 3d 69 (La. 2015).

<sup>3</sup> This is, of course, because the death penalty is not available for juveniles. See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>4</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The Eighth Amendment’s guarantee against cruel and unusual punishment applies to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>5</sup> *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

<sup>6</sup> *Id.* at 257 (Brennan, J., concurring).

<sup>7</sup> *Id.* at 314 (Marshall, J., concurring).

invalidity in the statutes themselves.<sup>8</sup> On the narrower holding—which survives to this day—the statutes erred in giving “[j]uries (or judges, as the case may be) . . . practically untrammelled discretion to let an accused live or insist that he die.”<sup>9</sup>

In the wake of *Furman*, states modified their death penalty statutes to comply with the Court’s decision.<sup>10</sup> And in 1976, the Court confronted some of these revisions, affirming the constitutionality of two<sup>11</sup> and invalidating one.<sup>12</sup> One of the affirmed revisions was reviewed in *Gregg v. Georgia*, where the defendant challenged Georgia’s revised statutory scheme, which (1) bifurcated the guilt and sentencing hearings, (2) allowed additional evidence and argument in sentencing hearings, and (3) instructed juries in sentencing hearings to consider aggravating and mitigating factors before determining whether to impose the death penalty.<sup>13</sup> With these safeguards, the Court upheld the statutory scheme.

In contrast to the scheme in *Gregg*, which sought to curb arbitrary imposition of the death penalty through checks and guided discretion, the statutory scheme in *Woodson v. North Carolina* eliminated arbitrary discretion by simply eliminating discretion entirely. Indeed, the scheme made the death penalty mandatory for any first-degree murder conviction.<sup>14</sup> Obviously, this was not what the *Furman* Court had in mind, and the mandatory-death penalty statute was held unconstitutional.<sup>15</sup> And although the Court in *Woodson* declined to decide whether a mandatory statute might survive constitutional muster in “extremely narrow categor[ies] of homicide, such as murder by a prisoner serving a life sentence,”<sup>16</sup> the Court later explained that any “departure from the individualized capital-sentencing doctrine” is unconstitutional.<sup>17</sup>

In the four years after *Gregg* and *Woodson*, the Court clarified the individualized considerations required by the Eighth Amendment. In

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<sup>8</sup> *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). The remaining justices would have held the statutes constitutional. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

<sup>9</sup> *Id.* at 248 (Douglas, J., concurring).

<sup>10</sup> *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (plurality opinion).

<sup>11</sup> *Id.*; *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion).

<sup>12</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

<sup>13</sup> *Gregg*, 428 U.S. at 188-92.

<sup>14</sup> *Woodson*, 428 U.S. at 286-87.

<sup>15</sup> *Id.* at 301.

<sup>16</sup> *Id.* at 287 n.7.

<sup>17</sup> *Sumner v. Shuman*, 483 U.S. 66, 78 (1987).

*Lockett v. Ohio*,<sup>18</sup> the Court explained that capital statutes must—as a constitutional minimum—direct sentencers to consider the following mitigating factors: (1) the circumstances of the crime; (2) the character of the defendant; and (3) the defendant’s record.<sup>19</sup> Moreover, in *Godfrey v. Georgia*,<sup>20</sup> the Court explained that capital statutes must direct sentencers to consider—and find—specific aggravating factors before sentencing someone to death.<sup>21</sup> The purpose behind this mandate was to ensure that capital punishment is reserved for defendants who are “materially more ‘depraved’ than that of any person guilty of murder.”<sup>22</sup> In other words, death is reserved for the worst of the worst.

In *Enmund v. Florida*,<sup>23</sup> the Court erected yet another restriction, prohibiting sentences of death for a defendant “who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”<sup>24</sup> Although *Enmund* seemed to prohibit capital felony-murder entirely, the Court in *Tison v. Arizona*<sup>25</sup> carved out an exception for where a defendant is (1) a “major particip[ant] in the felony committed,” and (2) exhibits “reckless indifference to human life.”<sup>26</sup> This, according to the *Tison* Court, satisfies the heightened culpability imagined in *Enmund*.<sup>27</sup>

The Court’s most recent pronouncement on adult capital punishment came in *Kennedy v. Louisiana*.<sup>28</sup> There, the Court held that even for incredibly heinous acts, such as the rape of a child, the Eighth Amendment bars imposition of death “where the crime did not result, and

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<sup>18</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

<sup>19</sup> *Id.* at 604. Other mitigating circumstances are permitted, yet not mandated. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (allowing severe emotional disturbance, turbulent family history, and beatings by harsh father as mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (allowing good behavior in prison while awaiting trial as mitigating factor); *Brown v. Payton*, 544 U.S. 133 (2005) (allowing post-conviction religious conversion as mitigating factor).

<sup>20</sup> *Godfrey v. Georgia*, 446 U.S. 420 (1980).

<sup>21</sup> *See id.* at 433. The Court has never mandated which aggravating factors must be considered, and the factors vary by state. For a complete list of current aggravating-circumstance statutes, see *Handling Criminal Appeals* § 133.18.

<sup>22</sup> *Godfrey*, 446 U.S. at 433.

<sup>23</sup> *Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>24</sup> *Id.* at 797.

<sup>25</sup> *Tison v. Arizona*, 481 U.S. 137 (1987).

<sup>26</sup> *Id.* at 158.

<sup>27</sup> *Id.*

<sup>28</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

was not intended to result, in death of the victim.”<sup>29</sup> With this decree, the Court essentially cabined capital punishment to murder.<sup>30</sup>

Synthesizing the above discussion, the current Eighth Amendment restrictions on capital punishment include the following:

1. The death penalty can never be mandatory (*Woodson*).
2. The defendant must be convicted of murder (*Kennedy*).
3. On a felony-murder conviction, there must be proof of major participation in the felony and reckless indifference to human life (*Enmund* and *Tison*).
4. There must be a separate sentencing hearing (*Gregg*).
5. The sentencer must have guided discretion with directed consideration of aggravating and mitigating factors (*Lockett* and *Godfrey*).

It is also worth mentioning that throughout the Court’s death penalty jurisprudence, it has explained that two separate determinations must be made: “the eligibility decision and the selection decision.”<sup>31</sup> These determinations have separate requirements. A person is not even eligible for the death penalty unless, for example, the defendant is “convicted of a crime for which the death penalty is a proportionate punishment.”<sup>32</sup> Once the sentencer determines that the defendant is death eligible, however, the sentencer must also determine whether the death-eligible defendant “should in fact receive the sentence.”<sup>33</sup> And the Court has required, for example, that this selection decision be guided with directed consideration of aggravating and mitigating factors.<sup>34</sup>

Although the eligibility-selection distinction is a critical feature of the Court’s death penalty jurisprudence, it is not necessary to analyze the determinations separately moving forward. For one, there is some

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<sup>29</sup> *Id.* at 412.

<sup>30</sup> Technically, *Kennedy* did not render capital statutes unrelated to crimes against individuals unconstitutional. *See, e.g.*, 18 U.S.C. § 794(a)–(b) (2012) (espionage); *id.* § 2381 (treason); *id.* § 3591(b) (trafficking large quantities of drugs); CAL. PENAL CODE § 37(a) (West 2016) (treason); GA. CODE ANN. § 16-5-44(c) (2015) (aircraft hijacking). No opportunity to challenge the constitutionality of these statutes is available, however, because no one is on death row for any such offense. *See Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder> (last visited Apr. 1, 2016).

<sup>31</sup> *Tuliaepa v. California*, 512 U.S. 967, 971 (1994).

<sup>32</sup> *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)).

<sup>33</sup> *Id.* at 972.

<sup>34</sup> *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

concern that the Court has recently “throw[n] away the distinction,” and I do not intend to resolve that issue here.<sup>35</sup> More important, though, I am only seeking to harmonize the two lines of jurisprudence. If done well, then both the eligibility and selection requirements will match.<sup>36</sup> Granted, this will mean that the same concerns about the internal consistency of the adult-death penalty jurisprudence will be brought into the JLWOP jurisprudence—such as ensuring that the eligibility and selection decisions do not collapse into each other. But that is an inevitable consequence of this Article’s limited goal: keeping the adult death-penalty jurisprudence the same, but changing the JLWOP jurisprudence to conform.

### III. JLWOP JURISPRUDENCE: FROM *ROPER* TO *MILLER*

I turn now to JLWOP jurisprudence, which is much more recent and brief, as the Court only declared imposition of the death penalty for crimes committed as a juvenile unconstitutional in 2005.<sup>37</sup> To reach this decision, the Court has—starting with *Roper v. Simmons*—gone to great lengths to explain that “children are constitutionally different from adults for purposes of sentencing.”<sup>38</sup> The difference, according to the Court, stems from children’s “diminished culpability” and the “greater possibility [that they] will be reformed.”<sup>39</sup> The Court went on to highlight three essential differences between juveniles and adults: (1) juveniles lack maturity, “result[ing] in impetuous and ill-considered actions and decisions”;<sup>40</sup> (2) “juveniles are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure”;<sup>41</sup> and (3) a juvenile’s character “is not as well formed as that of an adult,” and thus “less fixed.”<sup>42</sup> For these reasons, the Court held that the death penalty is

<sup>35</sup> See Kent Scheidegger, *Dangerously Sloppy Language in the Hurst v. Florida Opinion, Crime and Consequences* (Jan. 21, 2016), <http://www.crimeandconsequences.com/crimblog/2016/01/dangerously-sloppy-language-in.html>. I do not however, find this concern persuasive.

<sup>36</sup> In practice, a sentencer would decide between JLWOP and life with the possibility of parole, in the same way that in an adult case, the sentence would decide between the death penalty and LWOP.

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>38</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (discussing the JLWOP jurisprudence, starting with *Roper*).

<sup>39</sup> *Roper*, 543 U.S. at 570.

<sup>40</sup> *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350 (1993)).

<sup>41</sup> *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

<sup>42</sup> *Id.* at 570.

never an appropriate punishment for a child.

Five years after *Roper*, the Court took aim at JLWOP, which became the de-facto harshest juvenile punishment available. In *Graham v. Florida*,<sup>43</sup> the Court reviewed a sentence for LWOP for crimes committed a mere thirty-four days before the defendant's eighteenth birthday.<sup>44</sup> Citing *Kennedy* and *Enmund* numerous times, the Court held this sentence unconstitutional and categorically barred JLWOP for any "offender who did not commit homicide."<sup>45</sup>

Notably, the *Graham* Court explained that LWOP, although only "the second most severe penalty," still "share[s] some characteristics with death sentences."<sup>46</sup> Indeed, LWOP is an "irrevocable" forfeiture that denies a defendant of all hope.<sup>47</sup> And JLWOP is "especially harsh," because juvenile offenders will, on average, serve more time in prison.<sup>48</sup>

The next confrontation with JLWOP arose in *Miller v. Alabama*,<sup>49</sup> where the Court declared mandatory-JLWOP-sentencing schemes unconstitutional. Speaking for the Court, Justice Kagan articulated a direct comparison between the harshness of JLWOP and capital punishment: "we view[] this ultimate penalty for juveniles as akin to the death penalty, we treat[] it similarly to that most severe punishment."<sup>50</sup> The Court did not go so far as to say that there must be a separate sentencing hearing; rather, it merely held that sentencers "must have the opportunity to consider mitigating circumstances" and make an individualized decision.<sup>51</sup>

With the JLWOP–adult capital punishment analogue fully out on the table, Justice Kagan then teased out two lines of precedent "reflecting [the Court's] concern with proportionate punishment." In the first, the Court "has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."<sup>52</sup> In the second, the Court "[has] prohibited

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<sup>43</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>44</sup> *Id.* at 55. To be more specific, Graham was first charged as an adult and convicted for an offense at age sixteen, which, coupled with the second conviction, resulted in the JLWOP sentence. *Id.* at 53-57.

<sup>45</sup> *Id.* at 82.

<sup>46</sup> *Id.* at 69.

<sup>47</sup> *Id.* at 69-70.

<sup>48</sup> *Id.* at 70.

<sup>49</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>50</sup> *Id.* at 2466.

<sup>51</sup> *Id.* at 2475.

<sup>52</sup> *Id.* at 2463 (citing *Graham v. Florida*, 560 U.S. 48 (2010), *Kennedy v. Louisiana*, 554



mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death.”<sup>53</sup> And as the Court in *Graham* layered the first line onto the JLWOP parallel, Justice Kagan used the second line for guidance in *Miller*. Citing *Woodson* and *Sumner*, she declared any mandatory-JLWOP-sentencing scheme unconstitutional.<sup>54</sup>

### A. The JLWOP Analogue: An incomplete Portrait

As noted in Part II, the Court has not shied away from strong proclamations comparing JLWOP and capital punishment for adults. In perhaps the boldest instance, Justice Kagan in *Miller* cited Chief Justice Roberts’s concurring opinion in *Graham* for the principle that the Court interprets the “[t]reat[ment] [of] juvenile life sentence as analogous of capital punishment.”<sup>55</sup> But this reference omitted some important words that followed: “. . . is at odds with our longstanding view that ‘the death penalty is different from other punishments in kind rather than degree.’”<sup>56</sup> Justice Kagan citing the Chief Justice for a principle he rejected is not, inherently, of great concern. It demonstrates, though, that the Court has accepted the JLWOP analogue and rejected Chief Justice Roberts’ original position.

With the Court’s acceptance of the JLWOP analogue in tow, we can easily see the comparisons I briefly teased out in Part II. To wit, *Kennedy* became *Graham* and *Woodson* became *Miller*. If we take the Court’s JLWOP analogue seriously, however, we—or rather, the Court—cannot stop here. The Court must complete the portrait. A task to which I now turn.

### B. A Completed Portrait

Layering other capital punishment restrictions onto JLWOP should be an easy task. One need only review the remaining capital cases on the books—*Gregg*, *Lockett*, *Godfrey*, *Enmund*, and *Tison*. And crafting

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U.S. 407 (2008), *Roper v. Simmons*, 542 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding capital punishment of “mentally retarded criminals” unconstitutional)).

<sup>53</sup> *Id.* at 2463-64 (citing *Sumner v. Shuman*, 483 U.S. 66 (1987), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

<sup>54</sup> *Id.* at 2467-69.

<sup>55</sup> *Id.* at 2467.

<sup>56</sup> *Graham v. Florida*, 560 U.S. 48, 90-91 (2010) (Roberts, C.J., dissenting) (quoting *Solem v. Helm*, 463 U.S. 277 (1983)).

a harmonious JLWOP scheme produces clear results: (1) there must be a separate sentencing hearing;<sup>57</sup> (2) a sentencer would need guided discretion with specific consideration of aggravating<sup>58</sup> and mitigating<sup>59</sup> factors; and (3) although there is a general prohibition against JLWOP for felony-murder convictions,<sup>60</sup> there is a narrow exception for defendants who are major participants in a felony and display reckless indifference to human life.<sup>61</sup>

Despite the simple results, several problems immediately come to mind. First, it may seem counterintuitive for the Court's JLWOP jurisprudence to advance in a different order than its capital punishment jurisprudence. In particular, the Court mandated both bifurcated trial proceedings and that sentencers consider aggravating and mitigating factors before other restrictions, such as barring the death penalty for offenses other than homicide. And yet, the Court layered the latter onto JLWOP jurisprudence in *Graham* and has never addressed the prior.

Such dissonance between the jurisprudential paths is not intrinsically problematic if a subsequent capital punishment restriction did not logically build off of prior restrictions. While all restrictions evolve from shared principles, the major concern is whether the dissonance is logically incoherent. That is not the case. Bifurcated trial proceedings and consideration of aggravating and mitigating factors, for example, are connected. After all, they both stem from the second precedential line articulated by Justice Kagan in *Miller*; that is, increasingly individualized consideration. Categorically barring a punishment for non-homicide offenses, on the other hand, falls in Justice Kagan's first line of precedent, and is not logically derivative of increased individualization.

In addition, the Court has already progressed "out of order." Indeed, the first JLWOP restriction—precluding JLWOP for non-homicide offenses<sup>62</sup>—derives its parallel from the most recent capital restriction case.<sup>63</sup> And the Court's next JLWOP restriction—precluding mandatory JLWOP, even for homicide offenses<sup>64</sup>—derives its parallel

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<sup>57</sup> *Cf. Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (plurality opinion).

<sup>58</sup> *Cf. Godfrey v. Georgia*, 446 U.S. 420 (1980).

<sup>59</sup> *Cf. Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

<sup>60</sup> *Cf. Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>61</sup> *Cf. Tison v. Arizona*, 481 U.S. 137 (1987).

<sup>62</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>63</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>64</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

from one of the oldest capital restriction cases.<sup>65</sup>

But there is still a lingering concern that some *justifications* for capital restrictions are not analogous to the JLWOP context. For example, a reason for additional layers of procedural protections in capital cases is that an incorrect sentence, if carried out, cannot be corrected, calling into question whether the justifications for death penalty-sentencing limitations are applicable in the JLWOP context at all. But the greater opportunity for error correction in JLWOP sentences should, at most, only undermine the need for bifurcated proceedings.<sup>66</sup> The distinction is inconsequential where the Court has imposed limitations on the scope of permissible offenses warranting the death penalty. In those cases, the basis for the restriction was to narrow the punishment's application to the worst of the worst offenders.<sup>67</sup> This was the case, for instance, when the Court required consideration of mitigating and aggravating factors. Accepting the Court's purported rationale at face value, it ought to resonate with equal force when applied to JLWOP.

This analysis is most powerful when considering the *Enmund-Tison* principle, which precludes death eligibility if the defendant neither killed nor intended to kill, unless the defendant is a major participant in the commission of a felony resulting in death and exhibits a reckless indifference to human life.<sup>68</sup> The purpose behind both *Enmund's* general prohibition and *Tison's* exception is that the most awesome punishment is ill-suited for defendants lacking the most blameworthy constitution. And if a defendant lacks even an intent to kill, that seems categorically less blameworthy.

Sure enough, the Court had the opportunity to layer the *Enmund-Tison* principle over to JLWOP this term. In *Jacobs v. Louisiana*, the state had charged and convicted Jacobs as a principal on two counts of second-degree murder.<sup>69</sup> Although sixteen at the time of the offense, Jacobs received mandatory consecutive sentences of LWOP.<sup>70</sup> In addition, under Louisiana law the jury only needed to find that Jacobs assisted in committing an aggravated burglary and armed robbery that resulted in

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<sup>65</sup> Woodson v. North Carolina, 428 U.S. 280 (1976).

<sup>66</sup> Even this is difficult to argue. After all, bifurcated proceedings do not exist so that defendants have a second chance to plead their innocence.

<sup>67</sup> See, e.g., Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

<sup>68</sup> Tison v. Arizona, 481 U.S. 137, 158 (1987).

<sup>69</sup> State v. Jacobs, 67 So. 3d 535, 545-46 (La. Ct. App. 2011).

<sup>70</sup> *Id.* at 593.

murder.<sup>71</sup> As a result, the jury did not need to find that Jacobs actually killed or even intended for the felony to result in death.

The first problem with *Jacobs*, which should jump out, is that the sentence violates *Miller*'s prohibition against mandatory JLWOP. Jacobs was convicted prior to the Court's decision in *Miller*, though, and the Louisiana Supreme Court denied Jacobs' post-conviction request for relief under *Miller*, purporting that *Miller* did not apply retroactively.<sup>72</sup> As a result, the principal issue raised in *Jacobs* on appeal to the U.S. Supreme Court was whether *Miller* applied retroactively. When the Court elsewhere declared *Miller* retroactive in *Montgomery v. Louisiana*,<sup>73</sup> the Court granted, vacated, and remanded ("GVR") Jacobs's case.<sup>74</sup> The Louisiana Supreme Court then was required to apply *Miller*.

In addition to confronting *Miller*'s retroactivity, Jacobs questioned the constitutionality of JLWOP sentences that do not require proof that a defendant actually killed or intended to kill.<sup>75</sup> Relying heavily on the *Roper/Graham/Miller* trilogy, Jacobs argued in his petition for certiorari that there should be a categorical bar against such sentences. Unfortunately, with *Jacobs* GVR'd we will not have an immediate answer to this problem.

### C. Looking to the Future

Although *Jacobs* was GVR'd, it is likely that a future defendant will seek relief on the same grounds. And if the Court squarely considers this claim, the analogue has our answer: as a general matter, JLWOP sentences that do not require proof that a defendant actually killed or intended to kill violate the Eighth Amendment, per *Enmund*. But the Court should acknowledge an exception where a defendant demonstrates reckless indifference to human life while being a major participant in a felony murder, per *Tison*.

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<sup>71</sup> *Id.* at 552 n.11.

<sup>72</sup> *State v. Jacobs*, 165 So. 3d 69 (La. 2015). Interestingly, Jacobs never actually needed *Miller* to be retroactive for relief. The U.S. Supreme Court denied Jacobs's petition for certiorari on direct appeal "less than four months after deciding *Miller*." *Id.* Then the Louisiana Supreme Court mistakenly said that Jacobs's conviction became "final"—for purposes of retroactivity—when Jacobs "filed" his petition for writ of certiorari to the U.S. Supreme Court. *Id.* That is mistaken. The conviction was "final" when the U.S. Supreme Court *denied* Jacobs's petition. *See* *Griffith v. Kentucky*, 479 U.S. 314 (1987).

<sup>73</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

<sup>74</sup> *Jacobs v. Louisiana*, 136 S. Ct. 1362 (2016), *vacating and remanding* *State v. Jacobs*, 165 So. 3d 69 (La. 2015).

<sup>75</sup> Petition for Writ of Certiorari at 15-21, *Jacobs*, 136 S. Ct. 1362 (No. 15-5004).

Even if the Court were to address this point and decide a case in the manner just proposed, additional disharmony between the JLWOP and capital-sentencing doctrines would persist. In particular, the *Lockett* requirement to consider mitigating factors and the *Gregg* requirement to prove aggravating factors have never been addressed. But I see no principled reason why these requirements ought not apply to JLWOP. After all, these are procedural safeguards built to ensure that the worst punishment is only handed down to the worst offenders rather than for error correction. And for the members of the Court who have adopted the analogue, it will be hard to justify blocking the rules in *Lockett* and *Gregg* from merging into the JLWOP jurisprudence.

#### IV. CONCLUSION

Some readers may protest how the Court has painted JLWOP as a direct analogue for adult-capital punishment and whether the analogue is warranted. And in their defense, there are strong reasons to challenge the Court for deviating from its long-standing “death-is-different” tradition.<sup>76</sup> But regardless of how one feels about the analogue, the Court has accepted it. And nothing suggests that the Court will reverse course. With this in mind, we should anticipate *Enmund*’s general prohibition, *Tison*’s exception, *Lockett*’s mitigating factors, and *Gregg*’s aggravating factors to join *Graham* and *Miller* in limiting JLWOP.

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<sup>76</sup> *E.g.*, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (Stewart, J., plurality opinion) (“death is different in kind from any other punishment”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plurality opinion) (“death is qualitatively different from a sentence of imprisonment, however long”); *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (“[d]eath . . . is in a class by itself”).