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Juvenile Lifers and Judicial Overreach: A Curmudgeonly Meditation on *Miller v. Alabama*

Frank O. Bowman, III*

I. INTRODUCTION

Imprisoning an adolescent for life without the possibility of release is a dreadful idea, regardless of the beastliness of the conduct that earned the sentence. Such sentences are fiscally extravagant, morally doubtful exercises in protracted antiseptic savagery. They are quite literally inhumane inasmuch as their imposition requires that the law ignore our deepest intuitions about human development and human nature. Most notably, the young lack the capacity for moral discrimination and impulse control that more years will bring. And of nearly equal moment, no one who achieves a normal modern life expectancy is remotely the same creature at the end of that span as he was at its teenage beginning. It is thus a grievous wrong to decree lifelong bondage, unransomable by any degree of reformation, for the adult who will be for the misdoings of the child who once was. That said, not all dreadful ideas are unconstitutional and the United States Supreme Court is not empowered to right all wrongs. Moreover, the Court is sadly apt to do mischief when it steps outside its proper sphere. Sometimes the mischief comes in the galling, but relatively benign, form of logically tangled doctrine born of failure to carefully reconnoiter the legal regions the Court's beneficent instincts have prompted it to enter. But sometimes the Court intrudes so far into the preserves of other constitutional actors as to create serious question about the legitimacy of its behavior.

In *Miller v. Alabama*, the Court found unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause all laws subjecting murderers who killed before their eighteenth birthdays to a sentence of mandatory life without parole (LWOP).¹ *Miller* followed by two years the 2010 case of *Graham v. Florida*, in which the Court voided statutes imposing LWOP sentences on juveniles who committed non-homicide crimes.²

These cases were striking for several reasons. First, of course, they have dramatic implications in the area of juvenile justice. The Court continued down the path it embarked on in *Roper v. Simmons* when it ruled the death

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1. 132 S. Ct. 2455 (2012).

2. 130 S. Ct. 2011 (2010).

penalty cruel and unusual for juveniles, regardless of the crimes they committed, and declared categorically that the relative immaturity of juveniles made them less criminally culpable and thus both ineligible for certain very harsh punishments and subject to different procedures than adults for others.³ Second, the Court's reasoning in *Miller* and *Graham* has potentially far-reaching implications for the sentencing of adults. These opinions extend to non-capital crimes the unique body of Eighth Amendment law the Court had hitherto restricted to death penalty cases. And the language of Justice Elena Kagan's majority opinion in *Miller* casts at least some doubt on the power of legislatures to impose any mandatory sentence, whether death or a term of imprisonment.⁴

This Article focuses very little on the implications of *Miller* and *Graham* for the population they most directly affect – juvenile offenders previously eligible for sentences of life without parole – and more on the implications of the Court's reasoning in *Miller* and *Graham* for sentencing generally. However gratifying the results of *Miller* and *Graham* may be as sentencing policy, they are troubling as a constitutional matter both because they are badly theorized and because they are two strands of a web of decisions in which the Court has consistently used doubtful constitutional interpretations to transfer power over criminal justice policy from the legislatures – state and federal – to the courts.

II. CRIME DEFINITION AND LEGISLATIVE POWER

Throughout the American constitutional period it has been universally accepted – and repeatedly held – that legislatures, not judges, have the power to define crimes.⁵ Judicial crime creation lacks democratic legitimacy. And it applies a necessarily retrospective method to a lawmaking process that, in

3. 543 U.S. 551, 571, 578 (2005).

4. See *Miller*, 132 S. Ct. at 2467-69.

5. See, e.g., *Harris v. United States*, 536 U.S. 545, 549 (2002) (“Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts.”); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (relying on legislative supremacy in identifying facts relevant to criminal liability to hold that a state legislature can exclude evidence of intoxication from consideration on the issue of *mens rea* in homicide); *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (“[W]e should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.”); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (holding that the New York legislature had the power to designate “extreme emotional disturbance” as an affirmative defense to murder, rather than an element of the crime). As for the role of judges, “[j]udicial crime creation [in the United States] is a thing of the past.” John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985).

order to comply with the overriding principle of legality,⁶ should be prospective, giving potential offenders fair notice of the nature of prohibited conduct and the severity of potential punishment.⁷ This seemingly elementary observation is more consequential than it seems because even otherwise sophisticated lawyers and judges tend to use the word “crime” carelessly without pausing to consider what a “crime” is. The answer, as the Court itself finally figured out in the line of Sixth Amendment jury trial cases beginning with *Apprendi v. New Jersey*,⁸ is that a “crime” is simply a name, a legal shorthand, used to signify a correlation between a particular bundle of legislatively specified facts, called “elements,” and a legislatively specified array of punishments a judge is allowed to impose if all the elements are proven.⁹ In short, a “crime” is not, as lawyers are prone to think, simply a list of elements. It is instead a list of factual elements *legislatively paired* with a particular range of punishments.¹⁰ If one changes *either* the elements or the range of punishments the legislature has specified for those elements, the result is a different crime.¹¹

For example, imagine a crime, call it “blasphemy,” for which the legislature has decreed that if the government proves Facts A, B, and C, the judge must impose a sentence of imprisonment between three and five years. Suppose that, one day, a court were to hold, in reliance on the Eighth Amendment or the Sixth Amendment or some other constitutional provision, that the statutorily prescribed sentence of three to five years could be imposed on a defendant charged with blasphemy *only* if the government proved Facts A, B, and C that the legislature enumerated, *plus* a new Fact D that the court itself added to the list of required elements. We would all understand that the court

6. “The doctrine of legality . . . is considered the first principle of American criminal law jurisprudence.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 5.01, at 39 (5th ed. 2009); *see also* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1685 (1987) (“[T]he legality principle enjoys nearly complete priority over the public interest in punishing wrongdoers . . .”).

7. Among the “basic premises which underlie the whole of Anglo-American criminal law” is “that there must be some advance warning to the public as to what conduct is criminal and how it is punishable – a fundamental principle sometimes expressed by the maxim *nullum crimen sine lege, nulla poena sine lege* (no crime or punishment without law).” WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.2, at 8 (2d ed. 1986).

8. 530 U.S. 466 (2000).

9. Indeed, as discussed *infra* note 12, a legislature need not give a special name to a bundle of facts correlated with a range of punishments in order for that set of facts to be a separate “crime” for constitutional purposes.

10. Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 370 (2010) (hereinafter Bowman, *Debacle*).

11. *See generally id.* at 379-89.

in such a case had *redefined* blasphemy by changing the list of elements associated with its prescribed penalty of three to five years.

Then suppose, on another day, a court were to hold, again for some assertedly constitutional reason, that for a defendant charged with blasphemy, proof of Facts A, B, and C no longer authorized imprisonment of three to five years, but no more than one year, thus transforming blasphemy from a felony into a misdemeanor. In this second case, the court would not merely be judicially softening the punishment for blasphemy. Here, too, by changing the correlation between factual elements and permissible punishment authorized by the legislature and given the name “blasphemy,” it would be redefining that “crime.” In sum, to change *either the list of factual elements* authorizing a particular set of punishments or to change *the set of punishments authorized by proof of a list of factual elements* is to redefine a “crime.”¹²

12. My perceptive colleague Paul Litton has expressed skepticism of this assertion based on the ordinary usage of the word “crime.” Conversation with Paul J. Litton, Assoc. Professor of Law, Univ. of Mo. Sch. of Law, in Columbia, Mo (Aug. 27, 2013). He proposes the following dialogue to illustrate that “competent English speakers” are accustomed to use the word “crime” to mean a name given to a list of factual elements without necessary reference to the punishment attached to that list:

Speaker 1: “West Virginia and Michigan have the same definition of the crime of first degree murder.”

Speaker 2: “That’s interesting. Do they provide the same punishment for that crime?”

Speaker 1: “No.”

Id. It is, of course, right that this conversation is intelligible as a matter of general usage, but the fact that one sense of a word may be intelligible in general usage is hardly dispositive of the question of what that word means when employed as a term of art in constitutional adjudication. In its due process and jury right cases, the Supreme Court has defined the term “crime” very particularly for constitutional purposes. To summarize with almost indecent brevity a very long progression I have discussed in detail elsewhere, *see* Bowman, *Debacle*, *supra* note 10, the Court held in *In re Winship*, 397 U.S. 358, 368 (1970), that due process requires the government bear the burden of proving beyond a reasonable doubt each and every “element” of the “crime” charged. Thereafter, the Court has held under the Sixth Amendment that an “element” is any fact that, once proven, increases either the possible maximum, *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000), or required minimum sentence, *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), triggered by conviction, and that all such “elements” must be found by a jury. Throughout its due process and jury right cases, the Court has consistently held that the legislature has near-plenary power to define “crimes” by enumerating their “elements” and specifying the correlation between those elements and the range of possible punishments. *See, e.g.,* Montana v. Egelhoff, 518 U.S. 37, 43 (1996). Thus, for constitutional purposes, it is precisely the legislative specification of a correlation between proof of a fact and an alteration of the available range of punishments that makes a fact an “element” and thus part of the definition of a “crime.”

It is easy to lose sight of this point because, for reasons of linguistic efficiency, courts and legislatures have historically assigned names to particular bundles of legislatively designated facts – murder, rape, robbery, burglary, and so forth – and law

As noted above, courts are not supposed to intrude on the legislative prerogative to define crimes. Moreover, the United States Supreme Court should be particularly chary of issuing decisions that redefine state crimes. Considerations of federalism should make federal judges especially reluctant to second-guess the judgments of state legislatures in matters of state criminal justice policy.¹³ But in its Eighth Amendment cases, first in the death penalty area and now with respect to juvenile life sentence cases, the Supreme Court has engaged in both types of judicial crime redefinition – changing the set of punishments authorized by legislatures for a crime and changing the legislatively prescribed elements of crimes.

The courts' power to engage, at least occasionally, in the first type of judicial crime redefinition – limiting the varieties of legislatively authorized punishments permitted by a set of element facts – is necessarily implicit in the Eighth Amendment. If the Cruel and Unusual Punishment Clause is judicially enforceable at all, it must, at a bare minimum, include a grant of power to declare that at least some punishments are so barbaric that they can never be imposed on anyone regardless of the facts of the offender's wrongdoing. And if the Clause is to be accorded anything more than this minimalist interpretation, it also implies a grant of judicial power to declare that certain punishments, though acceptable in some circumstances, cannot be imposed in others because to do so would be unjustly disproportionate. In its capital cases, the Court has employed this categorical proportionality analysis to find the death penalty unconstitutional for rape, either of an adult¹⁴ or of a

students' first introduction to criminal law is much consumed with memorizing the list of element facts customarily associated with the traditional names. But a list of facts legislatively correlated with a particular range of punishments need not have a special name to be a separate crime for constitutional purposes. This is most evident from an examination of criminal codes for offenses like homicide where the law subdivides the multifarious situations in which one person kills another into multiple seriousness categories carrying quite different penalties. Sometimes the legislature gives these categories separate names, e.g., first degree murder, second degree murder, and manslaughter, which lawyers intuitively recognize as being separate "crimes." But sometimes the legislature will subdivide a named category like manslaughter into different seriousness grades carrying different punishment ranges based on the presence or absence of designated facts, but without giving all the differently punished subdivisions special names. It is the difference in punishment that makes two bundles of legislatively prescribed facts constitutionally different "crimes," not the fortuity of legislative assignment of different names to those bundles.

13. *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) ("Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of dea[th] as a punishment for murder is not without justification and thus is not unconstitutionally severe.").

14. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

child,¹⁵ and even for murder if the defendant is insane,¹⁶ mentally retarded,¹⁷ or a minor.¹⁸

But the Court has also invoked the Eighth Amendment to judicially alter the legislatively prescribed elements of crimes. Indeed, the central project of the Court's entire line of death penalty cases beginning with *Furman v. Georgia*¹⁹ is a judicial redefinition of capital murder. The Court has said, in effect: "The list of element facts which state legislatures formerly said constituted capital murder and thus authorized death is no longer sufficient. We, the Court, now decree that *new*, judicially-mandated, facts – those 'aggravating factors' required by *Furman*²⁰ and *Gregg*²¹ – must be added to state statutes and thereafter be proven to juries to authorize the *old* penalty."

Though the passage of time since *Gregg v. Georgia* makes this seem unremarkable, it is pretty radical stuff. In its death penalty cases, the Court did not merely say, "There shall be no burning or breaking on the wheel or drawing and quartering." Or even, "There shall be no judicially sanctioned killing by the state." Instead, it said, "There can be judicially sanctioned killing, but only if you legislatures change the definitions of the crimes for which it is authorized to include new elements that we judges approve, but which have never, in the centuries-long history of Anglo-American law, been included by any legislature as elements of capital murder.

Indeed, although the addition of judicially-mandated aggravating factors to capital murder was certainly an aggressive assertion of judicial authority, it was less radical than both the Court's ban on death as the mandatory punishment for even the highest degree of murder²² and the court-created requirement that there can be virtually no limitation on the number or type of mitigating factors a jury may consider in deciding not to recommend death.²³ The underappreciated radicalism of these holdings stems from their tension with the presumption of legislative supremacy in defining crimes and their pun-

15. *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

16. *Ford v. Wainright*, 477 U.S. 399, 409-10 (1986).

17. *Atkins v. Virginia*, 536 U.S. 304, 349 (2002).

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

19. 408 U.S. 238 (1972).

20. *Furman*, 408 U.S. at 297.

21. *Gregg v. Georgia*, 428 U.S. 153 (1976).

22. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

23. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). There are some restrictions on purportedly mitigating evidence; to be admissible, the evidence must relate to the defendant's character or record or the circumstances of the offense. But, of course, these categories are so elastic as to impose few meaningful limits on evidence in mitigation. When the Court has held purportedly mitigating evidence excludable, it has customarily been because the proffered evidence, carefully considered, was not logically relevant to the question of punishment. See, e.g., *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (excluding so-called lingering doubt evidence that attempted to cast doubt on the factual validity of the jury's guilty verdict, rather than providing a reason to mitigate the defendant's punishment).

ishments. Legislatures define crimes, not only when they specify facts that must be proven before a defendant is eligible for a particular range of punishments, but when they *rule out* other facts as being legally irrelevant to guilt of a particular crime, which occurs routinely when legislatures create, abolish, or limit so-called affirmative defenses.

For example, when a legislature authorizes the insanity defense, it is deciding that insanity is a fact that may be considered by a jury in deciding whether a defendant is guilty and thus punishable for crime. But legislatures also routinely restrict the kinds of mental illness which qualify as legal insanity, as Congress famously did in the wake of the attempted assassination of President Reagan by substituting a statutory version of the restrictive M’Naghten Rule for the then-prevalent federal standard which permitted a finding of insanity based on defects in impulse control.²⁴ Other legislatures have even further restricted the definition of insanity and barred admission of so-called diminished capacity evidence.²⁵ Indeed, some state legislatures have opted not to permit insanity as a defense at all.²⁶ Similarly, some legislatures bar consideration of voluntary intoxication in determinations of a defendant’s culpable mental state, and the Supreme Court has affirmed their power to do so.²⁷ In each of these instances, the legislature is defining what conduct is criminal in its state by excluding some facts from the jury’s consideration.²⁸

24. President Reagan’s would-be assassin, John Hinckley, was tried and found not guilty by reason of insanity under a standard derived from the American Law Institute’s Model Penal Code which permits a finding of insanity if the defendant lacked “substantial capacity either to appreciate the criminality [or wrongfulness] of his conduct or to conform his conduct to the requirements of law.” MODEL PENAL CODE § 4.01(1) (1985); *Hinckley v. United States*, 163 F.3d 647 (D.C. Cir. 1999). In response to the outcry over Hinckley’s acquittal, in 1984, Congress passed 18 U.S.C. § 17, which essentially codifies the traditional rule first announced in M’Naghten’s case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843), that one is insane if laboring under such a defect of reason arising from a disease of the mind that he either did not know the nature and quality of the act committed, or if he did know it, he did not know it was wrong. See generally DRESSLER, *supra* note 6, § 25.01 at 339, § 25.04 at 347-48.

25. See, e.g., *Clark v. Arizona*, 548 U.S. 735, 742 (2006) (upholding against constitutional challenge an Arizona statute that (a) defined the insanity offense to include only the right-wrong prong of M’Naghten and not the first, or cognitive incapacity, prong, and (b) barred admission of psychiatric testimony on the issue of defendant’s ability to form the required culpable mental state for homicide).

26. DRESSLER, *supra* note 6, § 25.06 at 363 n.145 (noting that Idaho, Kansas, Montana, and Utah all abolished the insanity defense).

27. *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996).

28. Paul Litton argues that legislative manipulation or abolition of the insanity defense does not constitute defining crime. Conversation with Paul J. Litton, *supra* note 12. Essentially, he maintains that insanity is a confession-and-avoidance defense – in criminal law theory, an “excuse” rather than a “justification” – and thus the defendant is claiming, not that he did not commit a crime, but that it would be unjust to

Another manifestation of legislative power to restrict the scope of legally relevant facts is the existence of minimum sentences for crimes. Minimum sentences have become particularly controversial in the last few decades because state and federal legislatures have been regrettably prone to pass statutes with very high minimum sentences,²⁹ all too commonly for crimes that may not be that serious.³⁰ Drug crimes have been particularly susceptible to this treatment,³¹ the most notorious example being the draconian minimum penalties for possession of relatively small quantities of crack cocaine.³² But, in truth, there is nothing either novel or particularly controversial about a minimum sentence for crime. Since the beginning of the Republic, legisla-

punish him for having committed it. *Id.* I do not find the excuse/justification distinction useful in this context. In jurisdictions that have some form of an insanity defense, the defendant's sanity (however locally defined) is best thought of as part of the mental element of every offense. The prosecution enjoys a presumption of sanity in every case in which the defendant does not affirmatively raise the issue, but once the defendant has born his burden of going forward, the issue is properly raised and subject to proof or disproof in accordance with the locally applicable rules. See DRESSLER, *supra* note 6, § 25.02 at 344-45. When a defendant does raise insanity, his essential claim is that he should not be convicted because, at the time of the crime, he lacked an essential, even if customarily presumed, component of the required culpable mental state. When a legislature alters insanity doctrine, it changes the boundaries of criminal culpability in just the same way as it does when it assigns or redefines culpable mental states or permits or restricts evidence of intoxication to exonerate or mitigate. At least in my view, categorizing insanity as an excuse rather than a justification does not alter this reality.

29. For a list of the many federal statutes containing mandatory minimum sentences, see *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS (Feb. 25, 2013), <http://fammm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

30. As the U.S. Sentencing Commission's 2011 report on mandatory minimum sentences rather drily described the current federal situation, "[C]ertain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute." U.S. SENT'G COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 345 (2011) [hereinafter U.S. SENT'G COMM'N, 2011 MANDATORY MINIMUM REPORT].

31. *Id.* at 149-52 (describing the penalty structure, including mandatory minimum penalties, for narcotics offenses under federal law); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 740-45 (1996) (arguing that federal drug sentences are too long).

32. Between 1995 and 2007, the U.S. Sentencing Commission issued four reports calling for amelioration of federal cocaine penalties. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: FEDERAL COCAINE SENTENCING POLICY (2007).

tures have passed criminal laws requiring that, upon conviction of Crime X, the defendant must be sentenced either to some single sentence or to some range of punishments.³³ The nature of a range is that it has a top and a bottom. And the nature of a statute that requires a defendant convicted of Crime X to be sentenced to one to three years is to limit the universe of facts relevant to the lower limit of the defendant's sentence. By which I mean that, for a defendant convicted of a crime carrying a sentence of between one and three years, the legislature is decreeing that, once the elements of the crime have been proven, *no other fact is relevant* to determination of the defendant's minimum sentence. No fact, however heart-wrenching, will be sufficient to lower the defendant's sentence below one year.

Until its decision in *Miller*, the Court consistently rejected challenges to the power of legislatures in non-capital cases to define, abolish, or restrict defenses or to set punishment ranges with required minimums.³⁴ It could hardly do otherwise, because both specifying what elemental facts are *required* for liability and punishment and specifying what facts are *irrelevant* to liability and punishment are merely two sides of the same coin of crime definition. Which brings us back to the Court's death penalty cases. Here, the Court not only arrogated to itself a veto over legislatures' power to specify the factual elements *required* for liability and punishment, but by voiding statutes that set death as the single penalty for certain murders³⁵ and by mandating no limit on mitigating factors in death cases,³⁶ the Court also preempted legislatures' power to *limit the facts that are legally relevant* to liability and punishment and implicitly challenged the general legislative authority to decree minimum punishments.

This is big stuff – a terrifically aggressive assertion of judicial power over a core legislative prerogative. Of course, despite the acknowledged primacy of legislatures in defining crimes and setting penalties, the Eighth Amendment does give the Supreme Court a legitimate constitutional role in policing the outer boundaries of that legislative power.³⁷ Nonetheless, what the Court has done with death cases in *Furman* and *Gregg*, and now in juvenile LWOP cases in *Graham* and *Miller*, is subject to at least two serious criticisms. First, the standard the Court applies in deciding whether a particular punishment is cruel and unusual has degenerated to the point of being no

33. See, e.g., U.S. SENT'G COMM'N, 2011 MANDATORY MINIMUM REPORT, *supra* note 30, at 7 (noting that "Congress has used mandatory minimum penalties since it enacted the first federal penal laws in the late 18th century" and detailing the many instances of federal mandatory minimum sentences enacted from 1789 through 2011).

34. See *infra* notes 86-90 and accompanying text.

35. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

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

37. "[T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power." *Gregg v. Georgia*, 428 US 153, 174 (1976).

more than transparent cover for the personal preferences of the justices. Second, the Court's procedural remedies for supposed Eighth Amendment violations go far beyond any conceivable warrant in the constitutional text.

III. JUDGES, POLITICIANS, AND SOCIETY: DEFINING THE STANDARD FOR "CRUEL AND UNUSUAL PUNISHMENT"

Until *Furman*, the Supreme Court had rarely considered the Cruel and Unusual Punishments Clause.³⁸ In practice, the Court restricted application of the Clause to methods of punishments that would have been thought barbarous or immoral at the time of the adoption of the Bill of Rights,³⁹ or at most, to cases in which the proposed penalty, though of a permissible type, was so disproportionate in degree to the severity of the crime or culpability of the offender as to have violated the sensibilities of the founding generation.⁴⁰ But this view of the Eighth Amendment, still strongly espoused by the conservative originalist wing of the current Court,⁴¹ could not reach the death

38. Eighth Amendment decisions were rare in part because occasions for considering that amendment were relatively rare during the long interval between the adoption of the Constitution and the determination in the latter half of the twentieth century that the Bill of Rights applied to the states. Until the middle of the twentieth century, the federal law enforcement establishment was small, as was the number of federal criminal prosecutions. Thus, the leading Eighth Amendment cases commonly arose from review of penalties enacted by territorial legislatures, as in *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (upholding a law passed by the territorial legislature authorizing execution by hanging, shooting, or beheading, at the prisoner's option). See also *Weems v. United States*, 217 U.S. 349 (1910) (overturning a sentence imposed under a statute passed by the legislature of the Philippines when it was a U.S. territory).

39. See, e.g., *Wilkerson*, 99 U.S. at 136 ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].").

40. In *Weems*, the Court affirmed that the Eighth Amendment bars disproportionate punishments as well as barbarous methods. 217 U.S. at 373. It also endorsed in embryonic form the principle that the scope of the Cruel and Unusual Punishments Clause could widen as societal views changed, noting that the clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Id.* at 378. Nonetheless, this language was mere dicta because the Court went on to say that in making its decision it "may rely on the conditions which existed when the Constitution was adopted." *Id.* at 375.

41. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting) ("[T]he Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous 'methods of punishment,' . . . specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." (citation omitted)); *Atkins v. Virginia*, 536 U.S. 304, 339 (2002) (Scalia, J., dissenting) (denying that Eighth Amendment prohibits excessive punishments, and contending that under current law it applies only to modes of punishment considered cruel or unusual in 1791 or those violative of evolving standards of decency). The

penalty since the death penalty enjoyed near-universal acceptance at the time of the founding⁴² and the possibility of its infliction is written into the constitutional text.⁴³

Death penalty opponents could only prevail against originalist logic by advancing the theory that what is or is not cruel or unusual is governed, not by the founding understanding, but by “evolving standards of decency that mark the progress of a maturing society.”⁴⁴ That point of view won the day in the Court,⁴⁵ but it immediately opened the question of how the Court is to decide what the prevailing standard of decency is and whether a particular punishment so far exceeds that standard as to be unconstitutional.

At the onset of the modern era of death penalty jurisprudence and for some four decades thereafter, the Court accepted the premise that the primary indicator of the prevailing societal standard of decency was the democratic judgment of the people expressed through the statutory enactments of elected legislatures. For example, in 1972 in *Furman*, the Court found all existing death penalty statutes procedurally inadequate⁴⁶ and flirted with abolishing the death penalty altogether.⁴⁷ However, thirty-five states and the United States Congress immediately passed death penalty laws thought to address *Furman*'s procedural concerns.⁴⁸ Thus in 1976 in *Gregg*, the Court backed away from complete abolition, in major part because it could not plausibly

same view was also vigorously expressed by Justices Edward White and O.W. Holmes dissenting in *Weems*. 217 U.S. at 382-413.

42. JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 8 (2012).

43. *See, e.g.*, the Fifth Amendment, in which the possibility of the infliction of death as a criminal punishment is mentioned three times: in the grand jury clause (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”), the double jeopardy clause (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”), and the due process clause (“nor be deprived of life, liberty, or property, without due process of law”). U.S. CONST. amend V.

44. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *see also* *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

45. *Estelle*, 429 U.S. at 104-06.

46. *Furman v. Georgia*, 408 U.S. 238 (1972).

47. In *Furman*, two justices were of the view that the death penalty is unconstitutional per se. *Id.* at 257 (Brennan, J. concurring); *id.* at 314 (Marshall, J., concurring). Four would have reached the opposite conclusion. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting). Three reserved ruling on that point. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J. concurring).

48. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

claim that the majority of the society rejected that penalty.⁴⁹ Of course, rather than meekly accepting the democratic rebuke implied in the states' response, the Court instead pursued the project begun in *Furman* of judicially rewriting capital murder statutes to advance the ultimately irreconcilable⁵⁰ goals of consistency and individualization.⁵¹ It said, in effect: "Well, okay, you can have your death penalty even though we may think it barbarous, but only if imposed for the new kind of capital murder we are judicially defining and only if the sentencer has effectively unlimited discretion to extend mercy."

From the perspective of interbranch relations, one might argue that, although the Court grudgingly accepted the legislative power to impose death, its post-*Furman* restrictions on that power trenched even more deeply on legislative prerogatives than a flat ban would have, a point to which we will return below. Nonetheless, for decades legislative opinion expressed through statutes remained at the heart of the evolving standards of decency determination. As the Court wrote in *Atkins v. Virginia*, "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"⁵² In addition, the Court has given weight to other objective indicia of the national consensus, includ-

49. *Id.* at 179 ("The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since *Furman* [h]ave undercut substantially the assumptions upon which their argument rested. . . . [I]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary sanction.").

50. Full discussion of the proposition that the goals of consistency and individualization in capital sentencing practice are irreconcilable is beyond the scope of this Article. But at least two of the Justices themselves, one pro- and the other anti-death penalty, have made the point. Compare *Walton v. Arizona*, 497 U.S. 639, 656-69 (1990) (Scalia, J., concurring) (noting acidly that to suggest that there is perhaps some inherent tension between the lines of cases stressing consistency and those stressing individualization "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II"), with *Callins v. Collins*, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (expressing doubt that the twin goals of consistency and individualization can be achieved in any capital punishment regime).

51. *Gregg*, 428 U.S. at 206-07 (holding that death penalty statutes must channel the discretion of the sentencer to avoid arbitrary imposition of death); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that the sentencer must be able to account for both the circumstances of the crime and the characteristics of the defendant). See generally LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 191 (3d ed. 2012) ("The two key constitutional requirements for imposing the death penalty are *guided discretion* and *individualized consideration*.").

52. 536 U.S. 304, 312 (2002) (quoting *Penry v. Linaugh*, 492 U.S. 302, 331 (1989)); see also *Penry*, 492 U.S. at 331 (holding that legislation is the "clearest and most reliable objective evidence of contemporary values").

ing the verdicts of sentencing juries⁵³ and the views of professional organizations,⁵⁴ international practice,⁵⁵ and public opinion polls.⁵⁶

But as the years passed, the Court also introduced and then gave increasing prominence to the notion that the outer boundaries of the Eighth Amendment are not determined by objective indicia of “evolving standards of decency” in the society at large, but by the justices’ “own judgment” – a metric capable of producing a finding of cruel and unusual punishment even in a case fully in accord with contemporary society’s evolved standards. The Court put the matter baldly in its 2002 decision in *Atkins*, asserting that “in cases involving a consensus [of state legislatures on the suitability of the death penalty for a particular class of defendants], our own judgment is ‘brought to bear’ . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”⁵⁷ But even in *Atkins*, the Court treated its own judgment not so much as an entirely independent and co-equal source of authority for divining what current standards of decency will permit, but more as a necessary reservation of power to interpret potentially ambiguous objective indicators. Notably, the *Atkins* Court began with an analysis of legislative actions illustrating, so it said, a recent trend toward banning execution of the mentally retarded.⁵⁸ Only then did the Court add its own analysis of jurisprudential factors which argued in favor of the same result.⁵⁹ However, particularly in the sequence of juvenile justice cases beginning with the 2005 decision in *Roper* to abolish the juvenile death penalty and continuing through *Graham* and *Miller*, the Court has become progressively less deferential to legislatures and other indicators of democratic judgment.

In *Roper*, the Court overturned the decision it made only sixteen years earlier in *Stanford v. Kentucky* upholding the constitutionality of the death penalty for persons older than fifteen but younger than eighteen when they

53. *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (quoting *Gregg*, 428 U.S. at 181) (finding that data on behavior of sentencing juries “is a significant and reliable objective index of contemporary values” (internal quotation marks omitted)).

54. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”).

55. *Id.*

56. *Atkins*, 536 U.S. at 316 n.21.

57. *Id.* at 313 (citation omitted).

58. *Id.* at 313-17.

59. *Id.* at 317-21.

committed a capital crime.⁶⁰ In 1989, the *Stanford* Court found no national consensus favoring abolition of the death penalty for sixteen- and seventeen-year-old murderers and expressly repudiated the idea that the Court's own judgment could be employed to void a legislatively-authorized penalty in the absence of a national consensus favoring that action.⁶¹ Writing for the Court in *Roper*, Justice Anthony Kennedy found that the consensus absent in 1989 was established in 2005 because eighteen states expressly barred the death penalty for juveniles,⁶² five of which had adopted that position since *Stanford*.⁶³ Justice Kennedy waved away the inconvenient fact that more states (twenty) statutorily authorized the juvenile death penalty than did not.⁶⁴ By adding the twelve states with no death penalty for anyone to the eighteen banning it for juveniles, he was able to establish that a majority of states banned juvenile executions.⁶⁵ And while the increase in states prohibiting the juvenile death penalty in the years since *Stanford* was not large, Justice Kennedy pointed to the trend rather than the actual numbers.⁶⁶ He also emphasized that actual imposition of the death penalty on juveniles was so rare as to make it constitutionally unusual.⁶⁷ He placed considerable weight on international opinion disfavoring juvenile capital punishment.⁶⁸ And he reaffirmed the authority asserted in *Atkins* to employ the Court's own judgment to find a punishment cruel and unusual independent of objective evidence of a national consensus to that effect.⁶⁹

Whatever one's personal views on execution for juvenile crimes, *Roper* is a bold assertion of judicial authority – declaring unconstitutional a penalty that indisputably would have been permissible to the founders and that was statutorily authorized by forty percent of the states at the time of the decision. Still, Justice Kennedy could fairly argue that juvenile execution was barred in a slowly growing majority of states and was actually inflicted in only a literal handful of cases. However, when it came time for him to write the majority

60. *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated* by *Roper v. Simmons*, 543 U.S. 551 (2005).

61. *Id.* at 373.

62. *Roper*, 543 U.S. at 564.

63. Four states legislated a minimum age of eighteen and one judicially banned juvenile executions. *Id.* at 565.

64. *See id.* at 564.

65. *Id.*

66. *Id.* at 566 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)) (“[I]t is not so much the number of these States that is significant, but the consistency of the direction of change.”).

67. *Id.* at 564-65 (noting that since the 1989 *Stanford* decision, “six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so.”).

68. *Id.* at 575 (noting that the United States is “the only country in the world that continues to give official sanction to the juvenile death penalty”).

69. *See id.* at 574.

opinion in *Graham*,⁷⁰ striking down life-without-parole sentences for juvenile non-homicide defendants, he had no such arrows in his quiver. As of 2010, thirty-seven states and the federal Congress statutorily authorized LWOP sentences for persons who committed non-homicide crimes while under the age of eighteen.⁷¹ Seven more states authorized sentencing juvenile murderers to life without parole, and only six banned the penalty for all juvenile crimes.⁷² Thus, not only did three-quarters of the states and the federal government legislatively authorize non-homicide juvenile LWOP, but the trend evidence so important to Justice Kennedy in *Roper* pointed in the opposite direction in *Graham* because the number of laws authorizing the penalty increased in the decades prior to the decision.⁷³ Even the argument from frequency of application was strained. Justice Kennedy contended that only 123 persons nationwide were serving LWOP sentences for non-homicide juvenile crimes,⁷⁴ a small group to be sure, but still ten times the number of juveniles sentenced to death. Lacking any persuasive evidence of societal consensus against non-homicide juvenile LWOP, Justice Kennedy was obliged to base the majority's holding almost exclusively on an extended analysis of the relative culpability of juveniles vis-a-vis adults and the theoretical jurisprudential justifications for life without parole sentences.⁷⁵

Two years later, in its *Miller* opinion banning mandatory life without parole even for juvenile murderers,⁷⁶ the Court abandoned its last vestigial pretense of respect for legislative judgment or any other indicator of societal consensus on Eighth Amendment questions. Justice Kagan, writing for the majority, was unable to claim that the majority of American legislatures had rejected mandatory LWOP for juvenile homicide because twenty-eight states and the federal government mandated such sentences for some form of murder.⁷⁷ She was similarly unable to claim that there was a legislative trend away from statutorily authorizing such sentences, because the trend, if any, was in the opposite direction.⁷⁸ And, given that more than 2,000 prisoners were serving life sentences as a mandatory consequence of convictions for murders committed before age eighteen,⁷⁹ she could not argue that imposition of such sentences was freakishly rare. Undeterred, Justice

70. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

71. *Id.* at 2023.

72. *Id.*

73. *Id.* at 2050 (Thomas, J., dissenting).

74. *Id.* at 2023-24 (majority opinion). The number was disputed by the State of Florida, *id.*, and by Justice Thomas in dissent, *id.* at 2050-51, but no one seems to dispute that it is at the right order of magnitude.

75. *Id.* at 2026-31.

76. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

77. *Id.* at 2471, 2471 n.9.

78. *Id.* at 2478 (Roberts, C.J., dissenting).

79. *Id.* at 2472 n.10 (majority opinion); *id.* at 2479 n.1 (Roberts, C.J., dissenting).

Kagan simply embarked on her own analysis of whether life without parole for juveniles is consistent with a list of “legitimate” justifications for punishment.⁸⁰ This was in itself a remarkable exercise, since, as discussed in greater detail below,⁸¹ the Court has never delineated constitutionally legitimate and illegitimate justifications for punishment, and was more remarkable still because one would hitherto have thought that the job of determining both the goals of punishment and the suitability of particular punishments is one for the legislature.

In sum, even under the flexible, modern, non-originalist view of the Eighth Amendment, the sole basis on which the Court can plausibly strike down juvenile LWOP sentences as cruel and unusual is that such sentences violate the “evolving standards of decency that mark the progress of a maturing society.” But in *Miller*, the majority gives the back of its hand to every objective indicator of those standards with the exception of its own doctrinally ungrounded, and inescapably personal, opinions.⁸² As for the views of the elected representatives of the people – the legislators who enact laws and the governors who sign them – the *Miller* majority cares not a farthing. What apparently matters now, indeed the only thing that now matters, is the Court’s own idiosyncratic assessment of whether a given punishment for a given offender type conforms to the Court’s views of penological theory. As is doubtless clear from the introduction to this Article, I tend to agree as a matter of criminal justice policy with much of what Justice Kagan writes, but my sympathy with her views cannot obscure the fact that *Miller* and *Graham* represent a dramatic judicial challenge to legislative authority in the criminal area.

It is not a challenge that can be waved away with the assertion that under the Eighth Amendment it is the Court’s job to decide what is cruel and

80. *Id.* at 2462-69.

81. See *infra* note 98 and accompanying text.

82. Paul Litton takes gentle issue with my use of the word “opinions” here and “preferences” above to describe the justices’ views. Conversation with Paul J. Litton, *supra* note 12. He categorizes the conclusions reached by judges doing constitutional law as being the product of “evaluative judgments” rather than “preferences” because preferences may be arbitrary, like a preference for chocolate over vanilla ice cream, while “evaluative judgments” are assertedly the product of reasoned judgment. *Id.* And he argues that, in the end, judges confronting the delphic mysteries of imprecise constitutional text sometimes have no choice but to base their judgments on their own moral senses. *Id.* I do not deny that conscientious judges try very hard to employ reason both in arriving at their conclusions and in explaining them, or that in constitutional adjudication the judicial reasoning process is sometimes unavoidably guided by personal moral conviction. In the hard cases, particularly where other guideposts are absent, judges like the rest of us will heed what Justice Holmes called his “can’t helps.” Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918). However, I also think that the proper role of a constitutional judge is to consciously minimize the occasions when his or her personal “can’t helps” are the true ground of decision. That brand of judicial modesty is in short supply in *Miller*.

unusual. That is true, but profoundly unhelpful, because the hard question is not whether the Court is constitutionally delegated the responsibility for identifying cruel and unusual punishments – which of course it is – but what standard, fairly grounded in the Constitution, the Court should use in making that determination.

Defenders of expansive Supreme Court readings of the Cruel and Unusual Punishments Clause often assert that broad judicial interpretive authority is inherent in what they claim to be the Eighth Amendment's essentially counter-majoritarian purpose.⁸³ But the contention that the Eighth Amendment is necessarily a counter-majoritarian tool is, at best, only partly true. Moreover, merely because a constitutional rule is counter-majoritarian in some of its applications by no means grants judges standardless discretion to interpret the *scope* of the rule.

The Eighth Amendment is incontestably counter-majoritarian in the narrow sense that whenever a court overturns a statute as imposing cruel and unusual punishment, it is striking down an enactment ratified by the majority of a popularly elected legislature – and probably signed by a popularly elected governor or president. Even the tightly constrained originalist Eighth Amendment of Justices Antonin Scalia and Clarence Thomas is counter-majoritarian in this sense. For example, if a legislature were to adopt drawing-and-quartering or boiling in oil as approved methods of execution, the ensuing prompt, predictable, and indisputably correct judicial declaration that such measures are unconstitutional would be “counter-majoritarian” to the extent that the court’s ruling voided the judgment of a particular transient legislative majority. But even in such a case, the counter-majoritarian label would, at best, be accurate only sometimes. After all, the judicial authority to prohibit boiling in oil flows directly from the majoritarian consensus against such state terror written into the text of the Constitution. Thus, in any case in which courts void a *state* legislative enactment for violating the *national* constitution, the judicial action is just as likely to represent victory for the views of the national majority against a purely regional preponderance of opinion as the reverse. Moreover, even when judges void a statute favored by a contemporary national majority on the ground that it violates the Constitution as understood in 1791, they do so because under our system the old majority trumps the new one in the absence of constitutional amendment.

83. See, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term – Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) (“The preferences of the majority should not determine the nature of the eighth amendment or of any other constitutional right.”); Ian Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 312 (2013) (arguing that the Court’s traditional use of objective indicia such as state legislative enactments to determine the reach of Eighth Amendment protections is inappropriate because “the majority’s preferences would define a counter-majoritarian right”); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 63 (2008) (“What is the worth of a right good against the majority when that same majority interprets that right?”).

The point is that a narrowly focused originalist constitution can be vigorously counter-majoritarian – forcefully protecting future minorities against that set of evils expressly barred by its text or the incontestable intentions of the founders – without necessarily granting judges authority to expand the list of evils anticipated by the founders and thus to void any legislative enactment offensive to contemporary judicial sensibilities. Hence, the fact that the Eighth Amendment sometimes has counter-majoritarian effects really tells us nothing about how broadly the phrase “cruel and unusual punishments” should be interpreted.

Moreover, the insistence that the Eighth Amendment, at least as it has been applied for the last two centuries, is fundamentally counter-majoritarian cannot easily be squared with the Supreme Court’s own Eighth Amendment doctrine. Again, since the 1950s, the Court’s stated justification for barring as “cruel and unusual” even punishments that plainly would have been acceptable to the founding generation was that the language of the Amendment should be read in light of the “evolving standards of decency that mark the progress of a maturing society.”⁸⁴ But this is itself an inescapably majoritarian standard – the Court claims the power to move beyond both the constitutional text and the founding understanding precisely in order to enforce the ostensibly evolved mores of *contemporary* society.⁸⁵ But if only a minority of contemporary society embraces the supposedly evolved mores, those mores cannot be those *of* the society. And without the sanction of an evolved social consensus, which in plain terms means a change in the opinion of the majority, the court has no identifiable constitutional authority to void a penalty.

The better way to view the Eighth Amendment is that the text and founding era understanding set a floor below which later legislatures may not sink, but that, even as to punishments permissible in 1791, the Supreme Court has a license to determine that a sufficiently broad and settled consensus against such punishments has arisen that they now offend the Constitution. That is not a counter-majoritarian reading of the Amendment because it actively seeks to effectuate the will of modern majorities, but it does give the Court limited authority to expand the previously-accepted reach of the Amendment’s prohibitions. One might view this approach as judicial correction of a democratic market failure: The Constitution embedded the national consensus of a bygone period as the foundational law and, as a result of its cumbersome amendment process, made updating that consensus prohibitively difficult. Hence, judges are empowered to modernize the foundational law through cautious attention to evolving social and political mores.

84. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

85. “A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

This is not, however, the posture of the current majority of the Court. Rather, the Court has abandoned the entirely defensible position that the sparse language and misty historical provenance of the Eighth Amendment invite some interpretive flexibility based on a cautious assessment of evolving social conditions. Instead, the majority has staked out the far more radical claim that the current social consensus serves no limiting function on the power of the justices to impose their own individual opinions. The Eighth Amendment found in *Graham* and *Miller* is, for the first time, both in theory and in practice genuinely and entirely counter-majoritarian. Indeed, it is difficult to read these opinions, particularly *Miller*, without concluding that the prevailing faction of justices sees in the widespread modern embrace of tough juvenile punishments by the elected branches not a signal for judicial restraint in the face of democratic judgment, but precisely the reverse: a stimulus for active judicial resistance to a broadly popular policy of which the majority of the Court disapproves.

IV. THE TROUBLESOME RAMIFICATIONS OF *GRAHAM* AND *MILLER*

The foregoing may seem like an old song, of course. People are always fretting that the End of Days is nigh because the Supreme Court is insufficiently deferential to either the legislature or the executive. But I sense that something rather different is happening with this Court, both because *Graham* and *Miller* diverge so markedly from prior Eighth Amendment jurisprudence and because they are quite consistent with other lines of criminal justice cases in which the Court has unabashedly seized the reins of power for the judiciary.

The most obvious novelty of *Graham* and *Miller* is they breach the firewall that for decades after *Furman* confined meaningful Eighth Amendment challenges to capital cases. Repeatedly declaring that “death is different,” the Court did not seriously attempt to apply “evolving standards of decency” to non-capital punishments involving terms of years. The justices occasionally proclaimed their theoretical power to void sentences of imprisonment as disproportionate to the crime or blameworthiness of the offender,⁸⁶ but in practice they affirmed even the most draconian prison sentences.⁸⁷ The sole exception to the general rule of inaction was the 1983 decision in *Solem v. Helm* voiding a life-without-parole sentence imposed on a repeat felon for passing a

86. *Solem v. Helm*, 463 U.S. 277, 286-87 (1983).

87. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003) (finding no constitutional error in a sentence of twenty-five years to life imposed on the defendant following his conviction for stealing three golf clubs valued at \$1200 from the El Segundo Golf Course pro shop); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a sentence of fifty years to life following conviction for stealing \$150 in videotapes); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding against proportionality challenge a sentence of LWOP for possession of a substantial quantity of cocaine).

bad \$100 check.⁸⁸ The Court's disinclination to subject non-capital sentences to Eighth Amendment scrutiny has been so plain that the First Circuit remarked in 2008 that "instances of gross disproportionality [in noncapital cases] will be hens-teeth rare."⁸⁹ And, outside the realm of capital crimes, the Court did not challenge the authority of legislatures to define the elements of crimes or to command imposition of mandatory sentences based on proof of designated facts. Nor had the Court ever decreed any special procedures as preconditions for imposing particularly severe non-capital sentences.

Graham and *Miller* shatter the death-is-different wall not merely by applying the Court's characteristic Eighth Amendment capital punishment analysis to lengthy non-capital penalties, but also by extending to non-capital crimes its pattern in death cases of prescribing intrusive procedural remedies for Eighth Amendment violations. In *Graham*, the Court might simply have decreed that the imposition of a life sentence on a juvenile for a non-homicide offense is cruel and unusual, and left it at that. Instead, it barred only life sentences *without parole*, and observed that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."⁹⁰ In short, the Court held that juvenile non-homicide offenders may be sentenced to life in prison so long as the state creates a parole system for such offenders, even if the state offers parole release to no other class of defendant.

In *Miller*, the Court might simply have found that life sentences without parole for juvenile murderers are cruel and unusual and left it at that. Instead, the Court held that LWOP sentences can constitutionally be imposed on juvenile killers so long as they are not a mandatory consequence of conviction for murder.⁹¹ Here, the Court replicated its approach to capital cases, permitting the challenged punishment but only if the sentencer has discretion not to impose it in consideration of mitigating factors related to the defendant's youth.⁹²

88. *Solem*, 463 U.S. 277.

89. *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008); see also Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008) ("Eighth Amendment challenges to excessive incarceration [are] essentially nonstarters.").

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

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

92. *Id.* Indeed, the Court's phrasing of this point seems to go beyond a requirement of discretionary authority. Justice Kagan writes: "Although we do not foreclose a sentencer's ability to [impose an LWOP sentence] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* This language does not merely give the sentencer the option of considering the peculiar qualities of youth, but requires such consideration. *Id.* Moreover, the Court effectively commands the

The Court would doubtless characterize its holdings in both *Graham* and *Miller* as cautious and incremental inasmuch as neither case flatly bans life imprisonment for offenses committed by minors. But one can fairly view these rulings as even more intrusive into the legislative sphere than a flat ban. In *Miller*, as in the capital cases that precede it, the Court's remedy encroaches on the legislative prerogative of defining crime by requiring consideration of facts the legislature expressly excluded. In *Graham*, the Court goes further still by requiring as a prerequisite for imposition of non-homicide juvenile life sentences that states implement a discretionary back-end release mechanism that may have no existing counterpart for adult offenders.

Moreover, the Court's reasoning justifying its incrementalist, procedural approach is potentially more unsettling than a categorical ban on life imprisonment for juvenile crime would have been. The results in both *Graham* and *Miller* are expressly justified by reference to the special qualities of youth – the “lack of maturity” and “underdeveloped sense of responsibility,”⁹³ the increased susceptibility to peer pressure, and the unformed state of their characters⁹⁴ – all assertedly diminishing a juvenile's moral culpability for crime.⁹⁵ In both cases, the majority opinions analyze what they enumerate as the accepted theoretical justifications for criminal punishment – retribution, deterrence, incapacitation, and rehabilitation⁹⁶ – in light of these aspects of the juvenile personality and conclude that there is insufficient theoretical justification for imposing life without parole sentences on any nonhomicidal juvenile criminals or for imposing mandatory LWOP sentences on juvenile murderers.⁹⁷ This approach is unsettling in at least four ways.

First, the Court's exaltation of retribution, deterrence, incapacitation, and rehabilitation as *the* constitutionally-approved justifications for punishment goes beyond anything the Court has previously done. While these categories are commonly employed by criminal justice theorists, I am unaware of prior authority anointing these four with exclusive constitutional status.⁹⁸ To

sentencer to consider youth as a strongly mitigating factor, rather than a factor, which might also have aggravating force insofar as a youthful killer has a longer life ahead in which to reoffend. *Id.*

93. *Miller*, 132 S. Ct. at 2464; *Graham*, 130 S. Ct. at 2026.

94. *Miller*, 132 S. Ct. at 2464; *Graham*, 130 S. Ct. at 2026.

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

96. *Id.* at 2028.

97. *Miller*, 132 S. Ct. at 2465-66; *Graham*, 130 S. Ct. at 2028-30.

98. In *Graham*, Justice Kennedy cites *Ewing v. California*, 538 U.S. 11, 25 (2003), as authority for listing retribution, deterrence, incapacitation, and rehabilitation as “the goals of penal sanctions that have been recognized as legitimate.” *Graham*, 130 S. Ct. at 2028. But *Ewing* says only that, “A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.” 538 U.S. at 25 (citing WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d ed. 1986)). Notice that the *Ewing* list is illustrative (“such as”), not exclusive. Indeed, in the sentence immediately before the one on which Justice Kennedy relies,

be fair, these four rationales are by far the most commonly advanced, as well as the most obviously applicable to prolonged incarceration. Still, one is struck by the Court's casual, one might even say cavalier, approach to a question as fundamental to this and future cases as adopting a canonical list of approved justifications for punishment.

Still more striking is Justice Kennedy's phrasing of the new requirement of a parole release opportunity for non-homicide juvenile prisoners. He declares that states "must . . . give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and *rehabilitation*."⁹⁹ Thus, rehabilitation is now not only one of four newly-canonical justifications for punishment, but is seemingly *primus inter pares* insofar as the absence of the opportunity for rehabilitation is held to render certain punishments constitutionally void.¹⁰⁰ If this aspect of *Graham* has any legs, it really is a revolutionary challenge to legislative supremacy because, as Chief Justice John Roberts ably demonstrates in his *Miller* dissent, rehabilitation and other justifications for punishment have fallen in and out of legislative favor over the decades with no prior intimation from the Court that any of them had special constitutional status.¹⁰¹ Even if the Court retreats from the suggestion of privileged status for rehabilitation, elevating the Court's meditations on the theoretical justifications for punishment above objective indicators of social consensus at the forefront of Eighth Amendment analysis is itself troubling. As any survivor of first-year Criminal Law is painfully

the *Ewing* Court wrote that, "[o]ur traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" *Id.* (citation omitted). Moreover, the treatise upon which the *Ewing* Court relies lists a fifth justification for punishment, what it calls "education," meaning that "punishment serves . . . to educate the public as to the proper distinctions between good conduct and bad – distinctions which, when known, most of the public will observe." LAFAVE & SCOTT, *supra* note 7, § 1.5 at 25. Some refer to this as the expressive justification for punishment. See Christopher Bennett, *Expressive Punishment and Political Authority*, 8 OHIO ST. J. CRIM. L. 285 (2011). At least two other justifications are advanced for some forms of punishment: the restitutionary objective when a sentence includes required payments of money, goods, or services to victims and the closely related restorative objective when a sentence includes required participation in communal activities. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5, at 42 n.42 (2d ed. 2003); *id.* at 5-6 (2d ed. Supp. 2013-2014).

99. *Graham*, 130 S. Ct. at 2030 (emphasis added).

100. Justice Thomas asserts flatly that the *Graham* majority "declar[ed] that a legislature may not forswear[r] . . . the rehabilitative ideal." *Id.* at 2054 (Thomas, J., dissenting) (internal quotation marks omitted). That may overstate the certitude and clarity of Justice Kennedy's actual language just a bit, but it is not an unfair conclusion.

101. *Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting); see also Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1-13 (2003).

aware, these concepts are notoriously malleable, inherently in tension, and can be employed to justify virtually any outcome. A Court constrained only by arguments about punishment theory is, in truth, not constrained at all.

Second, the nature of the remedies in both *Graham* and *Miller* necessarily implies their applicability beyond minor defendants. Neither case categorically rejects life sentences for juvenile crime. Both require individualized assessments of culpability and character – *Miller* at the front end of the sentencing process for juvenile murderers, and *Graham* at the back end for all other juveniles subject to life sentences. The requirement of individualization at both the front and back ends rests on the Court's determination that there are constitutionally meaningful differences in development and psychology among individuals all along the age spectrum from juveniles to persons many decades older. This has important implications. The advent of one's eighteenth birthday has no necessary biological or moral significance. It is, at best, a useful, though arbitrary, temporal marker somewhere in the middle of the transition from legally irresponsible adolescence to genuine adulthood. But the differential rate of adolescent development now accepted as fact by the Court implies not only that there are some young persons under age eighteen who may deserve life in prison, but also that there are some persons aged eighteen and over who have all the immature qualities *Graham* and *Miller* identify as constitutional bars to life sentences. Likewise, if it is now laid down as a constitutional principle that all persons sentenced to life for a juvenile crime have a sufficient potential for personal change and rehabilitation that they must at some point during their adulthood be offered an opportunity for parole release, then it is hard to see why the same judgment is not equally true of offenders of every age, or at the very least of nominal adults in their late teens and early twenties who are still completing the process of maturation.

Third, just as the categorization of persons under eighteen as a constitutionally distinct class of juveniles is fairly arbitrary, the Court's effort to treat "life" sentences without parole as a constitutionally distinct class of punishment cannot withstand scrutiny. There is, after all, no meaningful difference between a sentence of "life without parole" and the not-uncommon sentence to a term of years that extends beyond any plausible span of human life. Nor are defendants likely to feel much difference between life sentences without parole and life sentences with the possibility of parole thirty or forty years hence, or between LWOP and terms of years so long that the prisoner will be released only if he can survive into his seventh or eighth decade. One can argue that the latter cases offer the hope of freedom, however long delayed, while the former offer none. But that sort of distinction seems to me mostly poetical, the sort of highfalutin thing judges and academics write without considering either the searingly prosaic reality of spending the best part of a life in a cell or the fact that for most elderly parolees the proffered "hope" is not the sunlit beach Morgan Freeman's old con reaches at the conclusion of "The Shawshank Redemption," but lonely poverty in a dingy tenement. In any case, the distinction between a sentence to life in prison with-

out parole and a sentence to all but a sliver of life in prison seems far less clear as a matter of logic, and far harder to sustain as a matter of policy, than the distinction between a sentence of death and a prison sentence of any length. In fine, the door to expansion of the *Graham/Miller* line to adult offenders serving life or near-life sentences certainly seems ajar.

Fourth, and perhaps most significantly, the Court's remedies in *Graham* and *Miller* come very near to constitutionalizing discretion in sentencing generally. Hitherto, individualized sentencing was constitutionally required only in death cases; it now reaches not only the front-end decision to impose some life terms, but the back-end release decision for other life terms. Despite the particular juvenile context of these rulings, they plainly suggest a broader challenge to legislative authority to set definite minimum sentences for any crime and any offender. Justice Kagan hints strongly at such a challenge in the opening paragraph of *Miller*, when she characterizes juvenile LWOP sentences as "run[n]g afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."¹⁰² Note that this summary of the Court's holding is limited neither to any one class of defendants nor to any identifiable quantum of punitive severity.

V. CONCLUSION: WHY ISN'T THIS GOOD NEWS?

Given my aversion to overlong criminal sentences, particularly for juveniles, the obvious unease with the Court's work in *Graham* and *Miller* that permeates this Article perhaps calls for some explanation. My deepest concern flows from the view that the American constitutional order is more fragile than we often carelessly suppose. When any branch of the national government persistently overreaches – or, as in the case of Congress for some years past, persistently abdicates its most basic responsibilities – the entire federal structure is put out of balance, with unpredictable and potentially disagreeable consequences. At the least, if the overreach (or the abdication) is sufficiently flagrant and prolonged, respect for the decisions of the offending branch is likely to diminish both among the coordinate branches and the interested public.

Seen in isolation, the results in *Graham* and *Miller* seem unlikely candidates for this level of constitutional angst. No one is going to picket the Supreme Court or launch a campaign to impeach Justice Kagan over the lost power of state legislatures to put minors in prison for life. But the Court's stated rationale for this limitation on legislative power should, and I think will, give a great many people in and out of government considerable pause.

What is arresting is not so much the judicial restrictions on juvenile LWOP as the pointed abandonment as primary determinants of the Court's Eighth Amendment authority of both legislative action and the underlying democratic judgment that action has always been thought to represent. For

102. *Miller*, 1323 S. Ct. at 2460.

nearly half a century after *Trop v. Dulles*,¹⁰³ even when it aggressively regulated the narrow capital realm, the Court insisted that it could only act constitutionally with the sanction, however imperfectly measured, of societal consensus inferable from the actions of democratically accountable officials. That posture of deference and judicial modesty went overboard with a splash in *Graham* and *Miller*. The Court no longer troubles even to pretend that it is anything but an independent moral arbiter of legislatures' criminal law authority. This approach is very much of a piece with the hubris evident in the Court's last decade or so of Sixth Amendment jury right cases. In the line of opinions beginning with *Apprendi v. New Jersey*,¹⁰⁴ the justices have twisted the Sixth Amendment into an insoluble logical pretzel largely, as I have argued elsewhere, because they did not like the Federal Sentencing Guidelines and the efforts of legislatures to constrain judicial sentencing discretion.¹⁰⁵ Not coincidentally, I think, the effect of both the Court's Sixth and Eighth Amendment cases has been to relocate sentencing power away from legislatures and to judges.

As it happens, the Court's recent activism in the criminal area has tended to produce real-world outcomes that defense lawyers and law professors tend to like: fewer death sentences, shorter terms of years for juvenile offenders, and a gradual decline in federal sentence length since the transformation of the Federal Sentencing Guidelines into an advisory system in *United States v. Booker*.¹⁰⁶ So academics and advocates for defendants all shout "hurray!" I cannot completely join the wild rumpus. Because I think that a Supreme Court that manifests growing disrespect for what elected representatives and governors and presidents do over there in their supposedly coequal branches, a Supreme Court that increasingly thinks of itself – and of judges generally – as far wiser, far more dispassionate, and far more suitable to make governing choices than the unsophisticated yahoos whose power comes from the votes of the even less sophisticated masses, I think that Supreme Court is dangerous indeed.

On a final and more restrained academic note, I suggest that if the Court intends to proceed any further down the path suggested by *Graham* and *Miller*, it needs to step back and develop a better theoretical foundation. Candidly, I am not sure what form such a foundation would take; one of the reasons the Court, until recently, limited its Eighth Amendment stylings to capital cases was surely that designing a constitutional template for judging the proportionality of crime to punishment in non-capital sentences proved insupera-

103. 356 U.S. 86, 101 (1958).

104. 530 U.S. 466 (2000).

105. See generally Bowman, *Debate*, *supra* note 10.

106. 543 U.S. 220, 246 (2005). For discussion of federal sentencing trends after *Booker*, see Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUSTON L. REV. ___ (forthcoming 2014).

bly complex.¹⁰⁷ Perhaps some direction could be found precisely in the fact that *Graham* and *Miller* are such bold repudiations of the products of the legislative process. Perhaps the Court could try to distinguish certain extremely punitive sentencing schemes as products of persistent systemic flaws in the legislative process, sufficiently devoid of rational support that judicial intervention is required. After all, one might fairly argue that the Court's increasing intervention in criminal justice policy is only the natural response of exasperated judges to the persistent bloody-minded misadventures of the elected branches, that legislative dysfunction has produced judicial meddling. But presuming to judge the adequacy of the legislative process, as opposed to the merits of its statutory product, might fairly be thought a larger invasion of legislative prerogatives than anything the Court has done so far.

In any case, dysfunction here is largely in the eye of the beholder. Legislatures and the people who elect them did not decide that the sentencing policies rejected in *Miller* and *Graham* are terrible. Rather, the justices are now openly measuring legislative action by the yardstick of their personal opinions or at best by the values of the professional legal class they represent. And even as a member of that class largely in accord with its values, I am not entirely comfortable with the sweep of the Court's claim of power to enforce them.

107. See Frank O. Bowman, III, *Ewing v. California: The Supreme Court Takes a Walk on "Three Strikes" Law . . . And That's Fine*, JURIST (March 24, 2003), available at <http://jurist.law.pitt.edu/forum/forumnew103.php> (arguing that fashioning a usable Eighth Amendment proportionality test for all but the most unusual non-capital cases is virtually impossible).