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I. INTRODUCTION

Be an opener of doors.

– *Ralph Waldo Emerson*[1]

In March 2013, I had the privilege of participating in a symposium at the University of Missouri School of Law that addressed the question of whether the United States Supreme Court's recent decision in *Miller v. Alabama* was a "bombshell" or a "baby step."[2] As discussed below, *Miller* held that the Eighth Amendment barred the use of mandatory juvenile life-without-parole (LWOP) sentences.[3]

As the fifth case in a decade to expand the scope of the Eighth Amendment[4] and the second to broaden its application to juvenile LWOP,[5] *Miller* certainly may be no more than another incremental step within a broader line of cases.[6] On the other hand, *Miller* suggests a number of possible avenues for broadening the Eighth Amendment. And the need to expand the Eighth Amendment has not diminished with the Court's work over the

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1. http://www.goodreads.com/quotes/635803-be-an-opener-of-doors.

2. *See Program*, UNIVERSITY OF MISSOURI SCHOOL OF LAW, http://law.missouri.edu/faculty/symposium/lawreview2013/index.html (last updated Feb. 18, 2013) (describing symposium).

3. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

4. *See id*. at 2569 (banning mandatory juvenile LWOP sentences); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (banning LWOP sentences for juvenile offenders in non-homicide crimes); Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (banning the death penalty for non-homicide crimes); Roper v. Simmons, 543 U.S. 551, 578 (2005) (banning the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (banning the death penalty for mentally retarded offenders).

5. *See Miller*, 132 S. Ct. at 2460; *Graham*, 130 S. Ct. at 2034. For more on the practical implications and consequences of *Graham*, see Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012).

6. *Miller*, 132 S. Ct. at 2472.

past decade.[7] In an age of penal populism, the United States remains an outlier, arguably in the history of the world, in its use of mass incarceration of criminal offenders.[8]

Contrary to Professor Frank Bowman's claim, the Court's recent Eighth Amendment cases are not a judicial revolution seeking to curb the power of legislatures.[9] Rather, the Supreme Court's expansion of the Eighth Amendment, as Judge Nancy Gertner suggests, simply restores an absent Court to its proper role of policing legislative overreaching.[10] Prior to its 2002 decision in *Atkins v. Virginia*, the Supreme Court largely abdicated its role of protecting the rights of individuals against the majoritarian legislative enactments that have resulted in the United States' position as an outlier in the world in its use of severe punishments.[11] The failure to abolish capital punishment,[12] the proliferation of mandatory minimum sentences,[13] the expansive use of LWOP sentences,[14] and the mass incarceration of criminal offenders[15] render

7. *See, e.g.*, William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010) [hereinafter *More Different than Life*] (arguing that LWOP sentences are unique and deserve their own level of higher scrutiny).

8. *See, e.g.*, Roy Walmsley, *World Prison Population List*, INTERNATIONAL CENTRE FOR PRISON STUDIES 1 (2011), *available at* http://www.prisonstudies.org/images/news_events/wppl9.pdf (showing that the United States has the highest prison population rate in the world at 743 persons per 100,000 of the national population); *see also* MARC MAUER, RACE TO INCARCERATE 9-10 (2d ed. 2006).

9. Frank O. Bowman III, *Juvenile Lifers and Judicial Overreach: A Curmudgeonly Meditation on* Miller v. Alabama, 78 MO. L. REV. 1015 (2013) (The recent cases are "strands of a web of decisions in which the [Supreme] Court has consistently used doubtful constitutional inter-pretations to transfer power over criminal justice policy from the legislatures . . . to the courts.").

10. Nancy Gertner, Miller v. Alabama: *What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041 (2013) (symposium keynote remarks).

11. *See* CONNIE DE LA VEGA ET AL., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 11 (May 2012) [hereinafter CRUEL AND UNUSUAL], *available at* www.usfca.edu/law/docs/criminalsentencing/.

12. *See generally* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 10-13 (2010) ("The American death penalty is *peculiar* insofar as it is the only capital punishment system still in use in the West."); ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 111-28 (4th ed. 2008) (describing the United States' resistance to abolishing the death penalty); William W. Berry III, *The European Prescription for Ending the Death Penalty*, 2011 WIS. L. REV. 1003 (2011) [hereinafter *The European Prescription*] ("The United States of America remains the only Western democracy that continues to use capital punishment.").

13. *See, e.g.*, Michael Tonry, *The Mostly Unintended Consequences of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65-114 (2009).

14. *See* CRUEL AND UNUSUAL, *supra* note 11, at 8 (comparing the almost 41,000 offenders serving LWOP sentences in the United States to the small numbers in other countries throughout the world).

the United States unique among Western nations in its harsh approach to criminal sentencing.[16]

Given this reality, this Article does not seek to offer a prediction as to what *Miller will mean*, as others in the symposium have done quite well.[17] Instead, the Article explores what *Miller can mean*. In doing so, the Article highlights different avenues for extending *Miller* such that it can become a bombshell over time, albeit by offering potential baby steps to theorists and litigators alike.[18]

This contribution, then, illuminates the potential doctrinal and theoretical consequences of the *Miller* decision within the broader context of the Supreme Court's Eighth Amendment jurisprudence. Without arguing for one normative outcome over the other and recognizing that the Court's work in this area has been largely incremental, this Article offers an intellectual road map that develops many of the arguments for broadening the Eighth Amendment made more plausible after the *Miller* decision.

At the heart of this exploration is the concept that "juveniles are different."[19] Specifically, this Article argues that there are two distinct meanings of

15. Currently, the United States of America has "5 percent of the world's population and 25 percent of the world's known prison population." *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearings Before the J. Economic Comm.*, 110th Cong. 1 (2008) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg44772/pdf/CHRG-110shrg44772.pdf (providing a transcript of the committee hearing in which Senator Webb made his remarks about prison populations). Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system, and I choose to believe the latter." *Id.* at 1-2; *see also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html (reporting data about prison and population).

16. *See* CRUEL AND UNUSUAL, *supra* note 11, at 7; Walmsley, *supra* note 8, at 1.

17. *See generally* AUSTIN SARAT, LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY (2012). Frank O. Bowman III, *A Curmudgeonly Meditation on* Miller v. Alabama, 78 MO. L. REV. 1015 (2013); Nancy Gertner, Miller v. Alabama: *What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041 (2013); Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087 (2013); Clark Peters, *Precedent as a Policy Map: What* Miller v. Alabama *Tells Us About Emerging Adults and the Direction of Contemporary Youth Services*, 78 MO. L. REV. 1183 (2013).

18. This Article certainly does not fall into the category that Chief Justice Roberts complained of last summer at the Fourth Circuit Judicial Conference. Am. Constitution Soc'y, *Law Prof. Ifill Challenges Justice Roberts' Take on Academic Scholarship*, ACSBLOG (July 5, 2011), http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts'-take-on-academic-scholarship. Roberts commented, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which . . . isn't of much help to the bar." *Id.*

19. Miller v. Alabama, 132 S. Ct. 2455, 2482 (2012).

this conceptualization: (1) that juveniles are unique as offenders, and (2) that juvenile LWOP is a unique punishment. While certainly not mutually exclusive, each interpretation offers its own set of consequences and paths to pursue in challenging criminal sentences under the Eighth Amendment.

Part II of the Article provides the context for the *Miller* case, outlining the theoretical underpinnings of the Court's Eighth Amendment jurisprudence. Part III describes the Court's "different" jurisprudence, linking the concept of "juveniles are different" to the Court's longstanding view that "death is different."[20] In Part IV, the Article demonstrates how the two possible interpretations of the Court's statement in *Miller* that "juveniles are different" – as a character-based form of differentness and, in the case of juvenile LWOP, as a punishment-based form of differentness – create distinct theoretical bases for broadening the scope of the Eighth Amendment. Finally, Parts V and VI explore the potential theoretical and doctrinal consequences of each of those understandings.

II. CONSTITUTIONAL UNDERPINNINGS

Before investigating the possible directions for doctrinal expansion of the Eighth Amendment, it is important to explore its broader constitutional underpinnings. The force and persuasiveness of each of the potential approaches outlined below rests, in part, on their respective abilities to capture the theoretical constructs of the Eighth Amendment developed by the Supreme Court.

A. Defining "Cruel and Unusual"

1. The Text

It has long been within the purview of the Court to define what the language of the Constitution means, as well as its scope.[21] In theory, this allows the Court to protect the interests of the minority – those who are subject to

20. Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004) (discussing the Court's death-is-different jurisprudence).

21. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 178-80 (1803) (establishing the principle of judicial review and the role of the Court as the primary arbiter of the meaning of the Constitution).

punishment by the State – against overreaching by the legislature in the form of cruel and unusual punishments.[22]

Cruel punishments are ones that are excessive in light of the offense.[23] This can occur in two senses. First, a punishment becomes cruel when it causes an unwarranted amount of physical pain and suffering.[24] A second related way that a punishment becomes cruel is when its imposition results in a deprivation of life or liberty incongruent with the conduct of the offender.[25] Unusual punishments, by contrast, are those that states rarely impose.[26] What makes a punishment unusual, then, is its uncommonness or rarity.[27] And this rarity is the very thing that calls it into question under the Constitution.[28]

These basic definitions of cruel and unusual remain largely uncontested. There remains ambiguity, however, surrounding which of the multiple possible meanings of the conjunction "and" apply.[29] One possible reading is the conjunctive one, in which a punishment must be both cruel *and* unusual to violate the Eighth Amendment.[30] Another reading is the disjunctive one, where the Amendment would prohibit cruel punishments and unusual punishments.[31] Finally, a third reading would group the two concepts collective-

22. *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1818-19 (1997). The exercise of judicial power to invalidate statutes on constitutional grounds has been the subject of much academic debate. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 523-607 (2002).

23. Coker v. Georgia, 433 U.S. 584, 592 (1997); William W. Berry III, *Following the Yellow Brick Road of the Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different" Jurisprudence*, 28 PACE L. REV. 15, 21 (2007) [hereinafter *Following the Yellow Brick Road*]; Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784-85 (1970).

24. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 49-50 (2008); Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

25. *Coker*, 433 U.S. at 592; *Following the Yellow Brick Road*, *supra* note 23, at 21; Goldberg & Dershowitz, *supra* note 23, at 1794.

26. *Following the Yellow Brick Road*, *supra* note 23, at 19 (citing Goldberg & Dershowitz, *supra* note 23, at 1789).

27. Furman v. Georgia, 408 U.S. 238, 309 (Stewart, J., concurring) (stating that infrequently imposed death penalties "are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

28. *Id.* at 310.

29. Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 605 (2010).

30. *Id.*

31. *Id.*

ly, such that a "cruel and unusual" punishment is a singular idea.[32] This reading combines the ideas because cruel punishments are by their nature unusual, and unusual punishments are, by their nature, cruel.[33]

As with most constitutional provisions, the Court must next decide what its frame of reference for interpretation should be. Two schools of interpretation – originalism and living constitutionalism – have dominated this discussion in recent years.[34] The next two sections consider the implications of these approaches for interpreting the Eighth Amendment.

2. The Originalists

The most obvious originalist approach to the Eighth Amendment, which Justice Antonin Scalia has advocated,[35] restricts the definition of cruel and unusual punishments to those punishments proscribed at the time of the adoption of the Constitution.[36] Such an approach would mean that capital punishment in particular creates no Eighth Amendment issue because state governments commonly used that punishment in 1787.[37] As Justice Scalia and others have argued, under this approach only punishments involving infliction of torture or some similar brutality would infringe upon the prohibition against cruel and unusual punishments.[38]

In recent years, however, Professor John Stinneford and others have called this originalist view into question based on historical research.[39] Professor Stinneford claims that the original meaning of the Eighth Amendment

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32. *Id.* at 600.

33. *Id.*

34. *See id.* at 568-69, 584 n.98, 604 n. 225.

35. *See, e.g.*, Harmelin v. Michigan, 957, 965 (1991); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1740, 1758-66 (2008) (describing Scalia's originalist approach in detail).

36. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 352-53 (2002) (Scalia, J., dissenting).

37. *See* Michael H. Reggio, *History of the Death Penalty*, *in* SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1, 4 (Laura E. Randa ed., 1997), *reprinted in Frontline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html (last visited Oct. 22, 2013). During America's foundational years, hanging served as the most common method of capital punishment. *Id.* Executions were public, and sometimes thousands of onlookers would attend a hanging. *Id.* at 5. On occasion, crowds would get drunk and grow violent during executions and continue their debauchery well into the night. *Id.*

38. *See, e.g.*, Stinneford, *supra* note 35; Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 865 (1969). The punishments imposed by Judge Jeffreys during the Bloody Assizes would be examples of this, including such atrocities as drawing and quartering. *Id.* at 853-54.

39. Stinneford, *supra* note 35.

contemplated adjustment over time as a one-way expanding ratchet that would prohibit certain punishments based on increased societal understanding that a particular punishment is cruel and unusual.[40] Further, Professor Stinneford has suggested that implicit in this understanding is the concept of proportionality.[41] In other words, a punishment that, under modern standards, is excessive with respect to the culpability of the offender and the harm caused by the criminal act violates the Eighth Amendment.[42]

Ironically, under either approach to the original meaning of the Eighth Amendment, LWOP sentences may be unconstitutional. Under the approach adopted by Justice Scalia, such sentences did not exist in 1787, or at the very least did not enjoy widespread usage.[43] In that case, the Eighth Amendment's application to LWOP sentences would rest upon whether such sentences are more severe than the punishments permitted in 1787; namely, the death penalty. Many have argued that an LWOP sentence is worse than a capital sentence,[44] and the high number of death row volunteers – inmates who waive their appeals in order to accelerate their execution dates – seems to support this conclusion.[45]

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40. *Id*. at 1818-19.

41. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 951-52 (2011) [hereinafter Stinneford, *Rethinking Proportionality*].

42. *Id*. at 952. *But see* William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 62-69 (2011) [hereinafter *Separating Retribution from Proportionality*] (taking issue with Stinneford's claim that the original conception of Eighth Amendment proportionality consists only of retribution as a purpose of punishment).

43. *See* Stinneford, *Rethinking Proportinality*, *supra* note 41, at 1757-66 (discussing how Justice Scalia's originalist interpretation of "unusual" from the Cruel and Unusual Punishment Clause is based on what was legal and practiced at the end of the eighteenth century rather than what was disproportionate or excessive).

44. This certainly is true with respect to likelihood of reversal on appeal. *See, e.g.*, Alex Kozinski & Steven Bright, Debate, *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353, 1360-61 (1997) (quoting Judge Alex Kozinski's view that innocent defendants are better off being charged with a capital crime in California because they will get "a whole panoply of rights of appeal and review that you don't get in other cases"); Patrick McIlheran, *Illinois Re-Examines Life Sentences*, MILWAUKEE J. SENTINEL, Oct. 25, 2006, *available at* 2006 WLNR 19566654 ("[T]he safeguards that states build into capital cases – the things that make the death penalty so costly – make it less likely an innocent man will be executed than simply imprisoned wrongly.").

45. *See, e.g.*, John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 939-40, 940 n.5 (2005); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 n.1 (2002); *see also* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 860-61 (1983), *available at* http://scholarlycommons.

Under the Stinneford reading of the original meaning of the cruel and unusual punishment clause, LWOP sentences could also violate the Eighth Amendment, at least in cases in which that punishment is excessive for the crimes committed. While the Supreme Court has rejected this idea before,[46] it is certainly possible that the societal view of proportionate punishment has evolved over time to conclude that LWOP sentences are excessive for certain crimes, particularly non-violent, victimless crimes.[47]

3. The Evolving Standards of Decency

The second common method of constitutional interpretation is that of a living Constitution, one whose meaning is not static but evolves over time consistent with modern understanding.[48] This approach reasons that the world is very different from what it was in 1787, and that the point of employing broad constitutional language – like "cruel and unusual punishments" – was to allow the political branches to supply it with more specified content over time.[49]

In *Weems v. United States*, the Supreme Court adopted such an approach.[50] Explaining that for a constitutional principle "to be vital, [it] must be capable of wider application than the mischief which gave it birth," the Court counseled that "[i]n the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be."[51] Forty years later, the Court cemented this concept in *Trop v. Dulles*, explaining that "the words of the [Eighth] Amendment are not precise, and that their scope is not static."[52] As a result, the Court mandated that the Eighth Amendment "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[53]

As explored below, the Court has adopted a two-part test to determine whether a particular punishment contravenes evolving standards of decency. First, the Court examines what it terms objective indicia – the use of the pun-

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law.northwestern.edu/jclc/vol74/iss3/6/; Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1902-03 (1998).

46. *See* Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991). *But see infra* Part III (suggesting that *Graham* and *Miller* may provide a basis for challenging the holding in *Harmelin*).

47. Indeed, many of those currently serving LWOP sentences are non-violent offenders, often because of drug offenses. CRUEL AND UNUSUAL, *supra* note 11, at 33.

48. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY (2005).

49. *Id.*

50. 217 U.S. 349, 373 (1910).

51. *Id.*

52. 356 U.S. 86, 100-01 (1958) (footnote omitted) (referencing the Court's decision in *Weems v. United States*).

53. *Id.* at 101.

ishment by juries and legislatures.[54] Specifically, the Court counts the number of legislatures that allow the punishment in question.[55] Second, the Court brings its "own judgment . . . to bear,"[56] exploring whether the punishment is excessive under the "evolving standards of decency."[57] In particular, the Court assesses whether the punishment in question satisfies retributive and utilitarian purposes of punishment.[58]

Interestingly, in such cases the Court has always found that punishments violating the evolving standards of decency fail both the objective and subjective inquiries.[59] This consistency may stem, in part, from a concern that using the Eighth Amendment to nullify a legislatively-approved punishment requires a more robust analysis than the mere belief of five justices that a particular punishment is excessive or inappropriate.[60]

B. Two Conceptions of Proportionality

Perhaps the unifying value behind the Court's decision to place Eighth Amendment procedural and substantive restrictions on the use of particular

54. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (indicating that the Court should look to state legislative practices and jury decisions to help determine the meaning of the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (defining the approach as requiring an examination of "objective indicia"). Presumably, the less the use, the more unusual the punishment is, and the more cruel it is either because it is objectively cruel and thus used less or because imposing unusual punishments is cruel.

55. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)) ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"). In practice, the Court's application of this method has created controversy. *See, e.g.*, *id.* at 337-38 (Scalia, J., dissenting). The question of how to count the states, including whether states that have abolished the death penalty has been one concern. *Id.* at 342-47. In addition, in several cases, the number of states allowing the practice has been the majority in the United States. *See, e.g.*, *Roper*, 543 U.S. at 554. In such cases, the Court has looked to both the direction of the change and international practices. *See id.*; *Atkins*, 536 U.S. at 337-38 (Scalia, J., dissenting).

56. *Coker*, 433 U.S. at 597.

57. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *Roper*, 543 U.S. at 560-61 (quoting *Dulles*, 356 U.S. at 101); *Atkins*, 536 U.S. at 311-12 (quoting *Dulles*, 356 U.S. at 101); *Coker*, 443 U.S. at 603 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (internal quotation marks omitted).

58. *See, e.g.*, *Coker*, 433 U.S. at 592; *see also* sources cited *supra* note 4. These purposes in the death penalty context typically include retribution and deterrence, and occasionally dangerousness. *See* sources cited *supra* note 4.

59. *See, e.g.*, *Kennedy*, 554 U.S. at 407-08; *Roper*, 543 U.S. at 560-61; *Atkins*, 536 U.S. at 311-12; *Coker*, 443 U.S. at 592.

60. *Following the Yellow Brick Road*, *supra* note 23, at 27-28 (discussing Justice Blackmun's dissent in *Furman v. Georgia*, 408 U.S. 238 (1972)).

punishments is the concept of proportionality.[61] The Court's cases have developed this idea in two senses: proportionality between the criminal offense and the punishment (herein described as "absolute proportionality")[62] and proportionality among punishments for offenders committing similar criminal offenses ("relative proportionality").[63]

1. Relative Proportionality ("Unusual")

In *Furman v. Georgia*, the Supreme Court famously declared the death penalty unconstitutional because its application was inconsistent.[64] As Justice Stewart explained, because there were so many individuals committing murders and so few receiving the death penalty, receiving a death sentence was akin to being "struck by lightning."[65] When the Court reinstated the death penalty four years later in *Gregg v. Georgia*,[66] it did so because the Georgia legislature had adopted safeguards[67] to ensure that it would achieve some level of consistency – or at the very least avoid randomness – in determining who received the death penalty.[68]

In *Furman* and *Gregg*, then, the Court established that the Eighth Amendment required the use of procedural safeguards (at least in capital cases) that ensured some level of relative proportionality in the implementation of punishments.[69] In other words, failure to provide for some modicum of comparable outcomes for comparable offenders in death penalty cases – some measure to minimize the disparity inherent in jury sentencing – violates the Eighth Amendment.

One way to conceptualize the Eighth Amendment problem here is to label such outlier sentences as "unusual," in the sense that most other similar

61. *Kennedy*, 554 U.S. at 437 (highlighting the need for a unifying Eighth Amendment principle); William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 102 (2011) [hereinafter *Promulgating Proportionality*] (arguing that proportionality is the unifying Eighty Amendment principle).

62. *Promulgating Proportionality*, *supra* note 61, at 90-93.

63. *Id.* at 93-96.

64. 408 U.S. 238, 239 (1972) (per curiam).

65. *Id.* at 309 (Stewart, J., concurring).

66. 428 U.S. 153, 187 (1976). The Court decided two additional cases that upheld state capital punishment statutes for similar reasons. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding Texas's new capital statute); Proffitt v. Florida, 428 U.S. 242, 260 (1976) (upholding Florida's new capital statute).

67. These safeguards included: (1) bi-furcation of the guilt and sentencing phases at trial, (2) the requirement of proof of aggravating circumstances to impose the death penalty, and (3) proportionality review by the state supreme court. *Gregg*, 428 U.S. at 190-91, 204-05.

68. *Id.* at 222-23.

69. *Id.* at 164-67; *Furman*, 408 U.S. at 271-81 (Brennan, J., concurring); *Promulgating Proportionality*, *supra* note 61, at 72.

offenders receive lesser sentences.[70] Again, the constitutional problem is that certain sentences are excessive *by comparison* to those received by offenders committing similar crimes.[71]

2. Absolute Proportionality ("Cruel")

Rather than asking whether a punishment is excessive in terms of the punishments imposed on comparable offenders, absolute proportionality asks if a punishment is excessive in terms of the offense committed.[72] In the Court's cases, this inquiry contemplates excessiveness in terms of all of the applicable purposes of punishment.[73]

Assessing absolute proportionality requires consideration of the characteristics of both the offender and the criminal act.[74] As the Court explained in *Woodson v. North Carolina*, the Eighth Amendment requires individualized sentencing consideration in capital cases and thus prohibits mandatory death sentences.[75] Further, the Court has prohibited limitations on the use of mitigating evidence at sentencing to allow for complete consideration of each individual's situation.[76]

The question, then, is whether the particular punishment at issue is always excessive in light of the characteristics of the offense or the offender.[77] For instance, the Court has held that the death penalty is an excessive pun-

70. William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 694 (2012) [hereinafter *Practicing Proportionality*]; *Promulgating Proportionality*, *supra* note 61, at 78.

71. *Practicing Proportionality*, *supra* note 70, at 694-95; *Promulgating Proportionality*, *supra* note 61, at 75-76.

72. This inquiry is not limited to "*just deserts*" retribution; it also includes other purposes of punishment. *See Separating Retribution from Proportionality*, *supra* note 42, at 70; Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 266 (2005). *But see* Stinneford, *Rethinking Proportionality*, *supra* note 41, at 967-78 (arguing that "the Supreme Court should recognize that excessiveness under the Cruel and Unusual Punishments Clause is a retributive concept and should not permit legislatures to pursue utilitarian goals at the expense of individual justice").

73. In the death penalty context, the only valid purposes of punishment are retribution and deterrence. *See Gregg*, 428 U.S. at 183-84 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893, 910, 920 (2010). But, in juvenile LWOP cases, rehabilitation is back on the table. *See* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1233, 1238-40 (2013).

74. *Promulgating Proportionality*, *supra* note 61, at 90-93.

75. 428 U.S. 280, 304-05 (1976).

76. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

77. Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

ishment for any non-homicide crime[78] and for mentally retarded[79] and juvenile offenders.[80] If the requirement of relative proportionality is an analog to the concept of unusualness, then the concept of absolute proportionality can serve as a proxy for the concept of cruelty.[81] A punishment that is excessive with respect to the crime committed – and the applicable purposes of punishment – is, by definition, a cruel one.[82]

C. Judicial Hesitancy

Despite the robust development of Eighth Amendment doctrine[83] since the Court's 1972 decision in *Furman*, the story of the Court's regulation of state criminal punishment is one of passivity and hesitancy.[84] Indeed, as explored below, the Court has largely embraced the concept of deference to state legislatures in its application of the Eighth Amendment.[85]

1. Limited Application of Absolute Proportionality

Prior to the past decade, the Court had placed virtually no Eighth Amendment limit on the imposition of particular punishments, even where the punishment seemed excessive for the crime.[86] This was particularly true in non-capital cases.[87]

78. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008).

79. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

80. Roper v. Simmons, 543 U.S. 551, 578 (2005).

81. *See Practicing Proportionality*, *supra* note 70, at 687; *see also Promulgating Proportionality*, *supra* note 61, at 114 (proposing a new model of proportionality providing a unifying principle of Eighth Amendment jurisprudence).

82. *Promulgating Proportionality*, *supra* note 61, at 106.

83. *See, e.g.*, James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1 (2007); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151 (2003); Steiker & Steiker, *supra* note 20 (summarizing and commenting on developments since *Furman*).

84. There is a second narrative, one that separates capital from non-capital cases. *See supra* Part II.A. *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (acknowledging the Court's different treatment of capital cases); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861 (2008).

85. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting); William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 451, 459 (2011) [hereinafter *Repudiating Death*].

86. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18, 30-31 (2003) (affirming sentence of twenty-five

Indeed, the Supreme Court upheld the following harsh and arguably disproportionate sentences under the Eighth Amendment: two consecutive sentences of twenty-five years to life for stealing $150 worth of videotapes;[88] a twenty-five year sentence for stealing $1,200 worth of golf clubs under a three strikes law;[89] an LWOP sentence for a first offense of possessing 672 grams of cocaine;[90] two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana;[91] and a third strike life-with-parole sentence for felony theft of $120.75 by false pretenses.[92]

In fact, prior to 2002, the Court only limited the state's ability to punish under the Eighth Amendment in four cases in the post-*Furman* era.[93] In the death penalty context, the Court prohibited the use of capital punishment for rapists,[94] insane offenders,[95] and offenders playing a minor role in felony murder crimes.[96] The Court also held in *Solem v. Helm* that an LWOP sentence for presenting a bad check for $100 violated the Eighth Amendment.[97] *Solem*, though, is an outlier in light of the Court's decisions cited above – similar cases of disproportional sentences in non-capital cases. Indeed, the standard that the Court articulated in those cases is one of gross disproportionality, which is a standard almost never met.

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years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 959-60 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370-72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265-66 (1980) (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 281-84 (1983) (affirming the Eighth Circuit's reversal of a sentence of life without parole for presenting a no account check for $100, where defendant had six prior felony convictions).

87. *See* sources cited *supra* note 86.

88. *Lockyer*, 538 U.S. at 66, 77.

89. *Ewing*, 538 U.S. at 18, 30-31.

90. *Harmelin*, 501 U.S. at 961, 994.

91. *Hutto*, 454 U.S. at 370-72.

92. Rummel v. Estelle, 445 U.S. 263, 265-66 (1980).

93. *See* Ford v. Wainwright, 477 U.S. 399, 401 (1986); Solem v. Helm, 463 U.S. 277, 303 (1983); Enmund v. Florida, 458 U.S. 782, 801 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977).

94. *Coker*, 433 U.S. at 593.

95. *Ford*, 477 U.S. at 409.

96. *Enmund*, 458 U.S. at 788. *But see* Tison v. Arizona, 481 U.S. 137, 158 (1987) (allowing prosecution for reckless endangerment in felony murder cases).

97. 463 U.S. at 281-82, 303.

2. The "Categorical Revolution"

Beginning in 2002, the Court has narrowly decided five cases holding that the Eighth Amendment categorically prohibits a certain type of offender or offense from receiving a certain punishment.[98] As Professors Jordan and Carol Steiker have noted, this shift is remarkable in its departure from the Court's previous refusal to entertain such claims.[99]

Part of the explanation for the Court's decision to move in this direction includes the changed death penalty climate in the United States.[100] Beginning in the late 1990s, a series of events led to increasing doubts about the use of the death penalty, particularly considering the risk of the execution of an innocent individual.[101] In 1991 and 1994 respectively, Supreme Court Justic-

98. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (banning mandatory juvenile LWOP sentences); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (banning LWOP sentences for juvenile offenders in non-homicide crimes); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (banning the death penalty for non-homicide crimes); Roper v. Simmons, 543 U.S. 551, 567 (2005) (banning the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (banning the death penalty for mentally retarded offenders).

99. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW AND INEQ. 211, 212-13 (2012).

100. For an explanation of the connection between popular opinion and the Court's decisionmaking, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2011); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 365 (2009) (arguing that the majoritarian approach of the evolving standards is consistent with the Court's majoritarian tendencies).

101. *See* Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1066-67 (2003) (showing research indicates that approximately "seven out of every ten [people] sentenced to death in the twenty-three years [after] *Furman v. Georgia* were convicted in trials . . . found to be flawed," that many of these were found to be innocent, and that 5% of defendants sentenced to death are exonerated later (footnote omitted)). Indeed, the Innocence Project reports that 311 individuals in the United States have been exonerated based on DNA evidence, eighteen of whom spent time on death row. *DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Oct. 28, 2013). For two contrasting views on the ability of findings of innocence to end capital punishment, compare Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004) (arguing that appreciating the fallibility of the criminal justice system of convicting innocent people will have a lasting effect on criminal law), with Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005) (questioning the strategic value of focusing on innocence in the effort to reform or abolish capital punishment).

es Lewis Powell and Harry Blackmun renounced the death penalty based in part on their perceptions of error.[102] In 2000, Illinois Governor George Ryan imposed a moratorium on the death penalty after a study discovered that thirteen residents of the state's death row were actually innocent.[103] A 2001 study conducted by Columbia University law professor James Liebman revealed an error rate of sixty-eight percent in capital cases.[104] Six states – New York (2007), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013) – have recently abolished capital punishment, with a number of other state legislatures considering abolition as well.[105] Finally, a series of lawsuits challenging the constitutionality of lethal injection as a method for execution led to a one-year temporary moratorium on capital punishment in 2007-08 while the Supreme Court considered the issue.[106]

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102. *See* George Ryan, Address at Northwestern University College of Law: I Must Act (Jan. 11, 2003), *in* AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION 163, 178-79 (2005); *Repudiating Death*, *supra* note 85, at 442-45 (describing how both Blackmun and Powell renounced the death penalty and investigating the basis for these reversals); *see also* Austin Sarat, *Recapturing the Spirit of* Furman: *The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 9-12 (1998).

103. Henry Weinstein, *Md. Governor Calls Halt to Executions*, L.A. TIMES, May 10, 2002, at A16, *available at* 2002 WLNR 12444368. Maryland Governor Parris Glendening also declared a moratorium on executions in his state on May 9, 2002. *Id.*

104. Andrew Gelman et al., A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. EMPIRICAL LEGAL STUD. 209, 216-17 (2004). See Death Penalty Due Process Review Project: Death Penalty Assessments, AM. BAR ASS'N, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html (last visited Oct. 28, 2013) (formerly known as the "Moratorium Implementation Project," describing the ABA's moratorium project and providing links to its studies of various states).

105. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 28, 2013). These discussions are continuing, particularly in light of the higher costs of capital punishment during an era of economic recession. *See also* Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1, *available at* 2009 WLNR 3623046 (reporting that legislators in Colorado, Kansas, Nebraska, New Hampshire, and Montana have introduced bills to abolish capital punishment in light of higher costs).

106. *See* DEATH PENALTY INFO. CTR., *Lethal Injection: Stays Granted*, http://www.deathpenaltyinfo.org/lethal-injection-stays-granted. The Supreme Court upheld the constitutionality of lethal injection in *Baze v. Rees*, 553 U.S. 35, 47 (2008), but the method of execution still remains a contentious issue in many states. *See, e.g.*, Paul Elias, *Calif Execution Collapses After Court Setbacks*, ASSOCIATED PRESS, Sept. 30, 2010 (describing ongoing litigation over lethal injection in California); Douglas A. Berman, *Details on the Botched Ohio Execution Attempt, Issue Spotting, and Seeking Predictions*, SENTENCING L. & POL. BLOG (Sept. 16, 2009, 12:40 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/09/details-on-the-

Another part of the explanation may be that the harshness of the punishments themselves opened the door for the Court to broaden the Eighth Amendment. Indeed, the Court has highlighted – on more than one occasion – the extreme nature of the punishments in comparison to those utilized in the rest of the world.[107] The first case to highlight this harshness, *Atkins*, held that death sentences for mentally retarded offenders constituted cruel and unusual punishments.[108] Three years later, in *Roper v. Simmons*, the Court similarly barred death sentences for juvenile offenders.[109] And in 2008, the Court held in *Kennedy v. Louisiana* that the death penalty was impermissible for non-homicide crimes, striking down a Louisiana statute that made child rape a capital crime.[110]

All three of these cases followed the Court's evolving standards of decency test described above, finding that the objective evidence showed that a majority of states did not allow the practice in question and, as a subjective matter, that the purposes of punishment did not justify its imposition. Even though these decisions departed significantly from the Court's prior passivity in Eighth Amendment cases, the cases were more noteworthy for their signaling value – that is, that death penalty abolition may again be a possibility – than for their on-the-ground consequences.[111] Indeed, the number of mentally retarded offenders, juvenile offenders, and child sex offenders sentenced to death was relatively minor.[112]

In 2010, the Court broke with its prior focus on capital cases, as explained below, to examine the Eighth Amendment's applicability to juvenile LWOP sentences.[113] In *Graham v. Florida*, the Court banned juvenile LWOP in non-homicide cases, providing a juvenile LWOP analog to the Court's decision in *Kennedy*.[114] Following its evolving standards of decency juris-

botched-ohio-executions-issues-spotting-and-seeking-predictions.html (discussing Ohio's struggles with lethal injection in various cases).

107. Roper v. Simmons, 543 U.S. 551, 575-78 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

108. 536 U.S. at 321.

109. 543 U.S. at 578-79.

110. 554 U.S. 407, 446-47 (2008).

111. Steiker & Steiker, *supra* note 99, at 222.

112. *Juvenile Offenders Who Were on Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/juvenile-offenders-who-were-death-row (last visited Oct. 28, 2013) (juvenile offenders); *see Death Penalty for Offenses Other than Murder*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited Oct. 28, 2013) (child sex offenders); *List of Defendats with Mental Retardation Executed in the United States*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states (last visited Oct. 28, 2013) (mentally retarded offenders).

113. Graham v. Florida, 130 S. Ct. 2011, 2017-18 (2010).

114. *Id.* at 2034.

prudence, the Court emphasized its understanding from *Roper* that juveniles are, as a class, less culpable than adults.[115]

Most recently, the Court extended its absolute proportionality jurisprudence to mandatory juvenile LWOP sentences.[116] In *Miller*, the Court held that the Eighth Amendment banned mandatory juvenile LWOP sentences, providing a juvenile LWOP analog to *Woodson*.[117] As *Woodson* found with regard to the death penalty, the Court in *Miller* found that the Eighth Amendment requires individualized sentencing determinations in juvenile LWOP cases.[118]

3. The Importance of "Differentness"

Given the Court's hesitancy to infringe on the power of states to impose punishments under the Eighth Amendment, it has often invoked the concept of "differentness" as a justification for its few interventions.[119] The idea is that an extenuating circumstance makes the situation different such that (1) it justifies the Court's incursion into the states' power to punish,[120] and (2) it communicates a bright-line limit to allay fear of pervasive future incursions.[121]

Just as the Court couples its subjective determination of what punishments are excessive with objective indicia that support its instinct, the Court employs the concept of differentness in Eighth Amendment cases to achieve a sense of legitimacy.[122] Because certain cases are unique in their consequences, the Court believes that it is entitled to regulate the imposition of punishment in those cases.[123] Without this hook of differentness, the Court has – for the most part – been unwilling to transcend the authority of states to impose particular punishments.[124]

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115. *Id.* at 2028.

116. Miller v. Alabama, 132 S. Ct. 2455, 2463-64 (2012).

117. *Id.*

118. *Id.* at 2475.

119. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616-17 (2002) (Breyer, J., dissenting) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row were erroneous is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (remarking that death differs from life imprisonment because of its "finality").

120. Atkins v. Virginia, 536 U.S. 304, 319 (2002); *see* Roper v. Simmons, 543 U.S. 551, 568-70 (2005).

121. *See supra* note 120 and accompanying text.

122. *Roper*, 543 U.S. at 568.

123. *Id.* at 568-69.

124. *See* cases cited *supra* note 86.

As explained in the next section, the first and longstanding conception of differentness was that of death: the death penalty is a "different" punishment.[125] *Graham* and *Miller* have offered a second category of different: juvenile offenders.[126]

III. TWO KINDS OF DIFFERENT

A. Death Is Different

As Professor Rachel Barkow and others have argued, the Supreme Court's Eighth Amendment jurisprudence has been a tale of two kinds of cases: capital and non-capital.[127] First coined by Justice William Brennan in *Furman*, the Court has often emphasized, "Death is different."[128] Specifically, the death penalty is a unique punishment in two senses: its severity and its finality.[129]

While some have argued that LWOP is a harsher sentence, the Court has recognized on many occasions that the death penalty is the most severe punishment available.[130] Indeed, it is the ultimate punishment as it results in the termination of one's life.[131] Consequently, the death penalty is a unique punishment in that the outcome of its imposition is different from, and more severe than, any other punishment.[132] Similarly, the death penalty is a unique punishment because of its finality.[133] Once an offender is dead, there is no remedy for him in cases of procedural error or innocence.[134] With other punishments, due process violations and wrongful convictions – although costly – always have the remedy of release from custody.[135] In capital cases, there are no remedies once punishment occurs; the offender is dead.[136]

Referring often to this concept that death-is-different, the Court has justified its imposition of both the relative and the absolute proportionality requirements under the Eighth Amendment.[137] Because the consequence is

125. *See supra* note 119 and accompanying text.

126. Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 130 S. Ct. 2011 (2010); William W. Berry III, *The Mandate of* Miller 51 AM. CRIM. L. REV. __ (forthcoming 2014) [hereinafter *The Mandate of* Miller].

127. *See, e.g.*, Barkow, *supra* note 84, at 1146 (acknowledging the Court's different treatment of capital cases); Berman, *supra* note 84, at 866.

128. *See supra* note 20 and accompanying text.

129. *See supra* note 119 and accompanying text.

130. *See* cases cited *supra* note 119.

131. *See* cases cited *supra* note 119.

132. *See* cases cited *supra* note 119.

133. *See* cases cited *supra* note 119.

134. *See* cases cited *supra* note 119.

135. *See* cases cited *supra* note 119.

136. *See* cases cited *supra* note 119.

137. *See* cases cited *supra* note 119.

death, disparity in sentencing outcomes rises to the level of an Eighth Amendment problem.[138] Similarly, imposition of capital punishment for certain crimes or certain offenders becomes excessive or inappropriate.[139]

In the Court's Eighth Amendment cases, the concept of death-is-different not only supported the creation of constitutional prohibitions in capital cases, it also allowed the Court to eschew any similar analysis in non-capital cases because they were not "different."[140] Because non-capital offenders did not face the death penalty, their punishments did not merit heightened Eighth Amendment scrutiny, even when the punishments were harsh or excessive compared to the criminal offense.[141]

B. Juveniles Are Different

For almost forty years, the death-is-different distinction divided the cases under the Eighth Amendment into two groups.[142] In *Graham*, however, the Court contravened this previously impermeable barrier by holding that the Eighth Amendment proscribed juvenile LWOP sentences in non-homicide cases.[143]

In his dissent, Justice Clarence Thomas decried the decision, bemoaning, "Death is different no longer."[144] For the conservative wing of the Court, this decision was particularly insulting because it violated the promise of differentness, that the Court's ability to make Eighth Amendment incursions into the realm of state legislative authority no longer had a bright-line limitation.[145] Chief Justice John Roberts' concurring opinion, which suggested that the Court use a case-by-case analysis in such cases, rather than create a categorical Eighth Amendment rule, echoed this sentiment.[146] For Chief Justice Roberts, the facts of *Graham* itself may have warranted the Court's intervention, but were certainly not an invitation for the Court to create categorical Eighth Amendment proscriptions in non-capital cases.[147]

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138. *See* cases cited *supra* note 119.

139. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); Graham v. Florida, 130 S. Ct. 2011, 2030 (2010); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008); Roper v. Simmons, 543 U.S. 551, 575 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002); Coker v. Georgia, 433 U.S. 584, 592 (1977).

140. *See* cases cited *supra* note 86.

141. *See supra* note 86 and accompanying text.

142. *See supra* note 127 and accompanying text.

143. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

144. *Id.* at 2046 (2010) (Thomas, J., dissenting) (internal quotation marks omitted).

145. *Id.* at 2046-47. The dissenters in *Graham* made a similarly complaint in *Miller v. Alabama*. 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting).

146. *Graham*, 130 S. Ct. at 2037 (Roberts, C.J., concurring).

147. *Id.*

While the Court clearly believed it ought to extend the Eighth Amendment, it is unclear as to what motivated the Court to cross the death-is-different line in *Graham*. The Court's language indicated that LWOP was, in many ways, its own kind of death sentence, and thus was not so different from death.[148] On the other hand, the Court also found that, as individuals with inherently decreased culpability, juvenile offenders were unique in their own sense.[149] Finally, perhaps, it was the combination of these two ideas – the severity of LWOP, particularly as imposed upon juveniles, and the unique characteristics of juvenile offenders – in the juvenile LWOP sentence that justified the Court's incursion into state legislative power in a non-capital case.

With the *Miller v. Alabama* decision two years later, however, it has become clearer that the Court recognizes a new kind of "different": juvenile offenders. In finding that the Eighth Amendment bars mandatory juvenile LWOP sentences, Justice Elena Kagan explained that if "'death is different,' children are different, too."[150]

Though the Court has now clearly articulated its view that juveniles are different, it has not yet outlined the contours of this new proclamation of differentness. In other words, if juveniles are different, what further incursions into state legislative power might the Court authorize? As explored below, this Article argues that there are two distinct meanings of this conceptualization: (1) that juveniles are unique as offenders, and (2) that juvenile LWOP is a unique punishment. While certainly not mutually exclusive, each interpretation offers its own set of consequences and paths to pursue in challenging criminal sentences under the Eighth Amendment.

As indicated above, while the *Miller* case certainly does not explore these possibilities and the Court is not suddenly entertaining a rapid expansion of the Eighth Amendment, the point of illuminating these various rabbit holes is to suggest the logical extensions of the Court's reasoning and the bevy of arguments that it has unearthed.

IV. EXPLORING HOW JUVENILES ARE DIFFERENT

A. Juveniles Are a Unique Character of Offenders

In *Miller*, *Graham*, and *Roper*, the Court endeavored to demonstrate that juveniles are different from adult offenders.[151] The Court in *Miller* identified the three normatively significant distinctions between the two groups: "immaturity, impetuosity, and failure to appreciate risks and consequenc-

148. *Id.* at 2027; *More Different Than Life*, *supra* note 7, at 1124-25.

149. *Graham*, 130 S. Ct. at 2027.

150. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

151. *See Miller*, 132 S. Ct. at 2467-68, 2470; *Graham*, 130 S. Ct. at 2026-27; Roper v. Simmons, 543 U.S. 551, 569-71 (2005).

es."[152] The Court described these "three significant gaps between juveniles and adults" as follows:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."[153]

One sentiment, then, from these decisions is that the unique character of juveniles as a class warrants separate consideration for Eighth Amendment purposes. Just as the death penalty has its own set of Eighth Amendment rules, so might juveniles have their own protections. If juveniles are indeed different because they are a unique category of offender, they are a different kind of "different." Instead of the differentness relating to the unique nature of a punishment, the juvenile differentness in this conceptualization relates to the unique nature of the class of offenders. Put differently, death is a different type of *punishment*; juveniles are a different type of *offender*.

While this distinction might appear to be one of semantics at first glance, it actually has important consequences when considering possible future applications of the Eighth Amendment. Considering the character of the offender rather than the character of the punishment means that, for that class of offender, the Court need not circumscribe its review of punishments inflicted on the class of offenders to the death penalty. *Graham* and *Miller* have demonstrated as much, as the Court has applied the Eighth Amendment, with reference to this different class of offenders, to a noncapital sentence: LWOP.

Thus, if the basis for Eighth Amendment scrutiny is the class of offender, not the type of punishment, then any type of punishment that is excessive for a particular class is, in theory, fair game. In other words, if "juveniles are different" creates a class-of-offender-based differentness, then the Eighth Amendment would prohibit any sentence that is excessive in light of the special characteristics of the class. This conceptualization also opens the door to a second possibility: that there may be other classes of offenders that are also different. If the Eighth Amendment permits categorical proscriptions based on the different nature of the class of offender, as opposed to the different nature of the punishment itself, then other classes of offenders

152. 132 S. Ct. at 2468.

153. *Id.* at 2464 (citations omitted) (quoting *Roper*, 543 U.S. at 569, 570).

that can demonstrate unique characteristics may warrant their own sets of categorical proscriptions.

B. Juvenile LWOP is a Unique Category of Punishment

A second, alternative reading of the Court's proclamation that juveniles are different is in conjunction with the punishment it invalidated in both *Graham* and *Miller*: LWOP. Rather than viewing the class of the offender as the basis for the differentness, this conceptualization contemplates that juvenile LWOP sentences are their own unique category of punishment.

As with the conceptualization of juveniles as a different class of offender, the understanding that juvenile LWOP is a different kind of punishment has much support in the language of *Graham* and *Miller*. As the Court explained, "Life-without-parole terms . . . 'share some characteristics with death sentences that are shared by no other sentences.'"[154] Like the death penalty, an LWOP sentence is "a forfeiture that is irrevocable."[155] Thus, "[i]n part because we viewed this ultimate penalty for juveniles as akin to the death penalty," as the Court explained in *Miller*, "we treated it similarly to that most severe punishment."[156]

If juvenile differentness really refers to the differentness of juvenile LWOP, then a different set of possible Eighth Amendment expansions arises. First, juvenile LWOP is different in the same way that death is different. The idea is that, for juveniles, juvenile LWOP is essentially a death sentence and, as a result, such sentences should receive the same Eighth Amendment protections as the death penalty.

Both *Graham* and *Miller* support this conceptualization. One way to read *Graham* is to regard it as the simple application of the death-is-different protection from *Kennedy* to juvenile LWOP.[157] If juvenile LWOP is another type of death sentence, this application is far less of an intellectual leap than the dissenters have suggested. Put differently, the Court simply reinforced its holding that offenders who commit non-homicide offenses cannot receive a death sentence by applying it to *another type of death sentence* – juvenile LWOP. Under the same reading, *Miller* simply adopted the holding in *Woodson*, which prohibits mandatory death sentences and requires individualized consideration of offenders in capital cases.[158] In other words, because the Eighth Amendment prohibits mandatory death sentences and mandatory juvenile LWOP is a type of mandatory death sentence, mandatory juvenile LWOP violates the Eighth Amendment.

154. *Id.* at 2466 (quoting *Graham*, 130 S. Ct. at 2027).
155. *Graham*, 130 S. Ct. at 2027.
156. 132 S. Ct. at 2466.
157. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008).
158. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976).

Thus, the first significant consequence of reading juvenile LWOP as a different type of punishment – in the same way that the death penalty is – is to open the door to the application of death-is-different categorical exclusions and heightened scrutiny to some, if not all, juvenile LWOP cases. If the basis, though, for this expansion is the idea that juvenile LWOP is a second type of death sentence, it raises a question as to whether other types of death sentences might also exist. Under an expanded conception of death, then, other sentences equivalent to death in the same way as juvenile LWOP might also have the same claim to Eighth Amendment proscriptions.

A broader conception of what counts as a death sentence for the purposes of the Eighth Amendment might contravene some of the Court's pre-*Graham* decisions such as *Harmelin v. Michigan*.[159] *Graham* and *Miller* suggest, however, that such a reading is not far-fetched. Because *Harmelin* rested on "the qualitative difference between death and all other penalties," *Graham* and *Miller* undermine its precedential value.[160] The Court's holdings in *Graham* and *Miller* clearly establish that juvenile LWOP is not qualitatively different from death for purposes of the Eighth Amendment.[161] The *Miller* Court rejected the dissent's argument that *Harmelin* foreclosed a broader reading of the Eighth Amendment, finding its reading "myopic."[162]

Indeed, the two categorical prohibitions against juvenile LWOP – mandatory sentences and non-homicide cases – rest upon the idea that this sentence is ultimately a decision that the offender is irredeemable, and thus dead to society. The hopelessness of such a sentence, which condemns the offender to die in prison, makes it similar in character to capital punishment. At its heart, juvenile LWOP is essentially a death sentence. To require Eighth Amendment protections in such cases seems more fair than problematic.

V. APPLICATIONS OF CHARACTER-BASED JUVENILE DIFFERENTNESS

Having explained the intellectual basis for expanding the Eighth Amendment through the lenses of character-based and punishment-based differentness, in its final two sections this Article concludes by broadly exploring potential applications of these two theoretical frames. As explained above, if juveniles are different in the sense that they are a unique class of offender, two potential consequences logically follow. First, the limitation on death sentences as the only relevant punishment for Eighth Amendment purposes dissipates. Second, if juveniles are different as a class, other classes of offenders may also be different.

159. *See* Harmelin v. Michigan, 501 U.S. 957, 995 (1991).

160. *Id.*

161. *See* Graham v. Florida, 130 S. Ct. 2011, 2027-28 (2010); *Miller*, 132 S. Ct. at 2463-64.

162. *Miller*, 132 S. Ct. at 2470.

A. Proportionality-Based Juvenile Sentencing

If the restriction on punishment scrutiny under the Eighth Amendment no longer applies, then the doctrinal expansion of the cruel and unusual punishment clause with respect to juveniles could go much further than juvenile LWOP cases. In fact, if the reason for the heightened scrutiny were the nature of juvenile offenders, then any potential punishment would be available for the same inquiry.

Under the principles of *Miller*, *Graham*, and *Roper*, the Court has concluded that juvenile offenders, by definition, possess less culpability than adult offenders do, and therefore warrant lesser sentences for the same crimes.[163] As a result, the Court has theoretically opened the door to the question of whether other punishments are excessive for other juvenile crimes. Without the presence of the death-is-different construct, the Court could adopt a sliding scale of proportionality with respect to juvenile offenders, justified by the unique nature of the class and its constitutionally-identified differentness. Lengthy sentences for juvenile offenders who committed non-violent crimes, for instance, might violate the Eighth Amendment because of juvenile differentness. The understanding that juvenile offenders warrant certain protections because of their vulnerable characteristics as a class would therefore apply to any potential punishment.

The jurisprudential outcome of this character-based notion of juvenile differentness would be a series of decisions in which the Court identifies the outer limits of the state's power to impose certain punishments on juveniles as related to particular offenses. Put differently, this approach would allow for a proportionality revolution of sorts, with pure absolute proportionality inquiries applying to all juvenile offenders, irrespective of the punishment imposed.[164]

The virtue of such a system would be to require the Court to engage in a serious review of the punishment practices of state legislatures, at least with respect to juvenile offenders. In such a context, the Court would actively regulate the punishment decisions of states by throwing out excessive juvenile punishments, and would serve as a check on the tyranny of the majority. Such a system might help to counterbalance the reactionary nature of penal populism that has led to the United States being an outlier in the world in terms of criminal justice policy. Moreover, such an approach would not be unique for the Court, particularly in comparison to its incursions into state power in other areas of the Constitution. In particular, the Fourth Amendment's robust jurisprudence provides an example of the Supreme Court en-

163. *See Miller*, 132 S. Ct. at 2465; *Graham*, 130 S. Ct. at 2028-30; Roper v. Simmons, 543 U.S. 551, 567 (2005).

164. *See* Nancy Gertner, Keynote Address at the Missouri Law Review Symposium: *Miller* and the Eighth Amendment: Major Change or *Sui Generis*? (March 8, 2013).

gaging in a similar type of case-by-case analysis to determine the contours of an open-ended constitutional provision.[165]

B. Other Kinds of "Different"

If, as mentioned above, juveniles are a unique class of offenders, other possible classes of offenders might deserve similar Eighth Amendment protection. This subsection considers some possible candidates.

1. Mental Retardation

Perhaps the most obvious candidate for a second protected class of offenders under the Eighth Amendment is the class that started the categorical revolution in *Atkins*: mentally retarded offenders.[166] Like juveniles, mentally retarded offenders possess a diminished capacity.[167]

As the Court explained in *Atkins*, "[b]ecause of their impairments, however, [mentally retarded offenders] by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[168] As a result, "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[169] Indeed, mentally retarded offenders are similar to juveniles in that both classes possess a diminished culpability and, as a result, perhaps deserve less punishment.

But there are core differences, too, which might make the Court hesitant to declare mentally retarded offenders a protected class for Eighth Amendment purposes. First, there is a decreased likelihood of rehabilitation for mentally retarded individuals, as members of that class (as the Court defines it) often possess sub-average intelligence and reduced adaptive skills.[170] In both *Graham* and *Miller*, the possibility for growth and redemption clearly influenced the Court's willingness to restrict juvenile LWOP sentences.[171] This is not always the case for mentally retarded offenders.[172]

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165. *See, e.g.*, THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 15, 47 (2008).

166. 536 U.S. 304, 321 (2002) ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

167. *See Miller*, 132 S. Ct. at 2463.

168. 536 U.S. at 318.

169. *Id.*

170. *See id.* at 208 n.3, 320.

171. *See Miller*, 132 S. Ct. at 2464 (citing Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)) ("Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'"); J. M. Kirby, Graham, Miller, *& the Right to Hope*, 15 CUNY L. REV. 149, 152 (2011) ("The [*Miller*] decision recognizes rehabilitation as 'a penological goal that forms the

Second, while the age of the offender is usually an ascertainable fact, the question of whether an offender qualifies as mentally retarded for judicial purposes is often unclear.[173] The result in many cases will be litigation over the question of mental retardation, requiring significant court time and resources.[174]

Finally, at the heart of the Court's willingness to prohibit the death penalty in *Atkins* was the inability of mentally retarded offenders to communicate.[175] This difficulty in communication manifests itself in the ability of the state to convey its reasons for the death penalty to the offender.[176] It also creates problems in the offender's ability to discuss and establish an adequate defense with his attorney.[177] As such, the broadening of the Eighth Amendment to restrict LWOP sentences for mentally retarded offenders seems more complicated than applying it to juvenile LWOP sentences.

Nonetheless, the Eighth Amendment could apply to mentally retarded offenders under this conceptualization by regulating the type of offense, rather than just the severity. The Court could theoretically proscribe certain types of sentences for mentally retarded offenders to ensure that such offenders receive sentences that both comport with their offenses and consider their diminished capacity.

2. Mental Illness

A second potential class of offenders protected under this character-based model of juvenile differentness would be mentally ill offenders. While mentally retarded offenders simply lack capacity, mentally ill offenders can possess a host of other mental illnesses that influence their ability to perceive the world around them.[178]

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basis of parole systems' in determining that penological theories do not justify non-homicide juvenile LWOP sentences. In support of its holding, the court in *Miller* reiterates Graham's reasoning regarding the role of the rehabilitation.").

172. *See supra* note 171 and accompanying text.

173. *See Atkins*, 536 U.S. at 317.

174. *See, e.g.*, *id.*, *remanded to* 266 Va. 73 (2003) (to decide the issue of whether or not the defendant was mentally retarded).

175. *Id.* at 318 ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities . . . to communicate . . . . Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.").

176. *See, e.g.*, *id.* at 320; Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105 (describing the execution of Rickey Ray Rector, who saved his dessert at his final meal for later).

177. *See Atkins*, 563 U.S. at 320-21.

178. Alice Medalia & Nadine Revheim, *Dealing with Cognitive Dysfunction Associated with psychiatric disabilities: A handbook for families and friends of individuals with psychiatric disorders*, N.Y. STATE OFFICE OF MENTAL HEALTH,

As a class, then, mentally ill offenders might warrant specialized Eighth Amendment consideration with respect to certain punishments. In particular, the Court could weigh the effectiveness of incarceration against the effectiveness of institutionalization. In doing so, the Court could develop bright-line rules circumscribing the ability of the state to punish the mentally ill in certain ways. Further, by creating categorical prohibitions or other restrictions, the Court might ensure that states do not abdicate their responsibility to treat mentally ill offenders humanely, whether guilty of petty crimes or capital ones.

An added benefit of heightened Eighth Amendment scrutiny with respect to mentally ill offenders is that states might decrease recidivism rates and better incapacitate individuals who are truly dangerous because of a mental condition.[179] Because they possess unique characteristics, mentally ill offenders may merit the same Eighth Amendment protections that capital offenders receive.

Even so, expanding the Eighth Amendment in this way would create its own set of difficulties. The most significant of these difficulties would be delineating the class of offenders in determining which mental illnesses qualify. Further, the wide range of diseases and conditions falling under the rubric of mental illness could encompass such a diverse group of individuals as to make a bright-line constitutional rule impractical.

3. Veterans

Another possible category of offenders warranting heightened Eighth Amendment protection is individuals who have served in the armed forces. Like juveniles and mentally-compromised offenders, veterans possess characteristics that suggest that they might be less culpable than other offenders.

First, the act of serving in the military should count as a mitigating factor in most criminal cases.[180] Thus, all things being equal, military service could mean that a particular offender merits a lesser sentence.[181] Unlike mentally retarded offenders, mentally ill offenders, or juveniles, veterans may deserve their own class for Eighth Amendment purposes based on their merit – rather than diminished capacity. Second, military service in which the veteran suffered a serious injury might also provide a mitigating factor in terms of diminished capacity.[182] Such injuries may be physical, mental, or

http://www.omh.ny.gov/omhweb/cogdys_manual/CogDysHndbk.htm (last modified Nov. 15, 2012).

179. Psychotic and schizophrenic individuals, in particular, come to mind.

180. *See* Porter v. McCollum, 558 U.S. 30, 40, 43-44 (2009).

181. *See* Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2965-68 (2009).

182. *See id.* at 2965-66. Individuals with toxic shock syndrome or other similar conditions might merit mitigating consideration.

emotional, but given that they occurred during the course of service to one's country, courts may be willing to consider the degree to which such circumstances lessen the appropriate sentence.

Categorical rules, then, might be appropriate for veterans as a class. For instance, LWOP sentences might be excessive for all veterans because it is cruel and unusual to declare a veteran to be an irredeemable person.[183] On the other hand, isolating veterans as a class for Eighth Amendment purposes has its own difficulties as well. The concept of using a "moral ledger" departs significantly from the idea of vulnerable offenders, and opens the door to a number of other possible groups that might have similar merit. This difference suggests that it may be more appropriate to allow juries to consider such evidence on an individual basis rather than to create a bright-line constitutional rule.

4. Other Possible Categories

Aside from the three possible groups above, it is difficult to identify other classes that should be different for purposes of the Eighth Amendment. Categories relating to gender or race – while important in the discrimination context – seem to have little bearing here, although it is possible that a consequence of demonstrating systemic discrimination would be to create Eighth Amendment protections for the affected group.[184]

At the other end of the spectrum, age seems to be a possibility, though an unlikely one.[185] The theory would be that elderly individuals suffer from some kind of diminished capacity warranting Eighth Amendment exclusions.[186] Another possible way to explore Eighth Amendment exclusions for the elderly would be to assess the impact of term sentences as they relate to age. For instance, giving a ten-year sentence to a seventy-year-old individual for a non-violent crime might create Eighth Amendment issues because its effect may be the same as an LWOP sentence.[187] It might be, however, equally insulting to equate elderly offenders with juvenile offenders, particularly because old age and diminished capacity are often not related. Further, in many ways the loss of capacity in elderly offenders seems different than the underdeveloped character of juveniles.

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183. It is worth remembering that for dangerous offenders, the state can always keep them in prison even with the abolition of LWOP. 18 U.S.C. § 4246(a) (2012). Such a decision just means that the state must revisit the sentence later. *Id.* at § 4247(e)-(f).

184. *See* McCleskey v. Kemp, 481 U.S. 279, 315-19 (1987).

185. Allen v. Ornoski, 435 F.3d 946, 954 (9th Cir. 2006), *cert. denied*, 546 U.S. 1136 (2006).

186. *See id.* at 952-53.

187. A more palatable way to think of this is to consider it in the context of death-in-custody sentences. *See infra* Part VI.B.

As mentioned above, there is the opportunity to develop a sliding scale of proportionality with respect to all of the categories identified here. The Court could define proportionality with respect to a particular punishment for a particular class. Alternatively, the Court could create categorical exceptions for certain punishments for certain crimes where the offender falls into one of the protected categories.

VI. APPLICATIONS OF PUNISHMENT-BASED JUVENILE DIFFERENTNESS

Examining the other conceptualization of "juveniles are different" – that is, viewing juvenile LWOP as another kind of different punishment – yields an entirely different set of practical applications. As explained above, if juvenile LWOP is different, it is because it is essentially a type of death sentence. With that in mind, it is worth considering the degree to which juvenile LWOP should be a corollary to the current death-is-different Eighth Amendment proscriptions.

A. Juvenile LWOP Is Different Like Death Is Different

1. Categorical Exclusions

As with the death penalty, juvenile LWOP creates the possibility of categorical exclusions based upon its uniqueness as a punishment. Indeed, as explored above, the Court has already established two such exceptions: barring juvenile LWOP sentences in non-homicide cases in *Graham*,[188] and mandatory juvenile LWOP sentences in *Miller*.[189]

The obvious place to look, then, for possible further categorical exclusions for juvenile LWOP is to the Court's death penalty cases. It is also worth considering that while juvenile LWOP as a punishment may be different in the same way that the death penalty is different as a punishment, it might nonetheless be a different and less severe punishment such that not every analogous categorical prohibition may apply.

One likely suspect for expansion of death-is-different categorical exclusions is in the area of felony murder cases. The Court held in *Enmund v. Florida* that the Eighth Amendment prohibits the imposition of the death penalty where the offender "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[190] It limited this exception, though, in *Tison v. Arizona*, explaining that the Eighth Amendment did not bar the imposition of the death penalty in felony murder

188. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).
189. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).
190. 458 U.S. 782, 797 (1982).

cases where the defendant exhibited a "reckless disregard for human life."[191] Many of the same considerations relating to adult participation in felony murder also apply to juvenile participation, including the likelihood of decreased culpability. As a result, adoption of this categorical exclusion for juvenile LWOP cases seems palatable.

Two perhaps more difficult cases would be the categorical exclusions that relate to the mental characteristics of the offender. The prohibition against giving the death penalty to a mentally retarded offender might not apply as easily to the case of a mentally retarded juvenile offender facing an LWOP sentence. While rehabilitation – and thus the possibility for a productive life – is one of the central reasons for giving juvenile LWOP heightened Eighth Amendment scrutiny,[192] mentally retarded juveniles may be less likely to demonstrate maturity and personal growth.[193] In addition, the importance of communicating the reason for the sanction to a mentally retarded offender loses force when the death penalty is not involved.

A second group categorically excluded based on the mental capacity of the offender is the Eighth Amendment prohibition against execution of insane defendants under *Ford v. Wainwright*.[194] As with mentally retarded juvenile offenders, insane juvenile offenders seem less likely to warrant a categorical exclusion for juvenile LWOP.[195] For the same reasons as indicated above, barring a juvenile LWOP sentence on grounds of insanity does not seem to advance the Eighth Amendment rationale for a categorical exclusion in the same manner.

The most aggressive categorical prohibition to apply to juvenile LWOP would be to use *Roper* as an analog to declare that juvenile LWOP itself violated the Eighth Amendment.[196] The Court declined to entertain this issue in *Miller*, but suggested in dicta that it might be a question worth considering.[197] Specifically, the Court highlighted the absence of "deliberate, express, and full legislative consideration" of the appropriateness of juvenile LWOP sentences.[198] The reasoning would be that the death penalty is an excessive punishment for juveniles, and as juvenile LWOP is a type of death penalty for juveniles, it should receive a categorical Eighth Amendment exclusion. The reasoning of the Court in *Roper*, *Graham*, and *Miller* – that juveniles

191. 481 U.S. 137, 157 (1987).

192. *See supra* note 171 and accompanying text.

193. *See* Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002).

194. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

195. *See* Christina Lee, *The Judicial Response to Psychopathic Criminals: Utilitarianism over Retribution*, 31 LAW & PSYCHOL. REV. 125, 129 (2007); Ont. Ministry of Children and Youth Servs., *Review of the Roots of Youth Violence: Literature Reviews*, http://www.children.gov.on.ca/htdocs/English/topics/youthandthelaw/roots/volume5/chapter02_psychological_theories.aspx (last modified Apr. 27, 2010).

196. *See* Roper v. Simmons, 543 U.S. 551 (2005).

197. *See* Miller v. Alabama, 123 S. Ct. 2455, 2473 (2012).

198. *Id.* at 2473 (internal quotation marks omitted).

are different and that LWOP is a type of death sentence – gives support to such a reading.[199]

Banning juvenile LWOP would not necessarily mean that no juvenile offenders would serve a life sentence. Rather, it would simply mean that states, at some future date, would re-examine the question of whether the juvenile offender could rejoin society.

2. Heightened Procedural Scrutiny

A second, different consequence of concluding that juvenile LWOP (as a punishment) is different in the same way that death is different would be the development of heightened procedural protections in juvenile LWOP cases. This expansion could occur both in terms of absolute and relative proportionality.

In terms of absolute proportionality, *Miller* already indicated the need for courts to make individualized sentencing determinations in juvenile LWOP cases as required by *Woodson* in capital cases.[200] The corollary principle from *Lockett v. Ohio* – that the state cannot restrict the introduction of mitigating evidence at capital sentencing – ought similarly to apply in juvenile LWOP cases.[201] This is particularly true because juvenile offenders are often likely to have relevant mitigating evidence to introduce.[202]

As to the question of relative proportionality, the same set of death penalty safeguards could theoretically apply to juvenile LWOP. The Court could require states to adopt aggravating circumstances, as well as systemic safeguards such as proportionality review. There is one significant difference, though, between the death penalty and juvenile LWOP that makes this unlikely. Capital cases, unlike juvenile LWOP cases, often require the jury to make the sentencing decision, increasing both the likelihood of sentencing disparity and the need for safeguards.[203]

Nonetheless, some similar safeguards might be appropriate given the uneven application of juvenile LWOP sentences by states. Part of the problem is that many states, in adopting truth-in-sentencing laws, abolished parole.[204] As a result, life sentences become LWOP sentences, even in cases

199. *Id.* at 2458 (citing *Roper*, 543 U.S. at 569-70); *id.* at 2459 (citing Graham v. Florida, 130 S. Ct. 2011, 2027 (2010)).

200. *Id.* at 2475.

201. 438 U.S. 586, 604 (1978).

202. Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 408-09 (2012).

203. *See* U.S. Dep't of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, Part IV.B, JUSTICE.GOV (June 6, 2001), http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm.

204. *Truth in Sentencing Law & Legal Definition*, USLegal, http://definitions.uslegal.com/t/truth-in-sentencing/ (last visited Sept. 22, 2013).

where the legislature might not have initially sought to mandate death in the custody of the state. Requiring states to create safeguards to ensure that those receiving juvenile LWOP sentences are the worst of the juvenile offenders would help remedy the seemingly haphazard application of juvenile LWOP sentences in which almost half of those serving such sentences committed non-violent crimes.[205]

B. Death Includes Other Death-in-Custody Sentences

The second possible area of Eighth Amendment expansion in the realm of punishment-based juvenile differentness is a further broadening of the definition of death under the Eighth Amendment. In other words, if the concept of juveniles-are-different really means that juvenile LWOP is different, it raises the question of whether other punishments likewise ought to be different for Eighth Amendment purposes. Specifically, if juvenile LWOP is a type of death penalty, it seems that LWOP and other lengthy sentences might too be types of death sentences.

1. LWOP

The first candidate for expanding the definition of death beyond juvenile LWOP is LWOP itself. The only fundamental difference between the two sentences is, of course, the age of the offender. Moreover, in many cases this difference is negligible. An eighteen-year-old offender is really no different than one who is seventeen, at least in terms of the impact of an LWOP sentence. Relevant science indicates that cognitive development continues until age twenty-five, such that the line of demarcation between juvenile and adult does not occur until then.[206] As a majority of offenders are under the age of twenty-five, the distinction between a juvenile LWOP sentence and an LWOP sentence is not of great significance.

Further, the consequence of an LWOP sentence is the same for both the juvenile and adult offender: death in prison. Neither will ever leave the

205. *See* CRUEL AND UNUSUAL, *supra* note 11, at 26, 33-34.

206. Cynthia Klein, *Maturation of the Prefrontal Cortex*, Bridges 2 Understanding (Mar. 5, 2013), http://bridges2understanding.com/maturation-of-the-prefrontal-cortex/ ("This [prefrontal cortex] region of the brain gives an individual the capacity to exercise 'good judgment' when presented with difficult life situations. Brain research indicating that brain development is not complete until near the age of 25, refers specifically to the development of the prefrontal cortex."); *see* Joseph M. Peraino & Patrick J. Fitz-Gerald, *Psychological Considerations in Direct Filing*, Colo. Law., May 2011, at 41, 42 ("Adolescent brains experience periods of explosive growth and restructuring. During adolescence, brains that have been developing neural connections since before birth undergo a long process of insulating neural pathways so they eventually will operate more quickly and efficiently. Neuroscience research shows that human brains do not fully develop until age 25.").

custody of the state. Indeed, the notion that having a few extra years to rehabilitate fundamentally distinguishes these two sentences for constitutional purposes ignores the reality of juvenile LWOP and LWOP generally. As LWOP and juvenile LWOP are essentially the same sentence, it makes sense to expand the conception of death to include LWOP sentences as well. Doing so opens the door to similar categorical exclusions as identified for juvenile LWOP, as well as similar heightened scrutiny. Specifically, mandatory LWOP sentences seem particularly problematic and, as such, are an area in need of immediate reform. As I have written elsewhere, the *Miller* case arguably mandates the extension of its juvenile LWOP principle to all LWOP sentences.[207]

2. Sentences Approaching Life Expectancy

Beyond LWOP, sentences in which the offender is likely to die in prison also fit the same broad definition of death. These *de facto* LWOP sentences occur when the length of the sentence approaches the life expectancy of the offender.[208] The practical consequence, then, of such a sentence is that the offender will die in the custody of the state.

Because there is no functional difference between LWOP sentences and *de facto* LWOP sentences, the Eighth Amendment conception of death under this punishment-based reading of juveniles-are-different should include such sentences. Term sentences approaching the life expectancy of the offender would then receive at least some of the same protections as capital cases. The opportunity for individualized sentencing consideration, the ability to put on mitigating evidence, and a prohibition against mandatory term sentences extending to the end of an offender's life expectancy would all be protections available under this expansion.

3. Long Sentences

Finally, and perhaps more controversially, long sentences might also count as death sentences for Eighth Amendment purposes. Imagine a juvenile offender who receives a fifty-year sentence; it is effectively a death sentence for him, even though he is likely to leave prison one day. As prison will be his home for most of the productive years of his life, the sentence in many ways condemns his life to a kind of death. The inability to have any semblance of a life in light of a lengthy incarceration suggests that such a sentence is the functional equivalent of death.

Following this line of analysis, some of the death-is-different protections seemingly would apply for such lengthy sentences. In particular, the ability to introduce mitigating evidence, to have a Court determine such a sentence

207. *See The Mandate of* Miller, *supra* note 126.

208. *See* CRUEL AND UNUSUAL, *supra* note 11, at 21.

(as opposed to a legislatively-imposed mandatory minimum), and the possibility for rehabilitation (as with juveniles) all seem to be important possible safeguards for such offenders.

VII. CONCLUSION

This Article has attempted to illuminate many of the potential lines of argument flowing from the Court's decision in *Miller*. Rather than advocate for one normative approach over another, this Article instead aimed to encourage academics and practitioners alike to develop these ideas in hopes that the courts will continue to expand the Eighth Amendment and provide a more robust review of state punishment practices. Specifically, this Article sought to demonstrate the ambiguity in the Court's characterization of juveniles as a new kind of Eighth Amendment different. Each approach, then, offers its own consequences based upon the theoretical constructs inherent in each.

If juveniles are a different kind of offender, then *Miller* and *Graham* open the door to a sliding scale of Eighth Amendment proportionality for juvenile offenders. Further, if juveniles are a unique class under the Eighth Amendment, this suggests that other classes – such as mentally retarded offenders, mentally ill offenders, or veterans – might also warrant heightened Eighth Amendment scrutiny.

If juvenile LWOP were a different kind of punishment, then the meaning of death under the Eighth Amendment would now encompass juvenile LWOP. The result would be the exporting of categorical safeguards in capital cases to juvenile LWOP cases as the Court has done in *Miller* and *Graham*.[209] In addition, procedural protections accorded to offenders in capital cases might also apply in juvenile LWOP cases. Perhaps even more importantly, if death includes juvenile LWOP, it reasonably should include LWOP sentences – as well as *de facto* LWOP sentences – and maybe even lengthy term sentences.

Finally, none of these technical doctrinal approaches would be necessary if the Supreme Court would apply a simple proportionality test to its application of the Eighth Amendment and, in doing so, robustly regulate the use of punishment by states. Until the Court moves in a more sweeping way, incremental change under the Eighth Amendment remains the best hope for the Court in recapturing its role as protector of the individual Eighth Amendment right to be free from excessive punishment at the hands of the state legislatures and courts.

209. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).