

## YOUTH AND PUNISHMENT AT THE ROBERTS COURT

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### ABSTRACT

*Scholars are divided on how to assess the Supreme Court's recent trio of juvenile life-without-parole ("LWOP") cases. Some extol the cases as exemplars of the Court's "moral leadership," heralding a "revolution in juvenile justice" and perhaps also auguring shifts in the Court's jurisprudence of adult punishment. Others are more pessimistic, arguing that the cases solidify a two-track approach in which there is one Eighth Amendment for juveniles and one for adults, and the juvenile LWOP cases are unlikely to have any broader significance. This Article doubles down on the latter, more pessimistic reading. A close reading of the opinions themselves, focusing on the Justices' rhetoric and situating that rhetoric within historical context, reveals that a near-majority of the Court (and possibly a majority, with the replacement of Justice Kennedy, although that remains to be seen) would not only permit juvenile LWOP sentences but affirmatively favors the project of mass incarceration that states have embarked upon in the past forty years. This wing of the Court reads the Eighth Amendment as punishment-facilitating, through the lens of what might be called "carceral conservatism." The remainder of the Court supports greater procedural regulation of mass incarceration at its extremes, but appears to broadly accept the core justifications for lengthy imprisonment for ordinary adults. This wing of the Court reads the Eighth Amendment as punishment-regulating, through the lens of what might be called "carceral proceduralism." Far from examples of moral leadership, the juvenile LWOP cases may exemplify the Court's moral uselessness in the face of mass incarceration. This Article concludes by briefly gesturing at some alternative principles that might animate a more robust or "carceral skeptic" jurisprudence, drawing on prison abolitionist thought, international comparisons, and originalist scholarship.*

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## INTRODUCTION

Earlier this year, the Louisiana Board of Pardons and Paroles denied parole to Henry Montgomery.<sup>1</sup> Henry Montgomery is seventy-one years old and has lived at Angola state prison for the majority of his life.<sup>2</sup> Now, I suppose, he will go on living there. When he shot and killed a sheriff's deputy in Baton Rouge, in November 1963, he had just turned seventeen, and he was sentenced to life in prison.<sup>3</sup> The only reason Montgomery even had a parole hearing is that, two years ago, the United States Supreme Court mandated that Louisiana give him one. In *Montgomery v. Louisiana*, the Court reaffirmed an earlier holding that mandatory life-without-parole (“LWOP”) is unconstitutional for juveniles, and further held that this rule applies retroactively, even to people like Montgomery who received life sentences as teenagers long ago.<sup>4</sup> The Court did not require that state prison officials actually release Montgomery or anyone else. Only that they

<sup>1</sup> Associated Press, *His Case Helped Change the Law for Juvenile Offenders, But After Serving 54 Years He Was Denied Parole*, ATLANTA BLACK STAR (Feb. 19, 2018), <https://atlantablackstar.com/2018/02/19/case-helped-change-law-juvenile-offenders-serving-54-years-denied-parole/>.

<sup>2</sup> Bryn Stole, *Will 71-Year-Old Baton Rouge Man who Killed Deputy Leave Prison Before He Dies? It's Possible*, ADVOCATE (June 21, 2017, 10:54 AM), [https://www.theadvocate.com/article\\_fa13d3a4-5699-11e7-b440-4b5b249d116e.html](https://www.theadvocate.com/article_fa13d3a4-5699-11e7-b440-4b5b249d116e.html).

<sup>3</sup> *Id.*

<sup>4</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

think about it.<sup>5</sup> People sometimes do horrible things when they are “children,” Justice Kennedy wrote, but sometimes those same people “change.”<sup>6</sup>

Most of Montgomery’s relatives have passed away by now, but he has a cousin, who visits him in prison.<sup>7</sup> They played together as children, at their grandparents’ farm. “I remember him playing with the horses,” she told a newspaper reporter, “teaching me to ride, explaining the different animals.”<sup>8</sup> As I read about Montgomery’s case, I learned also about other children. Charles Hurt, the sheriff’s deputy, had three children. His daughter, Becky, was nine when she lost her father.<sup>9</sup> She is now an adult, Becky Wilson, and when two years ago the Supreme Court considered Montgomery’s case, she filed a brief urging the justices not to disturb his sentence. “Wilson believes that forgiveness is a personal issue—and she has forgiven Montgomery,” the brief explained.<sup>10</sup> In fact, although I read this somewhere else, Wilson and her sister once visited Angola and met with Montgomery.<sup>11</sup> But parole hearings would “retraumatize” her and her family, she said, “forcing them to relive the events that traumatized them.”<sup>12</sup> So it seems that no one involved was particularly helped by the Court’s ruling. Not particularly helping anyone is an apt characterization of a lot of recent Supreme Court decisions. The suggestion of this Article is that the more representative clue about the likely future trajectory of the constitutional law of punishment in the United States is not that the Supreme Court ordered Louisiana to provide Henry Montgomery with a parole hearing, but that Henry Montgomery remains in prison.<sup>13</sup>

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<sup>5</sup> See *id.* (explaining that states retain discretion whether to release juvenile offenders, thereby ensuring that “[t]hose prisoners who have shown an inability to reform will continue to serve life sentences”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Stole, *supra* note 2.

<sup>9</sup> Brief Amicus Curiae of Becky Wilson & the Nat’l Ass’n of Victims of Juvenile Murderers in Support of Respondent at 12, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Wilson Brief].

<sup>10</sup> *Id.* at 1.

<sup>11</sup> Stole, *supra* note 2.

<sup>12</sup> Wilson Brief, *supra* note 9, at 3.

<sup>13</sup> See Ashley Nellis, *For Henry Montgomery, a Catch-22*, MARSHALL PROJECT (Feb. 28, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/28/for-henry-montgomery-a-catch-22> (“If Henry Montgomery’s situation is any indication of how the Court’s ruling will continue to play out across the country, it’s a sad commentary on the meaning of justice today.”).

The idea that people might “change” between childhood and adulthood—that there is a life stage called “adolescence,” during which a person is not yet a fixed character—constituted the central premise of three recent cases, including *Montgomery*’s, in which juvenile justice advocates persuaded the Supreme Court to carve out an adolescence exception to the constitutional law of criminal punishment. Though the Eighth Amendment prohibits “cruel and unusual punishments,”<sup>14</sup> the Court has historically interpreted that provision so narrowly that in practice, and especially outside of the death penalty context, it does not ordinarily function as a meaningful constraint on the government’s power to punish.<sup>15</sup> As it applies to children and teenagers, however, the Roberts Court has infused the clause with slightly more meaning. The Rehnquist Court had already held, in 2005, that children under eighteen could not be sentenced to death.<sup>16</sup> Then, in *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and finally *Montgomery*, the Roberts Court took some incremental steps further. Pronouncing that “age is relevant to the Eighth Amendment,” the Court held that children under the age of eighteen may not be sentenced to life-without-parole for non-homicide crimes, and may be sentenced to life-without-parole for homicide crimes only upon an individualized sentencing determination, invalidating twenty-nine states’ mandatory LWOP statutes as applied to juveniles.<sup>17</sup>

Some scholars have emphasized the distinctive nature of these cases, framing *Graham*, *Miller*, and *Montgomery* as about “kids,” and the ways that they are “different.”<sup>18</sup> This Article begins from the contrary premise, mining the juvenile LWOP cases for clues about the Roberts Court’s assumptions and internal divisions on questions of what might be called garden-variety adult punishment—the implicit default against which juvenile punishment is compared. This Article performs a close reading of these cases, contextualized in historical perspective, to taxonomize a divide

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<sup>14</sup> U.S. CONST. amend. VIII.

<sup>15</sup> See John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 440 (2013) (characterizing the Eighth Amendment as “illusory” in practice).

<sup>16</sup> *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

<sup>17</sup> *Miller v. Alabama*, 567 U.S. 460, 467 (2012); *Graham v. Florida*, 560 U.S. 48, 76 (2010).

<sup>18</sup> See, e.g., CARA H. DRINAN, *THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY* 8 (2018) (construing *Miller* as establishing that “children are different in the eyes of the law”); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 957 (2016) (distinguishing the juvenile LWOP cases from the mainstream of the American law and culture of punishment because “juvenile crime is a special case”). But see Paul Litton, *Bombshell or Babystep? The Ramifications of Miller v. Alabama for Sentencing Law and Juvenile Crime Policy*, 78 MO. L. REV. 1003, 1004 (2013) (recognizing that *Miller* raises “questions” about the future of “Eighth Amendment jurisprudence” more generally).

on the Roberts Court over the “mediating principles,” or purposive commitments, that the justices bring to bear when interpreting the Cruel and Unusual Punishments Clause.<sup>19</sup> In the juvenile LWOP cases, a slim majority reads the clause through the lens of what might be called “carceral proceduralism.”<sup>20</sup> From this perspective, imprisonment is generally legitimate but, at the extremes and as applied to especially vulnerable groups, the Eighth Amendment should be read to impose some modest and mostly procedural limits on state power to imprison. The Cruel and Unusual Punishments Clause is interpreted as punishment-regulating, at least at the extremes. The remaining justices read the clause instead through the lens of what might be called “carceral conservatism.”<sup>21</sup> On this view, imprisonment is a positive good because it incapacitates individuals deemed risky or violent. Courts, therefore, should avoid interpretations of the Eighth Amendment that would unduly intrude upon state power to imprison. The Cruel and Unusual Punishments Clause is interpreted as punishment-facilitating, with the set of punishments that are “cruel and unusual” assumed to be quite small.

No wing of the Court, then, reads the Eighth Amendment from a starting perspective of frank recognition of the moral travesty of mass incarceration—what might be called a perspective of “carceral skepticism.”<sup>22</sup> Such a perspective might counsel reading the Eighth Amendment as far as possible to minimize the state power to imprison. Instead of defining the constitutional limits on punishment with reference to extreme sentences (such as LWOP) as applied to especially vulnerable groups (such as juveniles), as the jurisprudence does at present, a jurisprudence oriented around carceral skepticism might instead impose a heavy burden on the state to justify the need to imprison in every routine case. The Cruel and Unusual Punishments Clause might be recast as punishment-minimizing, defining the set of punishments that are “cruel and unusual” more broadly. Of course, it is aspirational if not fantastical to imagine that the current Court would endorse such a principle any time soon, but pondering what the Eighth Amendment might mean in the light of such a principle is useful as a thought experiment. Doing so highlights

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<sup>19</sup> Borrowing from Owen Fiss, Reva Siegel defines a “mediating principle” as a mode of interpreting a particular constitutional provision “purposively to vindicate one particular understanding of the concept or value the clause expressly guarantees.” Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282 n.8 (2011) (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976)).

<sup>20</sup> See *infra* Section II.B.

<sup>21</sup> See *infra* Section II.A.

<sup>22</sup> See *infra* Part IV.

by contrast the limited nature of the Roberts Court's juvenile LWOP cases and their capacity to preserve the status quo of mass incarceration. There may be resources within carceral proceduralism for introducing new protections on the margins for exceptional categories of adults, but the juvenile LWOP cases cannot be read to encourage a constitutional attack on mass incarceration more broadly. As Judge Nancy Gertner has observed, the Eighth Amendment has proven an inadequate tool for "deal[ing] with the extraordinary prison terms that we have been imposing on defendants across this country for the past three decades."<sup>23</sup> The juvenile LWOP cases do not call that assessment into question.

This Article thus provides a more pessimistic reading of the juvenile LWOP cases than many juvenile justice scholars, who have generally received these cases with optimism. Some extol *Graham*, *Miller*, and *Montgomery* as exemplars of the Supreme Court's "moral leadership" and predict that they will launch a "revolution in juvenile justice."<sup>24</sup> Others have given the decisions a more guarded, but still positive reception, finding in *Graham* and *Miller* "reasons for optimism" about the possibility of a "fairer" juvenile justice regime.<sup>25</sup> If nothing else, the cases have "symbolic importance," signaling a new and salutary judicial recognition of "the relevance to criminal punishment of differences between juvenile and adult offenders."<sup>26</sup> Eighth Amendment scholars, in contrast, have tended to emphasize the exceedingly limited nature of the Court's holdings in *Graham*, *Miller*, and *Montgomery*,<sup>27</sup> noting that the cases in which the Court has actually invalidated death or LWOP punishments affect "only one-thousandth of one percent of all felony convictions."<sup>28</sup>

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<sup>23</sup> Nancy Gertner, *Miller v. Alabama: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1041–42 (2013); see also Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1586–87 (2012) (developing this point at greater length).

<sup>24</sup> DRINAN, *supra* note 1818, at 7–8.

<sup>25</sup> Elizabeth S. Scott, "Children Are Different": *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 74, 105 (2013).

<sup>26</sup> *Id.* at 90.

<sup>27</sup> See generally Litton, *supra* note 18 (summarizing different views of *Miller* as "bombshell" or "baby step").

<sup>28</sup> Stinneford, *supra* note 15, at 490. For more optimistic readings, see, for example, William W. Berry III, *Eighth Amendment Presumptions A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 102 (2015) (characterizing *Miller* as a possible "baby step" toward "ending mass incarceration"); Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 415–16, 419 (2017) (suggesting that *Graham* and other cases reflect an incremental shift in Eighth Amendment jurisprudence "toward a fundamentally robust protection" for "the liberty interests of criminal defendants," in which the Court plays a more active role "as an independent arbiter of excessive punishment"). As Smith and Robinson acknowledge, if any such shift is underway it is proceeding extremely gradually; I therefore

This Article doubles down on this more pessimistic view of the juvenile LWOP cases by emphasizing not only these cases' doctrinal and practical limits but also some troubling implications of the Justices' rhetoric. For a dark subtheme pervades this line of cases: they inscribe into constitutional law an optimistic account of the potential of adolescents, but at the expense of introducing into the case law an extremely bleak vision of adults. Justice Kagan's majority opinion in *Miller*, for example, relies throughout upon an essentialized categorical distinction between "adolescents," plastic and thus presumptively reformable, and "adults," fixed and thus potentially irredeemable.<sup>29</sup> Justice Kagan expresses concern not about LWOP as a punishment, but only about "subjecting a juvenile to the same life-without-parole sentence *applicable to an adult*."<sup>30</sup> Although it remains to be seen whether or how *Miller* will be extended beyond the juvenile context, Justice Kagan's *Miller* opinion could equally be used to shore up the constitutional status of LWOP as an acceptable form of punishment, except in very limited circumstances. If so, that outcome could hinder efforts to roll back mass imprisonment, for it is the availability (and routine use) of life prison terms that makes the United States an extreme outlier, calibrating the entire scale of punishment in this country at a very high baseline.<sup>31</sup> While introducing new procedural limits on the sentencing of children, then, the lasting significance of the juvenile LWOP cases could be to reaffirm as the default rule that the Constitution imposes no meaningful limits on mass

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interpret their analysis more as an aspirational claim about where they hope the Court will go than as an empirical description of the Court's past decisions.

Though acknowledging that the group encompassed by the juvenile LWOP cases is tiny, Stinneford characterizes the case law as "highly protective" of that group, *supra* note 15, at 491, a characterization with which I disagree. *Graham* and *Miller* do not actually preclude serving life in prison for any juvenile, they merely require certain procedural formalities (parole hearings in *Graham*—at which parole may be denied—and individualized sentencing in *Miller*). See *Miller v. Alabama*, 567 U.S. 460, 479–80, 489 (2012) (holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," but "not foreclos[ing] a sentencer's ability to make [the] judgment" that the "harshest possible penalty" is merited, so long as the sentence is not imposed mandatorily); *Graham v. Florida*, 560 U.S. 48, 76 (2010) ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release [i.e., a parole hearing]").

<sup>29</sup> *Miller*, 567 U.S. at 471–74.

<sup>30</sup> *Id.* at 474 (emphasis added).

<sup>31</sup> See Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1246 (2011) (explaining how the anomalous use of life sentences in the United States serves to "anchor" the larger "system of over-punishment"); see also Kleinfeld, *supra* note 18, at 950–58 (characterizing LWOP as "the paradigmatic example" of imprisonment as banishment, and emphasizing the difference between American acceptance of LWOP vs. European rejection of LWOP as exemplary of the divide between the two regions' "cultures of punishment").

imprisonment.

Rather than examples of moral leadership, then, the juvenile LWOP cases exemplify the Court's moral uselessness in the face of mass incarceration.<sup>32</sup> In providing a critical reading of the juvenile LWOP cases—and especially *Miller*—this Article highlights themes that are latent in the scholarly discussion of these cases, but that merit further emphasis and development. A close reading of the opinions themselves, focusing on the Justices' rhetoric and situating that rhetoric within historical context, reveals that a near-majority of the Court that decided the juvenile LWOP cases would not only permit juvenile LWOP sentences but has no constitutional qualms about, and may even affirmatively favor, the overall project of mass incarceration that states have carried out over the past several decades. This near-majority could soon become a majority, because of the retirement of Justice Kennedy and his replacement by a jurist whom commentators predict will prove more consistently conservative.<sup>33</sup> The remaining members of the Roberts Court—who constituted the slim majorities that decided the juvenile LWOP cases—express doubts about the “carceral state”<sup>34</sup> at its extremes, but broadly accept the core justifications for lengthy imprisonment for ordinary adults. Thus, like the carceral conservatives, they broadly accept as constitutional the status quo of mass incarceration.

These observations raise, in turn, a larger question: Where is the Constitution in the “carceral state”? Criminal procedure scholars have grappled with dimensions of this question, of course, but it invites more

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<sup>32</sup> See Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, in *THE NEW CRIMINAL JUSTICE THINKING* 111, 113 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (characterizing the Supreme Court as having “retreat[ed] from the meaningful application of basic constitutional values” in the criminal realm).

<sup>33</sup> See Oliver Roeder & Amelia Thomson-DeVeaux, *How Conservative Is Brett Kavanaugh?*, *FIVETHIRTYEIGHT* (Jul. 17, 2018, 6:54 AM), <https://fivethirtyeight.com/features/how-conservative-is-brett-kavanaugh/> (summarizing several scholars' empirical predictions that “Kavanaugh is likely to be a very conservative justice”). Of course, Justice Scalia has also been replaced since the juvenile LWOP cases were decided, and while most commentators describe his replacement, Neil Gorsuch, as similarly conservative, it remains possible that he will rule in idiosyncratic ways. See Mark Joseph Stern, *The Gorsuch Brief*, *SLATE* (Oct. 11, 2018, 6:29 PM), <https://slate.com/news-and-politics/2018/10/nielsen-preap-aclu-neil-gorsuch-briefs.html> (describing progressive advocates' view that Gorsuch may be persuadable to rule in their favor on textualist grounds).

<sup>34</sup> For an explanation of the term “carceral state,” see generally Kelly Lytle Hernández, Kahlil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 *J. AM. HIST.* 18 (2015). But see Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 *THEORETICAL CRIMINOLOGY* 422 (2017) (cautioning against unreflective uses of the term to imply a unified entity responsible for punishment).



engagement from scholars and teachers of constitutional law more broadly. Must and will the “Constitution-in-practice” accommodate mass incarceration indefinitely? As Jack Balkin has shown, each of the successive state-building projects of modern United States history—the administrative and regulatory state, the welfare state, and the surveillance state—initially posed challenges to constitutional culture and the rule of law, though (for better or worse) the “Constitution-in-practice” ultimately found ways to accommodate each of them.<sup>35</sup> What, then, about the “carceral state”—the complex of punitive laws, institutions, practices, and norms that developed gradually throughout United States history but has accelerated and metastasized since the 1970s into a phenomenon without historical or comparative parallel?<sup>36</sup> Will a similar trajectory also lead (in this case, most likely for worse) to permanent constitutional accommodation with this latest state-building project? On the current Court, only Justice Sotomayor has forthrightly confronted these questions. In her dissenting opinion in *Utah v. Strieff*, a Fourth Amendment case, Justice Sotomayor cited several well-known books about mass incarceration to support her description of how “people of color are disproportionate victims” of unconstitutional policing, and may feel that they are “not . . . citizen[s] of a democracy but the subject[s] of a carceral state.”<sup>37</sup> But notably, no other Justice joined that section of her dissent.

Superficially, the carceral state may seem to pose fewer conceptual challenges for constitutional culture than the regulatory or welfare states, since the Bill of Rights itself provides guidance on questions of bail, sentencing, and criminal procedure. But the Bill of Rights was drafted and ratified at a time when prisons were novel and imprisonment was not yet the default mode of punishment.<sup>38</sup> And many other components of constitutional law and culture, beyond just the criminal procedure provisions in the Bill of Rights, interlock to make it difficult to challenge mass incarceration through litigation: the backdrop assumption of a state “police power,” the norm of judicial deference to democratically elected legislatures, and the intent requirement for proving racial discrimination.<sup>39</sup> It is,

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<sup>35</sup> See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 25 (2008).

<sup>36</sup> Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 703 (2010).

<sup>37</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

<sup>38</sup> At the founding, fines, whipping, and banishment remained common forms of punishment. By 1810, imprisonment in the new state penitentiaries had become more common. REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941* at 32, 38 (2008).

<sup>39</sup> On how legislative deference and other doctrinal moves operate as “canons of evasion” enabling

therefore, a more difficult question than it may appear whether the Constitution is up to the task of confronting an apparatus of internal banishment on the scale that the state and federal governments have collectively built in recent decades.<sup>40</sup> The carceral state is more than the sum total of individual criminal prosecutions and something closer to Balkin's conception of the surveillance state, a "way of governing" whose tentacles reach into all of the institutions and practices of law and society.<sup>41</sup> It is beyond the scope of this Article to consider every way in which the carceral state has been "rationalized and accommodated" by the courts, in ways that are likely to continue and in ways that are best described as "constitutional" phenomena.<sup>42</sup> As Sharon Dolovich sharply observes, "every day, courts around the country hear cases with facts that would make a layperson's jaw drop . . . and yet find no constitutional problem."<sup>43</sup> But the juvenile LWOP cases present a potent illustration of this larger phenomenon, revealing just how much punishment the Court is willing to tolerate, and just how far a state has to go before incurring the Court's intervention.

This Article proceeds as follows. Part I surveys the methodological models and historical context that inform this Article's reading of the juvenile LWOP cases. Part II performs a close reading of *Graham*, *Miller*, and *Montgomery* to develop this Article's account of the underlying commitments that guide the Roberts Court's approach to punishment cases. Part III briefly suggests some alternative possibilities that might emerge if the Court were instead to adopt a "carceral skeptic" lens in Eighth Amendment cases, drawing on prison abolitionist thought, comparative constitutional law, and originalist scholarship. This final Part is brief because it is intended to spark rather than to settle thought. It is offered in the spirit of imagination. What might a constitutional law of punishment look like that would question rather than accommodate the carceral state?

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courts to avoid meaningful scrutiny of penal practices, see Dolovich, *supra* note 32. For a classic analysis of how the intent requirement played out in the realm of drug sentencing, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

<sup>40</sup> For state-specific studies, see, for example, RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2010).

<sup>41</sup> Balkin, *supra* note 35, at 4; cf. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

<sup>42</sup> This phrase is borrowed from Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 500–01 (2006) (describing how the courts "rationalized and accommodated" the growth of the administrative and national security states).

<sup>43</sup> Dolovich, *supra* note 32, at 140–41.

## I. METHODS AND PREMISES

Constitutional scholars have long recognized that the “Constitution-in-practice” encompasses more than simply the text—and even, perhaps to the consternation of originalists, more than simply the text as interpreted in light of its “original meaning”—but also judicially developed “mediating principles,” “decision rules,” “tiers of scrutiny,” “frameworks,” and so on.<sup>44</sup> For this reason, “in the day-to-day practice of constitutional interpretation . . . the specific words of the text play at most a small role.”<sup>45</sup> Constitutional disputes, certainly in the lower courts but even, in many cases, at the Supreme Court, are more commonly “decided by reference to ‘doctrine’ . . . and to considerations of morality and public policy” than by textual analysis alone.<sup>46</sup> Some scholars normatively endorse this reality of “common law constitutional interpretation,” while others criticize it (or, in the case of judges, pretend not to be doing it), but as a descriptive matter, it is difficult to gainsay David Strauss’s observation that constitutional doctrine, as developed by lawyers and judges over the generations, is what gives the Constitution its day-to-day practical meaning.<sup>47</sup> “At any point in time,” in Jack Balkin’s formulation, “there will be a configuration of institutions, conventions, practices, and doctrines whose contours are partially disputed,” which together comprise the “constitution-in-practice.”<sup>48</sup>

A. *Mediating Principles*

One component of the Constitution-in-practice, especially useful in taxonomizing how the Supreme Court interprets open-ended constitutional provisions, are what scholars of the Equal Protection Clause have called “mediating principles.” A mediating principle is not an explicitly stated doctrinal rule, but “a judicial gloss” that “‘stand[s] between’ the courts and the Constitution,” helping to translate broad ideals referenced in the text

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<sup>44</sup> See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 1–7 (2004) (summarizing scholarship on these “metadoctrinal” features of constitutional law).

<sup>45</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

<sup>46</sup> *Id.* at 883.

<sup>47</sup> *Id.* at 934. Strauss’s point is readily confirmed by the observation that introductory law school courses on constitutional law do not simply assign the text of the Constitution; to understand the Constitution as it works in practice, lawyers must be familiar with not only the text, but also the body of doctrine that has grown up around it (whether or not they agree with that doctrine or the interpretive methods that spawned it).

<sup>48</sup> Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 241, 242 (David Dyzenhaus & Malcolm Thorburn eds., 2016) (emphasis omitted).

into more detailed real-world meanings.<sup>49</sup> It is a mode of interpreting a particular constitutional provision “purposively,” in order “to vindicate one particular understanding of the concept or value the clause expressly guarantees.”<sup>50</sup> In a now-familiar distinction, scholarship on the Equal Protection Clause has long distinguished between “anti-classification” and “anti-subordination” readings of the constitutional equality guarantee.<sup>51</sup> Jurists who understand the clause to instantiate a principle of anti-classification (or “colorblindness”) read the clause to disfavor policymaking that classifies individuals as members of racial groups, regardless of the stated reason for the classification.<sup>52</sup> This reading best describes the general thrust of the case law, particularly in recent years.<sup>53</sup> Others, although never a majority of the Court, argue instead that the Equal Protection Clause instantiates an anti-subordination principle, which permits or, on some accounts, even requires policymaking aimed at disrupting entrenched social hierarchies by elevating the social standing and material well-being of historically subordinated groups.<sup>54</sup> From this perspective, racial classifications are not necessarily disfavored; policymakers may sometimes classify individuals by race if their reason for doing so is to administer preferential benefits for historically subordinated groups, but not if their reason for doing so is to reinforce traditional hierarchies.<sup>55</sup>

Importantly, these types of implicit mediating principles may divide the Court even as they remain latent in most cases because they will not necessarily generate different outcomes in all applications.<sup>56</sup> In *Brown v. Board of Education*,<sup>57</sup> the anti-classification and anti-subordination approaches would have yielded the same outcome since segregation both classified individual students by race and, by relegating African-American

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<sup>49</sup> Fiss, *supra* note 19, at 107–08.

<sup>50</sup> Siegel, *supra* note 19, at 1282 n.8.

<sup>51</sup> Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 35 (2003).

<sup>52</sup> Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470 (2004) (describing the view that *Brown* “declare[d] the constitutional principle that government may not classify on the basis of race”). The anti-classification principle, as elaborated by Siegel, corresponds to what Fiss originally called “the antidiscrimination principle.” See Fiss, *supra* note 19, at 108.

<sup>53</sup> Siegel, *supra* note 52, at 1473.

<sup>54</sup> *Id.* at 1472–73 (defining the “antisubordination principle” as the “conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”).

<sup>55</sup> Fiss, *supra* note 19, at 153–54.

<sup>56</sup> See *id.* at 170 (“In many situations it will not make a great deal of difference whether the Court operates under the antidiscrimination principle or the group-disadvantaging one.”).

<sup>57</sup> 347 U.S. 483 (1954).

children to separate and inferior schools, reinforced a racial hierarchy that had both social and economic implications.<sup>58</sup> It was only the subsequent decades of contestation over the continuing legacy of *Brown* that exposed the divide between the two views, most bitterly in the affirmative action cases, in which the principles pointed to opposite outcomes.<sup>59</sup> Preferential treatment for historically disadvantaged groups appears wholly illegitimate on a strong anti-classification view that regards all racial categorization as equally odious, but perfectly legitimate or even required on a strong anti-subordination view.<sup>60</sup>

Reva Siegel has surfaced in the Court's more recent jurisprudence a third principle at work, the "anti-balkanization" norm.<sup>61</sup> Particularly evident in the opinions of "swing justices" Kennedy and O'Connor in affirmative action cases, the anti-balkanization reading of the Equal Protection Clause occupies a middle ground between the individualistic, conservative formalism of the anti-classification principle and the group-based, redistributive vision of the anti-subordination principle.<sup>62</sup> In Justice Kennedy's view, as elucidated by Siegel, the Equal Protection Clause should be read with the purpose in mind of minimizing balkanizing social divisions.<sup>63</sup> Policymaking that takes account of race or other group categories is permissible in the service of bridging social divides, including those that derive from the continuing legacy of segregation. But race-based policymaking is impermissible if the categories are too crudely defined, or if they are used in ways that are likely to foment resentment and encourage people to identify themselves primarily as part of subgroups rather than as part of a larger society.<sup>64</sup>

It may seem as though this approach is inapposite to the Eighth Amendment. In contrast to equal protection scholarship, much of which has focused on distilling and evaluating the "mediating principles" at work

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<sup>58</sup> See Fiss, *supra* note 19, at 170–71.

<sup>59</sup> See *id.* at 171–72; see also Siegel, *supra* note 52, at 1470.

<sup>60</sup> See Fiss, *supra* note 19, at 155, 171–72. Interestingly, Fiss's suggestion that courts might offer "time-bound" approval for preferential programs for minorities anticipated Justice O'Connor's suggestion in the affirmative action cases that after 25 years they may no longer be constitutional (which is not to say that Justice O'Connor engaged in anti-subordination readings of the Equal Protection Clause). See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

<sup>61</sup> See generally Siegel, *supra* note 19.

<sup>62</sup> See *id.* at 1300–02 (describing how the anti-balkanization view combines premises from both the anti-classification and anti-subordination views).

<sup>63</sup> See *id.* at 1305–08.

<sup>64</sup> See *id.* at 1300–03.

in the jurisprudence, scholars often characterize Eighth Amendment jurisprudence as untethered to any coherent principles.<sup>65</sup> For example, Erwin Chemerinsky describes the constitutional law of punishment as “markedly inconsistent both in terms of substantive limits and procedural requirements.”<sup>66</sup> Indeed, the Supreme Court itself has characterized its punishment jurisprudence as lacking “a unifying principle.”<sup>67</sup> In this standard account, the Court’s Eighth Amendment jurisprudence represents “a paradigm of improper judicial legislation.”<sup>68</sup> Lacking any guiding principles, the Justices are instead thought to indulge in Eighth Amendment cases in independent moral and policy judgments, free-floating from any conception of the constitutional text or the larger commitments that it embodies. In Justice Scalia’s withering assessment, Eighth Amendment doctrine shifts with the winds, guided by no principle but the Justices’ own idiosyncratic assessments of societal “evolution.”<sup>69</sup> In Justice Alito’s view, Eighth Amendment jurisprudence has degenerated ever closer to representing simply “the personal views of five Justices.”<sup>70</sup>

On the surface, proportionality offers the closest thing to a guiding principle in Eighth Amendment jurisprudence.<sup>71</sup> Members of the Court

<sup>65</sup> *E.g.*, Berry, *supra* note 28, at 67, 70 (arguing that Eighth Amendment case law lacks “a set of broader guiding principles delineating the boundary between acceptable and impermissible punishments.”); Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 858 (2013) (describing Eighth Amendment doctrine as “notoriously unclear and inconsistent”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005) (describing Eighth Amendment jurisprudence as “ineffectual and incoherent”); Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 429 (2011) (characterizing Eighth Amendment jurisprudence as inviting “confusion and cynicism”); *id.* at 415 (arguing that Eighth Amendment case law “lacks political legitimacy” because the Court typically “fails to specify the actual grounds of decision,” opening itself up to the criticism that it is simply imposing policy preferences); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 476 (2005) (characterizing Eighth Amendment case law as a “mess”). Such complaints have a long lineage; for an earlier example, see Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 838 (1972) (characterizing Eighth Amendment jurisprudence as an “analytical void”).

<sup>66</sup> Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2004).

<sup>67</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 436–37 (2008).

<sup>68</sup> *Stinneford*, *supra* note 15, at 438; *see id.* at 442 (suggesting that the Court’s cases reflect the Justices’ “substantive policy judgment . . . rather than the judgment embodied in the Constitution itself”); *see also* Sigler, *supra* note 65, at 405 & n.16 (collecting sources attributing the Court’s decisions to the Justices’ “personal policy preferences” or rough assessments of public opinion).

<sup>69</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 737, 742 (2016) (Scalia, J., dissenting).

<sup>70</sup> *See Miller v. Alabama*, 567 U.S. 460, 509–10 (2012) (Alito, J., dissenting) (characterizing earlier cases as insisting otherwise, but implying that the Court no longer makes the effort); *see also id.* at 514 (describing post-*Miller* case law as “no longer tied to any objective indicia of society’s standards” and “entirely inward looking”).

<sup>71</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3104 (2015)

periodically insist that the Cruel and Unusual Punishments Clause embodies a “proportionality principle,” albeit a “narrow” one.<sup>72</sup> Yet, as many scholars have noted, the Court has vacillated in its willingness to enforce any meaningful proportionality requirement for criminal sentencing, particularly outside of the death penalty context.<sup>73</sup> Since 1983, the Court has not invalidated a single adult prison sentence as disproportionate.<sup>74</sup> Instead, in virtually every major modern case presenting a plausible proportionality challenge, the Court has upheld an extremely long prison term for a crime of debatable severity. For instance, in *Ewing v. California*, the Court affirmed a prison term of twenty-five years to life (pursuant to California’s since-revised Three Strikes Law) for the theft of three golf clubs.<sup>75</sup> It is difficult to imagine what, if any, sentence that any modern state would actually impose would run afoul of such a meager proportionality principle. In these cases, the Court always purports to leave open the possibility that a punishment might be held unconstitutionally disproportionate, yet it also always emphasizes that such cases will be “exceedingly rare.” By way of example, the Court has suggested that it might be unconstitutional “if a legislature made overtime

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(observing that Eighth Amendment case law prohibits “punishments grossly disproportionate to the severity of the offense”).

<sup>72</sup> *E.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring). *Contra Miller*, 567 U.S. 460, 501–04 (2012) (Thomas, J.) (stating that the Cruel and Unusual Punishments Clause “does not contain a ‘proportionality principle.’”); *Harmelin*, 501 U.S. at 985 (Scalia, J.) (disputing that grossly disproportionate sentences are unconstitutional).

<sup>73</sup> Jackson, *supra* note 71, at 3104 (noting that “the Court’s willingness actually to scrutinize the proportionality of sentences has varied over time and contexts”); Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2087–88 (2018) (summarizing the Court’s “startlingly uneven” proportionality jurisprudence).

<sup>74</sup> Jackson, *supra* note 71, at 3104 n.44; *see also id.* at 3185–86 (noting that “the Court’s Eighth Amendment case law on non-capital sentences for adult offenders is sparse” and “for non-death sentences of imprisonment the standard of ‘gross disproportionality’ will rarely be met”); Stinneford, *supra* note 15, at 484 (characterizing protections against excessive sentencing as “meaningless” after *Harmelin* and *Ewing*). In *Solem v. Helm*, the Court invalidated an LWOP sentence, pursuant to a South Dakota recidivist statute, for “uttering a ‘no account’ check for \$100.” 463 U.S. 277, 281 (1983). Subsequently, the Court has taken great pains to limit *Solem* to its facts and Justices Scalia and Thomas argued against giving *Solem* any stare decisis effect. *See Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring) (“I agree with Justice Scalia’s view that the proportionality test announced in *Solem v. Helm* is incapable of judicial application.”) (internal citation omitted) (citing *Solem*, 463 U.S. 277).

<sup>75</sup> *Ewing*, 538 U.S. at 14, 18; *see also Hutto v. Davis*, 454 U.S. 370, 372–75 (1982) (per curiam) (upholding forty-year prison sentence for possession with intent to distribute nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263, 264–66 (1980) (upholding life sentence under a Texas three strikes provision for “felony theft”—specifically, for refusing to return \$120 received as payment for air conditioner repairs that were allegedly not performed).

parking a felony punishable by life imprisonment.”<sup>76</sup> In effect, then, the Court has defined the proportionality principle so minimally that it is “has no meaning” in practice.<sup>77</sup>

Because the Justices do not even seem to adhere consistently to their own explicitly stated overarching principles in Eighth Amendment cases, the resultant body of doctrine appears multimodal. In John Stinneford’s analysis, the Court does not apply a single decision rule in Eighth Amendment cases, but rather toggles between two opposite rules: first, “an apparently irrebuttable presumption of constitutionality” in cases involving “imprisonment of adults,” and second, “an apparently irrebuttable presumption of unconstitutional excessiveness” in certain exceptional categories such as the death penalty for non-homicide offenses and juvenile LWOP.<sup>78</sup> Yet Stinneford does not suggest that either of these rules has any principled basis. Rather, he argues that the Court has come to rely on these “implementation rules” because it has neglected to interpret the meaning of the constitutional text.<sup>79</sup> As a result of this apparent doctrinal incoherency, scholarship on the Eighth Amendment often takes the form of proposing unifying principles that the Court *should* adopt, proceeding from the premise that the Court’s output thus far has been analytically and philosophically muddled.<sup>80</sup>

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<sup>76</sup> *Ewing*, 538 U.S. at 21 (quoting *Rummel*, 445 U.S. at 274 n.11).

<sup>77</sup> *Lockyer v. Andrade*, 538 U.S. 63, 83 (2003) (Souter, J., dissenting); see also Chemerinsky, *supra* note 66, at 1049–50 (predicting that like *Ewing*, *Andrade* would make it “very difficult, if not impossible, for courts to find any prison sentence to be grossly disproportionate”); Dolovich, *supra* note 32, at 128 (arguing that the Court’s cases post-*Solem* have upheld such draconian sentences that the case law creates a “presumption by extreme example,” signaling to lower courts that they should “uphold as constitutional virtually any sentence” (emphasis omitted)). Although such characterizations are most typically offered of the Court’s sentencing jurisprudence, there are also arguments that the Court has similarly rendered meaningless the Clause’s protections against unconstitutional conditions of confinement. See *id.* at 131–32 (arguing that courts incorrectly deny the majority of prisoners’ constitutional claims because they exploit doctrinal pathways to evade “look[ing] too closely at the actual lived experiences” of prisoners); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 360 (2018) (arguing that the Court’s interpretation of the Eighth Amendment in conditions-of-confinement cases “has radically undermined prison officials’ accountability for tragedies behind bars”).

<sup>78</sup> Stinneford, *supra* note 15, at 442–43.

<sup>79</sup> *Id.*

<sup>80</sup> John Stinneford argues that the Court has developed “implementation rules” in the Eighth Amendment context, but he views these rules as illegitimate because they are not grounded in a properly originalist interpretation of the text. *Id.* at 440–43. Another possible unifying principle might be the notion of progress embodied in the “evolving standards of decency” paradigm. Mary Sigler proposes that the Court’s “evolving standards” jurisprudence is incoherent and overly deferential to legislative majorities as applied, but nevertheless worth retaining. Sigler, *supra* note 65, at 429.



This Article takes a different tack, using the juvenile LWOP cases to suggest that it may be possible to distill certain coherent purposive commitments in Eighth Amendment jurisprudence, roughly analogous to the “mediating principles” familiar from equal protection scholarship. This Article does not endeavor to develop a comprehensive account of mediating principles across all of Eighth Amendment jurisprudence or even necessarily to argue that there are mediating principles in precisely the same sense that scholars use the term in the equal protection literature. Rather, the mediating principles literature provides a helpful methodological model, suggesting a way of reading backwards from the judicial rhetoric in the juvenile LWOP cases to identify implicit principles and “model division” on the Court about questions of criminal justice more generally.<sup>81</sup> This Article does not offer a normative endorsement of any of the principles identified (actually the opposite), nor make any claims about whether the Justices (or some subset of the Justices) are “correctly” interpreting the Eighth Amendment, under an originalist or any other theory of interpretation.<sup>82</sup> The project of this Article is mostly descriptive: to distill from the case law some clues as to the premises and assumptions at work in the Court’s recent punishment jurisprudence.

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<sup>81</sup> Cf. Siegel, *supra* note 19, at 1281–82.

<sup>82</sup> There is an extensive debate in the literature about originalism and the Eighth Amendment. See generally Erin E. Braatz, *The Eighth Amendment’s Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405 (2017) (exploring the context of penal reform in post-Revolution America and how the founding generation sought to distinguish American criminal law from practices in European monarchies); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (arguing that the American framers misinterpreted the English Bill of Rights when crafting the Eighth Amendment); Michael J. Zydney Mannheimer, Harmelin’s *Faulty Originalism*, 14 NEV. L.J. 522 (2014) (providing a “point-by-point” originalist critique of Justice Scalia’s plurality opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991)); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94 N.C. L. REV. 817, 817 (2016) (placing the language of the Eighth Amendment in the context of early-American notions on the “permissible limits on the treatment of slaves”); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567 (2010) (concluding that the Eighth Amendment bars only punishments that are both cruel and unusual); Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 81 (2010) (emphasizing that “the nature and quality of punishment are central to the concept of cruelty”); John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 441 (2017) [hereinafter Stinneford, *Cruel*] (arguing that the primary purpose of the Cruel and Unusual Punishments Clause is to “prevent unjust suffering, not the coarsening of public sensibilities”); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter Stinneford, *Unusual*] (examining the similarities and differences between the originalist and “evolving standards” interpretations of the word “unusual”).

Generally, equal protection scholars identify mediating principles by engaging in close reading of the Supreme Court's opinions themselves, as well as constitutional commentary, and seeking to backwards-engineer from those sources the superstructure of premises and assumptions that appear to be driving the Justices to their patterns of reasoning and outcomes in particular cases. Reva Siegel, for example, models in her work a method of closely reading "recent decisions" and "[a]bstracting from the complex logic of the case law unfolding in history" in order to "model division on the Court."<sup>83</sup> This approach does not simply take the Justices at their word, but it does start from their words and work from there. Methodologically, this Article takes cues from this approach of closely reading and abstracting from the internal logic of recent Supreme Court decisions. This Article therefore does not engage in extensive discussion of the underlying litigation in the lower courts, the advocates and organizations involved, and their own choices about how to frame the issues, although such a project would surely also illuminate much about the developing trajectory of Eighth Amendment law. Nor does this Article delve into the growing body of case law applying *Graham*, *Miller*, and *Montgomery* in the state courts and lower federal courts to new fact patterns. Rather, this Article's focus remains upon the Supreme Court.

### B. Historical Context

In conducting its close reading of the Supreme Court's juvenile LWOP opinions, this Article proceeds from the assumption that the Justices are influenced by cultural and political discourses of the society of which they are a part, and therefore that historical scholarship on how that society has developed over time may help to illuminate the discursive constructs at work in the Justices' reasoning.<sup>84</sup>

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<sup>83</sup> Siegel, *supra* note 19, at 1281–82.

<sup>84</sup> See G. Edward White, *Toward a Historical Understanding of Supreme Court Decision-making*, 91 DENVER U. L. REV. ONLINE 201, 202–03 (2014) (discussing how Supreme Court Justices are "historical actors whose decisions [are] shaped by the cultural boundaries on thought and discourse of their time," and noting that historians are well suited to "document" those cultural influences). See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (emphasizing the importance of historical context in understanding Supreme Court decision-making). However, White suggests that this kind of historical approach will typically be less helpful for understanding very recent Supreme Court decisions, because "we are too close to those events and attitudes" to recognize the deep assumptions of our cultural moment that both we and the justices may share. White, *supra*, at 203–04, 203 n.8. While acknowledging the need for humility in analyzing recent events that future historians may come to understand differently, this Article proceeds from the assumption

Two bodies of historical scholarship offer essential context for understanding the juvenile LWOP cases. The first is the history of childhood and youth. This Article reads the Justices' rhetoric in the light of historical scholarship on the intellectual, cultural, and political development of concepts central to the Court's reasoning—such as the construct of “adolescence” as a liminal phase in the life course. Much of the scholarly discussion about the juvenile LWOP cases has proceeded within the framework of positivist science, assuming that there are certain essential, biological differences that “actually” distinguish children from adults and then debating the extent to which such differences should inform the constitutional law of punishment.<sup>85</sup> Without disputing that physiological development occurs during the human life span, this Article reads the Court's rhetoric instead within the context of the history of childhood and youth, a mode of historical scholarship that investigates how understandings of that developmental process are socially constructed and have changed over time, along with beliefs about the legal or institutional significance that should attach to categories like “childhood” or “adolescence.”<sup>86</sup>

The second indispensable historical context for reading the juvenile LWOP cases is the unprecedented buildup of the “carceral state” in the late twentieth-century United States.<sup>87</sup> After the 1960s, the United States embarked upon, and continues to engage in, a constellation of carceral practices “defined by comparatively and historically extreme rates of imprisonment and by the concentration of imprisonment among young,

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that historical context can be used to deepen our understanding even of relatively recent Supreme Court decisions.

<sup>85</sup> For a notable exception, see generally Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577 (2018) (engaging with the history of the cultural construction of “adolescence”). Also, beyond the recent LWOP cases, scholarship on juvenile justice broadly speaking has long incorporated the insights of the history of childhood and youth. See, e.g., BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 17–45 (1999) (providing an overview of the history of “the social construction of childhood and adolescence”).

<sup>86</sup> The history of childhood and youth is a subdiscipline of history with a wide and variegated literature, to which I do not attempt to cite comprehensively in this Article. For a classic (and much-debated) text in the field, see PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans., Vintage Books 1962) (1960) (exploring the concept of childhood as a construct, arguing that children were once seen merely as “small adults” but over time came to be viewed as occupying a distinctive life stage). For recent scholarship touching specifically upon the legal dimensions of the history of childhood and youth, see, for example, HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005) (chronicling how changing understandings of political consent reshaped the legal status of children).

<sup>87</sup> See Thompson, *supra* note 36, at 706 (detailing the twentieth-century American history of mass incarceration).

African American men living in neighborhoods of concentrated disadvantage.”<sup>88</sup> After fifty years of escalating and expanding use of imprisonment, the United States is now “the world’s leading jailer.”<sup>89</sup> Activists and scholars debate whether to label this phenomenon “mass incarceration,” “hyperincarceration,” “the new Jim Crow,” or “the prison-industrial complex,” but the phenomenon itself is now widely appreciated.<sup>90</sup> Together the federal and state governments incarcerate 693 of every 100,000 residents, for a total of more than two million prisoners—a rate and a total that are both much higher than the comparable figures in any peer country in the world and much higher than the United States’ own historic levels before the “punitive turn” in United States social policy beginning in the 1970s.<sup>91</sup>

Not only does the United States have an incarceration rate “more than five times higher” than most of its peers, but this same characterization holds at the state level—there is no United States state that is not extremely punitive.<sup>92</sup> It is true that the Southern and Western states are *even more* extremely punitive than the United States norm, but the United States norm is itself quite extreme, and even purportedly lenient or progressive states by United States standards appear quite regressive in world comparison. Massachusetts, for example, the United States’ state with the

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<sup>88</sup> Christopher Wildeman, *Mass Incarceration*, OXFORD BIBLIOGRAPHIES: CRIMINOLOGY, <http://www.oxfordbibliographies.com/abstract/document/obo-9780195396607/obo-9780195396607-0033.xml?rskey=F2p5o1&result=103> (last modified Apr. 24, 2012). On the harms wrought by mass incarceration upon African-American communities in particular, see generally Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

<sup>89</sup> Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOC. 11, 11 (2017).

<sup>90</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that discrimination based on criminal status is a colorblind form of racial discrimination); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (critiquing the Jim Crow analogy as having a negative effect on collective memory); Loïc Wacquant, *Class, Race, & Hyperincarceration in Revanchist America*, DEDALUS, Summer 2010, at 74 (labeling the phenomenon “hyperincarceration”); Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DEDALUS, Summer 2010, at 124 (arguing that the phrase “mass incarceration” is “melodramatic”); Timothy Shenk, *The Origins of the Carceral State*, DISSENT: BOOKED (Aug. 30, 2016), <https://www.dissentmagazine.org/blog/booked-origins-carceral-state-elizabeth-hinton> (discussing the “carceral state” in an interview with Harvard Associate Professor of History and of African and African American Studies Elizabeth Hinton).

<sup>91</sup> Press Release, Peter Wagner & Alison Walsh, Prison Policy Initiative, States of Incarceration: The Global Context 2016 (June 16, 2016), <https://www.prisonpolicy.org/global/2016.html>. For a range of perspectives on this phenomenon, see generally the essays collected in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* (Kevin R. Reitz ed., 2018).

<sup>92</sup> Press Release, *supra* note 91.

lowest incarceration rate, nevertheless has an incarceration rate higher than every European and South American country, and lower only than Turkmenistan, El Salvador, Cuba, Thailand, Russia, Rwanda, Panama, and Costa Rica.<sup>93</sup> Draconian sentencing laws and practices like LWOP, while not the sole factor, are a linchpin of mass incarceration: “people convicted of felonies in the United States are far more likely to be sentenced to confinement than is the case in other countries and . . . U.S. prison sentences are extraordinarily long compared to those imposed in other democracies.”<sup>94</sup> Comparing United States sentencing practices to those in other countries that make much more judicious use of prison, Michael Tonry concludes: “No meaningful progress will be made in reducing mass incarceration . . . until sentencing laws and practices are overhauled.”<sup>95</sup>

The insight that the contemporary United States is exceptionally punitive is, of course, far from novel. Activists, especially women of color with loved ones affected by abusive policing and prolonged prison terms, have made this point for decades.<sup>96</sup> Sociologists and political scientists have long sought to make sense of the American phenomenon of “mass imprisonment.”<sup>97</sup> Legal scholars have provided wide-ranging explorations of the historical, cultural, doctrinal, and philosophical underpinnings of

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<sup>93</sup> *Id.*

<sup>94</sup> Beckett, *supra* note 89, at 14 (summarizing MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025 (2016)).

<sup>95</sup> TONRY, *supra* note 88, at 2.

<sup>96</sup> See, e.g., GILMORE, *supra* note 40, at 5–29 (describing 1990s activism by women with loved ones in the California prison system).

<sup>97</sup> MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001). For other examples, see, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 3–8 (1997) (challenging the view that mass imprisonment was a straightforward and inevitable response to public concerns about rising crime, and instead describing a more complex process in which political elites took the lead in framing crime as “the consequence of insufficient punishment”); TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 16 (2014) (conceptualizing mass incarceration as the result of a “grand social experiment” in replacing rehabilitative policies with severe punishment); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 2 (2015) (describing how the carceral state has “begun to metastasize” and distort a wide range of public programs and institutions); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 10 (2014) (arguing that both conservative and liberal politicians advanced “constructions of black criminality” to justify the widening resort to imprisonment); JEREMY TRAVIS ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 24 (2014) (exploring policies that have contributed to the rise in mass incarceration); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 4–5 (2006) (arguing that “the prison boom was a political project that arose partly because of rising crime but also in response to an upheaval in American race relations in the 1960s and the collapse of urban labor markets for unskilled men in the 1970s,” and has had counterproductive consequences).

America's "harsh justice," particularly the tendency instantiated in very lengthy prison terms to write people off as irredeemable,<sup>98</sup> and demonstrated how, across a range of doctrinal contexts, the Supreme Court has largely failed to regulate the machinery of the "carceral state," tinkering with its excesses only at the extremes.<sup>99</sup> As Sharon Dolovich observes, "judicial oversight and review are supposed to discipline . . . the state's exercise of its penal power" in theory, and yet in practice American courts "largely affirm the outputs of our plainly compromised criminal system."<sup>100</sup>

At this point, then, American judicial rhetoric about punishment cannot be read independently of this now widely recognized historical phenomenon. When the Justices write about punishment, the positions they take and the words they use must be lined up against this backdrop reality: the United States is extraordinarily punitive, its dominant form of punishment is imprisonment, and legislative sentencing choices over the past forty or fifty years have played a large part in constructing this reality. Therefore, whenever the Justices debate the merits of deferring to the legislature to make sentencing decisions, they are not debating the merits of deferring to legislative choices in the abstract. What they are debating, in real-world terms, are the merits of deferring to legislative choices to build and maintain mass incarceration. (Almost by definition, cases reflecting the opposite legislative choice—which is to say, cases in which individuals are not sent to prison, or are released from prison—are less likely to generate Eighth Amendment complaints, but in any event it is only very recently that states have begun to experiment with meaningful reforms to the status quo.) And by focusing on the juvenile LWOP cases, this Article seeks to draw attention to how thoroughly the American predilection for harsh punishment has permeated the Supreme Court—seeping through the Justices' rhetoric even in those opinions that may seem on the surface to hold out a hope of redemption that is so often missing from American criminal law.

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<sup>98</sup> See generally ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* (2014); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICAN AND EUROPE* (2003); Kleinfeld, *supra* note 18.

<sup>99</sup> See generally Jacobi & Ross, *supra* note 73.

<sup>100</sup> Dolovich, *supra* note 32, at 111.

## II. READING THE CASES

Informed by the methods and historical context discussed above, this Part provides a close reading of the Supreme Court's opinions in *Graham*, *Miller*, and *Montgomery*—reading them not only with the grain to determine their holdings and doctrinal significance, but also against the grain, and as historical artifacts, in order to surface the deeper assumptions about punishment lurking within them. Some scholars have expressed cautious hope that the holdings of the juvenile LWOP cases might be extended to support more rigorous constitutional review of adult sentencing,<sup>101</sup> or even open the door toward judicial intervention in the crisis of mass incarceration.<sup>102</sup> Yet as elaborated in the remainder of this Part, these cases may prove more limited than they appear.

### A. Carceral Conservatism

This Part's analysis begins with the conservative dissenting opinions in *Graham*, *Miller*, and *Montgomery*, for two reasons. First, as a matter of crude vote-counting, Justice Kennedy, the swing vote in *Miller* and *Montgomery*, has now retired. While it remains to be seen how Justice Kennedy's replacement will remake the Court's jurisprudence in the long run (and, for that matter, whether or how Scalia's replacement will alter the balance on the Court), it seems likely that the future Court will trend in a more conservative direction on criminal justice issues.<sup>103</sup> And thus, understanding the assumptions and premises of the conservative wing of the Court may be most relevant to predicting the near-term trajectory of the case law, even though this wing did not control the outcomes of the juvenile

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<sup>101</sup> *E.g.*, Jackson, *supra* note 71, at 3188 & n.438 (describing it as “uncertain” whether *Graham* and *Miller* “foreshadow a broader willingness to take a harder look at the constitutional proportionality of noncapital sentences,” including “prison sentences for adults”). For an argument that *Miller* should be extended to require individualized sentencing for any LWOP sentence or term-of-years sentence that is effectively a life sentence, see generally William W. Berry III, *The Mandate of Miller*, 51 AM. CRIM. L. REV. 327, 327–30 (2014). See also Berry, *supra* note 28, at 83–85 (arguing for more Eighth Amendment scrutiny of adult LWOP).

<sup>102</sup> *E.g.*, Berry, *supra* note 28, at 102 (characterizing *Miller* as a possible “baby step” toward “ending mass incarceration”); Smith & Robinson, *supra* note 28, at 415–19 (suggesting that *Graham* and other cases reflect an incremental but decided shift in Eighth Amendment jurisprudence “toward a fundamentally robust protection” for “the liberty interests of criminal defendants,” in which the Court plays a more active role “as an independent arbiter of excessive punishment”).

<sup>103</sup> See Daniel Epps, *Criminal Procedure in Winter*, 51 LOY. L.A. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3204125](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204125) (predicting that Trump's election makes it “unlikely” that the Supreme Court will in the near future extend criminal procedure doctrine in the ways hoped for by criminal justice reformers).

LWOP cases. Second and more substantively, this Article's overall account will likely make more sense if the conservative wing of the Court is analyzed first, because the conservative Justices have a less internally conflicted position about questions of punishment. They begin from a relatively straightforward view that punishment generally, and imprisonment more specifically, is a positive good, and therefore should be subject to only minimal constitutional limits. For the most part, the "swing" and liberal Justices seem to share this view as a default, as applied to what might be called ordinary adult punishment; it is only in cases presenting exceptional circumstances, like the juvenile LWOP cases, that they modestly depart from it.

This bloc of the Court, consistently including Justices Thomas and Alito (as well as the departed Scalia), and sometimes including Chief Justice Roberts, appears animated in Eighth Amendment cases by a vision of punishment that might be called "carceral conservatism."<sup>104</sup> They have developed a genre of opinion that blends deterrent and incapacitative philosophies of punishment with lurid imagery borrowed from the "tough-on-crime" politicking of the past fifty years to depict imprisonment as generally a positive good. When used on the right people (i.e., people who have revealed themselves as essentially "criminal"), it yields benefits for society. Thus, the Eighth Amendment should be read with the purpose in mind of facilitating punishment, minimizing judicial interference not only with state decisions to imprison people in the first instance but also with state decisions to keep people in prison who are already there. In the words of Justice Alito, the fact that the Eighth Amendment constrains judges from interfering with very long prison terms is not a regrettable feature of the Constitution that his judicial role consigns him to live with. It is, rather, a virtue of the Constitution that should be celebrated: it is "with good reason" that "[t]he Eighth Amendment . . . for the most part . . . leaves questions of sentencing policy" to the legislature.<sup>105</sup>

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<sup>104</sup> This term may be analogized to "carceral feminism," a term sometimes used to denote versions of feminist politics that endorse incarceration as a solution to gender-based violence. *E.g.*, Alex Press, *#MeToo Must Avoid "Carceral Feminism,"* VOX (Feb. 1, 2018, 8:40 AM), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> (presenting several reasons why police and prisons are ill-equipped to prevent sexual violence and instead advocating for distributive economic justice for women); *see also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 581 (2009) (criticizing the alliance between some versions of feminism and the politics of crime control).

<sup>105</sup> *Miller v. Alabama*, 567 U.S. 460, 515 (2012) (Alito, J., dissenting).



In the juvenile LWOP cases, the carceral conservative perspective emerges most clearly in the dissenting opinions of Justice Alito. In *Graham*, Justice Alito filed a separate, short dissent designed specifically to reassure states that they still retained the authority to impose very long prison sentences on juveniles. The *Graham* majority opinion, in Justice Alito's reading, does not, in any way, alter a state's authority to impose "a sentence to a term of years without the possibility of parole."<sup>106</sup> Justice Alito's *Graham* dissent also quotes and highlights a concession made by the petitioner at oral argument "that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional."<sup>107</sup> The underlying premise at work here is not only pro-prison but essentially pro-punishment. For Justice Alito, punishment in the service of protecting public safety is a core function of states and a function with which the federal courts interfere at their peril—or rather, at the peril of the people. Thus, Justice Alito seeks to provide states with a road map for how to minimize the interference caused by the *Graham* majority opinion.

For those Justices who begin from the premise that the continued imprisonment of convicted criminals is generally beneficial, it is prudent to avoid readings of the Cruel and Unusual Punishments Clause that might lead, even indirectly, to releasing people from prison. It is partly for this reason that the *Montgomery* dissenters disagreed with the holding that the new rules of juvenile LWOP must be applied retroactively, to people like Henry Montgomery. The *Montgomery* majority, Justice Thomas complains in his dissent, reads the Eighth Amendment in such a way that it would prevent state courts "from insisting that prisoners remain in prison when their convictions or sentences are later deemed unconstitutional."<sup>108</sup> This phrasing is telling. To appreciate its import, it is helpful to re-read the sentence in more truncated form. The crux of Justice Thomas's concern is that the *Montgomery* majority has disturbed the status quo in which "prisoners remain in prison." The fact that these prisoners may have been convicted or sentenced in violation of what (some) jurists would now consider constitutional requirements is not a reason to let them out of prison. The key fact about people like Henry Montgomery is that they are "prisoners," and thus "prison" is where they belong.

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<sup>106</sup> *Graham v. Florida*, 560 U.S. 48, 124 (2010) (Alito, J., dissenting).

<sup>107</sup> *Id.*

<sup>108</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 749 (2016) (Thomas, J., dissenting).

Though readily apparent in the juvenile LWOP cases, carceral conservatism can also be traced in the Roberts Court's Eighth Amendment conditions-of-confinement cases. Consider, for example, the dissenting opinions of Justices Alito and Scalia in *Brown v. Plata*, the 2011 California prison overcrowding case.<sup>109</sup> *Plata* upheld a lower court's order—based on hundreds of pages of factual findings and issued only after nineteen years of litigation—designed to remedy the uncontested finding that California's extremely overcrowded prisons constituted an Eighth Amendment violation, because the overcrowding made it impossible to provide prisoners with minimally adequate healthcare. At the height of the crisis, it was “an uncontested fact” that a prisoner was dying needlessly in the California prison system every seven days.<sup>110</sup> The lower court issued what is statutorily termed a “prisoner release order,” but the order did not actually require California to release prisoners “in an indiscriminate manner,” nor necessarily to release current prisoners outright. Rather, it mandated a gradual reduction of the prison population to more manageable levels, which could be achieved through prospective sentencing and policy reforms to reduce the future inflow of new prisoners and thereby bring down the prison population over time.<sup>111</sup>

In Justice Alito's view, the *Plata* majority dramatically overstepped the judicial role in approving such an order. Notably, Justice Alito's *Plata* dissent begins by emphasizing the power of states to punish: “The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.”<sup>112</sup> The dissent then characterizes the Eighth Amendment as imposing “an important—but *limited*—restraint” on punishment.<sup>113</sup> States, Justice Alito emphasizes, may punish “as they choose”—subject only to the very minor caveat that they cannot “depriv[e] inmates of ‘the minimal civilized measure of life's necessities.’”<sup>114</sup> Justice Alito goes on to predict that “grim” results will follow from the majority's

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<sup>109</sup> *Brown v. Plata*, 563 U.S. 493, 550 (2011) (Scalia, J. dissenting); *id.* at 565 (Alito, J. dissenting).

<sup>110</sup> *Id.* at 507–08 (quoting lower court findings of fact).

<sup>111</sup> *See id.* at 501 (summarizing the lower court order requiring California to reduce the prison population to 137.5% of design capacity, and noting that “the reduction need not be accomplished in an indiscriminate manner” but could be achieved through future changes such as “diversion of low-risk offenders and technical parole violators to community-based programs”).

<sup>112</sup> *Id.* at 565 (Alito, J., dissenting).

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> *Id.* at 565 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

holding.<sup>115</sup> Misrepresenting the effect of the order under review (which, again, did not require immediate or indiscriminate release of large numbers of prisoners at once, but could be satisfied gradually through prospective policy changes), and making a bizarre military comparison, Justice Alito accuses the court below of “order[ing] the premature release of approximately 46,000 criminals—the equivalent of three Army divisions” (the italics are Justice Alito’s).<sup>116</sup> The majority, in Justice Alito’s view, is “gambling with the safety of the people of California” and its disregard of public safety will likely generate “a grim roster of victims.”<sup>117</sup> The implicit premise of Justice Alito’s dissent, then, is that mass imprisonment promotes public safety. Therefore, any interference with a state’s institutions of mass imprisonment poses a risk to public safety. Formally, Justice Alito pegs his analysis to questions of statutory interpretation and disputes with the district court’s factual findings, but the emotion bubbling through his rhetoric makes clear that he is not merely quibbling about statutory text or findings of fact.<sup>118</sup>

Justice Scalia’s *Plata* dissent, joined by Justice Thomas, offers another illustration of carceral conservatism. Scalia begins by decrying the lower court order as “perhaps the most radical injunction issued by a court in our Nation’s history,” and the Supreme Court’s majority opinion affirming that order as “outrageous” and “absurd,” a total abrogation of the “power of a federal judge” that “takes the federal courts wildly beyond their institutional capacity.”<sup>119</sup> But the remainder of the opinion expresses more visceral worries than simply an abstract view about the institutional division of labor. The remainder of Justice Scalia’s *Plata* dissent is replete with gratuitous asides betraying a generalized fear of “prisoners,” reflecting the carceral conservative assumption that imprisoning the dangerous is a positive good, and thus a practice with which the Eighth Amendment should not be read to interfere. At one point, Justice Scalia predicts that the order will return to California’s streets “fine physical specimens who

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<sup>115</sup> *Id.* at 581.

<sup>116</sup> *Id.* at 566.

<sup>117</sup> *Id.* at 580–81.

<sup>118</sup> Justice Alito’s prediction of “grim” results echoed Justice Blackmun’s dissent many years earlier in the *Pentagon Papers Case*, which raised the specter of dead soldiers. *Id.* at 581; *N.Y. Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 762–63 (1971) (Blackmun, J., dissenting). In both cases, it is perhaps worth noting that the predicted effects do not seem to have occurred, but the Justices’ point in both cases that the majority had intolerably increased the *risk* that such effects *might* occur is not readily susceptible to empirical disproof.

<sup>119</sup> *Plata*, 563 U.S. at 550 (Scalia, J., dissenting).

have developed intimidating muscles pumping iron in the prison gym.”<sup>120</sup> In addition to the dehumanizing language, this line also betrays Justice Scalia’s inattention to the factual record in the very case he was deciding. California’s prisons had long been so overcrowded that they no longer had gyms. The gyms had been converted to makeshift dormitories, and were filled with triple bunk beds.<sup>121</sup>

Between Justice Scalia’s conjuring of “fine physical specimens” with “intimidating muscles” roaming the streets and Justice Alito’s specter of “Army divisions” committing coordinated mayhem throughout California, the clear message of the *Plata* dissents is that some people are irreparably and inherently dangerous, prison is the place for them, and the courts under the guise of the Eighth Amendment ought not interfere with their continued confinement. The carceral conservative Justices’ juvenile LWOP opinions are similarly replete with essentializing and descriptors of the individuals involved. Justice Scalia’s *Montgomery* dissent repeatedly positions Montgomery’s location in prison as essential to his identity as a person, denominating Montgomery as “a 69-year-old Louisiana prisoner” and an “inmate.”<sup>122</sup> Elsewhere Scalia refers to Montgomery as “a 17-year-old who murdered an innocent sheriff’s deputy,” conflating his core essence as a person with his past crime.<sup>123</sup>

The lens of carceral conservatism can help to explain the dissenters’ intense affront in the juvenile LWOP cases about what might seem to be a relatively minor doctrinal adjustment. Although the conservative Justices exaggerated the effects of *Plata*, they were right that it did involve a “prisoner release order.” In contrast, none of the Court’s decisions in

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<sup>120</sup> *Id.* at 554.

<sup>121</sup> See Stephen Yair Liebb & Héctor Oropeza, Opinion, *The Supreme Court Got It Right on Prison Overcrowding in California*, FOX NEWS (June 10, 2011), <http://www.foxnews.com/politics/2011/06/10/opinion-us-supreme-court-decision-on-prison-overcrowding-in-california-is.html#ixzz1P7ehIdxW> (perspective of two longtime prisoners in the California system criticizing Scalia’s dissent for “ignor[ing] the reality that gyms have been used to house prisoners for many years, which is part of the problem brought on by overcrowding” and noting that “[w]eights have not been available in California prisons for more than a decade”) (last updated Dec. 8, 2016); see also Brian Palmer, *Do Prisoners Really Spend All Their Time Lifting Weights?*, SLATE (May 24, 2011, 6:02 PM), <https://slate.com/news-and-politics/2011/05/do-prison-inmates-spend-all-their-time-lifting-weights.html> (explaining that state and federal prisons have generally not provided weights since the 1990s).

<sup>122</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 737, 743–44 (2016) (Scalia, J., dissenting). The term “inmate” is specifically experienced by many people in prison as dehumanizing. Blair Hickman, *Inmate. Prisoner. Other. Discussed*, MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed>.

<sup>123</sup> *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

*Graham*, *Miller*, and *Montgomery* required the states to actually release anyone, not even the named petitioners—all three of whom remain, as of this writing, in prison.<sup>124</sup> At first glance, it is puzzling why such limited holdings would generate *either* celebration or worry. But the dissenting Justices' anger becomes more comprehensible if one understands them to be reading the Eighth Amendment from the standpoint of carceral conservatism, from the operating assumption that mass imprisonment as practiced in the United States today is a positive good. Any judicial chipping away at the states' prerogative to punish, however seemingly marginal, thus represents a grievous intrusion upon the capacity of states to protect public safety. In Scalia's view, "the Constitution does not require States to revise punishments that were lawful when they were imposed."<sup>125</sup> What this means, translated into more concrete terms, is that the Constitution does not require Louisiana to contemplate the possibility of ever letting Henry Montgomery out of prison. To hold otherwise, in Scalia's words, would be "to upset" Louisiana's scheme of punishment.<sup>126</sup>

Thus far, this Article has suggested that the dissenting Justices in the juvenile LWOP cases read the Eighth Amendment through the lens of what might be termed carceral conservatism—the principle that mass imprisonment is generally a positive good and thus, when possible, the Cruel and Unusual Punishments Clause should not be read to disturb it unduly. The strongest counterargument to this account is what might be the Justices' own objection: that their dissents are motivated not by their personal endorsement of any particular legislative choice, only by their commitment to structural principles like federalism and separation of powers, and/or to interpretive methods like originalism. But this Article's account is not incompatible with accepting at face value the conservative Justices' commitments to these transsubstantive structural and interpretive principles. Deference toward state legislatures, for example, is certainly part of the mix in the juvenile LWOP dissents, and might even suffice to account for the raw vote counts in these cases as to outcomes.<sup>127</sup> But the dissenting Justices' rhetorical choices imply that, in Eighth Amendment cases, their decision-making, however informed by transsubstantive interpretive commitments, also finds confirmation in a substantive, purposive commitment to insulate from judicial interference state decisions to punish.

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<sup>124</sup> DRINAN, *supra* note 18, at 130–31.

<sup>125</sup> *Montgomery*, 136 S. Ct. at 741 (Scalia, J., dissenting).

<sup>126</sup> *Id.* at 742.

<sup>127</sup> *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 87 (2010) (Roberts, C.J., concurring) (describing Eighth Amendment case law as "emphasiz[ing] the primacy of the legislature in setting sentences").

On this point, it is illuminating to juxtapose the conservative Justices' rhetoric in the juvenile LWOP cases with their rhetoric in other doctrinal contexts. The American constitutional tradition provides jurists with a repertoire of stock phrases for signaling that they disagree with a legislative choice on the merits but feel duty-bound not to disturb that choice because of the constraints of the judicial role. Famously, in *Griswold v. Connecticut*, Justice Potter Stewart characterized Connecticut's contraceptive ban as "uncommonly silly," even "asinine," but nevertheless, in his view, constitutional.<sup>128</sup> In *Lawrence v. Texas*, Justice Thomas recycled this same language to describe the Texas sodomy ban, and stated that if he were a Texas legislator he "would vote to repeal it," even as he expressed the view that as a judge he felt "duty"-bound to uphold it.<sup>129</sup>

More recently, every one of the dissenting Justices in the LWOP cases has provided, in *Obergefell v. Hodges*—the same-sex marriage case—an example of what it looks like when he is dissenting (or wishes to appear to be dissenting) purely for federalism or separation-of-powers reasons. In *Obergefell* the identical line-up of dissenters insisted upon the importance of judicial deference to legislative decision-making, even as they each professed to be agnostic about, or even opposed to, the substance of the legislative decisions in question. Chief Justice Roberts acknowledged that there are "strong arguments" in favor of allowing same-sex marriage, "rooted in social policy and considerations of fairness."<sup>130</sup> Justice Scalia professed that the substantive law of marriage was "not of immense personal importance" to him; what concerned him was solely the majority's "hubris" in overriding the states.<sup>131</sup> Justice Thomas claimed that he personally was entirely agnostic about the value of marriage, observing that "[p]eople may choose to marry or not to marry" and opining that those "who choose not to marry" are no better or worse than anyone else.<sup>132</sup> And finally, Justice Alito criticized the *Obergefell* majority for choking off democratic deliberation about same-sex marriage by reading into the Constitution a modern, consent-based understanding of marriage, foreclosing the ability of states to retain a marriage regime based upon a "traditional," gender-based understanding. Justice Alito did not focus his criticism upon the substance of the modern understanding of marriage, but rather upon the Court's arrogation of authority to settle the legislative

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<sup>128</sup> *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

<sup>129</sup> *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

<sup>130</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

<sup>131</sup> *Id.* at 2626, 2629 (Scalia, J., dissenting).

<sup>132</sup> *Id.* at 2639 n.8 (Thomas, J., dissenting).

debate between the two.<sup>133</sup>

The juvenile LWOP dissents do not convey the same affect of agnostic detachment present in the *Obergefell* dissents. To the contrary, a sense of pique pervades the dissenting opinions in all three of the LWOP cases, a kind of verbal head-shaking at the majority's perceived naiveté. Justice Thomas's *Graham* dissent accuses the majority of undermining the "integrity" of the "criminal justice system"—that is, not the institutional integrity of the judiciary, as in *Obergefell*, but the integrity of the substantive field of law being regulated.<sup>134</sup> Consider also Justice Thomas's summary of why states might find LWOP to serve valid penological goals. Even the majority, Justice Thomas notes, "acknowledges" that juvenile LWOP has some deterrent and incapacitative effect, yet for some reason the majority finds those goals "*inadequate*" (the italics are Justice Thomas's).<sup>135</sup> Justice Thomas seems to be invoking vicariously the betrayal he imagines that legislators feel. Throughout their opinions, the dissenting Justices deploy carefully selected nouns and adjectives to signal normative approval not simply of legislative sentencing discretion as a structural matter, but of the legislature's sentencing choices as applied to these particular cases, characterizing the individuals involved as "depraved" "murderers" and "killers."<sup>136</sup> Justice Alito, for example, assesses the titular petitioner in *Miller* as having exhibited "brutality and evident depravity."<sup>137</sup> And although he nevertheless admits to harboring a degree of "sympathy" for Miller, he emphasizes that the petitioners before the Court represent only "two (carefully selected) cases" involving "very young defendants," and hopes that readers will not "be confused by the particulars" of those two cases.<sup>138</sup> In other words, there are other defendants out there for whom Justice Alito presumably has less or no sympathy.

The impression that the dissenting Justices intend to signal support for the state legislative choices under review is bolstered by their insertion of lurid anecdotes, drawn from news reports, of various brutal homicides committed by teenagers but unrelated to the cases at bar. The dissenting Justices might be understood to be citing these news stories to provide examples of the kinds of horrific facts that, perhaps, they felt the cases at

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<sup>133</sup> *Id.* at 2641–42 (Alito, J., dissenting).

<sup>134</sup> *Graham v. Florida*, 560 U.S. 48, 118–19 (2010) (Thomas, J., dissenting).

<sup>135</sup> *Id.* at 115–16.

<sup>136</sup> *See, e.g., Miller v. Alabama*, 567 U.S. 460, 494 (2012) (Roberts, C.J., dissenting) (describing prisoners serving LWOP for murders they committed before age 18 as "juvenile killers").

<sup>137</sup> *Id.* at 513 (Alito, J., dissenting).

<sup>138</sup> *Id.*

bar were lacking. Justice Thomas, in *Graham*, describes at length an unrelated crime of unusual “brutality” committed by a sixteen-year-old in Oklahoma.<sup>139</sup> If his goal with the dissent were simply to make a point about separation of powers and federalism as an abstract matter, this section with its gruesome details would seem gratuitous. Instead, this passage operates as a signal of sympathy with states’ choices to sentence youth who behave this way to extreme prison sentences. Chief Justice Roberts’s concurrence in the judgment in *Graham* utilizes the same rhetorical strategy. Chief Justice Roberts concurred only with the majority’s judgment that life without parole was a grossly disproportionate punishment for Graham himself—though emphasizing that he believed Graham “was dangerous and deserved to be punished,” just not punished with LWOP.<sup>140</sup> But his concurring opinion takes pains to contrast Graham’s case with a litany of “reprehensible” comparators: a teenager “who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock,” and a group of juveniles “who together . . . gang-raped a woman and forced her to perform oral sex on her 12-year-old son.”<sup>141</sup> If the dissenting Justices’ strategy (conscious or otherwise) was to use these examples in order to rally support for harsh punishment among readers, then they were on the right track: a recent psychological study found that people primed with a vignette of a particular murder committed by a teenager were far more likely to endorse LWOP for juveniles than people surveyed in the abstract about their views on LWOP.<sup>142</sup>

Justice Alito’s opinions provide similar hints of substantive agreement with the legislative choices under review. “Determining the length of imprisonment that is appropriate for a particular offense . . . inevitably involves a balancing of interests,” he writes in *Miller*.<sup>143</sup> So far, so deferential. But then, in the next sentence, Justice Alito tips his hand. “If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world.”<sup>144</sup> Here, then, is a positive endorsement of the value of prison. If nothing else, prison incapacitates. It removes people who are essentially “criminals” from society, thereby protecting everyone else from,

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<sup>139</sup> *Graham*, 560 U.S. at 112 (Thomas, J., dissenting).

<sup>140</sup> *Id.* at 92 (Roberts, C.J., concurring).

<sup>141</sup> *Id.* at 93–94.

<sup>142</sup> Nicholas Scurich, *Juvenile Murderers and “National Consensus,”* 12 HARV. L. & POL’Y REV. ONLINE 1, 4–6 (2017).

<sup>143</sup> *Miller*, 567 U.S. at 515 (Alito, J., dissenting).

<sup>144</sup> *Id.*



in Justice Alito's words, "the risk that these convicted murderers, if released from custody, will murder again."<sup>145</sup> That practical consequence, really, is the gravamen of Justice Alito's complaint with the majority. Justice Alito's logic is that marginally regulating the state's ability to imprison necessarily has the effect of increasing the likelihood of future murders. As an empirical matter, the relationship between imprisonment rates and violence levels is the subject of extensive and highly technical debates among social scientists.<sup>146</sup> The point here is not to reopen this empirical debate, but to observe that Justice Alito assumes one particular answer to this empirical question and imports that empirical assumption into his jurisprudence as a lens through which to view Eighth Amendment cases.

Chief Justice Roberts further signals his views in his *Miller* dissent. Unlike in *Graham*, in which Chief Justice Roberts concurred with the judgment, in *Miller* he joined the dissenters, arguing that the Eighth Amendment does not preclude states from imposing mandatory LWOP for juveniles who commit homicide. Why did he switch his vote? Because unlike *Graham*, which concerned a punishment few states ever imposed, *Miller* concerned a punishment that "most states" both permitted and "frequently impose[d]."<sup>147</sup> Like Justice Alito, Chief Justice Roberts assesses punishment (which is usually to say, in the modern world, imprisonment), as a positive good, even perhaps a moral duty of the modern state: "A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency."<sup>148</sup> Chief Justice Roberts then notes that "judges . . . have no basis for deciding" otherwise, but this separation-of-powers aside comes across as an afterthought.<sup>149</sup> The proposition that a "mature society" "may" realize the necessity of "removing . . . heinous murder[ers] from its midst" leaves open the possibility that Chief Justice Roberts thinks different "mature societies" might reasonably reach different determinations on this question (which is perhaps why he does not vote with the carceral conservatives across the

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<sup>145</sup> *Id.*

<sup>146</sup> For an introduction to the debate, see Wildeman, *supra* note 88 (finding that "the majority of the evidence now suggests . . . that incarceration's effects on crime are not nearly as large as once suspected"). See generally STEVEN RAPHAEL & MICHAEL A. STOLL, DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM (2009).

<sup>147</sup> *Miller*, 560 U.S. at 494 (Roberts, C.J., dissenting).

<sup>148</sup> *Id.* at 495.

<sup>149</sup> *Id.*

board).<sup>150</sup> But what is at least clear is that Chief Justice Roberts considers the choice to permanently “remov[e]” those convicted of murder an understandable one. This is of course a political view that many Americans share, so there is nothing unusual about Chief Justice Roberts expressing this view, but it is indeed a political view and not simply an institutional commitment to the proper balance between judges and legislatures.

Justice Thomas’s *Graham* dissent asserts that “[t]he question of what acts are ‘deserving’ of what punishments is bound so tightly with questions of morality and social conditions as to make it, *almost by definition*, a question for legislative resolution.”<sup>151</sup> In other words, in Justice Thomas’s view, it is not that contingent arrangements in the United States happen to assign questions of punishment to legislatures, but that questions of punishment are on some deeper, essential level inherently legislative by their nature. One learns something interesting from this sentence. If it were not for the “almost,” this sentence would read the Eighth Amendment out of the Constitution entirely. The addition of the “almost” recasts the sentence as taking the more modest step of *almost* reading the Eighth Amendment out of the Constitution. If questions about punishment and desert are “almost” by definition legislative questions, then what role are courts, applying the Eighth Amendment, supposed to play? A very minimal one, presumably.

The dissenting Justices’ rhetoric in the juvenile LWOP cases cannot be divorced from their social and historical context. For the past forty years, American legislatures have generally exercised their authority to prescribe criminal sentences in a punitive way. To defend the prerogative of legislatures against this backdrop is specifically to defend the prerogative of legislatures *to punish harshly*. One cannot consider the dissenting Justices unaware of this fact; they occasionally make express references to this historical context. Chief Justice Roberts, for example, provides in *Miller* a capsule summary of the familiar history in which the states rejected rehabilitation, beginning in the 1980s, and state-after-state decided “to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes.”<sup>152</sup> Thus when he insists elsewhere in the same opinion on “respect for elected officials” and raises concerns about “invalidat[ing] the laws of dozens of legislatures,”<sup>153</sup> we may reasonably assume that it is not legislative

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<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Graham v. Florida*, 560 U.S. 48, 120 (2010) (Thomas, J., dissenting) (emphasis added).

<sup>152</sup> *Miller*, 560 U.S. at 495 (Roberts, C.J., dissenting).

<sup>153</sup> *Id.* at 498.

decision-making generically that he is anxious to defend, but the recent history of legislative decision-making in the service of the build-up of mass incarceration. Justice Thomas too, in *Graham*, emphasizes the novelty of juvenile LWOP as a sentencing practice, describing how “over the past 20 years” states have become *more* severe in how they punish youth, and have tended to abolish or limit the use of parole.<sup>154</sup> Thus, when Justice Thomas elsewhere laments that the *Miller* majority has “[laid] the groundwork for future incursions on the States’ authority to sentence criminals,”<sup>155</sup> it is hard to read that lament purely as an abstract federalism concern. There would be no need to express a specific desire to protect, not the states’ authority generally, but “the states’ authority to sentence criminals,” except to signal agreement with the states’ determination that “criminals” are the essence of what prisoners are.<sup>156</sup> And it is people who are *essentially* and *incorrigibly* criminals and killers, in the dissenting Justices’ view, whom even the Court’s quite deferential Eighth Amendment jurisprudence too often improperly “shield[s]” from due punishment.<sup>157</sup>

In sum, a near-majority of the Roberts Court—and perhaps soon a majority—reads the Eighth Amendment from an apparent perspective of relative equanimity towards, or even approval of, legislative choices to further and maintain mass incarceration. Understanding the Justices’ carceral conservatism can help to make sense of the seeming limpness of Eighth Amendment case law. Scholars often characterize the Court’s minimal efforts at judicial review in this context as overly deferential to legislatures, or even as abdications of the Court’s responsibility to enforce the Eighth Amendment.<sup>158</sup> But at least on the Roberts Court, the Justices’ own rhetoric suggests that something more than deference to the legislature is going on. Rather, the Court’s disinterest in meaningful proportionality review of criminal sentences appears to reflect, at least for several of the Justices and at least in part, affirmative endorsement of the substance of the legislative decisions being made, as well as a purposive commitment to reading the Eighth Amendment so as to facilitate state practices and institutions of punishment.

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<sup>154</sup> *Graham*, 560 U.S. at 109–10 (Thomas, J., dissenting).

<sup>155</sup> *Miller*, 567 U.S. at 508 (Thomas, J., dissenting).

<sup>156</sup> *Id.* (emphasis added).

<sup>157</sup> *Graham*, 560 U.S. at 101 (Thomas, J., dissenting).

<sup>158</sup> *E.g.*, Jacobi & Berlin, *supra* note 73, at 2101 (arguing that the Court has “abdicate[d] its role as the nation’s supreme constitutional arbiter in sentencing” and instead serves to “rubber stamp” popular sentiments, no matter how punitive); Stinneford, *supra* note 15, at 481 (characterizing *Harmelin* as reflecting “total deference to the legislature, not merely as to how to implement the prohibition of excessive punishments, but as to the meaning of excessiveness itself”).

Another objection to this Article's account of carceral conservatism might concede that Justices Roberts and Alito tend to invoke consequentialist rationales for their votes, but maintain that the carceral conservative framework misrepresents the views of Justices Thomas and Scalia, whose real dispute with the majority in these cases derives from their commitment to originalism, not from any particular views about punishment. Certainly this is how the Justices themselves characterize the divide in Eighth Amendment cases, as a divide between the majority's mushy "evolving standards" and the conservative dissenters' fidelity to the amendment's original meaning. Justice Thomas's *Miller* dissent asserts, for instance, that most of modern Eighth Amendment jurisprudence is inconsistent "with the original understanding of the Cruel and Unusual Punishments Clause" and that *Miller* has further "compound[ed]" that inconsistency.<sup>159</sup> Justice Alito, in *Miller*, also considers the Court to have "long ago abandoned the original meaning of the Eighth Amendment."<sup>160</sup> In fact, the majority in these cases all but concedes this point. Justice Stevens, in his short *Graham* concurrence, suggests that perhaps it is true that "a death sentence for a \$50 theft by a 7-year-old" would not have offended Eighth Amendment standards once, but the standards "have evolved."<sup>161</sup> And in the view of Justice Stevens, this evolution is admirable. So too, Justice Kennedy's majority opinion frankly admits that the "evolving standards" framework is not grounded in originalism, but instead requires the Court to "look beyond historical conceptions" when applying the Eighth Amendment.<sup>162</sup>

For what it is worth, scholars, including some who identify as originalists, have criticized Justices Scalia and Thomas's purportedly originalist readings of the Eighth Amendment.<sup>163</sup> But in any event, it is

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<sup>159</sup> *Miller*, 567 U.S. at 502 (Thomas, J., dissenting).

<sup>160</sup> *Id.* at 510 (Alito, J., dissenting).

<sup>161</sup> *Graham*, 560 U.S. at 85 (Stevens, J., concurring).

<sup>162</sup> *Id.* at 58 (majority opinion).

<sup>163</sup> See, e.g., Lerner, *supra* note 85, at 1577, 1582–83 (arguing that Justices Scalia and Thomas's position relies on an insufficiently nuanced picture of the common law treatment of juvenile offenders). Lerner posits that it is possible to construct, at least for the sake of argument, a "living-originalist" defense of *Miller*. *Id.* at 1607. For the broader debate about the original meaning of the Eighth Amendment, see *supra* note 82 (collecting sources). In Justice Thomas's view, prisoners serving LWOP simply cannot "argue that [their] sentences would have been among the 'modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" *Miller*, 567 U.S. at 503 n.2 (Thomas, J., dissenting) (quoting *Graham*, 560 U.S. at 106 n.3 (Thomas, J., dissenting)). Since "14-year-olds were subject to" adult punishments in 1791, at a time when "mandatory death sentences were common," it must be "implausible," in Justice Thomas's view, "that a 14-year-old's mandatory prison sentence—of any length, with or

both beyond the scope of this Article and unnecessary to this Article's claims to adjudicate between the many competing originalist accounts of the Eighth Amendment. There is no necessary inconsistency between accepting the Justices' own claims that they are offering what they believe to be the best originalist reading of the Eighth Amendment and this Article's argument that they find confirmation for their doctrinal conclusions in how they comport with some larger purposive commitment—in the same way that equal protection scholarship can describe originalist jurists as adhering to the principle of anti-classification, even if the Justices might explain that they believe such a principle comports with the original meaning of the Fourteenth Amendment.

### B. *Carceral Proceduralism*

The consistent majority voting bloc, across all three of the juvenile LWOP cases, consists of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan (Chief Justice Roberts voted with the majority in *Graham* and

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without parole—would have been viewed as cruel and unusual.” *Id.* One premise of Justice Thomas's view is that the Cruel and Unusual Punishments Clause only bans certain “modes or acts” of punishment and that prison terms, of any length, are not among the prohibited modes. This premise, shared by both Justices Thomas and Scalia, has been questioned by both legal scholars and historians. The premise derives from Justice Scalia's account in *Harmelin*, disputed by Mannheimer, *supra* note 82, at 523, 525–26 (reviewing common law history and arguing that Justice Scalia misconstrued it); Lerner, *supra* note 85, at 1582 n.27 (discussing other originalist thought); Reinert, *supra* note 82, at 823 (arguing that “the jurisprudence of slavery demonstrates that the words ‘cruel’ and ‘unusual’ did not simply purport to regulate the *mode* of punishment, but also called for an inquiry into the *excessiveness* of punishment”); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *BUFF. L. REV.* 783, 786–92 (1975) (criticizing this reading of the Eighth Amendment). In addition to the criticisms that other scholars have leveled, I would also note that a second and perhaps even more doubtful premise of Justice Thomas's view is that, as of 1791, the Eighth Amendment was understood to import an accepted hierarchy of punishments, according to which death was worse than prison terms “of any length, with or without parole.” See *Miller*, 567 U.S. at 503 n.2 (Thomas, J., dissenting). Thus, if death would be permitted for a certain type of offender in 1791, then applying the original understanding would require holding that LWOP must be permitted for that type of offender today. In fact, the majority in the juvenile LWOP cases seems to share this premise, which is why they do not describe their interpretations as originalist. But prison was not yet widely used in 1791, and there was no parole until the twentieth century, much less any concept of “life without parole.” See MCLENNAN, *supra* note 38, at 32, 38 (noting that imprisonment did not become common in states until 1810). Since LWOP is essentially still a death sentence, but a much more protracted one, it is at best unclear how it should be squared with the original meaning of “punishment.” The meanings of life and death themselves were, of course, quite different in eighteenth-century understandings than they are today. The premise that LWOP can be transhistorically calibrated as milder than death might be arguable, but the argument would require far more development than Justice Thomas gives it in the LWOP cases to be persuasive.

*Montgomery*, but not in *Miller*, for reasons that align him more closely with the dissenters' carceral conservatism overall).<sup>164</sup> In each case, the dissenting Justices accused this majority of conflating their own policy preferences with constitutional requirements, overriding the proper bounds of the judicial role and infringing upon the prerogative of state legislatures with no principled basis. But in fact, an identifiable mediating principle is at work in these cases—and moreover, a principle that overlaps with the dissenters' carceral conservatism to a surprising degree. This principle might be termed “carceral proceduralism.”

A close reading of the majority opinions in the juvenile LWOP cases yields the conclusion that for the most part, the Justices in the majority share the dissenters' constitutional equanimity about prolonged imprisonment, certainly as to adult offenders in ordinary cases.<sup>165</sup> They agree, or at least claim to agree, with the conservative dissenters that some people are incorrigible, and states may conclude that they deserve to be “condemned to die in prison.”<sup>166</sup> “Retribution is a legitimate reason to punish,” explains Justice Kennedy, writing for the majority in *Graham*, and “[s]ociety is entitled to impose severe sanctions” on those who commit crimes.<sup>167</sup> Incapacitation is not only a “legitimate” reason for imprisonment but also “an important goal”—and even in some cases, a goal “sufficient to justify life without parole.”<sup>168</sup> Those who commit grievous offenses may “deserve[] to be separated from society for some time.”<sup>169</sup> Actually, if there is any conventional philosophy of punishment that this bloc regards skeptically, it is only rehabilitation—a surprising sentiment to encounter in a line of cases ostensibly about the meliorative potential of youth. Rehabilitation, Kennedy suggests, “is imprecise” as a concept and debatable as a policy goal.<sup>170</sup>

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<sup>164</sup> Justice Stevens joined the majority in *Graham* but retired soon thereafter; I would generally include him in this bloc, although his *Graham* concurrence evinces a deeper commitment to the more openly moralistic version of “evolving standards of decency” that the rest of the Court has moved away from. See *Graham*, 560 U.S. at 85 (Stevens, J., concurring) (reading the Eighth Amendment to embody a “moral commitment” to engage in a continuous process of updating its meaning).

<sup>165</sup> This is not to say that the individual Justices necessarily endorse mass incarceration as a policy matter; some of them probably do not.

<sup>166</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

<sup>167</sup> *Graham*, 560 U.S. at 71 (majority opinion).

<sup>168</sup> *Id.* at 72.

<sup>169</sup> *Id.* at 73.

<sup>170</sup> *Id.*

The only difference is that the majority appends some procedural asterisks to its endorsements of carceral punishment.<sup>171</sup> Although the Court often characterizes these procedural caveats as grounded in the proportionality principle,<sup>172</sup> proportionality is a misnomer for the principle actually being applied in these cases. At least, the term proportionality should not be taken too literally. The Court is not encouraging case-by-case balancing of individual sentences against individual crimes. Rather, proportionality operates in the juvenile LWOP cases as a term of art, signifying a categorical determination that certain special groups cannot (or ordinarily should not) be sentenced to certain very extreme punishments. Youth defines the boundaries of one such group, and with respect to LWOP, it may be the only such group (how far *Miller* will be extended to other groups remains to be seen). Central to the majority opinions in *Graham* and *Miller* is an essentialized distinction between youth and adults, and it is that distinction which, at least in these cases, provides the primary constitutional limit on very long prison terms. On the adult side of the divide, there are few if any constitutional limits on punishment-by-prison.

The carceral proceduralist Justices agree with their conservative colleagues that, for the ordinary offender who has committed some grievous crime, prison is an understandable response, and they even agree that LWOP is an understandable response. LWOP “*may* violate the Eighth Amendment *when imposed on children*,” the *Miller* Court held,<sup>173</sup> which is a carefully worded way of strongly implying, without technically foreclosing the issue, that LWOP likely does not violate the Eighth Amendment when imposed on anyone else. There are, the Court implies, legitimate “penological justifications for imposing the harshest sentences” on some people—just not necessarily “on juvenile offenders.”<sup>174</sup> The cases for retribution, deterrence, incapacitation, and rehabilitation are weak in the context of *juvenile* LWOP, the Court reasons, but that suggests the Court thinks there is some penological case to be made for adult LWOP.<sup>175</sup>

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<sup>171</sup> *Id.* at 71 (“Retribution is a legitimate reason to punish, *but . . .*” (emphasis added)).

<sup>172</sup> In the *Montgomery* Court’s summary: “Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment . . .” *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016); *see also* *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that mandatory juvenile LWOP “violate[s] [the] principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment”).

<sup>173</sup> *Miller*, 567 U.S. at 473 (emphasis added) (construing *Graham*, 560 U.S. at 69–70).

<sup>174</sup> *Id.* at 472; *see also* *Graham*, 560 U.S. at 67–68.

<sup>175</sup> *See* *Miller*, 567 U.S. at 472–73.

In several passages in *Graham*, the majority contemplates and seems to accept perpetual incarceration as not only constitutionally permissible, but even understandable for certain people. Consider the following sentence from *Graham*: “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.”<sup>176</sup> Now, remove the *Graham*-specific details: “A State is not required to guarantee eventual freedom.” Or consider this line in *Graham*’s discussion of penological goals: “To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. *The characteristics of juveniles* make that judgment questionable.”<sup>177</sup> Presumably, then, that judgment is not necessarily questionable for others who lack “the characteristics of juveniles.” And even as to juveniles, *Graham* emphasizes that the Eighth Amendment only prohibits a *sentence* of LWOP. The Eighth Amendment “does not require the State [actually] to release” a juvenile sentenced to LWOP “during his natural life,” only to provide him with parole hearings.<sup>178</sup> In other words: “The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.”<sup>179</sup> *A fortiori*, then, the Eighth Amendment must not foreclose the possibility that, say, adults convicted of homicide “will remain behind bars for life.”<sup>180</sup> Prison, then, is generally OK—even life in prison. The Eighth Amendment only “prohibit[s] States from making the judgment at the outset that [certain] offenders never will be fit to reenter society.”<sup>181</sup> If that judgment is made some other time—but not “at the outset”—such a determination is potentially permissible.

The majority’s commitment to procedural, rather than substantive, regulation of extreme forms of incarceration is especially evident in *Montgomery*, notwithstanding the Court’s convoluted efforts to construe *Miller* as “substantive” for purposes of the retroactivity analysis. Although retroactivity jurisprudence is complex, the majority’s reasoning in *Montgomery* can be boiled down to a simple premise: “no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose.”<sup>182</sup> In the criminal

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<sup>176</sup> *Graham*, 560 U.S. at 75 (emphasis added).

<sup>177</sup> *Id.* at 72–73 (emphasis added).

<sup>178</sup> *Id.* at 75; *see also id.* at 82 (holding that “[a] State need not guarantee the offender eventual release,” only “some realistic opportunity to obtain release”).

<sup>179</sup> *Id.* at 75.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016).



procedure context, the leading argument against the retroactivity of new constitutional rules is the state interest in finality. Declaring a rule retroactive disturbs the finality of long-ago criminal convictions, inviting prisoners to reopen their long-ago convictions and “forc[ing] the States to marshal resources” to defend those convictions anew.<sup>183</sup> For the *Montgomery* majority, this interest is unavailing as to mandatory juvenile LWOP because mandatory juvenile LWOP is defined by *Miller* as a constitutional nullity. But importantly, the component of the mandatory LWOP sentence that *Montgomery* identifies as a “constitutional nullity” is its mandatory nature. It is not the experience of spending life in prison that is unconstitutional, but lack of an individualized procedure for determining whether someone will spend life in prison. So long as such an individualized determination is provided, LWOP may still be imposed: *Montgomery* allows for the possibility “that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.”<sup>184</sup> And even for life prisoners who are afforded the opportunity of parole hearings, *Montgomery* confirms that it is permissible for a state to deny parole at every one of those hearings—that is, to determine each time the question arises that the prisoner has demonstrated “an inability to reform.”<sup>185</sup>

Unlike the dissenting Justices, the Justices in this bloc confront the reality and gravity of what an LWOP sentence means. Whereas Chief Justice Roberts describes LWOP as “of course, far less severe than a death sentence,”<sup>186</sup> Justice Kennedy readily acknowledges that a person sentenced to LWOP is essentially “condemned to die in prison.”<sup>187</sup> In that sense, as the Court recognized in both *Graham* and *Miller*, a sentence of LWOP is not actually so different from a death sentence. “Imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable,’” the Court observed in *Miller*.<sup>188</sup> LWOP at least “for juveniles” is “akin to

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<sup>183</sup> *Id.* (alteration in original)

<sup>184</sup> *Id.* at 733; *see also id.* at 734 (acknowledging possibility that LWOP “could be a proportionate sentence” for some juveniles).

<sup>185</sup> *Id.* at 736.

<sup>186</sup> *Graham*, 560 U.S. at 89 (Roberts, C.J., concurring).

<sup>187</sup> *Montgomery*, 136 S. Ct. at 736; *see also Miller v. Alabama*, 567 U.S. 460, 465 (2012) (describing how petitioners were sentenced to “die in prison”). Advocates and prisoners often refer to LWOP as “death by another name.” *See, e.g.,* Kenneth E. Hartman, *Death by Another Name*, MARSHALL PROJECT (Oct. 23, 2016, 10:00 PM), <https://themarshallproject.org/2016/10/23/death-by-another-name>; *see also* Ross Kleinstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J.L. & SOC. CHANGE 185, 185–89 (2016) (collecting quotations and references using this formulation).

<sup>188</sup> *Miller*, 567 U.S. at 474–75 (quoting *Graham*, 560 U.S. at 69).

the death penalty.”<sup>189</sup> That the majority bloc both recognizes the severity of LWOP and seems to generally accept the constitutional propriety of LWOP (subject only to modest procedural constraints, and even then only for certain limited categories of offenders) is perhaps the best evidence that they are operating within a doctrinal framework that is broadly accepting of mass imprisonment.

### III. THE PLACE OF YOUTH IN THE POLITICS (AND JURISPRUDENCE) OF PUNISHMENT

Youth awakes to a new world and understands neither it nor himself. The whole future of life depends on how the new powers now given suddenly and in profusion are husbanded and directed. Character and personality are taking form, but everything is plastic.”

—G. Stanley Hall<sup>190</sup>

[A] child’s character is not as “well formed” as an adult’s, his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”

—*Miller v. Alabama*<sup>191</sup>

We’re talking about kids who have absolutely no respect for human life and no sense of the future.

—John J. DiIulio, Jr.<sup>192</sup>

But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill?

—*Graham v. Florida*<sup>193</sup>

Understanding the divide on the Roberts Court as a divide between two forms of essentially pro-carceral reasoning—carceral conservatism and carceral proceduralism—casts in a new light the juvenile LWOP cases’

<sup>189</sup> *Id.* at 475; see also *Graham*, 560 U.S. at 69 (noting that LWOP sentences “share some characteristics with death sentences”).

<sup>190</sup> 1 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION, at xv (1904).

<sup>191</sup> 567 U.S. at 471 (alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

<sup>192</sup> *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00 AM), <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>.

<sup>193</sup> 560 U.S. at 93–94 (Roberts, C.J., concurring).

deployment of the concept of “adolescence.” This concept does not function in the cases as a wedge between a wing of the court that is broadly deferential toward punitive state policies and a wing of the court that is actively interventionist into punitive state policies. All of the Justices appear to agree about the constitutionality of most of the forms of harsh punishment widely used in the United States today, such as the prolonged imprisonment of adults. If their views were translated into a Venn diagram, they would largely overlap. Adolescence represents the sliver of difference, the outer bound of the diagram at which the carceral conservatives remain untroubled and the carceral proceduralists insist that additional procedure should attend a particular punishment.

The most revealing clash between the *Miller* majority and the various dissenters concerns the seemingly trivial matter of nouns. Justice Kagan’s opinion consistently uses the word “children” to describe the adolescents under discussion; the Justices voting in the majority in the juvenile LWOP cases tend to describe the defendants as “boys.”<sup>194</sup> Writing in dissent, Justice Alito mocks the majority’s use of the word “child” with square quotes: “Even a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a ‘child’ . . . .”<sup>195</sup> Instead of the word “children,” Chief Justice Roberts tends to use the word “teenagers”; Justice Alito prefers more lurid descriptors such as “teenage murderers,” “killers,” “convicted murderers,” “murderers under the age of 18,” or, at greater length, “the category of murderers that the Court delicately calls ‘children’ (murderers under the age of 18).”<sup>196</sup> “Seventeen-year-olds,” Justice Alito notes darkly, “commit a significant number of murders every year.”<sup>197</sup>

That the treatment of young people would divide the Court, at the margins, is not surprising because the politics of punishment has long been intertwined with the politics of youth—with societal debates about how best to educate and discipline young people. The anxieties about urban disorder that have propelled the growth of the American “carceral state” since the turn of the century have always been, in large part, anxieties about young people, whether labeled “juvenile delinquents,” “hoodlums,” or, later, “superpredators.” Central to the politics of law and order in the United States has been a persistent concern about the collapse of the family under modernity—the sense that parents, and especially fathers, no longer

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<sup>194</sup> See *Miller*, 567 U.S. at 465 (“[B]oys”); *id.* at 492 (Breyer, J., concurring) (“[O]lder boys”); see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (“[A]s a 17-year-old boy.”).

<sup>195</sup> *Miller*, 567 U.S. at 510 (Alito, J., dissenting).

<sup>196</sup> See *id.* at 498–99 (Roberts, C.J., dissenting); *id.* at 513–15 (Alito, J., dissenting).

<sup>197</sup> *Id.* at 513.

retained the same authority over their children that they once had.<sup>198</sup> In debates about education but also law, policymakers, lawmakers, law enforcers, jurists, and ordinary people puzzled over how the state might discipline youth into responsible adults if families could not be trusted. The progressive “juvenile justice” movement pushed for the establishment of separate courts and institutions designed for the special needs of youth.<sup>199</sup> In the progressive view, wayward youth were not genuine “criminals” and could yet be “saved” through treatment.<sup>200</sup> For a time, the rehabilitative impulse also motivated the punishment of adults in the United States to some extent, especially in some regions, but always with more controversy. By the 1970s the pendulum swung back and states “got tough.”<sup>201</sup> The resultant matrix of policies, which produced and has maintained the current landscape of “mass incarceration,” included not only more punitive criminal law generally but also a rollback of “juvenile justice,” returning teenagers in many cases back to the ordinary courts and institutions of the “criminal justice” machinery.<sup>202</sup>

In the juvenile LWOP cases, the two wings of the Court invoke these two different discursive legacies of the twentieth-century politics of punishment: the Progressive Era discourse of adolescence, which argued that young people remained in characterological development and thus should enjoy a moratorium on adult responsibilities and punishments (for both moral and utilitarian reasons—on the theory that youth treated with mercy might still reform, while youth punished overly harshly might become permanently stunted by the experience), and the post-World War II discourse of delinquency, which blended with the actuarial “new penology” of the late twentieth century to define youth as the most risky

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<sup>198</sup> See ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN AMERICAN CULTURE* 133, 143–44 (1929). Of course by the 1960s, texts like the Moynihan Report would translate this general concern into a specific racialized fear about the purportedly “matriarchal” black family which lacked a father figure altogether. On the complex political and cultural debates occasioned by the Moynihan Report, see MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY* 59–68 (2d ed. 2013).

<sup>199</sup> DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 205–10 (1980).

<sup>200</sup> See, e.g., Julian W. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 106–07 (1909) (suggesting that the juvenile offender may be on “the path that leads to criminality” but can still be developed into a “worthy citizen” and thus should be treated with the aim “not so much to punish as to reform . . . not to crush but to develop”).

<sup>201</sup> See generally JULILLY KOHLER-HAUSMANN, *GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA* (2017) (exploring the history of the decline of rehabilitation and the rise of deterrent punishment regimes in state prison systems during the 1970s).

<sup>202</sup> See DRINAN, *supra* note 18, at 133 (reviewing this history).

and dangerous sector of the population.<sup>203</sup> On this latter view, young people, far from meriting a moratorium on adult responsibility, were perhaps the group that it was most essential to incapacitate. The conservative Justices' dissenting opinions in the juvenile LWOP cases define adolescence not as the phase in which character is formed but as the moment when character is revealed. In this view, adolescents are essentially equivalent to adults—although if anything, *more* dangerous—both in their capacity for evil and their relatively fixed personality. Horrific acts, when committed by teenagers and adults alike, signal unfixable pathologies that require removal from society.

A. *The Significance of Adolescence for Carceral Proceduralism*

The majority opinions in the juvenile LWOP cases are constructed around an essentialized contrast between plastic adolescence and fixed adulthood. This distinction is present in Justice Kennedy's opinion for the Court in *Graham*, but especially pervasive in Justice Kagan's opinion for the Court in *Miller*. After *Graham*, some commentators expressed hope that the Court might extend its logic about the extreme severity of LWOP to provide for more robust judicial review of LWOP sentences more generally, but *Miller* appears carefully crafted to foreclose that possibility. *Miller* repeatedly emphasizes that it is only the *differences* between juveniles and adults that render LWOP sentences suspect *when applied to juveniles*—implying that adults can be fully deserving of LWOP sentences: “[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders . . . .”<sup>204</sup> LWOP “reflects ‘an irrevocable judgment about [an offender’s] value and place in society,’ at odds with a child’s capacity for change.”<sup>205</sup> “[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”<sup>206</sup> (ergo: what *Graham* said about children is *children-specific*); and “[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.”<sup>207</sup>

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<sup>203</sup> See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992) (defining the “new penology” in criminological discourse as “an actuarial language of probabilistic calculations and statistical distributions applied to populations”).

<sup>204</sup> *Miller*, 567 U.S. at 472 (emphasis added) (construing *Graham v. Florida*, 560 U.S. 48 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005)).

<sup>205</sup> *Id.* at 473 (alteration in original) (emphasis added) (quoting *Graham*, 560 U.S. at 74).

<sup>206</sup> *Id.* (emphasis added) (construing *Graham*, 560 U.S. at 69).

<sup>207</sup> *Id.* (emphasis added) (construing *Graham*, 560 U.S. at 71–74).

*Miller's* gloss on *Graham* is carefully crafted to cast no doubt on the constitutionality of LWOP for adults, emphasizing that in *Graham*, “juvenile status precluded a life-without-parole sentence, *even though an adult could receive it for a similar crime.*”<sup>208</sup> Elsewhere in *Miller*, Justice Kagan specifies that the constitutional problem lies not with life-without-parole sentences generally, but with “subjecting a juvenile to the same life-without-parole sentence *applicable to an adult.*”<sup>209</sup> The “foundational principle” of *Graham*, in Justice Kagan’s restatement, is that states may not punish “juvenile offenders . . . as though they were not children.”<sup>210</sup> It is (only?) “juvenile status” or the “attributes of youth” that render LWOP suspect.

In the name of saving juveniles from extreme punishment, then, *Miller* comes close to endorsing a pernicious implication: the notion that adults *can* be written off forever as incorrigible, as incapable of change. The “signature qualities” of youth, Justice Kagan emphasizes, “are all ‘transient.’”<sup>211</sup> It is only because youth is a fleeting and distinctively plastic phase of life that it is difficult to distinguish between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>212</sup> By implication, then, it is not rare for adults’ crimes to reflect irreparable corruption. It is only because “children are different” that they cannot be “irrevocably sentenc[ed] . . . to a lifetime in prison.”<sup>213</sup> By implication, then, adults can be irrevocably sentenced. Justice Kagan’s discussion of *Harmelin v. Michigan* further nails this point. Justice Kagan takes great pains to harmonize *Miller's* holding, invalidating mandatory LWOP for (juvenile) homicide, from the holding of *Harmelin*, which upheld mandatory LWOP for (adult) cocaine possession. Youth does all of the work of squaring the two otherwise seemingly inconsistent holdings: “*Harmelin* had nothing to do with children . . . . We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.”<sup>214</sup> In other words, there exist two separate and self-contained regimes of constitutional law of punishment—one for “children” and one for “adults”—and these two regimes “[have] nothing to do” with each other.<sup>215</sup> The dissenters seem to agree with this larger point. Chief Justice Roberts,

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<sup>208</sup> *Id.* (emphasis added).

<sup>209</sup> *Id.* at 474 (emphasis added).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 476.

<sup>212</sup> *Id.* at 479–80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

<sup>213</sup> *Id.* at 480.

<sup>214</sup> *Id.* at 481.

<sup>215</sup> *Id.*

in his *Miller* dissent, worries that the majority opinion could be extended to call into question other common practices in juvenile justice, such as the practice of trying juveniles as adults.<sup>216</sup> Tellingly, neither he nor any other *Miller* dissenter expresses any worry that *Miller* will have any spillover effect on *adult* sentencing.

*Miller*, then, could be read to affirm the constitutional status of LWOP as an acceptable form of punishment, except in very limited circumstances concerning juvenile offenders. (And even for juveniles, after all, *Miller* leaves intact the option to impose LWOP for homicide crimes, it just cannot be imposed automatically.) Leaving LWOP constitutionally intact is tantamount to leaving mass imprisonment constitutionally intact, because LWOP functions in many ways as the anchor for mass incarceration, calibrating the entire scale of punishment in the United States at an extremely harsh baseline.<sup>217</sup> LWOP is a relatively recent invention, dating to the 1970s if not later in most states, and remains virtually unknown outside of the United States.<sup>218</sup> The availability of LWOP, along with the routine use of life prison terms more generally, plays a large role in making the United States an extreme outlier in international comparison.<sup>219</sup> As Jonathan Simon explains, normalizing extreme sentences for the most serious crimes has “an inflationary effect on the whole structure of punishment,” “mak[ing] it far easier to set high sentences for all manner of less serious offenses.”<sup>220</sup> The United States’ anomalous tolerance for life sentences thus functions as the “anchor of a system of over-punishment” more generally.<sup>221</sup> While introducing narrow limits on the punishment of children, *Miller* essentially reaffirmed the constitutionality of that larger system.

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<sup>216</sup> *Id.* at 501 (Roberts, C.J., dissenting).

<sup>217</sup> Beckett, *supra* note 89, at 19 (stating that LWOP “sentences not only contribute to mass incarceration in a quantitative manner but also raise crucial ethical, humanitarian, and human-rights concerns”). See generally Judith Lichtenberg, *Against Life without Parole*, 11 WASH. U. JUR. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3172899](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172899) (arguing that LWOP cannot be justified on philosophical grounds).

<sup>218</sup> See Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaign in the United States*, 14 NW. U. J.L. & SOC. POL. (forthcoming 2018) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3039994](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3039994) (finding that LWOP was promoted as an alternative to the death penalty, although it did not necessarily reduce capital punishment).

<sup>219</sup> See generally Kleinfeld, *supra* note 18, at 1034 (finding that many countries in Europe have milder systems of criminal punishment than the U.S.).

<sup>220</sup> Simon, *supra* note 31, at 1249.

<sup>221</sup> *Id.* at 1246.

It is thus worth reflecting upon the basis for the Court's essentialized distinction between youth and adults. The Court cites findings from neuroscience and developmental psychology to support its analysis, but the scientific evidence alone cannot explain the totality of the Court's decision-making process.<sup>222</sup> After all, and as both the dissenting Justices and legal scholars have pointed out, the science does not necessarily support such a stark divide between the moral capacity of adolescents and adults.<sup>223</sup> Rather, what seems to motivate the majorities in these cases is the need to confine in some way the limits on punishment being introduced—the need to ensure that the rules established in these cases remain exceptional and do not swallow up the Court's default equanimity toward mass imprisonment. The difference between teenagers and adults works well to provide such a limiting principle, partly because of the availability of scientific evidence to lend the distinction objective trappings, but also because adolescence is such an entrenched trope in American discourse (legal and otherwise). Indeed, the neuroscientific findings cited by the Court—suggesting that adolescents tend to be more impulsive than adults and also more susceptible to peer pressure—resonate as true because they comport with our inherited, cultural common sense about the life course and our deeply embedded moral scripts of individual personality and responsibility. As Terry Maroney has written: “Adolescent brain science has become a quick, culturally salient way to reference those qualities we think are special about juveniles, such as immaturity, impulsivity, and malleability.”<sup>224</sup> Adolescence also connotes instability and uncertainty, which makes it an apt category to invoke when insisting upon additional procedure; if the character of an adolescent is presumed to be especially hard to know, then it makes sense to insist on greater procedural safeguards when evaluating adolescent character in order to reduce the risk of adjudicative error.

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<sup>222</sup> For a telling indicator of some juvenile justice scholars' view that neuroscience is at least in part a rhetorical overlay rather than a determinant of policymaking, see William S. Bush & David S. Tanenhaus, *Introduction*, in *AGES OF ANXIETY: HISTORICAL AND TRANSNATIONAL PERSPECTIVES ON JUVENILE JUSTICE* 3 (William S. Bush & David S. Tanenhaus eds., 2018) (characterizing “the current obsession with brain science” as an example of “reformers' rhetorical choices”); cf. Gertner, *supra* note 23, at 1042–43 (suggesting that the Court reached outcomes in *Miller* and *Graham* partly because “the arguments were based on *science*,” which seems more objective than “norms, policy choices, or values”).

<sup>223</sup> See Lerner, *supra* note 85, at 1604 (criticizing the *Graham* majority's “sweeping statements of juvenile immaturity” as “problematic,” partly because, “[a]s a descriptive matter, the categorization of teenagers as amorphously defective, vis-à-vis adults, is doubtful”).

<sup>224</sup> Terry A. Maroney, *The Once and Future Juvenile Brain*, in *CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE* 189, 203 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).



Adolescence is essentially an invention of the early twentieth century, when developmental psychology, the study of how individuals grow and change throughout their lives, was consolidating as an academic discipline.<sup>225</sup> By the 1920s, most educators and psychologists had adopted the pioneering psychologist G. Stanley Hall's theory of adolescence as a "moratorium on adult responsibility," developed beginning in the 1890s and first published in a 1904 treatise.<sup>226</sup> Applying the nineteenth-century maxim that "ontogeny recapitulates phylogeny," Hall posited that each human life replicated in miniature the evolution of the human race. Babies were savages, while older children might achieve a level of primitive maturity. Adolescence was the crucial window in which an individual would either attain civilization or be forever arrested at some lower stage. Through the turmoils of puberty, each adolescent relived in microcosm "some ancient period of storm and stress" for the human race, "when old moorings were broken and a higher level attained."<sup>227</sup>

Hall identified modern adolescence as a period of great promise, both for individual adolescents and society as a whole, but also great peril. The collective development of so many individual teenagers held the potential to raise humanity to ever-new heights of refinement. But for Hall, living through a historical moment of rapid urbanization and industrialization, that possibility of progress was threatened by "urbanized hothouse life," which "tend[ed] to ripen everything before its time."<sup>228</sup> Modern consumer culture, in his view, too often lured American youth away from the strictures of "duty and discipline" into the realm of "temptations,"

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<sup>225</sup> See KENT BAXTER, *THE MODERN AGE: TURN-OF-THE-CENTURY AMERICAN CULTURE AND THE INVENTION OF ADOLESCENCE* 3–5 (2008) (arguing that the construct of adolescence emerged in the early twentieth century "because it fulfilled specific cultural needs" at a time of rapid modernization); STEVEN MINTZ, *THE PRIME OF LIFE: A HISTORY OF MODERN ADULTHOOD* 9–10 (2015) (describing how both old age and adolescence began to be perceived in new ways during the late nineteenth century). For an account that emphasizes the role of structural societal changes in the emergence of adolescence (including technology, rising affluence, and urbanization and other demographic changes), see, generally, Frank A. Fasick, *On the "Invention" of Adolescence*, 14 *J. EARLY ADOLESCENCE* 6 (1994).

<sup>226</sup> Joseph F. Kett, *Reflections on the History of Adolescence in America*, 8 *HIST. FAM.* 355, 370–71 (2003); see also John Demos & Virginia Demos, *Adolescence in Historical Perspective*, 31 *J. MARRIAGE & FAM.* 632, 635–38 (1969).

<sup>227</sup> HALL, *supra* note 190, at xiii. For an overview of Hall's work and influence, see, generally, BAXTER, *supra* note 225, at 44–72. Because there is a sizable historical literature on adolescence alone, including Hall (and Hall is also treated by historians of gender, psychology, and eugenics, among others), I do not cite comprehensively to that literature here, but refer interested readers to Baxter's summary and citations to the literature.

<sup>228</sup> HALL, *supra* note 190, at xi.

“precocities,” and “the mad rush for sudden wealth.”<sup>229</sup> To counteract these trends, societal institutions must carefully control the conditions of adolescence, channeling youthful energy and the will to explore into disciplined, age-appropriate activities such as sports. Hall attributed delinquency to social causes; youth misbehaved when their development was stunted by oppressive institutions. Truants, for example, had given into “a mania for simply going away,” breaking out of the schoolroom cages where “pubescent boys and even girls often feel like animals in captivity.”<sup>230</sup>

Hall placed such great emphasis on the importance of carefully structuring laws, institutions, and opportunities around the special needs of adolescents because he believed that *after* adolescence, the opportunity to reform the character would be largely lost. “Criminals,” in his view, were “much like overgrown children” who had failed to master self-control during the adolescent window of opportunity; they were “egoistic, foppish, impulsive, gluttonous, blind to the rights of others.”<sup>231</sup> The most important lesson to learn while growing up, Hall explained, was that “self-control, the development of which in the individual is the unconscious but perhaps primary purpose of family, church, state, laws, customs, and most social institutions.”<sup>232</sup> To the extent that individuals within the community strengthened their “power of self-control,” then society as a whole would progress. Hall recommended “magnanimity and a large indulgent parental and pedagogical attitude” toward all young people, “and especially toward juvenile offenders.”<sup>233</sup> Children who were guided compassionately through the “storm and stress” of adolescence might come out on the other side having learned the right lessons, but children who were punished overly harshly might become forever stunted.<sup>234</sup> Instead of evolving into disciplined, orderly adults, children who were not carefully directed by their parents and teachers risked “evol[ving]” into “habitual” criminals.<sup>235</sup>

Although Hall’s ideas were more of a synthesis of then-reining ideas than an original contribution, and soon fell out of favor within academic psychology, his model of adolescence would remain enormously influential

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<sup>229</sup> *Id.* at xv.

<sup>230</sup> *Id.* at 348.

<sup>231</sup> *Id.* at 338.

<sup>232</sup> *Id.* at 339.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 306.

<sup>235</sup> *Id.* at 332.

upon American understandings of the life course.<sup>236</sup> Hall's conception of adolescence remade American society in countless lasting ways, underwriting the development of juvenile courts, the expansion of high schools, the development of youth activities and sports. While biologists no longer invoke recapitulation theory, and many of Hall's specific claims would sound bizarre or even disturbing to a modern reader (not to mention his eugenic predilections), his central image of adolescence as a time of "storm and stress" remains the dominant common-sense understanding of the teenage years. Adolescents are turbulent, hormonal, not yet fully in control of their behavior, not yet who they will one day become. As literary scholar Kent Baxter writes, Hall's "extremely evocative yet quite evasive notion of the 'storm and stress' of adolescence . . . was an immensely popular way of depicting this age group, and the anxiety of what might happen if this tempest got out of control was shared by many Americans."<sup>237</sup>

It is essentially Hall's vision of adolescence that pervades the Supreme Court's opinions in *Graham* and *Miller*. In Justice Kagan's restatement of this line of cases, "children are constitutionally different from adults for purposes of sentencing" because of "three significant gaps between juveniles and adults": (1) immaturity, which "lead[s] to recklessness, impulsivity, and heedless risk-taking"; (2) heightened vulnerability to family and peer pressure (partly due to lack of control over circumstances); and (3) incomplete characterological formation.<sup>238</sup> This third reason is especially important for understanding what, in the Court's view, differentiates adolescents from adults. In Justice Kagan's summary, "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"<sup>239</sup> Although the Court has variously invoked "common sense," "what every parent knows," "science," and "social science" as the sources of authority for this model of adolescence, and has increasingly dressed up its holdings with references to neuroscience, the basic outlines are a simplified, common-sense version of Hall's model of adolescence, which has long been influential (if not

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<sup>236</sup> See Demos & Demos, *supra* note 226, at 636 (noting that, while Hall "has been largely forgotten, if not rejected outright," the "'special cult of adolescence' seems to have lost no strength at all[,] [a]nd it was Hall, more than anyone else, who fixed it in our imagination").

<sup>237</sup> BAXTER, *supra* note 225, at 5. In addition to Hall, Baxter also emphasizes the role of Margaret Mead's anthropological studies in influencing the common understanding of adolescence. *Id.* at 44–71.

<sup>238</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

<sup>239</sup> *Id.* (alterations in original) (quoting *Roper*, 543 U.S. at 570).

hegemonic) in American culture.<sup>240</sup>

The majority's implied construction of adults as fixed and fully responsible agents—in contrast to mutable adolescents—also resonates with deeply entrenched cultural scripts. The invention of adolescence proceeded in tandem with the discovery of “adulthood,” the state of maturity toward which adolescents are developing. (Etymologically, adolescence literally means the process of growing into an adult.)<sup>241</sup> The word “adulthood” dates to the 1860s, but gained prominence as a cultural construct after World War II, when “adulthood” came to be equated with “maturity, settling down, and adher[ing] to proscribed gender roles.”<sup>242</sup> As youth became idealized as a time of exploration and freedom, adulthood became increasingly defined by contrast, as a time of constraint and stability—of marriage, family, career, and home. If adolescence meant change and growth, adulthood meant continuity, stability, permanence, “settl[ing] down.”<sup>243</sup> As historian Steven Mintz notes, this conception of adulthood has always been more mythical than real; there has never been a time “when a majority of Americans experienced what we might consider the model life script: a stable marriage and a long-term career working for a single employer.”<sup>244</sup> Since the 1960s, this purported experience of “traditional adulthood” has become increasingly detached from the actual experience of adulthood for the majority of Americans (whether these shifts are blamed on economic inequality, civilizational decline, or simply the normal processes of cultural change).<sup>245</sup> Nevertheless, the conception of adulthood as a time of fixity, during which a person has a stable household, career, personality, and character—for better or worse—retains a strong hold on American culture.

This twentieth-century ideal of adulthood, as a time when one has attained one's permanent, fixed state of being, lurks between the lines of the Supreme Court's adolescence canon. Beneath every description of teenagers in *Graham* and *Miller* is an implied counter-description of adults.

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<sup>240</sup> *Roper*, 543 U.S. at 569.

<sup>241</sup> See BAXTER, *supra* note 225, at 11 (noting that “the adolescent stage of development is often seen as the path by which the child becomes an adult,” and the concept adolescence thus denotes “this process of becoming”).

<sup>242</sup> MINTZ, *supra* note 225, at xi.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at ix–x.

<sup>245</sup> *Id.* at x. For a thoughtful discussion of the legal implications of this shift, see generally Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55 (2016). For a representative example of a polemic in the “civilizational decline” vein, see BEN SASSE, *THE VANISHING AMERICAN ADULT: OUR COMING-OF-AGE CRISIS AND HOW TO REBUILD A CULTURE OF SELF RELIANCE* (2017).

Juveniles “have a lack of maturity and an underdeveloped sense of responsibility,” “leading to recklessness, impulsivity, and heedless risk-taking”—ergo, adults are (or should be) mature, responsible, careful, thoughtful, and appropriately risk-averse.<sup>246</sup> Juveniles “are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment”—ergo, adults are (or should be) impervious to pressure, self-directed, and fully in control of their circumstances. “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity’”—ergo, adults have relatively well formed characters, their traits are largely fixed, and their actions may well signify that they are irretrievably depraved.<sup>247</sup> When presented in this way, Justice Kagan’s majority opinion in *Miller* is less an optimistic account of youth than it is a very dark account of adults. If the horrible crimes of teenagers can sometimes be false alarms, the horrible crimes of adults really are signs that they are simply too far gone to merit inclusion in society. (The *Miller* dissenters share this same dark view of adults, except that they think it equally applies to teenagers.)

Scholars have observed the sharp distinction in the way that Eighth Amendment case law treats juveniles and adults.<sup>248</sup> Yet they have generally interpreted (or criticized) this distinction as an unfortunate inconsistency within the case law, which provides different constitutional rules for juveniles and adults, creating a “two-track” Eighth Amendment.<sup>249</sup> Or they have debated the extent to which this distinction corresponds with some “true” biological reality about teenagers as compared to adults. The two-track set of rules makes sense if both tracks are understood to flow from the singular, overarching logic of carceral proceduralism: harsh imprisonment is generally constitutional, but should be procedurally regulated at the outer

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<sup>246</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *id.* at 490 (Breyer, J., concurring) (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

<sup>247</sup> *Id.* at 471 (majority opinion) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

<sup>248</sup> See, e.g., Berry, *supra* note 28, at 69 (noting that the Court has only recognized “narrow exceptions to states’ punishment power”); Stinneford, *supra* note 15, at 473 (“Rules governing adult imprisonment are driven by a desire to avoid interference with legislative power, while rules governing death penalty and juvenile life imprisonment cases are driven by a desire to limit punishment practices the Supreme Court considers pernicious . . .”).

<sup>249</sup> See, e.g., Stinneford, *supra* note 15, at 442–43 (describing Eighth Amendment doctrine as reflecting opposite presumptions that govern cases depending on their category, which he conceptualizes as “implementation rules”); cf. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1147 (2009) (similarly characterizing the Court’s jurisprudence as proceeding along different tracks, but identifying the dividing line as between capital and non-capital cases).

bounds. In *Graham, Miller, and Montgomery*, the construct of adolescence provides those bounds, because it introduces procedural uncertainty into the equation. Adolescents are not yet who they will later be, so unlike with adults, it is harder to know if they “deserve” punishments like LWOP; additional procedures are needed to avoid the risk of error.

*B. The Danger of Adolescents for Carceral Conservatism*

From the perspective of carceral conservatism, imprisonment may sometimes be the proper response to certain acts thought to signal a person’s dangerousness or inherently “criminal” nature, regardless of the individual attributes of the person who committed the acts—such as their age. Accordingly, it is not surprising that the dissenting Justices largely reject the constitutional significance of the differences between adolescents and adults.<sup>250</sup> Indeed, it is Justice Thomas, writing in dissent, who most explicitly recognizes the majority’s debt to G. Stanley Hall. Justice Thomas questions not only the constitutional status of adolescence but also the concept’s empirical basis. In his *Graham* dissent, to support the proposition that most teenagers can perform “adult-like moral reasoning” and thus should be held morally accountable in the same way as adults, Justice Thomas cites a pop-psychology book entitled *The Case Against Adolescence*.<sup>251</sup> Written by psychologist Robert Epstein, this book is explicitly framed as a debunking of G. Stanley Hall. Hall “didn’t create adolescence,” Epstein has written, “but he certainly reified it, claiming that the teen turmoil he saw at the turn of the twentieth century was a *necessary* feature of the teen years.”<sup>252</sup> Epstein argues that Hall’s view of adolescence, based on “faulty” and “discredited” understandings of biology, should be abandoned and that teenagers should instead be given “serious doses of real responsibility.” This argument is encapsulated in the book’s subtitle (not reproduced in the Supreme Court opinion): *Rediscovering the Adult in Every Teen*.<sup>253</sup> Epstein’s personal website includes the following endorsement by former speaker of the house Newt

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<sup>250</sup> Lerner offers a scholarly version of this argument, suggesting that in fact the modern tendency to insulate adolescents from full moral responsibility is a “self-fulfilling prophecy” that creates irresponsible teenagers. Like Justice Thomas, Lerner draws partly on Epstein, as well as on the writings of James Q. Wilson. See Lerner, *supra* note 85, at 1604 n.172, 1609.

<sup>251</sup> See *Graham v. Florida*, 560 U.S. 48, 118 (2010) (Thomas, J., dissenting) (citing ROBERT EPSTEIN, *THE CASE AGAINST ADOLESCENCE: REDISCOVERING THE ADULT IN EVERY TEEN* 171 (2007)).

<sup>252</sup> ROBERT EPSTEIN, *TEEN 2.0: SAVING OUR CHILDREN AND FAMILIES FROM THE TORMENT OF ADOLESCENCE* 73 (2010).

<sup>253</sup> EPSTEIN, *supra* note 251.

Gingrich: “Adolescence is a social experiment that has failed.”<sup>254</sup>

Yet if the carceral conservative perspective rejects adolescence as a social and political project intended to insulate youth from responsibility, it readily characterizes youth in categorical terms in other ways. For all its oddities, Hall’s view of adolescence was ultimately optimistic—with the right institutions and policies in place, he thought that teenagers could lead the way to a more civilized world<sup>255</sup>—but of course, Americans have also historically projected their anxieties and fears about modern life onto teenagers, from the 1950s wave of political investigations into “juvenile delinquency” through the “superpredator” panic of the 1990s.<sup>256</sup> Perhaps the most important influence upon the carceral conservative conception of youth as an especially dangerous group were the racialized anxieties of the 1960s, when policymakers—across the partisan political spectrum, notably—began to worry about a seemingly endemic “urban crisis.”<sup>257</sup> In truth, African-American children had never enjoyed the same presumptions of innocence and potential in American culture that defined childhood and adolescence for other groups.<sup>258</sup> But in the postwar decades, the policy discourse of “crime” became intertwined with anxieties about urban decline. Politicians worried about how to manage young, unemployed, African-American men in the nation’s deindustrializing cities, who became the public face of the political concept of “crime”—crime as politicians used the word, not as an individual noun denoting a particular act of wrongdoing, but as a collective shorthand denoting an amorphous miasma of violence and disorder that permeated the postwar American

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<sup>254</sup> See *Adolescence & Adulthood*, DREPSTEIN.COM, <http://drobertepstein.com/index.php/adolescence> (last visited Nov. 12, 2018).

<sup>255</sup> See BAXTER, *supra* note 225, at 62–63 (noting the “rehabilitative quality” in Hall’s theory, which posits that “if a correct path of development is pursued” during adolescence, then both individual adolescents and the human race will progress in a beneficial direction).

<sup>256</sup> See generally JAMES GILBERT, *A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S* (1988); DiIulio, *supra* note 192. Baxter observes that even Hall’s concept of adolescence was, from its emergence, “closely tied to fears about juvenile delinquency,” and thus was double-edged, conveying both ideal hopes for young people but also “connotations of savagery and barbarity.” BAXTER, *supra* note 225, at 15. Hall worried extensively about juvenile crime. See *id.* at 65–66.

<sup>257</sup> See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 4 (1996) (summarizing competing explanations over the decades for “persistent, concentrated, racialized poverty” in deindustrializing inner cities).

<sup>258</sup> See TERA EVA AGYEPONG, *THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO’S JUVENILE JUSTICE SYSTEM, 1899–1945*, at 3–6 (2018) (arguing that the rehabilitative discourse that animated the juvenile courts movement was primarily intended to benefit poor white and European immigrant children, whereas black children were not necessarily viewed as innocent and vulnerable in the same way).

city.<sup>259</sup> Beginning with the Johnson Administration's declaration of "War on Crime" and continuing through the Nixon and Reagan regimes, the federal government provided new forms of criminal justice funding and ideological support that encouraged local and state governments, in turn, to engage in an unprecedented campaign of surveillance, policing, arrest, and punishment of urban youth, laying the foundations for the phenomenon of mass incarceration that continues today.<sup>260</sup>

Tough-on-crime politics is sometimes framed in legal scholarship as an understandable if regrettable excess in response to a preceding uptick in youth crime.<sup>261</sup> New historical scholarship, drawing upon research into the decision-makers' archives, tends instead to describe both the postwar punitive turn and the urban disorder to which it responded as produced in tandem, by distorted patterns of public investment and disinvestment in troubled communities.<sup>262</sup> Policymakers began from the premise that youth, and especially urban minority youth, constituted dangers to be managed rather than children with potential to be cultivated. This perspective resonates with contemporaneous criticisms made by some juvenile justice scholars even in the midst of the twentieth century's successive crime panics. Urban minority youth, in Barry Feld's description, became defined as "bad kids" who required punishment, not social welfare programs.<sup>263</sup> As Franklin Zimring wrote with reference to the later panic of the 1990s, but with resonance for understanding earlier moments of panic as well, discussions about youth violence have had a tendency to devolve into

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<sup>259</sup> See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

<sup>260</sup> See generally *id.* at 1–4 (summarizing this progression).

<sup>261</sup> See, e.g., Andrew Koppelman, *American Evil: A Response to Kleinfeld on Punishment*, 50 ARIZ. ST. L.J. 179, 188 (2018) ("American criminal justice's harshness began as a response to a real problem: the spike in crime . . ."). But see Thompson, *supra* note 36, at 708–711 (questioning this standard account).

<sup>262</sup> See generally HINTON, *supra* note 259. For earlier antecedents, see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010). For a careful attempt at the height of the tough-on-crime 1990s to distinguish between perception and reality in the "youth violence epidemic," see FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 31–48 (1998). Zimring found "no unitary trend" in youth arrest rates (with reported increases for some categories of offenses attributable to changing police reporting standards). There was a sharp increase in youth arrests for homicide between the mid-1980s and early 1990s, but he attributed this not to a new and uniquely vicious breed of youth, but rather to an increase in gun violence. "Knives are universally available," he noted, but "the rate of killings with knives remained stable," suggesting that there was some change in the use or availability of guns, not a general uptick in "destructive intentions." *Id.* at 37–38. Without wading into the empirical debate here, I note this study only to point out that even at the height of the 1990s panic about youth crime the evidentiary basis for these policy changes was debated.

<sup>263</sup> Feld, *supra* note 85, at 6–8.



“fatalistic determinism,” with certain categories of youth all but written off as inevitably destined for criminality. This type of fatalism could then become an “excuse for disinvestment in urban youth development,” “blaming the toddler” today for crimes he may commit tomorrow rather than investing in his education and environment, and thus making predictions of delinquency self-fulfilling.<sup>264</sup>

One consequence of the “War on Crime” paradigm in postwar American social policy was to roll back many of the juvenile justice reforms introduced in the Progressive Era under the sway of Hall’s model of adolescence—such as separate juvenile courts and an emphasis on rehabilitation over punishment. Waves of punitive lawmaking targeting youth swept the nation first in the 1970s, although with relatively “modest” impact in most states, and then again in the 1990s, with more lasting and wide-reaching effects.<sup>265</sup> By the mid-1990s, policymakers described urban, primarily African-American and Latino teenagers as an essentially predatory class that could not be reformed, but could only be contained through prolonged incarceration.<sup>266</sup> In the infamous article that introduced the term “super-predators” to political discourse, John DiIulio confessed his own fear of teenage boys who had grown up in what he called “moral poverty,” “surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings,” and who now had “absolutely no respect for human life.”<sup>267</sup> DiIulio held out hope that future inner-city children could be spared this fate through expanded public investment in religion. But for those already in their teens, he lamented, it was already too late: “In deference to public safety, we will have little choice but to pursue genuine get-tough law-enforcement

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<sup>264</sup> ZIMRING, *supra* note 262, at 64; *see also id.* at 195 (“The largest failure of perspective in the youth crime panic . . . was a refusal to comprehend the multiple potentials and the contingency of a generation of young children not yet starting school when the bloodbath predictions were made.”). For a compassionate study of the feelings of stigma and shame that African-American and Latino youth experience when even their ordinary day-to-day behaviors are defined as inherently threatening and potentially criminal, see VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011). Rios agrees with previous scholars that criminalization can become a self-fulfilling “destiny,” but also emphasizes youth agency and resistance, finding that many develop a new political consciousness in response to their treatment; he argues for policy approaches that seek to encourage, educate, and support young people, rather than label or punish them. *Id.* at xv, 158.

<sup>265</sup> ZIMRING, *supra* note 262, at 4.

<sup>266</sup> *See id.* at 4–6 (collecting quotations and citations from the 1990s in which policymakers used the term “super-predators” and expressed fears of a “coming storm of violent youth crime”).

<sup>267</sup> DiIulio, *supra* note 192.

strategies against the super-predators,” DiIulio concluded.<sup>268</sup> “No one in academia is a bigger fan of incarceration than I am.”<sup>269</sup> In this hysterical discursive milieu, state after state rewrote their criminal and sentencing laws so that teenagers could be tried “as adults,” in regular criminal court rather than in specialized juvenile courts, and punished more harshly, often sent to regular prisons rather than specialized treatment facilities.<sup>270</sup> Thus, the phenomenon of “juvenile LWOP” that the Court, in recent years, has been asked to evaluate.<sup>271</sup>

This history is familiar to scholars of juvenile justice, but rehearsing it here is important because when juxtaposed with the dissenting opinions in the juvenile LWOP cases, the rhetorical resonances become unmistakable. Among conservatives in the political branches of government, the “tough-on-crime” stance is no longer universal; an alliance of fiscal conservatives, evangelical Christians, and libertarians now calls for criminal justice reform to mitigate the fiscal excesses and moral harms of mass incarceration.<sup>272</sup> DiIulio himself has since disavowed his “superpredator” writings, and many other authors of the late-twentieth-century prison boom have since expressed regrets.<sup>273</sup> But on the Roberts Court, 1990s-style carceral conservatism remains a significant lens for assessing questions of crime and punishment.

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> See ZIMRING, *supra* note 262, at xi (describing how in the 1990s, “virtually every state . . . changed the laws designed to cope with violence by offenders under 18” because of the perception that youth violence had become “a national emergency”); *id.* at 11–15 (summarizing the most common forms of legislation used by states in the 1990s to increase penalties for youth crime). At the same time, states also made it possible to impose harsher punishments within the juvenile justice system itself, blurring the distinction between the juvenile and adult criminal courts. See *id.* at 14–15; see also FELD, *supra* note 85, at 3.

<sup>271</sup> See generally DRINAN, *supra* note 18, at 15–16 (describing how 200,000 youth are charged in adult court each year and thus become potentially subject to extreme sentences like LWOP).

<sup>272</sup> See, e.g., *The Conservative Case for Reform*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform/> (last visited Nov. 12, 2018) (noting that “the corrections system must harness the power of charities, faith-based groups, and communities to reform offenders and preserve families” while addressing “runaway spending on prisons”).

<sup>273</sup> See Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> (“DiIulio . . . conceded today that he wished he had never become the 1990’s intellectual pillar for putting violent juveniles in prison and condemning them as ‘superpredators.’”); see also Mark L. Earley & Kathryn Wiley, *The New Frontier of Public Safety*, 22 STAN. L. & POL’Y REV. 343, 343–44 (2011) (expressing regret for support for the policies that contributed to mass incarceration during one of the author’s tenures as a Virginia State Senator and Attorney General).

It is not that the dissenting Justices do not recognize a distinction between children and adults; rather, they do not consider adolescents *who commit crimes* as having any continuing moral claim to the category of child-ness. In each of the juvenile LWOP cases, the dissenting Justices lampoon the majority's insistence on calling the defendants children, deploying scare quotes and implied judgments of absurdity to hammer home this point. "The majority," notes Justice Scalia, "presumably regards any person one day short of voting age as a 'child.'"<sup>274</sup> The majority, writes Justice Alito seemingly in a state of shock, thinks that "a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child.'"<sup>275</sup> Child-ness, for Justice Alito, seems not to be a chronological or biological fact about a person, but rather a qualitative signifier that connotes something like innocence or value to society.<sup>276</sup> By definition, committing horrific crimes removes one from that category, disproving that one has the necessary characteristics for the "child" honorific. (In the majority's view, in contrast, child-ness is simply a chronological and biological status, and by definition, when someone still has that status, heightened procedures should attend any decision to write them off forever.) Later Justice Alito makes the point again, more explicitly: "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."<sup>277</sup> If forced to select a single word to identify these people, Justice Alito would certainly not choose the word "child"—in his view, a misleading euphemism. But, it seems, he also would not choose the word "man," or "adult," although he might think those a slightly better fit. He would choose the word "murderer."

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<sup>274</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 744 n.2 (2016) (Scalia, J., dissenting).

<sup>275</sup> *Miller v. Alabama*, 567 U.S. 460, 510 (2012) (Alito, J., dissenting).

<sup>276</sup> Significantly, Justice Alito's rhetoric here echoes a long tradition of American discourse in which black children, notwithstanding their age, were not bestowed with the cultural attributes of "childhood" status. See, e.g., AGYEPONG, *supra* note 258, at 13–14 (describing how, in the Progressive Era, childhood was idealized as a time of innocence and purity, yet black children were instead portrayed in popular culture as "wild," "savage-like," and impervious to physical pain). Such tropes have proven remarkably durable in the American mind. Today, psychological studies continue to document that black youth tend to be misperceived as older than they actually are and viewed as less innocent than their white counterparts of the same age. See, e.g., Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014). I do not mean to suggest that Justice Alito consciously means to invoke or endorse the view that children differ by race, but rather to highlight the danger of rhetoric that opens the door for the possibility that some children are not "really" children in a society with a history of selectively dehumanizing particular groups.

<sup>277</sup> *Miller*, 567 U.S. at 513.

### C. *Where To?*

Because they rely so heavily on an essentialized distinction between youth and adults, the juvenile LWOP cases could have the effect of entrenching the constitutional status of LWOP and other extreme prison sentences for adults. Particularly now that Justice Kennedy has retired, it seems likely that a majority of the Roberts Court in future cases will seek to limit rather than expand upon *Miller*. If so, the language in *Miller* sharply distinguishing between youth and adults could form the basis for subsequent decisions cabinining the (already limited) holdings of *Graham* and *Miller* to juveniles and juveniles only.

Alternatively, it is theoretically possible that *Miller* will instead pave the way towards incremental changes in Eighth Amendment jurisprudence as it applies to adults, constituting an opening wedge towards more robust constitutional review of criminal sentencing overall. Although *Miller* is replete with asides that seem to imply adults are fixed, those asides could be discarded as dicta in future cases. Justice Kagan might, with apologies to Justice Cardozo, re-read her *Miller* opinion “with due contrition” one day, and notice “all sorts of cracks and crevices and loopholes” that she did not intend to include.<sup>278</sup> Prohibitions on birth control, after all, were first invalidated in *Griswold v. Connecticut* as a violation of marital privacy, in an opinion replete with judicial praise for the institution of marriage.<sup>279</sup> In light of *Griswold*'s rhetoric, one might have predicted at the time that the Court would never extend the right to contraception beyond the distinctive setting of the marital bedroom. And yet, seven years later the Court relied on *Griswold* in overturning a contraception ban as applied to unmarried individuals.<sup>280</sup> Moreover, if the Court actually takes neuroscience seriously, then perhaps changing scientific understandings of young adulthood will ultimately inform the Court's analysis. Recent findings in neuroscience suggest that some brain functions continue developing through the mid-twenties and perhaps beyond.<sup>281</sup> If so, then perhaps the special

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<sup>278</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 29–30 (1921).

<sup>279</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (extolling marriage as “sacred”).

<sup>280</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.”); see also Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 135 (2015) (tracing this doctrinal trajectory).

<sup>281</sup> See, e.g., Richard Alleyne, *Brain Only Fully ‘Matures’ in Middle Age, Claims Neuroscientist*, TELEGRAPH (Dec. 16, 2010, 7:00 AM), <http://www.telegraph.co.uk/news/health/news/8204782/Brain-only-fully-matures-in-middle-age-claims-neuroscientist.html> (“Brain scans have shown that the prefrontal cortex . . . continues to change shape in your 30s and 40s.”); *Brain Maturity Extends Well Beyond Teen*

considerations that *Graham* and *Miller* require for juveniles could be extended to adults,<sup>282</sup> or at least to categories of adult defendants who can, exploiting the Court's apparent receptivity to neuroscience, offer evidence that they suffer from a particular mental illness or addiction that makes them arguably analogous to adolescents.<sup>283</sup>

Still, even this possibility of incremental reform is limited in the face of mass incarceration. Even if the Court might gradually come to define LWOP as grossly disproportionate for certain types of adults (or for certain types of crimes), or to impose more individualized procedural requirements on extremely harsh prison sentences, regulating imprisonment only for special groups or at its harshest extremes is unlikely to diminish the overall scale of the carceral state. Few would argue, then, that *Graham* and *Miller* provide resources for a wholesale assault on mass incarceration.<sup>284</sup> As John Stinneford accurately notes, the Eighth Amendment as currently interpreted by the Court effectively leaves “the vast majority of

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*Years*, NPR (Oct. 10, 2011, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=141164708> (“[E]merging science about brain development suggests that most people don’t reach full maturity until the age 25.”); see also Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 642 (2016) (explaining that development psychologists and neuroscientists have established that brain development continues “well beyond the age of majority”); Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 *WIS. L. REV.* (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3138750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138750) (noting that the prefrontal cortex continues to develop into the early 20s).

<sup>282</sup> For examples of scholarly arguments in favor of extending *Miller* to adults, see, for example, Berry, *supra* note 101, at 347 (noting that “adults are no less human than juveniles are” and that some are likely to prove “redeemable”); Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 *MO. L. REV.* 1087, 1138 (2013) (“[T]he Court’s approach leaves room for lower courts to begin the process of extending . . . *Miller* and developing principled limitations on the imposition of LWOP on adult offenders.”); Smith & Robinson, *supra* note 28, at 472–74 (arguing that *Miller* should be extended to prohibit LWOP for nonviolent drug offenses); cf. Frank O. Bowman, III, *Juvenile Lifers and Judicial Overreach: A Curmudgeonly Meditation on Miller v. Alabama*, 78 *MO. L. REV.* 1015, 1034, 1038 (2013) (arguing—and ultimately lamenting—that the rationale of *Miller* cannot logically be cabined to juveniles or LWOP). *But see* Gertner, *supra* note 23, at 1043 (expressing doubt that *Miller* portends any broader constitutional right to proportional sentencing).

<sup>283</sup> See Gertner, *supra* note 23, at 1051 & n.84 (suggesting as possible examples those with “a particular diagnosis of mental impairment” that have “a distinctive fMRI signature,” or addicts with adolescent-like impulsivity and susceptibility to treatment; but noting that these analogies are necessarily “imperfect”).

<sup>284</sup> For instance, Smith and Robinson argue for readings of the Eighth Amendment to prohibit LWOP for juvenile homicide offenders, LWOP for non-violent drug offenses, and the death penalty. Smith & Robinson, *supra* note 28, at 469–79. Although I am broadly sympathetic to what I take to be their policy views on each of these subjects, I am confused about their implication that such doctrinal shifts would “reinvent” the Eighth Amendment into a robust protection against carceral excess. The vast majority of prisoners do not fall into any of these categories.

offenders . . . unprotected,”<sup>285</sup> and the juvenile LWOP cases seem unlikely to change that reality. This lack of protection makes sense, however, when the jurisprudence is understood as reflecting an underlying principle that punishment itself is not inherently problematic or suspect, only that it may require special procedural regulation for particular groups or exceptional categories. This view requires some default group for whom the Eighth Amendment imposes no real limits on legislative sentencing determinations or the length of imprisonment. In *Graham* and *Miller*, that default group is essentially “all adults.” Perhaps that group will become chipped away at over time, but the majority of adults will presumably continue to fall into it.

#### IV. IMAGINING CONSTITUTIONAL ALTERNATIVES

Highlighting the shared constitutional equanimity about mass imprisonment that unites the majority and dissenting opinions in the juvenile LWOP cases brings into relief what is missing in Eighth Amendment jurisprudence. At present, no member of the Roberts Court has articulated a reading of the Cruel and Unusual Punishments Clause mediated through a perspective that might be called “carceral skepticism.” Justice Sotomayor’s expressions of concern about the antidemocratic tendencies of the “carceral state” in her Fourth Amendment jurisprudence perhaps come closest. What might it mean to read the Eighth Amendment in such a way? Offered in the spirit of a thought experiment, this Part briefly surveys some bodies of thought that might offer conceptual resources for developing a “carceral skeptical” reading of the Eighth Amendment: prison abolitionism, comparative constitutional law, and even originalism.

This Part is offered primarily to bring into relief the limits of the current Court’s position. To be sure, the current Court is unlikely to adopt anything remotely like a prison abolitionist perspective any time soon. But the exercise of imagining alternatives can be a helpful way of denaturalizing the status quo. To draw again upon the equal protection scholarship on “mediating principles,” the Court’s purposive commitments can change over time in the course of popular constitutional contestation. In Pamela Karlan and Sam Issacharoff’s conception, mediating principles do not solely come from the Court, but are sometimes arrived at “democratically,”

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<sup>285</sup> Stinneford, *supra* note 15, at 494. Berry suggests “a constitutional framework for curbing mass incarceration,” although it is neither clear how many offenders the proposed framework would help nor how exactly it could be connected to existing jurisprudence. See Berry, *supra* note 28, at 67, 69–70 (noting that the Supreme Court has failed to establish “broader guiding principles delineating the boundary between acceptable and impermissible punishments”).

through “bottom-up political negotiation.”<sup>286</sup> When that happens, the choice for the Court is whether to reject or accept the democratically developed mediating principle.<sup>287</sup> Perhaps the rising tide of activism against mass incarceration will one day put the Court to that choice.

#### A. *Prison Abolitionism*

Prison abolitionism is best understood as an aspirational long-term vision around which to orient political organizing, not a literal call for the immediate or indiscriminate shuttering of prisons.<sup>288</sup> The prison abolition movement seeks to imagine, develop, and institute alternative ways of preventing and responding to violence and interpersonal harm that do not rely on “punishment and imprisonment.”<sup>289</sup> Ultimately, this movement envisions a future in which “safety and security will not be premised on violence or the threat of violence” at the hands of the state, but rather upon “a collective commitment to guaranteeing the survival and care of all peoples.”<sup>290</sup> Grounded in frank recognition of the moral travesty of the past forty years of mass incarceration, the form of abolition called for by this movement “may be understood . . . as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.”<sup>291</sup> Despite growing concern about mass incarceration and abusive policing within the legal academy, as Allegra McLeod points out, legal scholars and jurists tend to consider genuinely abolitionist solutions to be “generally unfathomable.”<sup>292</sup> Instead, reform calls tend to target only “the occasional, peripheral excesses of imprisonment”—which is, of course, an apt description of the juvenile LWOP cases, which could be read to construct JLWOP as a “peripheral excess” of an otherwise sound system—rather than taking on “the core

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<sup>286</sup> Issacharoff & Karlan, *supra* note 51, at 39.

<sup>287</sup> *Id.*

<sup>288</sup> See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1167–68 (2015) (defining prison abolitionism as “an aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls”).

<sup>289</sup> *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> (last visited Nov. 12, 2018); see also McLeod, *supra* note 288, at 1167–68 (explaining that the prison abolition movement “focuse[s] on structural reform[s] rather than individualized criminal targeting” with the end goal of rendering prisons obsolete).

<sup>290</sup> *INCITE!-Critical Resistance Statement*, INCITE!, <https://incite-national.org/incite-critical-resistance-statement/> (last visited Nov. 12, 2018)

<sup>291</sup> McLeod, *supra* note 288, at 1161.

<sup>292</sup> *Id.* at 1160.

operations of criminal law enforcement.”<sup>293</sup>

In an alternative universe where a prison abolitionist could be confirmed to the Supreme Court, how might such a jurist read the Eighth Amendment? When assessing the legitimacy of imprisonment, an abolitionist jurist would take stock not only of the theoretical justifications for punishment but also of the actual history of “the dehumanizing nature and racially subordinating legacy of criminal punishment in American society.”<sup>294</sup> Presumably, she would therefore begin from the premise that imprisonment has demonstrated itself suspect. As McLeod writes, an abolitionist ethic would move beyond “simply eliminating incarceration for nonviolent, nonserious, nonfelony convictions,” which would make little dent in the prison population, and consider that “[e]ven people convicted of serious, violent felonies . . . should be able to live their lives outside of cages.”<sup>295</sup> Thus, an abolitionist reading of the Eighth Amendment would surely reject the premise that anyone can be presumed “incurable,” and thus require some meaningful possibility of eventual release for every prisoner. (Such a position may seem outlandish from the American perspective, but it is the norm in Europe.)<sup>296</sup> An abolitionist jurist would also presumably be far more receptive than is the current Court to the remedy of actually releasing people from prison.<sup>297</sup> There may be no straightforward path from current doctrine to an abolitionist Eighth Amendment. Yet it is helpful to contrast this vision of constitutional jurisprudence with our current one, because it illuminates the extent to which imprisonment even for very long terms is generally presumed

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<sup>293</sup> *Id.* at 1161.

<sup>294</sup> *Id.* at 1235.

<sup>295</sup> *Id.* at 1170; *see also* GOTTSCHALK, *supra* note 97, at 2.

<sup>296</sup> *See* Kleinfeld, *supra* note 18, at 955 (discussing how European punishment regimes generally embody the premise that people are not incurable).

<sup>297</sup> For an example of a doctrinal argument that sounds in this vein (without characterizing itself as abolitionist), *see generally* Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575 (2012) (arguing for more expansive use of release from prison as a remedy for constitutional violations, rather than more limited remedies such as resentencing or monetary damages). In a more reformist vein, *see generally* Berry, *supra* note 28 (arguing for more rigorous Eighth Amendment scrutiny of, *inter alia*, adult LWOP, mandatory minimum sentences, and sentences over ten years for non-violent offenses, as a “framework” for “curbing mass incarceration”). For a new Eighth Amendment framework “grounded in our political morality,” *see* Sigler, *supra* note 65, at 406. Another possibility is suggested by scholarly proposals to incorporate “strict scrutiny” into Eighth Amendment jurisprudence. *See* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 854 (2013); *see also* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 NYU L. REV. 781, 784 (1994) (arguing that “the Court should apply strict scrutiny when evaluating criminal laws imposing imprisonment as a penalty”).



legitimate by all wings of the court.

### *B. International Comparisons*

Comparative constitutional law also provides resources for imagining an alternative Eighth Amendment jurisprudence that would provide a more substantial challenge to mass imprisonment. The use of international comparisons to inform United States constitutional law is, of course, a disputed interpretive practice.<sup>298</sup> Nevertheless, it bears emphasizing that the Court's thin reading of the Eighth Amendment contributes to the United States' status as an international outlier when it comes to punishment. Surely one factor enabling (though not, of course, determining) the United States' extremely punitive approach to governance, and mass incarceration more specifically, is the absence of meaningful constitutional review of prison sentences.<sup>299</sup>

The relative weakness of the Eighth Amendment is somewhat exceptional, compared to analogous provisions in other legal traditions. Of course, one of the most exceptional features of the United States Constitution, as it relates to punishment, is that it does not categorically prohibit the death penalty. In contrast, the constitutions of virtually all wealthy industrialized democracies (with the exception of the United States and Japan) contain express and unequivocal constitutional prohibitions of capital punishment.<sup>300</sup> But the Supreme Court's refusal to read the Eighth

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<sup>298</sup> See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109–10 (2005).

<sup>299</sup> The causes of the “punitive turn” are the subject of a vast and growing literature spanning sociology, history, political science, and law. For a comparative account that emphasizes cultural differences between Europe and the United States, see generally WHITMAN, *supra* note 98. A growing historical literature tends to emphasize the postwar politics of race, urban crisis, and backlash against the New Deal welfare state. See *e.g.*, HINTON, *supra* note 259; KOHLER-HAUSSMAN, *supra* note 201. Of course, there is something of a chicken-egg quality to my perhaps heroic attempt in this Article to isolate constitutional doctrine from the other factors driving U.S. punitiveness. If one accepts the arguments of Michael Klarman and others that the Supreme Court has functioned historically as a basically majoritarian institution, then perhaps the lack of constitutional limits was itself a function of the punitive turn in politics. See KLARMAN, *supra* note 84. But see EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (2013) (emphasizing the contingency of the Court's near-brush with abolishing the death penalty in the 1970s).

<sup>300</sup> *E.g.*, 1958 CONST. art. 66-1 (Fr.) (“No one shall be sentenced to death.”); REGERINGSFORMEN [RF] [CONSTITUTION] 2:4 (Swed.) (“There shall be no capital punishment.”); CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18 1999, title 2, ch. 1, art. 10, para. 1 (Switz.) (“Every person has a right to life. The death penalty is prohibited.”). Some countries retain the death penalty for treason but effectively prohibit capital punishment for ordinary, domestic crime. See, *e.g.*, 1993 CONST. ch. VIII, art. 140 (Peru) (“The death penalty shall only be applied for in offense of treason in wartime

Amendment as a meaningful limit on LWOP—outside, thus far, of the juvenile context—further contributes to the United States’ outlier status. In *Harmelin v. Michigan* (1991), a fractured majority of the Court affirmed a mandatory LWOP sentence for cocaine possession.<sup>301</sup> In contrast, the European Court of Human Rights (the “ECHR”) has outlawed LWOP sentences altogether as a violation of the European Convention on Human Rights.<sup>302</sup> Applying its own precedents barring “grossly disproportionate” sentences and favoring rehabilitation, the ECHR held that all prison sentences must provide some opportunity for “review” to determine whether “such progress towards rehabilitation has been made . . . that continued detention can no longer be justified on legitimate penological grounds.”<sup>303</sup>

Canadian constitutional law provides additional resources for imagining alternatives. In a provision that closely echoes the Eighth Amendment, Canada’s Charter guarantees “the right not to be subjected to any cruel and unusual treatment or punishment.”<sup>304</sup> Yet unlike the United States Supreme Court, the Canadian Supreme Court—as Vicki Jackson describes—has infused real meaning into this language, leveraging the provision to engage in rigorous proportionality review of criminal sentences.<sup>305</sup> For example, the Supreme Court of Canada invalidated a seven-year mandatory minimum for narcotics distribution offenses as grossly disproportionate.<sup>306</sup> Of course, a seven-year sentence frankly appears quite lenient in comparison to some of the sentences that the United States Supreme Court has upheld against Eighth Amendment challenges.

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and of terrorism . . .”). The Constitute Project’s online search tool yields 75 constitutions with a “prohibition of capital punishment” provision. *Explore Constitutions*, CONSTITUTE PROJECT [https://www.constituteproject.org/search?lang=en&key=cappun&status=in\\_force](https://www.constituteproject.org/search?lang=en&key=cappun&status=in_force) (last visited Nov. 12, 2018).

<sup>301</sup> *Harmelin v. Michigan*, 501 U.S. 957, 995–96 (1991).

<sup>302</sup> *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 44.

<sup>303</sup> *Id.* Exemplifying the disparity between European and American punishment practices, that decision only directly affected one country, because every other European country had already abolished LWOP legislatively. And that country was the United Kingdom, which had only forty-nine prisoners serving LWOP. Dominic Casciani, *Killers’ Life Terms ‘Breach Their Human Rights,’* BBC NEWS (July 9, 2013), <https://www.bbc.com/news/uk-23230419>. As of 2009, there were more than 41,000 prisoners serving LWOP in the United States. Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, SENTENCING PROJECT (July 2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf>.

<sup>304</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 12 (U.K.).

<sup>305</sup> Jackson, *supra* note 71, at 3186–87.

<sup>306</sup> *R. v. Smith*, [1987] S.C.R. 1045 (Can.); *see also* Jackson, *supra* note 71, at 3186–87.

These comparisons are not intended to suggest that these European and Canadian decisions have necessarily yielded transformative practical effects for punishment practices on the ground. To the contrary, advocates report disappointment that these decisions have subsequently been interpreted and enforced in relatively limited ways.<sup>307</sup> To be sure, were the United States to move toward similar doctrine there would still remain the separate question of how to translate the doctrine into meaningful practical change. Nevertheless, even if purely at the conceptual level, comparative constitutional law provides examples of more robust ways of defining the constitutional limitations on punishment.

*C. Towards an Anti-Carceral Originalism?*

Originalists might object that a “carceral skeptic” reading of the Cruel and Unusual Punishments Clause patently or perhaps even laughably contravenes the clause’s original meaning. Clearly, the Eighth Amendment contemplates the continued existence of punishment, of which imprisonment is a well-known form. However, a jurisprudence oriented in skepticism toward extremely harsh prison sentences would not necessarily be incompatible with originalism. One possible path to an anti-carceral originalism, although admittedly somewhat far afield from the current thrust of originalist scholarship and doctrine, would be to reinfuse Eighth Amendment interpretation with a more holistic appreciation for the Framers’ historical and ideological context. American Enlightenment thinkers shared a fundamental belief that “the present should be better than the past and the future better than the present,” and that “reason and empirical data” should guide the path of progress, “rather than inherited tradition.”<sup>308</sup> Legal historian Erin Braatz argues that there is no meaningful way to interpret the Eighth Amendment except within this late-eighteenth-century “milieu” of ferment and experimentation, including experimentation in the law and practice of punishment.<sup>309</sup> All of the framers admired Beccaria, the inaugurator of modern proportionality thinking; they all considered the ongoing project of moderating punishments to constitute one of the essential projects of “civilizing” progress; and they all agreed that

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<sup>307</sup> E-mail from Sharon Dolovich, Professor of Law, UCLA Sch. of Law, to Sara Mayeux Assistant Professor of Law, Vanderbilt Law Sch. (September 30, 2018, 6:02 PM) (on file with author). I thank Sharon Dolovich for suggesting this point and for sharing with me her impressions from conversations with British and Canadian colleagues.

<sup>308</sup> CAROLINE WINTERER, *AMERICAN ENLIGHTENMENTS: PURSUING HAPPINESS IN THE AGE OF REASON* 1–2 (2016).

<sup>309</sup> See generally Braatz, *supra* note 82.

it was not yet clear where this process of “civilizing” punishment might ultimately end.<sup>310</sup> The phrase “cruel and unusual” was itself intended to capture, Braatz argues, that ongoing dynamism, not to freeze constitutional limits on punishment in some static place.<sup>311</sup>

But even without going down that path, there is also fodder for a more anti-carceral reading of the Eighth Amendment in existing originalist scholarship. In fact, some of the leading scholarly originalist interpretations of the Cruel and Unusual Punishments Clause are already quite compatible with skepticism about the present-day United States’ historically anomalous use of imprisonment. For instance, John Stinneford makes an originalist argument that extremely long prison sentences for certain crimes might violate the Cruel and Unusual Punishments Clause because, in Stinneford’s view, the original meaning of “cruel” is “unjustly harsh”—without requiring any specific intent to cause pain—while “unusual” means “contrary to long usage.”<sup>312</sup> The Eighth Amendment thus prohibits, Stinneford argues, not only the revival of ancient forms of torture but also “cruel innovation in punishment.”<sup>313</sup> Applying this interpretation, Stinneford concludes, might render unconstitutional relatively novel components of the contemporary carceral state, such as long-term solitary confinement.<sup>314</sup>

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<sup>310</sup> *Id.* at 427, 429–30.

<sup>311</sup> *Id.* at 410 & n.18

<sup>312</sup> Stinneford, *Cruel*, *supra* note 82, at 445–47; *see also* Stinneford, *Unusual*, *supra* note 82, at 1745.

<sup>313</sup> Stinneford, *Cruel*, *supra* note 82, at 446–47.

<sup>314</sup> *Id.* at 502–03 & n.388; *see also id.* at 504–06 (discussing the harms of very long prison terms).

## CONCLUSION

This Article analyzes the judicial rhetoric in the Roberts Court's trio of juvenile LWOP cases in search of insight into the Justices' underlying assumptions about how the Constitution relates to the present crisis of mass incarceration. In *Graham*, *Miller*, and *Montgomery*, a slim majority of the Court reads the Eighth Amendment's Cruel and Unusual Punishments Clause to permit very long prison terms, subject to special procedural requirements for certain exceptional groups. Drawing on longstanding cultural tropes of adolescence as a time of flux, the Court constructs youth as the paradigmatic such group. This perspective might be called "carceral proceduralism." For the Justices in the majority in the juvenile LWOP cases, adolescents have uniquely (but transitorily) malleable personalities and thus cannot be sentenced to irrevocable forms of punishment without certain procedural safeguards, such as individualized sentencing determinations and regular parole hearings. The dissenting Justices in the juvenile LWOP cases—whose views could soon command a majority, given the retirement of Justice Kennedy—read the Eighth Amendment instead from a perspective that might be called "carceral conservatism." In this view, imprisonment is a positive good that promotes public safety, and courts should therefore read the Cruel and Unusual Punishments Clause narrowly, in order to avoid intruding upon the state prerogative to imprison.

What both wings of the Court share—at least on the evidence thus far—is a baseline assumption that adults (at least for purposes of constitutional analysis) can be assumed to have fixed characters, are potentially incorrigible, and thus can be subjected to permanent forms of punishment including life-without-parole. The archetypal adolescent that emerges from *Graham* and *Miller* is not necessarily incorrigible. The archetypal adult is potentially irredeemable, and thus can constitutionally be written off for all time.<sup>315</sup> Thus, the juvenile LWOP cases should not be misunderstood as harbingers of genuinely robust constitutional limits on punishment. Writing in dissent in *Miller*, Justice Alito describes the Constitution as a relatively weak source of limits on criminal punishment, opining that the Eighth Amendment "for the most part . . . leaves questions of sentencing policy to be determined by Congress and the state legislatures."<sup>316</sup> While Justice Alito accused the *Miller* majority of violating

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<sup>315</sup> For a provocative argument that this tendency in American criminal law renders it "evil," see Koppelman, *supra* note 261.

<sup>316</sup> *Miller v. Alabama*, 567 U.S. 460, 515 (2012) (Alito, J., dissenting).

this background rule, in fact *Miller* is perfectly consistent with the general principle that there are in the United States few meaningful constitutional limits on punishment. For critics of mass incarceration, that may be a frightening prospect.