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## Essay: Talking About Cruelty: The Eighth Amendment and Juvenile Offenders After *Miller v. Alabama*

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## Essay: Talking About Cruelty: The Eighth Amendment and Juvenile Offenders After *Miller v. Alabama*

### Cover Page Footnote

Professor of Law, Loyola Law School, Los Angeles; volunteer chaplain, Los Angeles County jails and juvenile detention halls. My thanks to Michael Kennedy, S.J., and Arturo Lopez of Jesuit Restorative Justice for helping me and my wife, Linda Goodman Pillsbury, LCSW, bring a trauma and spirituality program to the Barry J. Niedorf Juvenile Hall in Sylmar, California, in the summer of 2012 for adolescents facing long sentences, including life in prison. My greatest thanks go to the young men who participated in this program. Their experiences have helped shape my understanding of the issues involved and the arguments presented here.

**TALKING ABOUT *CRUELTY*:  
THE EIGHTH AMENDMENT AND JUVENILE  
OFFENDERS AFTER *MILLER v. ALABAMA***

*Samuel H. Pillsbury\**

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\* Professor of Law, Loyola Law School, Los Angeles; volunteer chaplain, Los Angeles County jails and juvenile detention halls. My thanks to Michael Kennedy, S.J., and Arturo Lopez of Jesuit Restorative Justice for helping me and my wife, Linda Goodman Pillsbury, LCSW, bring a trauma and spirituality program to the Barry J. Niedorf Juvenile Hall in Sylmar, California, in the summer of 2012 for adolescents facing long sentences, including life in prison. My greatest thanks go to the young men who participated in this program. Their experiences have helped shape my understanding of the issues involved and the arguments presented here.

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## I. INTRODUCTION

We need to talk about cruelty. If the subject is the constitutional ban on cruel and unusual punishments, then we need to talk about cruelty. If the subject is life sentences for juvenile killers, then we should talk about cruelty.

In a trio of cases, *Roper v. Simmons*,<sup>1</sup> *Graham v. Florida*,<sup>2</sup> and most recently, *Miller v. Alabama*,<sup>3</sup> the United States Supreme Court has developed a jurisprudence of proportionality to limit the punishment of juvenile offenders. A majority of Justices (a bare majority of five, it must be said) has struck down three different categories of punishment for offenders under the age of eighteen: the death penalty for murder (*Roper*),<sup>4</sup> life without chance of parole for nonhomicide offenses (*Graham*), and mandatory life without chance of parole for first-degree murder (*Miller*).

In these cases the Court has looked to a number of factors to assess constitutional proportionality, most importantly the science of brain development as it applies to adolescents, and national consensus as reflected in legislation and punishment practices. These factors seem to promise an objective means of assessing punishment for constitutional purposes. They also avoid talk about cruelty, the central normative term in the constitutional rule being applied.<sup>5</sup>

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1. 543 U.S. 551 (2005).

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

3. 132 S. Ct. 2455 (2012).

4. I follow the standard naming practice of referring to this case by the shorthand title of *Roper*. It does seem odd, though, that citation rules should name the case after Donald P. Roper, superintendent of the Potosi Correctional Center in Missouri who was named in the habeas case because he headed the Missouri prison that held the habeas petitioner, rather than Christopher Simmons, who was the habeas petitioner and original defendant convicted of murder.

5. Chief Justice Roberts, in his dissent, suggested that the word *unusual* in the constitutional text might have normative force, arguing that because there was no national consensus against the laws challenged in Arkansas and Alabama, life without chance of parole sentences for juvenile offenders for first-degree murder could not be deemed unusual. See *Miller*, 132 S. Ct. at 2477. For the argument that in its early usage, unusual referred to unprecedented increases in punishments, see John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1810–11 (2008). For other efforts to give cruelty normative content in Eighth Amendment punishment analyses, see Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81 (2010). See also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OH. ST. J. CRIM. L. 403 (2011) (“[T]he touchstone

If avoiding cruelty talk is the price we must pay for the holdings of *Roper*, *Graham*, and *Miller*, so be it. Holdings matter more than rationales, and I believe these holdings morally and constitutionally sound. I will particularly argue in support of the *Miller* holding here. Yet without addressing cruelty, two critical pieces of the discussion go missing.

The essential question with respect to juvenile perpetrators of serious violence is: How can we properly punish the cruelest of crimes without ourselves resorting to cruelty? In this question we see two often opposed but absolutely related aspects of cruelty: first, the potential cruelty of extreme penalties for teenagers and second, the cruelty of the criminal violence that lawful punishment serves to condemn. In the Eighth Amendment discussion, the tendency is to focus on one of these cruelties, largely to the exclusion of the other. But both are important.

The move to cruelty as a constitutional norm requires consideration of the moral responsibility of both punisher and offender. In the contemporary United States, moral responsibility is often seen as a matter of personal values or politics or both rather than the stuff of constitutional law.<sup>6</sup> The application of moral principles to crime and punishment is normally seen as the province of elected lawmakers: legislators and executives. This helps explain why the Court does not rely on explicitly moral reasoning in its recent Eighth Amendment jurisprudence. Nevertheless, I believe moral responsibility is at the heart of issues of cruelty in punishment. In the long run, whether juvenile offenders should be ordered to die in prison—the legal intent of a life without chance of parole sentence—depends in significant measure on the assessment of cruelty in both crime and punishment.

The move to cruelty does not provide definitive, final answers to severe punishment questions. Others may use cruelty talk to support outcomes exactly opposed to those I advocate here. The value of the move lies not, primarily, in deciding outcomes, but in addressing a

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of Eighth Amendment analysis . . . is the political morality of our liberal democracy—the best account of how our political values should shape and constrain the institute of punishment.”).

6. Justices Thomas and Scalia have made this point especially strongly in recent dissents. See *Graham*, 130 S. Ct. at 2055 (Thomas, J., dissenting); *Roper*, 543 U.S. at 615–16 (Scalia, J., dissenting).

fundamental aspect of the matter in question. Once more: If the question involves cruelty, we should talk about it.

My argument proceeds as follows. After setting up the issues and approach of the majority in *Miller*, we turn to the possibilities of cruelty as a constitutional norm. This begins with a look at cruelty historically, focusing on cruelty as an important moral and political norm for both Enlightenment thinkers influential on American thought in the late eighteenth century and its importance in the new American Republic's first modern innovation in punishment: the penitentiary. Next we look to the basic meaning of cruelty as a moral norm which condemns both sadism and indifference toward the serious suffering of others. This norm supports the *Miller* conclusion that mandatory life without chance of parole (commonly called "LWOP") sentences for certain juvenile offenders are cruel, but does so by means of a judgment that such sentences mandate a form of culpable indifference to individual value that constitutes cruelty. The Essay closes with a consideration of how a cruelty norm may guide courts in resolving the constitutionality of a life without chance of parole sentence for juveniles by a court that possesses the discretionary power to order a lesser sentence. The cruelty norm set out here would find a life sentence for a juvenile unconstitutional unless there was a subsequent opportunity for the offender to seek later release based on a demonstration of personal reform. Otherwise, a life sentence would disregard the basic value of the offender in the person that he or she might become.

## II. *MILLER*, IN SHORT

In *Miller v. Alabama*, the United States Supreme Court declared unconstitutional a mandatory sentence of life without chance of parole for offenders who commit crimes under the age of eighteen. In two cases, one from Alabama and the other from Arkansas, the Court struck down laws that required a juvenile convicted of first-degree murder in adult court to receive LWOP. In both instances, the state had originally provided sentencers with a choice of ordering death or life without parole for such murder.<sup>7</sup> The *Roper* decision eliminated

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7. See *Miller*, 132 S. Ct. at 2460–63; ALA. CODE §§ 13A-5-40(a), 13A-6-2(c) (1982); ARK. CODE ANN. § 5-4-104(b) (1997).

the death penalty, making LWOP the only sentence possible for juveniles convicted of first-degree murder in both states.

Justice Kagan, writing for the majority in *Miller*, found that mandatory life without chance of parole for juveniles violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>8</sup> The Court relied on the precedents of *Roper* and *Graham*, as well as the Court's much earlier cases requiring individualized sentencing in death cases. These latter cases bar mandatory capital punishment based on type of offense.

In its trio of juvenile punishment cases, the Court has started to develop an Eighth Amendment jurisprudence that echoes some of its death penalty jurisprudence of a generation earlier. In its earlier death cases, the Court repeatedly held that death is different as a penalty, and as a result the Court established substantive and procedural requirements not found in any other kind of criminal case. The motto for the Court's new line of cases must be: teens are different.<sup>9</sup> Or, to use the nomenclature of Justice Kagan and most advocates for juvenile offenders, children are different.<sup>10</sup> Juvenile offenders are different than adult offenders by virtue of their youth, and at least with respect to the most severe punishments, must be treated differently by the criminal law.

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8. See *Miller*, 132 S. Ct. at 2477.

9. "So if . . . 'death is different,' children are different too." *Id.* at 2470.

10. *Id.* In his dissent, Justice Alito wrote: "The category of murderers that the Court delicately calls 'children' (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood." *Id.* at 2489. Here, I use the terms *youth* or *teen* primarily because these are more common terms, in contemporary conversation, for persons aged fourteen through seventeen than "children." It has been my observation that teenagers do not generally like to be called "children." I certainly did not like it when I was that age.

A difficulty not addressed by the Court is the complexity of age as a marker of maturity. We commonly distinguish between chronologic and emotional or intellectual state of development, as by the judgment that one seems remarkably mature for their years, or, young (immature) for their age. Youth tried as adults in the criminal justice system present remarkable challenges to standard assessments of relative experience and development. In terms of life experience, including experiences of violence, trauma, drugs and alcohol, sex and parenting, they are often far more experienced than peers, indeed more experienced than many adults. In terms of emotional and intellectual development, though, they often lag behind peers, at least in some respects.

A quick story to illustrate: Recently I was in juvenile hall doing a program with a youth being tried as an adult and observed a female guard sarcastically yelling at youth forming up to go outside for recreation, reprimanding them for acting like two-year-olds. She added, something to the effect of, "Don't be such kids," and then added, as if to herself, "Oh, you are."



From *Roper* through *Miller*, a five-Justice majority on the Court has found significant support for its holdings in the science of adolescent brain development.<sup>11</sup> Researchers utilizing new technology and methods have produced a wealth of new data to support and explain age-old observations about teenagers. During the teen years, individuals are much more likely to be reckless and impulsive; they are much more heavily influenced by peers than they will be in later years.<sup>12</sup> These distinctions are the result of stages in brain development. The brain does not fully develop until early adulthood in the mid-twenties, with the last stage of development involving the prefrontal cortex. This is the region of the brain tasked with executive decision-making functions and is therefore arguably the most important to responsible conduct.<sup>13</sup>

Because of their youth, the Court has found teenage offenders less culpable: less capable of insight and self-control. Their criminal conduct is less indicative of fixed criminal character because of the greater likelihood that they will change as they grow to adulthood.<sup>14</sup> The impulsivity of youth also makes them less deterrable, because they are less likely to engage in the calculation of consequences that deterrent theory presumes. The Court has also observed in its recent cases that because of youth, sentencing judges have less ability to predict the future dangerousness of the offender.<sup>15</sup>

The Court concluded in *Miller* that laws that mandate LWOP for juvenile offenders make no sense because they do not permit decision makers to take account of the differences between juvenile offenders and adults.<sup>16</sup> Having established that these differences are relevant to punishment decision-making, the Court concluded that

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11. *Id.* at 2464–65.

12. *Id.*

13. *Id.*

14. “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Roper v. Simmons*, 543 U.S. 551, 570 (2004); *see also Miller*, 132 S. Ct. at 2468; *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (explaining that because juveniles are less mature and less likely to understand the consequences of their actions, their heinous crimes are not indicative of irreparable corruption).

15. This was an important aspect of Justice Kennedy’s reasoning in both *Roper* and *Graham*. *See Graham*, 130 S. Ct. at 2029; *Roper*, 543 U.S. at 573.

16. *Miller*, 132 S. Ct. at 2466.

they must be considered in sentencing.<sup>17</sup> The Court found major support for this final step in its reasoning in a line of cases that began with *Woodson v. North Carolina*<sup>18</sup> in which the Court required individualized sentencing in capital cases.<sup>19</sup> In *Woodson* and its progeny, the Court held that due to the unique severity of the death penalty, defendants had the right to a meaningful opportunity to present mitigation evidence and arguments.<sup>20</sup> This would be precluded if the death penalty was automatic based on the crime of conviction.<sup>21</sup> Therefore, no death penalty could be required based simply on conviction. In *Miller*, the Court found these precedents apposite, noting that for juveniles, a life without chance of parole sentence was not only the most severe that juveniles could suffer, but was effectively more severe than the same sentence given adult offenders, by virtue of both the total number of years served in prison and percentage of life spent incarcerated.<sup>22</sup> Again, given these differences, juveniles require distinct treatment.

Also important to the Court's juvenile punishment jurisprudence has been an examination of so-called consensus evidence: an analysis of national trends, and sometimes international practice, with respect to particular forms of punishment of young offenders.<sup>23</sup> This was a factor significantly relied upon in *Roper* where the Court noted the rarity of juvenile death penalty provisions and juvenile executions in the United States, and the even greater rarity of the penalty in the rest of the world.<sup>24</sup> It was also a factor in *Graham*, where the Court noted how unusual a life without chance of parole sentence was for a juvenile convicted of a nonhomicide offense.<sup>25</sup> In *Miller*, while the majority cited national and international trend

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17. *Id.* at 2469.

18. 428 U.S. 280 (1976).

19. *Id.* at 304.

20. *Id.* at 304–05.

21. *See* *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Sumner v. Shuman*, 483 U.S. 66 (1982); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *see also* *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (vacating death sentence imposed on a sixteen year old because the court failed to consider mitigating circumstances in sentencing); *Lockett v. Ohio* 438 U.S. 586 (1978) (plurality opinion) (reversing death sentence because Ohio statute did not give the sentencing judge a “full opportunity” to consider mitigating circumstances in sentencing).

22. *See Miller*, 132 S. Ct. at 2466; *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

23. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564–69, 576–78 (2005).

24. *Id.*

25. *Graham*, 130 S. Ct. at 2023–26.

evidence in support of its holding, the Court did not explicitly rely upon consensus data as in previous cases.<sup>26</sup> (Writing for himself and three other Justices, Chief Justice Roberts found the majority's decision ungrounded largely because it lacked support in the kind of national trend evidence that the Court had previously found critical to Eighth Amendment analysis in *Graham* and *Roper*.<sup>27</sup> At the time of *Miller*, a large number of states provided for juvenile LWOP sentences and twenty nine made such sentences mandatory on a juvenile's conviction in adult court of first-degree murder.<sup>28</sup>) Because the existence of a national consensus was not critical to the *Miller* Court's reasoning and is not relevant to the cruelty analysis proposed here, it will play only a small part in the discussion that follows.

In *Miller*, as in its earlier juvenile punishment cases, the Court did not consider *cruelty* as a constitutional norm. The Court's current proportionality analysis is predicated on the notion that a significant disproportion between punishment level and level of offender desert/dangerousness constitutes a cruel punishment. That is, grossly disproportionate punishment *is* cruel.<sup>29</sup> A cruel punishment in this sense is one that is excessive.<sup>30</sup> Under this approach, the analytic action lies in the assessment of proportionality factors; cruel just serves as the label for the final decision, whether constitutional or unconstitutional. Cruelty itself is not normative.

I believe we should use cruelty as a norm to assess the imposition of severe punishment. It promises to give Eighth Amendment analysis more textual and historical grounding than current approaches. And, at least in some cases, its moral focus will provide a critical norm to guide constitutional decisions. We will see that the cruelty norm suggested here provides another perspective on the mandatory life controversy in *Miller* and may also guide us in assessing future discretionary life sentences given juvenile offenders.

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26. *Miller*, 132 S. Ct. at 2470–75.

27. *Id.* at 2478–80 (Roberts, C.J., dissenting).

28. *Id.* at 2471 (majority opinion).

29. *Id.* at 2463–64.

30. See John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 938–61 (2011) (presenting an extended historical argument for reading the cruel aspect of the clause as meaning a punishment disproportionate to the severity of the crime).

### III. THE EARLY RHETORIC OF CRUELTY IN AMERICA

The question of how to punish violent crime is not a new one. Moral and political debates about this issue were prominent during the creation of the American nation, which followed the American Revolution in the late eighteenth century and continued well into the early nineteenth century. A critical concern then (as now) was how to punish effectively and yet avoid cruelty. A brief look at this history may help develop our own contemporary conception of penal cruelty, by allowing us to rediscover and reappraise its moral and political roots. But the question of history's import for contemporary law and policy is always fraught and requires some discussion before we can sensibly proceed.

Lawyers and judges frequently look to the past in hopes of finding a map to the legal terrain presented by the case at hand. The search is for the original intent of law drafters and adopters. How did they, or might they, have understood certain legal texts? This kind of historical inquiry has been an important part of judicial decision-making under the Eighth Amendment, and there is a significant scholarship concerning this form of historical inquiry into the Amendment as well.<sup>31</sup> This is not my purpose here in looking to history, however. I do not attempt to discern the particular intellectual lineage of the federal prohibition on cruel and unusual punishments found in the Eighth Amendment as ratified in 1789 or similar provisions in state constitutions that date from the late eighteenth and early nineteenth centuries. Instead, I look back for a more general sense of direction.

To return to my map metaphor, maps (or if you prefer the latest technology, global positioning devices) are wonderful guides to well-travelled territory. For more adventurous travel into new or foreign regions, however, one may need to rely on more general, directional guidance: navigation by stars or a compass or even an internal sense of direction. We may also try to figure the way ahead according to the path already taken, asking: Are we still headed in the same

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31. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969); William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355 (2005); Stinneford, *supra* note 30; Stinneford, *supra* note 5.

direction? We often use history to guide in this general sense, even in law. This is the historical direction I seek here; I believe it is a kind of direction particularly appropriate to deciding constitutional questions under cruel and unusual punishment because of the open-ended nature of its text and the character of our federal constitution today.<sup>32</sup>

This historical look may inform the “evolving standards of decency” standard used by the Court in *Miller* and many other Eighth Amendment cases in suggesting an evolutionary path, a direction.<sup>33</sup> Deepening our understanding of cruelty in American history should also inform moral and political discussions of punishment that occur outside the courtroom and that may determine the shape of penal legislation and practice in the days to come.

A brief look at this history tells us that the American concern with cruelty in punishment goes deep. It has been part of our national fabric from the very beginning.<sup>34</sup>

Initially we must set cruelty within an intellectual and ideological context, within the milieu of the thinkers which helped inspire the American Revolution. Historians of the American Revolution have long recognized its intellectual foundation in Enlightenment thought, particularly in that strand of thought that has been labeled republicanism.<sup>35</sup> The label covers a variety of thinkers, from the Continent, Britain, and North America, dating back to the seventeenth century and continuing through the eighteenth. Republicanism stands for a heterogeneous set of ideas about the

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32. For more closely argued versions of this jurisprudential approach to the Eighth Amendment, see Heffernan, *supra* note 31, and Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279 (2007).

33. *Miller*, 132 S. Ct. at 2463; *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373 (1910). For a particularly careful defense of such a use of history, see Heffernan, *supra* note 31.

34. *E.g.*, THE MASSACHUSETTS BODY OF LIBERTIES (1641), available at <https://history.hanover.edu/texts/masslib.html>. Section 46 provided: “For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel.” Section 92 provided: “No man shall exercise any Tirrany or Crueltie towards any brute Creature which are usualie kept for man’s use.” See sources at notes 39–50 *infra*.

35. *E.g.*, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969); see also PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 396–465 (1969) (analyzing the development of political thought in the Enlightenment).

possibilities of what we today call democracy and freedom, but what earlier thinkers were wont to call a republican form of government, and liberty for citizens.

Republican thought was frequently character-focused in that it applied terms of individual moral vices and virtues to the way that the state treated its citizens. This stemmed in part from the moral philosophy of the age, which was itself significantly character-focused.<sup>36</sup> This was also a time in the Western world when the state was standardly associated with a person—the monarch—and the lines between the personal and public in law were less sharply drawn than today.

Republican writers strove to distinguish the virtues of a republican people from the vices of tyrannical rule. A republican citizenry was reasonable and moderate in its passions; the tyrant was angry. The virtuous republic was moderate in response to threat and refrained from violence if at all possible. The tyrant was prone to extreme responses and great violence. Cruelty was a sign of the despotic and the tyrannical; it denominated exactly what a republican nation should eschew.

Cruelty was frequently decried as a central vice of both the individual and the state.<sup>37</sup> For example, complaints of cruelty against the English monarch and medieval laws can be found in the writings of Thomas Jefferson and John Adams respectively.<sup>38</sup> Cruelty was a

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36. *E.g.*, DAVID HUME, A TREATISE OF HUMAN NATURE 520–21 (1739–40); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, 1–5 (1759) (2011). *See generally* MICHAEL L. FRAZER, THE ENLIGHTENMENT OF SYMPATHY: JUSTICE AND THE MORAL SENTIMENTS IN THE EIGHTEENTH CENTURY AND TODAY (2010) (distinguishing two lines of Enlightenment thought, between sentimentalists such as Hume and Smith who emphasized the moral importance of emotion, and rationalists such as Immanuel Kant who sought a purely rational basis for moral principles and conduct).

37. *See* MICHEL DE MONTAIGNE, *Of Cruelty*, in THE COMPLETE ESSAYS OF MONTAIGNE 306, 306–18 (Donald M. Frame trans., 1965) (“Among other vices, I cruelly hate cruelty, both by nature and by judgment, as the extreme of all vices.”) *Id.* at 313. Hume also considered cruelty as the worst vice. Annette C. Baier, *Moralism and Cruelty: Reflections on Hume and Kant*, 103 ETHICS 436, 436, 439 (1993).

38. Thomas Jefferson, in his first draft of the Declaration of Independence, accused King George III of cruelty with respect to slavery: “He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.” This charge did not survive into the final draft, however. JOHN GABRIEL HUNT, THE ESSENTIAL THOMAS JEFFERSON 27 (1994).

central part of the Enlightenment critique of nonrepublican punishments. Especially as practiced on the Continent, the use of physical torture in investigation was decried as cruel. So were the bodily mutilations, flagellations, and torturous executions that were employed as punishments on the Continent, in England and, to a lesser extent, its colonies.<sup>39</sup> A great concern of penal reformers was the effect of public penal violence on citizens who witnessed it. Citizens could be corrupted by the brutality displayed at public hangings, floggings, and other punishments, just as tyrants were corrupted by their own unchecked exercise of brute power.<sup>40</sup>

Cesare Beccaria, one of the most influential writers on criminal justice in the eighteenth century, warned that harsh punishments hardened the hearts of men, corrupting them: “To the degree that punishments become more cruel, men’s souls become hardened, just as fluids always seek the level of surrounding objects . . . .”<sup>41</sup> Another writer influential on both sides of the Atlantic, Baron de Montesquieu argued: “The severity of punishments is fitter for despotic governments, whose principle is terror, than for a monarch or a republic, whose spring is honor and virtue.”<sup>42</sup>

Considerations of cruelty in punishment did not always focus on the character of the punisher or citizenry, however. Beccaria, Montesquieu, and others contended that cruelty was the result of

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John Adams, in a pamphlet on religion and feudal law said, “Thus was human nature chained fast for ages in a cruel, shameful, and deplorable servitude to him and his subordinate tyrants, who, it was foretold, would exalt himself above all that was called God, and that was worshipped [sic].” JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, in 3 THE WORKS OF JOHN ADAMS 450 (Charles Francis Adams ed., Bolles and Houghton 1851).

39. BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY (1787). Rush was a signer of the Declaration of Independence, a leading physician of his age, and an influential penal reformer.

40. “Capital punishment is not useful because of the example of cruelty which it gives to men. If the passions or the necessity of war have taught people to shed human blood, the laws that moderate men’s conduct ought not to augment the cruel example, which is all the more pernicious because judicial execution is carried out methodically and formally.” CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 51 (David Young trans., 1986) (1764) *See generally* RUSH, *supra* note 39 (arguing that public corporal punishments increase crime due to their coarsening effect on public moral sensibilities).

41. BECCARIA, *supra* note 40, at 46. On the influence of Beccaria on the framers, see Stinneford, *supra* note 30, at 956–57. *See also* MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 125–43 (1973) (detailing the widespread impact of Beccaria’s treatise on criminal legislation reform throughout Europe and the United States).

42. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 81 (Thomas Nugent trans., 1899) (1748).

excessive or unnecessary punishment. If severity of punishment could be made proportionate to severity of offense, then punishment would be inflicted only as necessary and cruelty could be avoided.<sup>43</sup> Eighteenth century penal reformers also targeted the physicality of traditional punishments as a source of cruelty. They believed that if punishment could address the mind or soul of the wrongdoer without attacking his body, this would represent a great advance.

In the latter part of the eighteenth century, an explicitly Christian critique of cruel punishment emerged, with the obligation of Christian compassion toward offenders becoming a central theme for many penal reformers. Quakers in both England and America led this early effort in evangelical humanitarianism. John Howard's heroic efforts at jail reforms in England directly inspired American thought on punishment following the American Revolution.<sup>44</sup> A new organization, the Society for the Alleviation of the Miseries of Prisoners in Pennsylvania, spearheaded reform efforts in that state to reform punishment according to the Christian obligation of benevolence.<sup>45</sup>

Benevolence toward all persons including criminal offenders was promoted as the positive virtue to defeat the vice of cruelty in punishment. As one Pennsylvania reformer wrote: "Every body acknowledges our obligations to *universal* benevolence. But these cannot be fulfilled, unless we love the whole human race, however diversified they may be by weakness or crimes."<sup>46</sup>

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43. See BECCARIA, *supra* note 40, at xvii.

44. See JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* (1777).

45. "When we consider that the obligations of benevolence, which are founded on the precepts and examples of the Author of Christianity, are not cancelled by the follies and crimes of our fellow Creatures: and when we reflect upon the miseries which penury, hunger, cold, unnecessary severity, unwholesome apartments and guilt (the usual attendants of Prisons) involve with them; it becomes us to extend our compassion to that part of Mankind, who are subjects of those miseries. By the aid of humanity, their undue and illegal Sufferings may be prevented, the links which should bind the whole family of mankind together, under all circumstances, be preserved unbroken: and such degrees and modes of punishment may be discovered and suggested as may, instead of continuing habits of vice, become the means of restoring our fellow Creatures to virtue and happiness." PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS, *CONSTITUTION OF THE PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS* 3-4 (Philadelphia, Joseph Crukshank 1806) (adopted May 8, 1987).

46. RUSH, *supra* note 39, at 7. The closest contemporary term for benevolence as used by reformers is empathy or compassion. Hume saw benevolence as the key to moral conduct. See HUME, *supra* note 36, at 83-86 (Sec. VI "Of Benevolence and Anger").



One of the first legislative tasks of the new American states following the Revolution was to create a set of criminal laws and punishments appropriate to the ideals of the new nation. These needed to be effective in controlling criminality, but not sanguinary (i.e., bloody); sufficient to keep order but not cruel. As one reformer put it, in language typical of the times:

It was not to be expected, that people enamored of freedom and a Republic, should long acquiesce in a system of laws, many of them the product of barbarous usages, corrupt society, and monarchical punishments, and imperfectly adapted to a new country, simple manners, and a popular form of government.<sup>47</sup>

Similarly, William Bradford, who served as the attorney general of Pennsylvania and later the second attorney general of the United States, wrote concerning criminal punishment in 1794:

[O]n no subject has government, in different parts of the world, discovered more indolence and inattention than in the construction or reform of the penal code. Legislators feel themselves elevated above the commission of crimes which the laws proscribe, and they have too little personal interest in a system of punishments to be critically exact in restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance which obscures their sufferings and blunts the sensibility of the Legislator. Hence sanguinary punishments, contrived in despotic and barbarous ages, have been continued when the progress of freedom, science, and morals renders them unnecessary and mischievous: and laws, the offspring of a corrupted monarchy, are fostered in the bosom of a youthful republic.<sup>48</sup>

Where did all this high-minded rhetoric about punishment lead? To the penitentiary. In a story well told elsewhere, the new American

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47. THOMAS EDDY, *AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE IN THE CITY OF NEW YORK* 9 (New York, Isaac Collins and Son 1801).

48. WILLIAM BRADFORD, *AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA* (Philadelphia, T. Dobson 1793), *reprinted in* 12 *AM. J. LEGAL HIST.* 122, 127–28 (1968). At the time that he wrote this, Bradford sat on the Pennsylvania Supreme Court.

states engaged in a series of penal experiments that ended in the creation of a new method of punishment, incarceration in a penitentiary.<sup>49</sup> The penitentiary was a large-scale institution designed for the long-term, postconviction confinement of offenders to effect both their punishment and reform.<sup>50</sup> The creation of the penitentiary was a celebrated achievement of the new American states, entailing the expenditure of great public sums, and often engendering great civic pride. These new institutions brought interested visitors from around the world, including Alexis de Tocqueville (who came ostensibly to see penitentiaries rather than democracy in action) and Charles Dickens.<sup>51</sup>

Two rival penitentiary systems arose, the so-called separate system of Pennsylvania in which prisoners were effectively held in solitary confinement during the entirety of their incarceration, and the silent system of New York, in which prisoners labored in congregate during the day in complete silence and were housed in single cells at night.<sup>52</sup> Reformers battled fiercely over the merits of each system both in achieving prisoner reform and avoiding penal cruelty.<sup>53</sup>

Defenders of the Pennsylvania system decried the use of the whip in New York penitentiaries. Immediate application of the lash by guards was the means by which silence was enforced in New York penitentiaries. Others claimed that the solitary confinement of prisoners in the Pennsylvania model was far crueler in its effects on mind and spirit. Among those holding the latter view was the

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49. The earliest penitentiaries were built and enthusiastically received in northern states. While most southern states eventually built penitentiaries as well, they came somewhat later and encountered greater skepticism than in the north. See EDWARD L. AYERS, VENGENCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 34–72 (1984).

50. See ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992); DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); see also MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750–1850 (1978) (on the development of the penitentiary in England).

51. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Herman R. Lantz ed., Francis Lieber trans., Southern Illinois University Press 1964) (1833); 1 CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION (London, Chapman and Hall 1842) (1987); WILLIAM CRAWFORD, REPORT ON THE PENITENTIARIES OF THE UNITED STATES (Patterson Smith 1969) (1835).

52. Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 737–38 (1989).

53. *Id.*

novelist Charles Dickens, who wrote following a visit to the Eastern Penitentiary in Pennsylvania, the only institution operating on the separate model: “The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.”<sup>54</sup>

What can we take from this history? Again historiographic cautions must be offered. This has been not only a very brief history, but a selective *rhetorical* account of but one side of a multi-sided historical debate. I have exclusively considered the writings of penal reformers. Though influential in their day, they were certainly not always persuasive. For example, even in post-revolutionary Pennsylvania, where punishment reform efforts were strongest, the basic “sanguinary” punishment of English law, the death penalty, was retained. Public whipping was used as a punishment in many American states well into the nineteenth century. Always there were powerful countervailing forces supporting harsh punishments, whether in traditional or modern forms. These forces have left less of a written record, but that does not make them unimportant historically.<sup>55</sup>

The full history of early American punishment is a complex story of many different persons, groups, and regions who, just as today, had bitter disagreements about the effectiveness and

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54. DICKENS, *supra* note 51, at 238. The famous novelist observed of the Pennsylvania penitentiary:

In its intention, I am well convinced that it is kind, humane and meant for reformation; but I am persuaded that those who devised the system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.

*Id.* at 238–39.

55. See Pillsbury, *supra* note 52, at 734–38; see also LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 77–82 (1993) (detailing the evolution of the penitentiary system).

justification of different methods of punishment. Given this, the brief ideological history of penal reformers given here can provide at most modest guidance in the resolution of contemporary penal controversies. What matters for our purposes are two main points.

One. From the beginning of the nation, cruelty mattered. It was one of the central negative values of the new Republic, something to be avoided at great cost. The new nation would not be what it aimed to be, what it declared itself to be, if it employed cruel punishments. As the variation between state punishment practices in America in the early nineteenth century demonstrates, cruelty in punishment was then, as now, a contested term. It had different meanings for different persons and groups. Still, it mattered greatly whether a punishment could be judged cruel. In the Republican thought of the eighteenth and early nineteenth century, cruelty was not an empty concept, not just a label to be placed on conclusions reached by other means but drew on a set of widely shared ideals. A shared understanding about the sort of person and state that acted in a cruel fashion provided moral guidance.

This rhetorical discussion was an important part of the historical context for the inclusion of cruelty as a constitutional norm for punishment in both federal and state jurisdictions in the United States. It provides a historical basis for considering cruelty as a norm capable of producing a counter-majoritarian limit on the methods and extent of punishment in the United States. It also provides a sound historical foundation for cruelty as a norm important to any political discussion in America of what punishments are just.

Two. Cruelty was frequently used as a term of character, focusing on the character of the punisher. The assessment of cruelty often rested on the punisher's attitude toward the punished. At least for some reformers, the punisher should strive for a benevolent attitude toward the punished. This attitude did not preclude imposing significant punishment; indeed, for many it was consistent with the creation of a truly fearsome new institution of punishment. It did require concern for the punished as a person with basic individual value, however.

Some will argue, and vigorously, that in constitutional law, history's guidance is limited to the analysis of original intent, which here might mean ascertaining what punishments were considered

anathema by the Framers' generation in the late eighteenth century in England and America.<sup>56</sup> Rebutting this argument would require discussion extending far beyond the bounds of this Essay, and yet it is worth at least briefly considering how we treat other historically grounded basic American values in addressing contemporary problems. If elsewhere we take a more capacious view of history's guidance and the growth of the American nation, that may provide partial support for doing so here as well.

In the modern United States we celebrate a long-standing commitment to the values of freedom and equality dating back to our most important founding documents: the Declaration of Independence signed in 1776, the Constitution adopted by Congress in 1787, and the Bill of Rights ratified by the states in 1791. We celebrate these historic documents even as we must acknowledge their—from the contemporary perspective—truly breathtaking limitations on freedom and equality. Their drafters and signatories did not protect rights for slaves, the unpropertied, and women. Indeed the Constitution *protected* race slavery in the South.<sup>57</sup> Still many Americans believe that both the Declaration of Independence and the original Constitution set out ideals of freedom and equality that should guide us today.<sup>58</sup>

We might take the same view of cruelty in punishment. This also was an original American value set out in founding documents, the Bill of Rights in particular. The abhorrence of governmental cruelty also was part of the original national vision, representing a critical moral and political distinction from the philosophies and practices of monarchial England and Continental regimes. There is a historical path here, dating back to the eighteenth century, of critiquing punishment according to cruelty. This is a word that had

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56. *See supra* note 33.

57. *E.g.*, U.S. CONST. art. I, § 2 (slaves counted as two-thirds of a person for purposes of representation in the House of Representatives; same for taxation); U.S. CONST. art. IV, § 2 (fugitive slave clause, providing for return of slaves escaping from slave states); U.S. CONST. art. I, § 9 (no ban on international slave trade until 1808). Among the most important provisions understood to protect slavery was Article V, which requires a three quarters majority of the states to approve any amendment to the Constitution. U.S. CONST. art. V. This gave the slaveholding South an effective veto on constitutional amendments with respect to slavery.

58. For example, Abraham Lincoln saw the Declaration of Independence as a foundation for American values of freedom and union. GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 130–33 (1992).

normative power for the generation that shaped the new republic. Even as its particular applications were hotly contested, its moral centrality was accepted. It provided general direction. Given this, why not take the norm of avoiding cruelty in punishment seriously today? I think we should. But if we do, what would that mean? To this question I now turn.

#### IV. TWO FORMS OF CRUELTY

What do we mean, today, when we call a person or an action cruel? Here we turn from intellectual history to moral philosophy. We must employ basic tools of analytic philosophy to elucidate and articulate cruelty's meaning as used in ordinary language. From this analysis we may glean a norm capable of application to many settings, including punishment. In essence, we seek to move from moral consensus to moral controversy, from examples of cruelty upon which all may agree and that therefore provide the outlines of norms generally agreed upon, to the application of those norms to controversies in contemporary criminal punishment.

The Oxford English Dictionary defines *cruel* as referring to persons who are "disposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hardhearted."<sup>59</sup> Here we find the two basic forms of cruelty distinguished according to mental state: the sadistic and the callous.<sup>60</sup>

The sadistic intentionally inflict great pain on others for their own pleasure or personal gain. Brutal and sustained attacks on the vulnerable—the torture of animals or children—represent core instances of such cruelty. The more common form of cruelty is that of indifference: callous disregard for the suffering of others. A person who drives at high speed on a narrow street lined with pedestrians while texting on a cell phone, acts with indifference to the danger her conduct poses to all nearby.

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59. OXFORD ENGLISH DICTIONARY 78 (2d ed. 1989).

60. Here and in the discussion that follows I have been influenced by John Kekes's analysis of cruelty. John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834 (1996). Kekes defines cruelty as: "the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions caused to their victims." *Id.* at 838; see also JEREMY WALDRON, TERROR, TORTURE AND TRADEOFFS 292–301 (2010) (taking an ordinary language approach to the definition of cruelty).

Cruelty normally involves severe suffering. In many instances of cruelty, the harm suffered is life-threatening. This may be true in a physical sense, but it may also be true because the harm suffered by the victim damages and endangers basic mental and emotional well-being. In all cases, certainly all cases relevant to punishment, the hurt must go deep to be cruel.

Cruelty is an emotion term in that it describes the emotionality of the cruel person. It is marked by the presence or absence of certain morally significant emotions: either pleasure at another's suffering or a radical lack of concern for—a blameworthy hardheartedness in the face of—another's suffering. The emotional dimension of cruelty explains why cruelty is often seen as a personal norm. We experience emotions according to what matters to us personally. The delight (positive emotion) or coldness (lack of emotion) of cruelty reveals what matters and does not to the person labeled cruel with regard to another person's suffering.

Cruelty involves a significant devaluation of the suffering person. That is, the person labeled cruel views the sufferer as less than a fully valuable human being. In the most extreme examples, the cruel person sees the sufferer as having no moral value. The sufferer's pain does not matter because the person suffering does not matter. The cruel person may seek and enjoy the other's suffering (sadism). Or, she may distance herself completely from that suffering (indifference). Either way, the pain of the sufferer prompts no moral concern, gives no cause for remorse or restraint.

Many cases of cruelty rest on a less obvious form of devaluation. Instead of completely rejecting the other's value, the other is valued in a very limited fashion. The other is treated as a lesser type of human being. The other, the one who suffers, is not seen as a unique person with his or her own unique strengths and weaknesses, fears and desires, but instead becomes a projection of the other's judgments. This radical restriction of view represents a blameworthy devaluation of person. Slavery in the United States provides a particularly stark illustration.

In the antebellum South, white slave owners commonly, and often sincerely, touted their concern for their black slaves, even

arguing that slavery benefited the slave.<sup>61</sup> White slaveholders valued blacks for who they (owners and other whites) saw them as being. The dark-skinned had value in white eyes, and even sometimes a value beyond property worth, but it was a value distinct from that of white persons.<sup>62</sup> There had to be a value distinction between the races to justify race slavery.

Today we judge racial slavery—the ownership of another person and their offspring by virtue of racial descent—as the height of cruelty. We judge it cruel because we see the profound devaluation of the slave inherent in the condition of slavery. We see the deep suffering that slavery’s denial of autonomy involves, even if the slave receives adequate food and shelter. We see the full *person* held in captivity, a sentient being that the slaveholder saw only partially, because the slaveholder saw only a member of a different race, or even species. We see the cruelty inherent in the slave owner’s radically narrowed view of the slave’s humanity.

Finally, the judgment of cruelty rests on an assessment of responsibility that comes out of the moral relationship between two or more persons: one who suffers and the other who is responsible for that suffering. Cruelty involves a judgment that the cruel person disregarded fundamental moral obligations that arose because of his or her relationship with the victim.

Where one person causes another great suffering, that conduct should give rise to an obligation to minimize or alleviate that suffering if possible. There is at least an obligation of concern for the suffering person. Someone who is cruel rejects basic moral obligations that we think a harm doer should have for his or her victim. In its sadistic form, cruelty describes a morally perverted relationship in which causing another pain is seen as a positive good. Cruelty can also involve the refusal to recognize moral obligations where we believe such obligations *should* exist by virtue of the

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61. See EUGENE D. GENOVESE & ELIZABETH FOX-GENOVESE, *FATAL SELF-DECEPTION: SLAVEHOLDING PATERNALISM IN THE OLD SOUTH* (2011); EUGENE D. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION* (1988); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD THE SLAVES MADE* (1976).

62. See THOMAS JEFFERSON, *Laws, in NOTES ON THE STATE OF VIRGINIA* (Univ. of N.C. Press 1954) (1787) (detailing Jefferson’s view of distinctions between the white, black, and Indian races).



consequences of one's actions or inaction. This is cruelty by indifference.

Most controversies over cruelty involve its responsibility aspect, or more precisely, the requirement of culpability for the other's suffering. We must for example distinguish between cases where the one causing pain is culpably indifferent to the victim's suffering and those where causing pain is consistent with concern. A doctor who performs an excruciatingly painful procedure on a patient will not be judged indifferent to the patient's suffering if the procedure is medically necessary. The patient's pain matters to the doctor (we hope); it is not the most important consideration in this circumstance, however. A parent punishing a child might present a similar example of causing pain with concern, not out of sadism or with indifference.<sup>63</sup> By contrast, causing damage sufficient to threaten another's life in some fundamental respect, without any moral justification and without any experience of concern, shows that the sufferer does not matter to the person causing the harm, and therefore that person may be called cruel.

#### V. CRUELTY AND PUNISHMENT: A QUESTION OF INDIFFERENCE

Now we are ready to apply the cruelty norm to punishment. The *Miller* question can be reframed: Is mandatory life without parole for a juvenile murderer a *cruel* punishment according to the general norms of cruelty? The three critical questions to ask are: (1) whether this punishment entails sufficient suffering such that its imposition might be cruel, (2) whether the state may be held responsible, that is, may be *blamed* for that suffering, and as part of that analysis, (3) whether the punishment decision involves a devaluation of the offender's value as a person by the decision-maker.

We begin with the prerequisite that cruelty involves a person or group experiencing serious suffering, meaning harm that threatens either physical life or the mental and emotional capacities necessary

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63. Both of these examples—the medical and parental infliction of pain for the good of the sufferer—are useful to illustrate culpable indifference, but less so for illustrating cruelty, because we generally presume that the pain inflicted in such cases will be moderate. Cruelty requires more significant suffering. If doctor- or parent-inflicted pain is severe enough to reach potentially cruel levels, then we are likely to re-examine the judgment that it was inflicted with concern as opposed to indifference.

for a decent life. Life-long incarceration involves such suffering. It is meant to—and does—inflict profound pain. Putting aside the physical pain that may be an (at least officially) unintended part of incarceration,<sup>64</sup> we see that incarceration is intended to deprive the individual of liberty and to remove the person from close personal relationships. By design in the United States, it precludes or strains close bonds between those outside and those inside.<sup>65</sup> Incarceration severely restricts the prisoner's opportunity for work, for growth, and for relationship.

Incarceration harms marriages and families. It separates children and parents, making those relationships difficult. It can lead to institutionalization, the inability to live outside of a prison environment. With some frequency, the stress of imprisonment causes or exacerbates mental illness. It can inspire deep despair, leading to suicide. In some settings, incarceration leads to violentization in which all relations are shaped by the threat of violence. A sentence of LWOP easily meets the suffering element of cruelty. It is meant to cause extreme suffering.

As the *Miller* Court recognized, life without chance of parole entails greater suffering for juvenile offenders than for adult offenders.<sup>66</sup> Young prisoners are more likely to be raped in prison than other inmates.<sup>67</sup> Proportionately, juvenile offenders given life sentences spend more of their lives in prison than others serving life terms.<sup>68</sup> Most profoundly, for a young person, life imprisonment can

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64. See *Farmer v. Brennan*, 511 U.S. 825, 853–54 (1994) (Blackmun, J., concurring) (citing cases of brutality in prisons and jails); Dolovich, *supra* note 5. For a report on brutality in the Los Angeles County jails, see CITIZENS' COMM'N ON JAIL VIOLENCE, REPORT OF THE CITIZENS' COMMISSION ON JAIL VIOLENCE (2012), available at <http://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf>.

65. See JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

66. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

67. HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 14–18 (2012), available at [http://www.hrw.org/sites/default/files/reports/us0112ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf). A concern with rape was not cited by the Court in *Miller*.

68. *Miller*, 132 S. Ct. at 2466.

arrest personal development, freezing him or her in an immature state.<sup>69</sup>

A cruelty judgment also requires moral responsibility, the determination that a person or entity is responsible for the other's suffering. It requires blame. This is the critical normative question for punishment. Obviously the state causes much of the prisoner's pain. Loss of liberty and the suffering that entails is explicitly envisioned by statute, ordered by a court, and funded by the people of the jurisdiction. Yes, the offender's decision to commit the crime triggers conviction and punishment. Yes, we can say: do the crime, and you must do the time. The connection between crime and punishment remains human-made, however. No punishment is *automatic* upon crime commission unless we the people decide it must be.<sup>70</sup>

By itself, causation does not establish responsibility, however. Severe punishment may be justified. Punishment can only be cruel if the state can properly be *blamed* for the suffering of juveniles serving mandatory life terms for murder. This judgment seems to require a comparison of the severity of punishment with the extent of the offender's desert or dangerousness (or both) according to basic punishment principles. But this assessment involves many difficulties.

To resolve the proper severity of punishment according to principles of punishment, we must first choose a punishment theory,

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69. See Robert Johnson & Sonia Tabriz, *Death by Incarceration as a Cruel and Unusual Punishment When Applied to Juveniles: Extending Roper to Life Without Parole, Our Other Death Penalty*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 251–52 (2009).

70. For an example of the way that responsibility can be shifted from punisher to the punished by an emphasis on the latter's choices, see the explanation that the trial court gave for imposing a life without chance of parole sentence on Terrance Graham, a sentence far greater than that requested by the prosecution or recommended by the State Department of Corrections. The sentencing court told Graham, in part:

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. . . . I have no idea. . . . Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.

*Graham*, 130 S. Ct. at 2020.

selecting most basically between retribution and deterrence.<sup>71</sup> Scholars have long debated the merits of each, but just because each theory has substantial public and expert support, courts are reluctant to choose between them. Indeed, it is hard to imagine a court making an explicit *constitutional* choice between the two.<sup>72</sup>

Even if such a choice could be made, there are difficult questions to resolve about the particular form and application of each theory. For example, within deterrence, how should the value of specific deterrence—the need to prevent further criminality by the particular offender—be weighed against the value of general deterrence—the need to deter other persons from similar wrongdoing? Are there circumstances in which an offender who poses little or no danger of reoffending may nevertheless be imprisoned because of the need to make an example for others? With retribution, there are equally important questions to resolve, including whether deserved punishment should rest exclusively on the crime of conviction or also include an assessment of the offender’s character, meaning his or her general disposition to wrongdoing.<sup>73</sup> And if both offense and character are considered in evaluating deserved punishment, how should they be weighed against each other?

Another set of complications comes from the considerable variation between cases. Even within an offense category such as first-degree murder, there can be significant differences in individual culpability and evident dangerousness. Witness the differences between the two defendants whose appeals were jointly resolved in

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71. This is an oversimplified view of punishment’s justifications, of course. It does not address mixed theories, which seek to use aspects of both deterrence and retribution, expressive theories, or restorative justice approaches. Nevertheless it should be sufficient for purposes of this discussion to identify the most common and basic division between punishment theories here: retribution and deterrence.

72. *E.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy J., concurring in part and concurring in the judgment) (“[T]he Eighth Amendment does not mandate adoption of any one penological theory.”); *see also Miller*, 132 S. Ct. at 2465–68; *Graham*, 130 S. Ct. at 2028–30; Ryan, *supra* note 5, at 102 n.116 (citing cases); Stinneford, *supra* note 30, at 924 n.104. Some have argued that retribution nevertheless should provide the core guidance for determinations of disproportionate punishment under the Eighth Amendment. *See Stinneford, supra* note 30, at 962–68; *see also* Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1756 (2012) (seeing retribution as driving recent Supreme Court decisions).

73. *See* JEFFRIE G. MURPHY, *PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION* (2012).

*Miller*. Kuntrell Jackson was convicted as an accomplice to a robbery that ended up as a murder. He did not participate in the act of killing or demonstrate any purpose to kill. Proof of the required mens rea for his form of capital murder (felony murder based on his role as an accomplice to a robbery that caused death) depended on his utterance of a single sentence that no witness at trial testified to hearing, but which was recorded in statements to police taken prior to trial.<sup>74</sup> Evan Miller, by contrast, was the perpetrator of a brutal killing by bludgeoning and fire, in which he demonstrated clear purpose to kill in both word and deed.<sup>75</sup>

Given the difficulty of these questions, it is not surprising that the Court has not set out a singular justification for severe punishment under the Eighth Amendment. The Court has instead employed a multifactor analysis drawing from different theories of punishment to set the outer boundaries of permissible punishment. From a criminal law scholar's point of view, the resulting analysis may lack analytic rigor and coherence, but considering the Court's constitutional role here, which is to set the outer bounds of punishment while permitting maximum latitude for jurisdictions to determine most punishment questions for themselves, this approach seems nearly inevitable. At least it seems inevitable if we frame the question as one of justified punishment according to punishment theory. But what if we evaluated punishment according to the norm of cruelty?

Instead of relying on punishment principles to supply a constitutional norm, we might use the norm of cruelty to assess the punisher's moral-emotive attitude toward the punished. We might ask: Is there anything in the punishment decision process that is likely to foster culpable indifference toward the offender's penal suffering? Is there anything in current punishment law or penal

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74. The evidence indicated that Jackson either said, "I thought you all was playin'," a statement presumably directed at his two companions, voicing Jackson's disquiet at the violent threats that had been made, or "[w]e ain't playin'," a statement directed at the robbery victim, which would represent a threat to the store clerk, that she should comply with the robbery demand. *Miller*, 132 S. Ct. at 2461. The "we ain't playin'" statement was attributed to Jackson by another participant in the robbery, Travis Booker, when he was questioned by police after the crime. At trial, Booker testified differently, stating that Jackson had actually said: "I thought you all was playin'." At trial Jackson also testified to making this latter statement. *Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004).

75. *Miller*, 132 S. Ct. at 2462.

process that encourages indifference to the value of the offender? Is there anything in substantive law or procedure that radically restricts the decision-maker's view of the offender as a person? The mandatory imposition of life sentences represents just such a restriction. It mandates indifference to the unique value of the offender as a person.

## VI. CRUELTY AND MANDATORY LWOP FOR JUVENILE OFFENDERS

Mandatory punishments have great popular appeal, especially for serious crimes. As the popular slogan goes: do the crime, and you do the time. With mandatory penalties, the link between crime and consequence appears unbreakable. If you want to avoid the consequence, just refrain from the crime. After the fact, once the crime is committed, there is no place for argument or negotiation, no listening to pleas for mercy or presentations in mitigation. The crime determines the punishment, all according to law. If we want the criminal law to send a clear and certain message condemning criminal violence—and of course we do—what could be better than this? Clear, simple, and emotionally powerful, this argument for mandatory punishments carries great political force. It does not make for good law, however. In practice, severe mandatory penalties violate basic precepts of due process.

Mandatory punishments effectively convert voters and legislators into sentencers. Without knowing the names or identities of those to be sentenced, the particulars of the crimes or the offender's individual involvement, legislators effectively sentence the as-yet uncharged. Judges become little more than legal functionaries at the sentencing proceeding, required to sentence according to statutory mandate regardless of case circumstances.<sup>76</sup> This is by design.<sup>77</sup>

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76. Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 141 (2001) ("The venerable ritual of sentencing has become a puppet show where defendants are not individuals but criminal classes and judges' discretion is hamstrung by generic legislative decrees."); see also KATE STITH & JOSE CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (discussing how mandatory sentencing laws have failed to cure inequities in punishment).

77. Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 494–96 (2002) [hereinafter *Emotive Due Process*]; Samuel H.

This approach is partly motivated by distrust of the judiciary. Some members of the public believe that judges, if permitted discretion, will be soft on offenders at sentencing.<sup>78</sup> Trends in judicial sentencing over the last generation provide little support for this concern, however, at least as compared with historical sentencing patterns.<sup>79</sup> There is a related and more deep-rooted reason for the abandonment of discretion, though. It is simply the desire to ensure harsh punishment, regardless. Mandatory penalties effectively play on certain traits of human nature to increase penal severity. Determining punishment in the abstract maximizes the human impulse for severe punishment of violent crime. And it renders ineffective the most important force for lesser punishment: empathy for the punished.

When we contemplate crimes in the abstract, we naturally imagine the worst offenses by the worst offenders.<sup>80</sup> Thus when we set punishments in the abstract, we set them at a very high level. This is not problematic if decision-makers have discretion to impose lesser punishments based on the particulars of offense and offender. It is a serious problem if the penalty set in the abstract is mandatory in application.

Sentencing in the abstract may be particularly affected by unconscious (or for some, conscious) bias with respect to race and

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Pillsbury, *Learning from Forgiveness*, 28 CRIM. JUSTICE ETHICS 135 (2009) [hereinafter *Learning from Forgiveness*].

78. See *Emotive Due Process*, *supra* note 77, at 516. The tendency to go to extremes in punishment has been long recognized. See JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 401 (J. Bowring ed., 1843).

79. Commitments to prison increased dramatically in California, in 1980–1990, even faster than the national increase in incarceration that occurred during this same period. FRANKLIN E. ZIMRING & GORDON G. HAWKINS, PRISON POPULATION AND CRIMINAL JUSTICE POLICY IN CALIFORNIA 7–10, 14–15 (1992). The legislation that comprised the state’s Three Strikes law, its single most important modern mandatory minimum sentencing law, was signed into law in early 1994, then put into the California constitution by approval in a voter proposition that fall. See JOE DOMANICK, CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN AMERICA’S GOLDEN STATE 123–41 (2004).

80. Social science research has documented a consistent disparity between opinions about sentences for crimes described in the abstract and particular instances of those crimes. The former are set higher than the latter. See JULIAN V. ROBERTS, *Public Opinion, Crime and Criminal Justice*, in 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99 (Michael Tonry ed., 1982); Michelle D. St Amand & Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 LAW & HUM. BEHAV. 515 (2001); see also Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 750–52 (2005) (discussing media impact on public views of criminal justice).

class. The assumption of mandatory sentencers, meaning voters or legislators, is that the worst crimes are committed by the worst people. For many, this conjures up individuals who are at the bottom of the social and economic hierarchy, who are likely to be the most depraved and the most dangerous. In recent years we have accumulated a great deal of data concerning race bias in punishment, especially in the death penalty, but also including the treatment of juvenile offenders.<sup>81</sup> Disparities according to race appear significant throughout the juvenile justice system. And while mandatory penalties seem to provide a race-neutral basis for decision, they actually may exacerbate preexisting biases through a variety of mechanisms.<sup>82</sup>

Even putting aside race and other group biases, we know as a matter of human nature that it is far easier to condemn persons at a distance than face-to-face. On the Internet, ordinary people hurl extraordinary verbal vitriol at others they have never met, using words they would never speak to another person in person. It is easy to malign faceless strangers. The converse is also true. It can be hard to condemn those we encounter face-to-face. In death penalty cases, lawyers know that success at the penalty phase requires humanizing the defendant, presenting him or her as a person who has suffered in the past. Jurors who otherwise would impose the death penalty based entirely on the crime may be swayed by the particulars of a defendant's upbringing, particularly incidents of child abuse.<sup>83</sup>

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81. For an overview of the literature, see DARNELL F. HAWKINS & KIMBERLY KEMPF-LEONARD, *OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE* (2005); Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 *DEPAUL L. REV.* 679, 683–87 (2002). See also Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 *YOUTH VIOL. & JUV. JUST.* 71 (2007) [hereinafter *Minority Youths*] (addressing the disproportionate number of minorities in the juvenile justice system); Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 *J. CRIM. L. & CRIMINOLOGY* 633 (2011) (analyzing link between African-American involvement in criminal justice and racial bias in school discipline).

82. See HUMAN RIGHTS WATCH, *WHEN I DIE, THEY'LL SEND ME HOME: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA*, 1, 24–29 (2008) (documenting racial disparities in California LWOP sentences). For current statistics and an introduction to the complexities of race disparity and discrimination in juvenile justice, see *Minority Youths*, *supra* note 81.

83. See SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* 140–44 (2005).



These basic observations about human judgment remind us of the importance of intuition in penal assessment. We see here how our intuitive reactions may be affected by personal encounter or by its limitation. Our moral judgments largely rest on intuition, which reason then rationalizes or perhaps modifies.<sup>84</sup> The physical presence of the one who is to be judged can affect intuitive judgment, because such presence can provoke empathy. Learning another's life history, especially if it involves significant suffering, and witnessing the concern of others for this person can change an observer's emotional response to the person. In short, the greatest check on our urge to punish severely is empathy for the offender, the feeling of sympathy we may have for the unique human being who will suffer that punishment.

In psychological terms, mandatory punishments operate to bar the influence, and even the experience, of empathy for the offender. With mandatory punishments, there is no point to full presentation of mitigation evidence because it cannot affect the legal sentence. If mitigation evidence is presented, the legal (but not true) sentencer, the judge, will not likely pay close attention because to do so would just make her or his task potentially more difficult emotionally. The court must still do as the law commands, regardless.

Understanding this, we see that mandatory sentences operate to deprive defendants of due process at sentencing even more effectively than would a rule that bars defense attorneys from sentencing hearings. Mandatory penalties deprive defendants of any meaningful opportunity to contest severe punishment by blocking the most effective of all moral appeals—the appeal to decision-maker empathy.

The individualized sentencing requirement in capital cases rests on just this understanding of empathy's moral importance. In a series of cases, the Court held that defendants in capital cases must have the opportunity to present themselves to sentencers as unique persons and not just as perpetrators of a particular category of offense. In capital cases, defendants must be permitted to make any mitigation argument that might persuade the decision-maker to spare the

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84. See JONATHAN HAITT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

defendant's life. In other words, the defendant has a constitutional right to appeal to sentencer empathy. No wonder the Court in *Miller* found these cases apposite to mandatory juvenile life without parole.

The Court has also recognized the legitimacy of appeals to empathy in another of its important late-twentieth-century Eighth Amendment decisions, *Payne v. Tennessee*,<sup>85</sup> on victim impact statements. Reversing an earlier decision, the Court in *Payne* held that victim impact statements are constitutional in capital cases.<sup>86</sup> The Court decided that presentations designed to reveal the uniqueness of victims and appeal to decision-maker empathy for victims could play an important role in the punishment decision process.<sup>87</sup> With victim impact statements, the appeal to empathy favors the prosecution, not the defense, but the principle that empathy is relevant to moral judgment is the same.<sup>88</sup>

In summary, severe mandatory penalties like life without parole for juveniles convicted of first-degree murder should be struck down because they are based on a radically narrowed view of the value of the punished and preclude effective appeals to sentencer empathy on their behalf. Such laws treat individual defendants as legal categories and not unique persons. This constitutes culpable indifference to their value as persons.<sup>89</sup> Thus, I think that the *Miller* decision is compelled by cruelty analysis. Mandatory life without chance of parole sentences for juvenile offenders are cruel.

Okay. But *Miller* is now precedent. What next? The important question now becomes whether sentences of life in prison for

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85. 501 U.S. 808 (1991).

86. *Id.* at 827.

87. *See id.*

88. I do not here address the many significant objections that have been made to the use of victim impact statements at sentencing, especially in capital cases. *See* Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Susan Bandes, *Victims, 'Closure,' and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (2009); Sheri Lynn Johnson, *Speeding in Reverse: An Anecdotal View of Why Victim Impact Testimony Should Not Be Driving Capital Prosecutions*, 88 CORNELL L. REV. 555 (2003). Those issues lie beyond the scope of this essay. My point here is just to note that empathy for victims may connect us to important moral values relevant to our response to violent crime, just as empathy for defendants may. In neither instance does the appeal to or experience of empathy guarantee just decision-making, however. For related issues, see the discussion of cruelty of murder, *infra* Part VII.

89. Mandatory punishments also subvert personal responsibility for punishment by ensuring that no one person or group feels personally responsible for taking a particular person's freedom. *See* Caldwell v. Mississippi, 472 U.S. 320, 332–34 (1985); Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545 (1996).

juveniles are constitutional if ordered by a court that had discretion to order a lesser sentence. Both the majority and dissenters in *Miller* clearly looked ahead to this question in their opinions.<sup>90</sup> What does cruelty analysis say here? Are such sentences cruel? How might we tell? To answer these questions, we must return to a matter raised in the introduction but not mentioned since: the cruelty of murder itself. We cannot assess the limits of constitutional punishment for murder unless we take seriously the need for punishment to condemn *murder's* cruelty.

## VII. THE CRUELTY OF MURDER: A SOCIAL-MORAL JUDGMENT

“That Miller deserved severe punishment for killing Cole Cannon is beyond question,” Justice Kagan declared in *Miller*.<sup>91</sup> But why? If juveniles are fundamentally different from adults in terms of their culpability because of their state of social and brain development, then how can a fourteen-year-old like Miller be sufficiently culpable to deserve severe punishment? Why shouldn't incarceration be limited to Miller's youthful years since both biologic and social science suggest that he will become a different person on reaching adulthood?

This is, of course, a rhetorical question. The Court never intimated in *Miller* or *Graham* or *Roper* that it would take the brain development argument this far. Instead it serves as but one factor, albeit an important one, in limiting the extremes of juvenile punishment. As the Court's dissenting Justices have noted, however, the lesser culpability for youth argument based on brain development does not have a clear stopping place with respect to juvenile punishment.<sup>92</sup> In fact the check on this argument for leniency comes

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90. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (“But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”). This dicta attracted the critique of the dissenters. *Id.* at 2481 (Roberts, C.J., dissenting).

91. *Id.* at 2469 (majority opinion).

92. *See id.* at 2481–82 (Roberts, C.J., dissenting). In fact, it is hard to see how this argument might be limited to juveniles, as brain development generally becomes complete at twenty-five, not eighteen. And, given the great variation in individual development rates and the fact that development is often delayed by acute or chronic trauma, which is suffered by many juvenile offenders, the argument, if accepted, might even apply to offenders older than twenty-five.

not from an examination of the juvenile's choice-making capacity, but from assessment of the criminal wrong done by the juvenile. It comes from the social and moral facts of the crime committed. It comes from our collective need to condemn acts of murder through lawful punishment. As a result, our punishment inquiry must shift focus from offender to offense.

In order to decide the limits of punishment in particular cases, we must assess cruelty with respect to both crime and its punishment. With this in mind, we consider the facts of the cases before the Court in *Miller*, in particular the prosecution's case against Evan Miller; he was the one who the majority stated clearly deserved severe punishment.<sup>93</sup>

Late one night in 2003, Evan Miller, fourteen, decided with a sixteen-year-old friend, Colby Smith, to rob or steal from a fifty-two-year-old neighbor, Cole Cannon, who had come to the Miller trailer home late at night.<sup>94</sup> Cannon came over in hopes of food—he had burned his own dinner—and to buy drugs from Miller's mother.<sup>95</sup> Miller and Smith later accompanied Cannon back to Cannon's trailer where they all smoked marijuana and drank.<sup>96</sup> Cannon appeared to pass out. Miller removed Cannon's wallet from his pocket and took \$300 cash, which he split with Smith.<sup>97</sup> Miller tried to put the wallet back in Cannon's pocket. Cannon awoke, and a struggle ensued.<sup>98</sup>

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93. The case of Kuntrell Jackson presents different considerations because of his minimal involvement in the robbery that was the predicate for his felony murder charge. In his concurrence in the case, Justice Breyer argued that no life without chance of parole sentence for Jackson could stand without a finding that he either acted with intent to kill or personally committed the act of killing. *Id.* at 2475–77 (Breyer, J., concurring). The facts before the Court indicated neither.

94. *Id.* at 2462 (majority opinion). The account in text is drawn from the Court opinion and the briefs of both Petitioner Miller and Respondent State of Alabama before the Court. Much of the evidence against Miller came from the testimony of codefendant Smith, who testified for the State, in exchange for which he was allowed to plead guilty to felony murder and received a life sentence with parole eligibility. Petition for Writ of Certiorari at 7, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2011 WL 5322568, at \*7. This pattern, in which an older codefendant receives a lighter sentence due to cooperation with authorities, is found in many cases in which juveniles receive an LWOP sentence. See HUMAN RIGHTS WATCH, *supra* note 82, at 35–37.

95. *Miller*, 132 S. Ct. at 2462; Reply Brief for Petitioner at 3, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2012 WL 837389, at \*3; Brief for Respondent at 6, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2012 WL 588454, at \*6.

96. *Miller*, 132 S. Ct. at 2462.

97. *Id.*

98. *Id.*

Cannon grabbed Miller by the throat. Smith then hit Cannon once with a baseball bat, which resulted in Cannon losing his grip on Miller.<sup>99</sup> Miller then took up the bat and repeatedly hit Cannon in the head with it. Miller covered Cannon's head with a sheet and delivered a final blow, stating: "I am God, I've come to take your life."<sup>100</sup> The boys left the scene but later returned to set several fires in Cannon's trailer in an effort to conceal their prior deeds. As this occurred, Cannon asked Colby Smith, "[W]hy are y'all doing this to me?"<sup>101</sup> Cannon died of injuries from the baseball bat attack and smoke inhalation.<sup>102</sup>

According to the basic culpability analysis of criminal law, which assesses the defendant's reasons for action, Miller was highly culpable. Miller's effort to kill Cannon was purposeful; Miller's words and deeds indicated that he sought to end Cannon's life without moral or legal justification. There is no indication that Cannon had done anything to harm or threaten Miller or a loved one prior to the incident. The theft that precipitated the killing appears to have been planned. While the attack that led to fatal violence was not premeditated,<sup>103</sup> having begun when Cannon grabbed Miller by the throat, Miller's subsequent, repeated blows with a baseball bat delivered on an apparently helpless Cannon and his participation in the arson of the trailer to cover up his crime, even while Cannon still lived, shows great indifference to the value of Cannon as a human being.

Other homicide offenders will rank higher on a scale of relative culpability, however. As noted, the original baseball bat attack on Cannon was not planned. The episode only became violent when Cannon, a much older man, grabbed Miller by the neck. Miller was severely intoxicated at the time of the violence, which must have

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99. *Id.*

100. *Id.*

101. Petition for Writ of Certiorari at 6, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2011 WL 5322568, at \*6.

102. *Miller*, 132 S. Ct. at 2462.

103. This analysis assumes, consistent with the law of most American jurisdictions, that premeditation reliably indicates greater culpability. For questions about the premeditation-culpability connection, see SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 98-124 (1998).

affected his cognitive abilities, emotions, and moral sensibilities.<sup>104</sup> And he was only fourteen years old.

So where does this leave us? Although Miller's was by no means the worst murder imaginable, I suspect that after considering all the facts, most Americans would agree with Justice Kagan that because of his brutal actions, their lack of justification, and their fatal consequence, Evan Miller merits serious punishment.

It is important to remember here that though this penal judgment can be rationalized—as I have just done here in summary fashion—for most people this judgment will be based on intuition. Many will experience repugnance and even fear on hearing these facts. Seeing what he did, Miller will strike many as brutal and dangerous. Or to use the language I have favored here, many will conclude that Miller's acts were cruel and that the law should condemn their cruelty with a significant sentence. How long a sentence becomes the critical question. Life without chance of parole? For that determination we must look at the person and life of Evan Miller beyond the acts for which he was convicted.

But before we attempt any holistic judgment of both person and offense, we need to be clear about *why* the basic facts of the crime have independent significance. We need to understand why the cruelty of the crime, based on mens rea culpability (reasons for action) matters in ways independent of the offender's state of personal development or personal history.

In the United States, punishment for serious crime is a drama that must play to multiple audiences. Most fundamentally, it responds to an individual's choices to harm others in violation of criminal law; it makes clear to the offender the wrongness of his or her conduct. Punishment also addresses community needs, declaring the extent of wrong done to those most directly affected, as well as the harms suffered by society at large. In this respect, punishment does important social-moral work, reaffirming fundamental

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104. Miller, who was only fourteen, had consumed nearly a fifth of whisky that night, smoked marijuana, and had taken two Klonopin pills. Petition for Writ of Certiorari at 6, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2011 WL 5322568, at \*6. Klonopin is a prescription medicine used to treat seizure disorders and anxiety. Among its known effects is heightening the intoxicating effects of alcohol. See *Klonopin*, DRUGS.COM, <http://www.drugs.com/klonopin.html> (last visited Feb. 2, 2013); *Clonazepam*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0009677/> (last visited Feb. 3, 2013).

principles and rules for the community by condemning their violation through penal sanction. The nature and extent of punishment serves as an indication of the social-moral meaning of the crime (its wrongness) to the community.

This social meaning work helps explain why the criminal law sets such strict limits on the relevance of psychological causes and explanations in assessing liability. Criminal law judges a defendant's chosen actions according to the reasons for which they were chosen, rather than the psychological origins of the defendant's behavior, because reasons for action help determine the crime's meaning to the community. Accidental and intentional harms signify different threats, different challenges to a community, even when the harm done is identical. The acts of the intentional killer and a driver with a blood-alcohol level just over the legal limit who causes a fatal accident through criminal negligence produce the same result: a person dies. Yet we distinguish this conduct in law and morality according to the reasons for which each "killer" acted. These reasons distinguish the actors in their relationships with the community. The intentional killer's purpose to kill makes him or her appear a more deliberate wrongdoer, one who rejects the community's most basic prohibition. This person therefore appears a more serious threat to community values than the drunk driver, who displayed no desire to take a life, and, if criminally negligent, likely had no awareness of the fatal risks of his conduct, though he should have.

The social meaning work of criminal law also explains the significance that American criminal law gives the harm accomplished by an offender, both physical and relational. As many scholars have noted, and not a few complained, harm matters in American criminal law even independent of offender decision-making.<sup>105</sup> Attempts at crime and completed crimes are normally punished differently even if the offender's choice to do wrong was the same, and the difference between success or failure was, from the defendant's perspective, purely fortuitous.<sup>106</sup> The difference is in the

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105. See Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363 (2004); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

106. On the concept of relational harms, see Samuel H. Pillsbury, *Review Essay: Learning from Forgiveness*, 28 CRIM. JUST. ETHICS 135, 144–46 (2009).

harm experienced by the community. The community experiences a completed rape differently than an attempted rape; a homicide (where the victim necessarily dies) differently than an attempted homicide. These crimes carry different social consequences and different social meanings. Punishment reflects not just an assessment of the offender's choices, but the effects of those choices on the community. That is part of the social reality that punishment must address.

As a result, judgments about the punishment of Evan Miller consider not just his choice-making capacities, but also the social-moral meaning of his acts. That he sought to kill Cole Cannon, that he bashed him repeatedly in the head with a baseball bat and then, after leaving him bleeding and helpless, returned to the scene to set fire to Cannon's trailer home matters because these facts indicate cruelty. They indicate an intentional attack on individual value and disregard for basic personal worth. Miller's punishment therefore needs to be sufficient to demonstrate the community's condemnation of that cruelty.<sup>107</sup>

#### VIII. CRUELTY AND THE PUNISHMENT OF VIOLENCE: PROCEDURAL REQUIREMENTS OF THE EIGHTH AMENDMENT IN JUVENILE SENTENCING

Throughout this Essay, my aim has been to suggest how the norm of cruelty might guide Eighth Amendment jurisprudence in the punishment of juveniles. We now have all the pieces in place, historical, moral and conceptual, to offer at least a broad outline of what a cruelty approach to punishment might require here. We will see that cruelty's direction in this context is largely procedural rather than substantive. This should not be surprising, both because of the difficulty of devising a *constitutional* theory of punishment that would provide clear substantive rules for sentencing, and because cruelty is a moral-emotive norm focused on how punishers approach the punishment decision rather than a rule dictating a particular penal result.

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107. This discussion also shows why Kuntrell Jackson's conduct was relatively less culpable under basic mens rea-reason analysis: he was a participant in the robbery and did not demonstrate purpose to kill in any of his words or conduct.



With respect to juveniles, the norm of cruelty supports three procedural requirements: (1) that the prosecution must have a full opportunity to present the facts of the defendant's crime to establish its cruelty; (2) that, consistent with the holding in *Miller*, the defense must have a full opportunity to present all potential mitigation evidence with respect to the offender, and finally, (3) that if a severe sentence is imposed, the law should also require a subsequent proceeding in which a decision maker may reconsider the sentence in light of the juvenile's subsequent maturity. This last requirement would render unconstitutional a sentence of life without chance of parole for a juvenile, even if discretionary.

Requiring least discussion, because it involves no change in current law or practice, is the first requirement that facts in aggravation based on the nature of the crime of conviction be presented at sentencing. The only reason this even needs articulation is to emphasize that the norm of cruelty provides guidance with respect to assessing both the crime and the offender. Declaring the cruelty of criminal violence is an important goal for just punishment along with avoiding cruelty in the punishment of crime. The latter sets the constitutional bounds for punishment, but those bounds must comprehend the community's need for punishment sufficient to condemn criminal violence. Stating both cruelty norms together also gives a clearer sense of the difficulty of the task of setting proper punishment for crimes of serious violence committed by juveniles.

Requiring more discussion, but largely flowing from the previous analysis of *Miller*, is the requirement of individualized sentencing, with full presentation of any offender-mitigation facts.<sup>108</sup> The defense cannot be handicapped in the adversarial contest for decision-maker hearts and minds at sentencing. The defense must have the opportunity to appeal to sentencer empathy by presenting a wide range of facts concerning the offender, especially his or her life history. So, for example, the sentencer in the case of Evan Miller

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108. For a similar argument based on the authority of *Graham*, see Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391 (2012).

should hear about the brutality, trauma, and disorganization of his home life. This did not occur at his original sentencing.<sup>109</sup>

Miller's father regularly violently beat Evan, his siblings, and his mother during Miller's early years of life. The violence in Miller's childhood home was so severe that Evan, *at six years old*, attempted to commit suicide to escape it.<sup>110</sup> He would try to take his own life three more times in succeeding years.<sup>111</sup> Eventually the State removed Evan and his siblings from the home because of abuse in the home. Evan was placed in foster care and remained there for two years until he was returned to the custody of his mother.<sup>112</sup> Evan's mother was a drug addict and alcoholic who was often away from the home for sixteen hours at a time. The family moved so often in Evans's childhood that his mother could not later remember all the schools he had attended.<sup>113</sup>

Evan began drinking and using drugs as early as eight years old.<sup>114</sup> Intoxicants used at an early age can have devastating effects on the brain and on overall development. Later Miller regularly used marijuana, crystal methamphetamine, and abused various prescription drugs.<sup>115</sup>

Few people on hearing this account, especially if given by someone with firsthand knowledge, would view Evan Miller in the same way as if all they knew of him was what he did to Cole Cannon. That is why it is essential that full mitigation information be presented to a sentencer who has the ability to order a lesser sentence than the maximum provided by law, if the sentencer believes it warranted.<sup>116</sup>

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109. In fact, Miller was sentenced to LWOP on the same day of his conviction "and without further proceedings." Petition for Writ of Certiorari at 7, *Miller v. Alabama*, 132 S. Ct. 548 (2011) (No. 10-9646). Miller then "expressed remorse for his actions and apologized to the victim's family, even though he knew it could not make any difference in the sentence he received." *Id.*; see *Miller*, 132 S. Ct. at 2469.

110. *Miller*, 132 S. Ct. at 2462.

111. *Id.* Counsel for Miller represented in his opening brief to the U.S. Supreme Court that Miller's first suicide attempt was at age five and that he made a total of five more suicide attempts in his young life. Petition for Writ of Certiorari, *supra* note 109, at 4–5.

112. Reply Brief for Petitioner, *supra* note 95, at 4.

113. Petition for Writ of Certiorari, *supra* note 109, at 4.

114. *Id.* at 5.

115. *Id.*

116. Miller's story is extreme, but not for that reason unusual for a young person charged with criminality, especially violent crime. Substance abuse begets substance abuse, trauma begets

Although my focus here has been on the Eighth Amendment and its mandates, there is another constitutional provision that is equally important here: the Sixth Amendment's right to effective assistance of counsel.<sup>117</sup> Attorneys for juveniles facing long prison terms must conduct an extensive investigation to discover mitigating facts. They must then effectively present this evidence to the sentencing judge.<sup>118</sup> Such presentations should be similar to those made in death penalty cases.<sup>119</sup> As in the capital context, this kind of presentation is not one for which many trial attorneys are presently trained or necessarily adept.<sup>120</sup> It requires a focus on family and mental health issues far beyond anything needed for liability determinations. It requires building a close rapport with an often distrustful and reticent teenage client.<sup>121</sup> It requires meeting family and others who know the youth. All this is an effort that few appointed attorneys (and almost all here are appointed rather than retained) currently have the time, investigative resources, or will to accomplish.<sup>122</sup> Yet the right to a mitigation presentation will mean nothing if attorneys do not utilize it. This will require a fundamental change in defense practice in many jurisdictions.

The last constitutional requirement, that juvenile offenders have an opportunity for reconsideration of severe sentences in later years based on the person that the offender has become, requires both elaboration and justification, not having been part of the discussion so far. The initial question is: How can a severe sentence such as a

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trauma, and violence begets violence, forming legacies handed down from one generation to the next. For a good introduction to the connection between trauma and juvenile delinquency, see Kristine Buffington, Carly B. Dierkhising & Shawn C. Marsh, *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, 61 JUV. & FAM. CT. J. 13, 16 (2010).

117. U.S. CONST. amend. VI; U.S. CONST. amend. VIII.

118. See Caldwell, *supra* note 108, at 402–10.

119. The Supreme Court began its ineffectiveness jurisprudence with a decision concerning a defense attorney's mitigation presentation in a death penalty case. *Strickland v. Washington*, 466 U.S. 668 (1984). The claim was rejected there, but more recently the Court has found ineffectiveness in a number of death penalty cases because of shortcomings concerning mitigation presentations. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); see also *Rompilla v. Beard*, 545 U.S. 374 (2005) (defense counsel had duty to consider and prepare for prosecution's evidence in aggravation in preparation for penalty phase hearing in capital case).

120. See Caldwell, *supra* note 108, at 416–20.

121. See *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010); HUMAN RIGHTS WATCH, *supra* note 82, at 37–41.

122. Caldwell, *supra* note 108, at 416–20.

life sentence be *cruel* if there were no restrictions on the presentation of facts in aggravation and mitigation at sentencing, and the sentencer was free to impose a lesser sentence? Where is the culpable indifference to person-value if the unique value of the young person was fully presented at the sentencing hearing? The answer is that especially with juveniles, to value a person means to see that person not only as the unique human being that he or she is but also to appreciate the possibilities of who that person might become.

A fundamental attribute of humanity is that humans can change. The greatest changes occur in childhood, adolescence, and early adulthood. If there is no mechanism for reconsideration of sentences for juveniles, this critical aspect of human value is denied legal recognition. Without a reconsideration opportunity, the fact that a teen who was impulsive, reckless, and without moral grounding, becomes an adult who has none of these traits, does not matter. That aspect of value, the value of becoming, is explicitly denied.

Making a life sentence irrevocable and unreviewable imposes a radically narrowed view of the offender's value.<sup>123</sup> Long mandatory sentences reduce an individual to a crime category, permanently. An LWOP sentence for a juvenile precludes legal reconsideration of the sentence and therefore constitutes indifference to the value of the person the teen might become. Thus the sentence demonstrates a cruel attitude toward the offender's worth; it should be held unconstitutional under the Eighth Amendment.<sup>124</sup>

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123. As Justice Kennedy put it: "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Graham*, 130 S. Ct. at 2030.

124. This requirement is consistent with the Court's holding in *Graham* that a defendant sentenced to a life without chance of parole sentence be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2029–30; *see also* *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that mandatory life without parole for juvenile offenders violates the Eighth Amendment); *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012) (concluding that a "110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses contravenes *Graham's* mandate against cruel and unusual punishment under the Eighth Amendment."). These cases reversed the original life sentence (which was either LWOP in name or function), contemplating a resentencing proceeding, rather than establishing a procedure for subsequent reconsideration of a lawful sentence. For a related argument, that *Graham* should be seen as a procedural decision, involving a right to discretionary parole consideration, as well as a substantive one setting a limit on length of sentence, see Richard A. Bierschbach, *Proportionality and Parole*, *supra* note 72.

Here it is worth taking just a moment to detail why it is so difficult for a trial court, especially one accustomed to adult defendants, to make a sound penological assessment of youthful offenders at the time of sentencing.<sup>125</sup> The court often must sentence for a crime of particularly senseless violence, as in *Miller* or in the companion case of Jackson.<sup>126</sup> The apparent senselessness of the violence seems to make the defendant appear both dangerous and depraved. The defendant will often appear to the court to be quite clueless about what he has done. We can see this in many cases, but particularly in the sentencing address in the *Graham* case, where the court professed exasperation and bewilderment at Graham's bad life choices.<sup>127</sup>

Youthful offenders often have significant learning disabilities. They have almost all experienced difficulty in school. Many, like Miller, suffer from serious mental illness. Many, like Miller, have serious substance abuse histories, leading to a loss of cognitive abilities, or at least a significant delay in their development. As a group, they are not very articulate, especially in an intimidating adult environment like the courtroom. With their histories of trauma and substance abuse, growing up in families and communities where introspection is a rare quality and survival—emotional and physical—an almost daily struggle, they have few resources for understanding themselves.

Many youthful offenders truly are clueless about what they have done and why. They often do not understand their own motives or emotional dynamics. They may express true bewilderment at their own actions. Often they do come to a mature understanding of the consequences of their actions in later years. Similarly, at the time of their sentencing, many do not fully understand the sentence they receive. That is a realization that also often comes years later.<sup>128</sup>

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125. See *Graham*, 130 S. Ct. at 2032.

126. By senseless here I mean lacking in the kinds of reasons that one might expect could motivate an adult to serious violence. Juvenile murders often are extremely impulsive acts with little prospect of selfish gain and a high chance of capture and punishment. See, for example, the Kuntrell Jackson case, in which the shooter killed the video store clerk when she did not provide money at his demand. The three would-be robbers then fled the scene without taking anything. *Miller*, 132 S. Ct. at 2461.

127. *Graham*, 130 S. Ct. at 2019–20.

128. In an interview after he was resentenced in 2012 and given a twenty-five year term, Terrance Graham told a reporter: "To me the 25 year sentence hurt more than the life sentence."

Given all this, it can be extraordinarily difficult for a court to distinguish between an individual whose cluelessness may be due to transient factors such as youth and home environment, and those whose disposition to violence and antisocial conduct is more deeply set, as in the condition of psychopathy.

There is considerably more to say about this requirement of subsequent reconsideration than can be managed in the confines of this Essay. Questions such as how long the original sentence needs to be to trigger the reconsideration requirement, when that reconsideration should occur, the basic parameters for the reconsideration decision, who should make it, and on what evidentiary basis are among the most important. The requirement of the legal opportunity may also presume some right to programs in prison in which a prisoner could concretely demonstrate personal change. Prisoners serving LWOP often are housed at the highest security level where programs are few, if any.<sup>129</sup>

It is sufficient for my present task to show that the basic prohibition on cruelty entails procedures that maximize the chance that those responsible for incarceration decisions will see the value of the person punished, and that for juvenile offenders this entails a reconsideration opportunity following the imposition of a life sentence or equivalent.

## IX. CONCLUSION

From his middle seat on the high bench of the courtroom of the United States Supreme Court, Chief Justice Earl Warren often asked

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Jeff Kunerth, *Terrence Graham's First Interview*, TROUT (May 16, 2012), <http://jeffkunerth.com/post/23161353754/terrence-grahams-first-interview>. He explained that when he received a life sentence at seventeen, it never seemed real to him. "Something inside me said it wasn't really real. I never felt in my heart I was going to do a life sentence. I guess that's why it didn't settle in like the 25 years." *Id.* Graham was twenty-five years old when he was resentenced. Jeff Kunerth, *Life Without Parole Becomes 25 Years for Terrence Graham, Subject of U.S. Supreme Court Case*, ORLANDO SENTINEL (Feb. 24, 2012), <http://articles.orlando.com/2012-02-04/features/os-life-without-parole-terrence-graham-20120224-12-1-terrence-graham-resentencing-parole/2>. Youth who receive long sentences in their teens frequently report that they did not comprehend the severity and reality of the sentence until years later, usually in their mid-twenties.

129. See HUMAN RIGHTS WATCH, *supra* note 82, at 56–60 (discussing juvenile LWOP in the California prison system).

a simple question that confounded lawyers arguing before the Court: “But is it fair?”<sup>130</sup>

The question stumped many advocates; it also confounded, annoyed, and even enraged many legal observers. What kind of a question is that, Is it fair? It is not a question about statutory interpretation or constitutional text. It does not address precedent or jurisprudence. How is this even a *legal* question?

In truth, Earl Warren’s fairness inquiry was in many ways a layman’s query. It was not grounded in any agreed-upon legal authority. Warren was asking a moral question, drawing on basic American values. Earl Warren believed that such values were at the heart of constitutional law.

Earl Warren was a man of extraordinary moral confidence, a confidence that can be traced to his personality, his professional experience, and his times. Before coming to the Court he had worked as a deputy district attorney and then a prominent elected district attorney, then the elected California attorney general, and finally a popular and successful governor of the state. In all of these roles he took strong stands on issues of right and wrong. He was part of the generation that led the nation to victory over the Axis powers in World War II and after the war, took on the nation’s longest standing and greatest failure of its promise of citizen freedom: its laws and customs of race discrimination.<sup>131</sup> Warren had an abiding faith in basic American values of equality and freedom that informed his constitutional jurisprudence. So it seemed to him, in an early plurality opinion that is still widely cited by the Court and commentators, that the Eighth Amendment’s prohibition against cruel and unusual punishment should depend on “evolving standards of decency that mark the progress of a maturing society.”<sup>132</sup> For Warren, the constitutional prohibition could not be divorced from American morals.

Chief Justice Earl Warren is long gone from the Court and so also is his confidence that basic moral values should guide constitutional law. I cite his example here because of the contrast it

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130. See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 451 (2006); Roger J. Traynor, *Chief Justice Warren’s Fair Question*, 58 GEO. L.J. 1, 4–5 (1969).

131. NEWTON, *supra* note 130, at 452.

132. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

provides to the Court's current Eighth Amendment jurisprudence, which largely avoids moral discourse, despite the Amendment's explicitly moral text.<sup>133</sup>

I have argued throughout that we need to talk about cruelty—and therefore speak morally—when considering the Eighth Amendment's rule for the punishment of juvenile offenders. Cruelty provides a moral standard, deeply rooted in Anglo-American history and with a foundation in constitutional text, that can provide normative guidance for contemporary punishment questions. It cannot settle the question of what punishment is just in a particular case, but it can provide important procedural safeguards for the decision process. And at least in some cases, it can better address the normative issues involved than the standards currently employed by the Court.

Science's insights into adolescent brain development may (and I believe should) inform punishment decision-making and constitutional standards. But criminal liability and punishment rules have nonscientific foundations. Criminal law sets fundamental rules for conduct in a community. These are based on moral expectations, on what we believe is fair to ask of each other individually, and on what is necessary for the community.<sup>134</sup> Science can never decide these questions. They concern the human world we choose to make, not just the world that is, which is science's exclusive concern.

Similarly, legislative and decisional trends across the nation, and even internationally, may inform the Court's assessment of

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133. The "cruel" prohibition in the Eighth Amendment is the only explicitly moral term in the Bill of Rights or the Constitution in the sense of making reference to a personal virtue or vice. Several Justices in modern times have acknowledged the moral nature of its rule. For instance, Justice Stevens has described "the moral commitment embodied in the Eighth Amendment." *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring); *see also id.* at 2021 (majority opinion) ("[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment." (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008))).

In biting dissents in the juvenile punishment cases, Justices Scalia and Thomas criticized what they called the moralizing of the majority in Eighth Amendment decisions, placing the word moral in quotations to indicate their belief that it signifies nothing more than the personal policy preferences of the majority rather than a norm capable of or appropriate to constitutional direction. In their view, the Eighth Amendment's Cruel and Unusual Punishment Clause has no moral content beyond prohibiting the kinds of punishments generally deemed barbarous by late eighteenth-century English and American courts and commentators. *See* cases cited *supra* note 6.

134. *See, e.g.,* Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 158 (2009).



“evolving standards of decency,” but they cannot provide a reliable constitutional rule. The Eighth Amendment is part of the Bill of Rights, which was designed to guard against the excesses of the majority.<sup>135</sup> Few groups are more vulnerable to majoritarian abuse than those convicted of serious crime.<sup>136</sup> We need a clear counter-majoritarian rule to protect against penal cruelty. And the Constitution gives us one.

Taking cruelty seriously as an Eighth Amendment norm involves a recognition, faithful to the views of this nation’s founders, of our human limitations as decision-makers. The human desire to make messy and complex problems simple so that they accord with our strongest initial feelings is powerful always, and especially so in punishment. It can easily lead to penal excess. The temptation to reduce persons convicted of crime to legal categories, to criminals of a particular type, and thereby restrict our view of their unique value, has great emotional appeal. At first glance it even seems to have moral content. Do the crime, and you do the time. The Eighth Amendment stands as a historical and legal reminder, though, that basic justice requires more. It requires concern for individual human value.

We cannot have confidence in the justice of any severe punishment given to a young offender unless the person to be punished has had a meaningful opportunity to appeal to the empathy of the sentencer by presenting a full life history and possibilities for future good. If a young offender is then given a life sentence, we cannot be confident of the justice of that sentence going forward unless he or she is afforded an opportunity in later years for reconsideration in light of the person that he or she has become. Without these procedural protections, any life sentence for a juvenile offender should be considered cruel, both morally and constitutionally.

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135. Ryan, *supra* note 5, at 93.

136. Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 55–56 (2007); *see also* Ryan, *supra* note 5, at 93 (noting “counter-majoritarian power . . . is undermined by relying solely on the Court’s consultation of the objective factors, such as state legislative action, and by eschewing the Court’s own judgment on the issue”).

