Evolving Standards of Decency: A Study of Political Perversity

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> Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions.
>
> – Michel Foucault

American jurisprudence, even for juveniles, remains an imperfect but consistent killing machine, designed to imprison and eliminate some of this country's citizens, irrespective of age or criminal record, and often for political advantage. Several states' determination to imprison juveniles until they die, and the expectation that more states will follow, ignores the Supreme Court's insistence on adhering to those oft-quoted "evolving standards of decency". This article discusses how decency remains an elusive target in American penal policy and documents key barriers to its realization with a focus on life without the possibility of parole sentences.

THE CONSTITUTION: ALIVE OR DEAD?

In the United States, two distinct classes of scholars continue to exchange charges and insults with respect to how the Constitution should be interpreted, with important implications for the criminal justice system. On the right are the originalists, insisting that the Framers knew precisely what they were doing when they composed the document, including the mechanism for modifying it when necessary. The Constitution, so goes this version, is therefore carved in metaphorical stone and subject to no contemporary redaction in efforts to make it comport with a preconceived philosophy. Thus, for example, since the Constitution explicitly permits capital punishment in the due process clause of the Fourteenth Amendment, no judge or panel of judges can invalidate the death penalty per se on the basis of some moral epiphany. Only the amendment process can accomplish that goal.

The other school claims that the Framers intended the Constitution to be a "living document", that is, one subject to interpretation as society grew more complex. Again using the death penalty as an example, given the Fourteenth Amendment's imprimatur, the several states and the government are free to enact capital punishment statutes, yes, but are there limits on the types of crimes that make a defendant death eligible? Could property crimes merit a death sentence? What about rape?

The Constitution similarly does not address the intellectual capacity or the mental state of capital defendants. Originalism argues that any act not proscribed by the original document is thus permissible, which means that laws allowing the execution of mentally handicapped people cannot be invalidated by any tribunal. Those favouring a more flexible approach insist that it is both morally and legally wrong to execute a defendant who lacks the capacity either to discriminate between right and wrong or who demonstrates an essential disconnect with objective reality.

Prompting the ire of the originalists, the Supreme Court has addressed both questions and disposed of these two issues. Only homicide cases make a defendant death eligible and no longer can mentally disabled prisoners be executed.

LEGAL PRECEDENTS

The two sides have disagreed on constitutional interpretations for the duration of the Republic's life, with the originalists holding sway for most of that time. Beginning roughly fifty years ago, however, the Supreme Court began to tilt in the opposite direction, most notably with its decision in *Brown v. Board of Education*,[1] which reversed fifty-eight years of precedent with respect to "separate but equal" facilities for different races.[2] *Brown* and its progeny, however, were insufficient instruments for dismantling segregation in public schools. It took the National Guard's armed presence to enrol nine black students in Little Rock, Arkansas, in 1957, three years after the Court decreed it. The state's resistance to the Supreme Court's ruling derived from the originalist argument that the Constitution never mandated schools in which black children and white children learned together.

Social issues were not the only ones subjected to constitutional scrutiny. The famous Miranda warnings grew from an Arizona case in which the Supreme Court ruled that coerced confessions included a failure to inform a prisoner of his right to an attorney before being questioned.[3] The court based its judgment on the Fifth Amendment, which prohibits anyone from being forced to provide inculpatory evidence. The originalists were apoplectic, insisting that the Fifth Amendment, which indeed prohibits coerced confessions, never mentions advising any defendant of his or her right to an attorney, much less providing one at no cost. Certainly, the Sixth Amendment provides the right to counsel in any criminal proceeding, but,

so the originalists argue, nothing requires the police to inform a defendant of that right prior to interrogation. If such an admonition is not found in the Constitution, then it is perfectly legal for the police to engage in any subterfuge to get a defendant to confess.

The living document proponents responded by articulating the various means police can use to exert psychological pressure on suspects, including playing on a fundamental ignorance of the Fifth Amendment. Although beatings were not completely eliminated,[4] more subtle – and effective – means of persuasion come into play, all of which are designed to circumvent the suspect's right to advice of counsel.

The ongoing debate between the two sides set the stage for the exponential growth of prison populations in the United States in response to the courts' perceived interference in state governance, especially criminal laws and penalties. State legislators were swept into office during the 1970s by a meteoric rise in the national crime rate, followed closely by the tough-on-crime rhetoric heard in every subsequent campaign. The results were predictable: longer sentences, minimum mandatory sentences, more death sentences, more executions, and, of course, the birth and expansion of the for-profit prison industry.

This result was not, however, unexpected. As far back as 1948, J. Edgar Hoover, the director of the Federal Bureau of Investigation, planned for the "mass detention of political suspects in military stockades, a secret prison system for jailing American citizens, and the suspension of the writ of habeas corpus" (Baker, 2012, p. 24). One need look no farther than Guantanamo Bay, Cuba, and the indefinite incarceration of suspected terrorists, including American citizens, to realize that Hoover's plan reached fruition sixty-three years later.

Following a parallel course, United States carceral policies continue to be framed in economic terms or enacted for political advantage. By 2008 this country earned the distinction of having 2.3 million men and women behind bars, more than any other nation, according to data maintained by the International Center for Prison Studies at King's College, London. China, which is four times more populous than the United States, is a distant second, with 1.6 million people in prison (Liptak, 2008). The United States still places first in incarceration rates, with 716 people in prison or jail for every 100,000 in population (Walmsley, 2013, p. 1).

The pattern is also visible on a microcosmic scale. Louisiana is the prison capital of the world – the *world* – imprisoning more people per capita than

Iran or China, by factors of five and thirteen, respectively. Incarceration functions as a hidden economic engine in the state, in which most prisoners are confined in for-profit prisons. Obviously, these prisoners are no more than "inventory" for a business, which would go bankrupt without a constant supply of men and women (Chang, 2012).

The increase in the carceral population from 200,000 to 2.3 million in the past 30 years has lead to prison crowding and concomitantly placed a tremendous strain on state budgets. The tough-on-crime policies have created a growing underclass of ex-prisoners who are faced with burdens, such as disenfranchisement and restricted employment and housing possibilities, which effectively prohibit them from reentering society as productive men and women.

CREATING A PERMANENT UNDERCLASS

If the results of mass incarceration were predictable, so also was the reasoning that produced them. James Baldwin's (1955) insights relating to crime and punishment predated the explosive growth of prison as a social tool by twenty-five years, yet they remain just as valid, and disturbing, as they were then. Baldwin described the manner in which information regarding criminalized behavior is often manipulated or created to suit a predisposition in favour of the "official" version of events. If the public can be convinced that laws need to be stricter, that certain classes are inherently criminally minded, that more severe sentences are required to maintain security, legislatures can campaign on winnable issues with little thought or effort.

In Baldwin's example, a white policeman shot a black soldier, an incident which quickly displayed permutations that did not resemble what actually happened. "[The public] preferred the invention because this invention expressed and corroborated their hates and fears so perfectly" (ibid, p. 179). Baldwin could just as well have been delivering a lecture on constitutional nuances to a contemporary law school class. This "concerted surrender to distortion" sadly describes current attitudes toward issues of crime and punishment frequently displayed by those charged as guarantors of the public weal. As Isaiah Berlin (1969, p. 10) put it more succinctly, "Enough manipulation of the definition of man, and freedom can be made to mean whatever the manipulator wishes".

Robert Johnson, a professor at American University with wide experience in capital cases, provides a telling description of the same trend, which continues to command broad public support. According to Johnson (2002, p. 12), the advent of mandatory sentences and supermax prisons is the direct result of the application of the "less eligibility principle": undeserving criminals are said to deserve less than *any* noncriminal citizen. That is, the conditions of imprisonment should subject the prisoner to conditions worse than those endured by the most abject homeless person sleeping on a heated sidewalk grate or on the bare ground.

Such attitudes hark back to the early twentieth century, when a 1913 article about the Atlanta Federal Penitentiary told largely disinterested readers: "Penal imprisonment is an institution of old date, born of barbarism and ignorance, nurtured in filth and darkness, and cruelly administered. It began with the dominion of the strong over the weak, and when the former was recognized as the community, it was called the authority of good over evil" (Hawthorne, 1913, p. 265). The author then addressed the possibility of reforming such an entrenched bureaucracy and offered the opinion that the idea was impossible, if not absurd. "No one talks about reforming the Black Death" (ibid).

How to explain this apparent philosophical stasis in penology? Certainly, dungeons, chains and public executions are no longer with us, but are sensory-deprivation cells, stun guns, and sanitized executions via drug overdoses an improvement? If we neglect evolutionary theories and the constitutional arguments for a moment, Isaiah Berlin (1955, p. 1) offers perhaps the best explanation for the persistence of the less eligibility principle: "[W]hen ideas are neglected by those who ought to attend to them . . . they sometimes acquire an unchecked momentum and an irresistible power . . . that may grow too violent to be affected by rational criticism". The American prison system presents the most stark example of unchecked momentum and irresistible power ever considered, and recent discussions regarding juveniles offer little evidence of a more enlightened approach.

DEATH TO NINTH GRADERS

The Supreme Court has periodically wrestled with the question of an age limit below which no defendant can suffer execution. The Court has vacillated, as we will show, between allowing the execution of high-school

students – and younger – and finally restricting the application of the death penalty to those who were old enough to vote when they committed their crimes, that is, eighteen.

As discussed above, the Constitution does not address the issue of the age of capital defendants. Therefore, according to the interpretative argument, lower courts have the burden of determining the moral and legal minimum age for executing the country's citizens. Not so, say the originalists. The states are free to execute capital defendants of any age, irrespective of any moral considerations. The interpretive model has prevailed with the Court's decision that prohibits execution for anyone who committed his or her crime prior to reaching eighteen.

Juveniles did not, however, always benefit from the increased scrutiny of their age during the penalty phases of their trials. It was not until 1988 that children under the age of 15 were spared the hangman's noose.[5] Prior to that opinion, in the United States, *soi-disant* moral arbiter to the rest of the world, it was perfectly legal to execute a ninth-grade student who had killed a classmate.

To clarify the questions concerning which children should be executed, the Supreme Court ruled the following year that the execution of 16- and 17-year-olds was not constitutionally barred.[6] The Court subsequently concluded that since a national consensus had formed against the execution of juveniles, the practice violated society's "evolving standards of decency". The Court therefore overruled its previous decision and established the minimum age for execution at 18.[7] Now, at least, a death sentence could not be imposed on anyone who was not at least a high-school senior.

In that opinion, from which four of the nine justices dissented, the prevailing majority said: "This Court has established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual'". The same evolving standards of decency were used to proscribe the execution of mentally disabled prisoners as well, but the most important of the plurality's reasoning cited a juvenile's lack of maturity, which meant that the imposition of a death sentence could not be justified on the grounds of irremediable depravity.

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson*

plurality recognized the import of these characteristics with respect to juveniles under 16. 487 U. S., at 833– 838. The same reasoning applies to all criminalized youth under 18 (*Roper* opinion at page 570-571).

In addition to considering evidence of a national consensus and evolving standards, the Court recognized that the punishment of death is disproportionately severe, because youth in conflict with the law cannot reliably be classified as among the worst. Expanding this logic, the Court found that juveniles are vulnerable to influence and susceptible to immature and irresponsible behaviour, not itself a great intellectual leap. This diminished capacity leads to the conclusion that neither retribution nor deterrence, both objectives of capital punishment, provides adequate justification for executing juveniles. Writing for the majority, Justice Kennedy said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity" (*Roper*, at 571).

At this point, it is instructive to examine two of the dissenting voices, those in favour of executing juveniles. Tossing aside the neuroscience that contradicted her opinion, Justice Sandra Day O'Connor took her dissent down the rabbit hole of delusion and denied the intrinsic differences in the maturity of adults and children. She argued that those differences between adults and juveniles were neither universal nor significant enough to justify a rule excluding juveniles from the death penalty. And, like Alice in that other rabbit hole, her epistemology had to run as fast as it could just to stay in one place.

Justice Antonin Scalia scolded the Court for ignoring the wishes of the people, manifested by the thirty-eight states that permitted the execution of juveniles.[8] He argued that the Court had improperly substituted its own judgment for that of the people in outlawing executions of youth, irrespective of the indications of that line of reasoning. If an equal number of state legislatures still permitted execution for, say, burglary, would those executions be constitutional? Scalia's reasoning would permit such a practice. He also criticized the majority for counting non-death penalty states toward a national consensus against juvenile executions, as if those wishes forbidding execution were somehow beyond statistical significance. Again we hear Isaiah Berlin's warning about manipulating definitions to achieve a specific goal, in this case, killing school children.

Although the execution of juveniles is now proscribed, another form of extreme punishment continues to threaten them. The rest of this paper examines the remaining issue pertaining to those defendants: life without parole.

FROM DEATH TO SLOW DEATH IN PRISON

In the United States, dozens of 13- and 14-year-old children have been sentenced to life imprisonment with no possibility of parole after being prosecuted as adults. Although the United States Supreme Court has declared execution to be unconstitutional for juveniles, young children have historically been sentenced to die in prison, even for crimes that did not involve a homicide. The Equal Justice Initiative (2012) has documented 73 cases where children 14 years of age or younger have been condemned to lingering deaths in prison. A recent Supreme Court decision has finally put a stop to the practice, at least at formal sentencing proceedings.

The 5-4 opinion,[9] involving two 14-year-olds convicted in separate homicides in Alabama and Arkansas, struck down 29 state laws that imposed mandatory life-without-parole sentences on juvenile murder defendants. The circumstances of the two cases bear on the arguments both for and against life sentences for juveniles.

In the Alabama case, Evan Miller, fourteen years old, was convicted of murder and sentenced to life after he and another boy set fire to a trailer where they had bought drugs from a neighbour. Here, Miller was an active participant in the crime.

In the Arkansas case, however, Kuntrell Jackson, also fourteen, remained outside a video store while two other teenagers entered with the intent to rob it. One of the other youths pulled a gun and killed the store clerk. Jackson was charged as an adult and sentenced to a life term without parole. He is one of 73 fourteen-year-olds serving such a sentence throughout the United States. Although Jackson's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy committed the murder. Jackson himself did not commit the killing and was not shown to have had any intent or awareness that the clerk would be shot. Because Arkansas law made a life-without-parole sentence mandatory upon Jackson's conviction, neither his age nor any of the other mitigating circumstances could be considered by his judge.

Justice Elena Kagan delivered the Court's opinion, referring to state laws that mandated life in prison for juveniles "even if the judge or jury would have thought that his youth and…the nature of his crime made a lesser sentence (for example, life *with* the possibility of parole) more appropriate". Significant for this discussion is Justice Kagan's invocation of "the evolving standards of decency that mark the progress of a maturing society". She also recognized a child's diminished moral culpability:

> The distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes… The case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because "the same characteristics that render juveniles less culpable than adults" – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment (*Miller* at p. 2465).

Justice Kagan further found that "Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' – but incorrigibility is inconsistent with youth" (*Miller* at p. 2465).

The opposition, the conservative four-justice minority, presented a disingenuous argument predicated on the similarity between a 17-year-old defendant and one who is eighteen and could therefore face a death sentence. Chief Roberts' dissent dismissed Justice Kagan's statistical and neurological evidence out of hand, ignoring both science and those pesky evolving standards: "Put simply, if a 17-year old is convicted of deliberately murdering an innocent victim, it is not unusual for the murderer to receive a mandatory sentence of life without parole". Thus, there is no Eighth Amendment violation of the "cruel and unusual" proscriptions. Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. joined in the dissent.

In the Alabama case, Miller's actions could be logically construed as a deliberate attempt to kill someone, in that case, the drug dealer, although Miller was only fourteen and not seventeen when he committed the crime. By the Chief Justice's articulated age standard, Miller, at fourteen, did not deserve a life sentence, but that did not keep the Chief Justice from objecting to reducing Miller's sentence. Keeping in mind that the defendant in the Arkansas case also was not seventeen, and ignoring the fact that

he did not deliberately kill anyone, the Chief Justice's dissent made no allowance whatsoever for that offense and indeed would have voted to uphold Jackson's sentence of life as well.

Also instructive is the brief of the Arkansas attorney general who argued for Jackson's sentence. He reminded the Court that "an overwhelming majority of state legislatures and the federal government… authorize the imposition of life without parole upon 14-year-olds such as [Jackson]" (page 7 of the brief). So much for those evolving standards.

MEET THE NEW BOSS. SAME AS THE OLD BOSS.[10]

Irrespective of the Supreme Court's ruling that juveniles could not face a mandatory sentence of death in prison, state politicians immediately began substituting their own philosophies and policies for the prohibited life sentences. During the research for a book, one of us (Nagelsen, 2008) interviewed Yvette Louisell, incarcerated in Iowa for a murder committed when she was seventeen. She was sentenced to life without parole. Thus, her case would fall under the Supreme Court's prohibitions announced in *Miller*.

When the decision was handed down there was rejoicing in Iowa. Yvette, shocked and thrilled, contacted Nagelsen and described how her attorney believed that she would get relief – her supporters, and she has many, assumed that her arduous thirty-year ordeal was coming to an end. Then the unimaginable happened.

The State of Iowa responded to the obligation to conform its sentencing practices to the dictates of the Supreme Court by eliminating mandatory life sentences for juveniles. Not to be thwarted, however, in its attempt to keep juveniles imprisoned for life, and irrespective of *Miller*, in July, Governor Terry E. Branstad commuted all juvenile life sentences to indeterminate sentences, requiring prisoners to serve a minimum of 60 years before applying for parole. An Iowa judge later rebuked him for ignoring the Supreme Court by not providing prisoners any meaningful opportunity to obtain release. Iowa District Court Judge Timothy O'Grady wrote, "A blanket sentence for 38 juvenile offenders that provides no eligibility for parole for 60 years is not the sort of individualized sentencing envisioned under *Miller v. Alabama*" (Mulville, 2012).

According to the United States Census Bureau (2012), actuarial tables show that the average life expectancy in Iowa is 80.54 years, which means

that a 17-year-old defendant sentenced to a minimum of 60 years will be, on average, 77 years old when s/he becomes eligible for parole. Since the average life expectancy is 80.54, then the parolee could expect to live another 3.54 years. So, the governor's commutation cynically implies, a juvenile serving 60 years is technically not serving life without the possibility of parole – on average, s/he would have another 3-1/2 years left.

Both North Carolina and California also quickly responded to the Supreme Court's proscription on mandatory life sentences by passing legislation – applied retroactively – requiring juvenile prisoners formerly serving life without parole to serve a minimum of twenty-five years before becoming eligible for parole. In Pennsylvania, juvenile prisoners will be required to serve between twenty-five and thirty-five years. And state courts in Florida, in a typically bizarre turn, have ruled that the Supreme Court's decision does not apply to juveniles currently serving life without parole, including a twelve-year-old found guilty of killing his two-year-old brother (Mulville, 2012).

THE ONTOLOGICAL ARGUMENT

The disingenuous legislation passed by the states to replace mandatory life sentences for juveniles continues to accept the argument that a fourteen-year-old child who commits a serious crime will never be more than who and what he was at that age. Scientific evidence and personal experience demonstrate how wrong-headed that argument is.

One of us (Nagelsen) taught college courses at the New Hampshire State Prison for men in Concord for eight years. During that time, prison demographics included those who had committed violent crimes, including murder, while still in their teens. Nagelsen therefore had the opportunity to observe some of those men as they literally grew to adulthood inside prison and in her classroom.

One young man in particular, who had committed a murder as a teenager, chose to attend college with the hope of earning his degree so that he might find his place in the world. He and Nagelsen had many discussions about the isolating effect prison has on the psyche and the void that is created when one is forced to grow up in such places. He found that education was the key to his growth and development; it helped him begin to step outside of himself and think in terms other than life behind the walls. Education,

especially higher education exposed him to a broad spectrum of philosophies that he would have not been privy to in the otherwise sterile environment of institutional life.[11] Education also afforded him the opportunity to engage in discourse with intellectuals from outside the walls who challenged him to confront his views, life, goals and his decisions.

For more than eight years, Nagelsen watched as this young man changed and matured into a new and improved version of his former self. Although prison tends to stagnate personal growth and delay the maturation process, both intellectually and emotionally, many of Nagelsen's young students demonstrated a remarkable ability to navigate the curriculum as effectively as on-campus students. Over the course of her tenure, Nagelsen also observed a distinct and measurable record of personal growth in her more dedicated students and a desire to return to society as viable, productive members, equipped with the skills necessary to effect that change. Her observations echo Justices Kennedy's in the *Roper* opinion:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The same reasoning applies to all criminalized youth under 18.[12]

Did all Nagelsen's younger students demonstrate the same positive attitudes and behaviours? Certainly not, but if rehabilitation remains a viable goal, those who did – and they outnumbered the ones who did not – deserve an opportunity for parole that a life sentence would deny. Ignoring the effects of growing up and insisting that a sixteen-year-old who commits a violent crime will always remain fixated at that age is as absurd as arguing that the person pictured in one's high school year book would look and act the same at his or her twentieth or thirtieth reunion. Simply imagining that all juvenile prisoners are incorrigible monsters, that they will never be more than what they were at the time of their crimes, does not, *pace* St. Anselm, mean that those prisoners actually exist.

And yet, legislation circumventing both the letter and the spirit of the recent Supreme Court decision prohibiting life sentences for juveniles is a fact in Iowa and other states. Even without resorting to subterfuge, legislatures can easily construct laws that impose what is in effect life without parole through the imposition of mandatory minimum and consecutive sentences.

American jurisprudence is failing, most egregiously in its treatment of juveniles I conflict with the law. The Court's decision to overturn the juvenile life without sentence appeared to be a step in the right direction; however, left to the states' to implement this decision, it may be years and many court battles before anyone serving a juvenile life without sentence actually steps outside prison walls again.

ENDNOTES

1 347 U.S. 483 (1954).
2 See *Plessy v. Ferguson,*163 U.S. 537 (1896), which declared separate but equal passenger compartments for rail travel constitutional.
3 *Miranda v. Arizona*, 384 U.S. 436 (1966).
4 Cf. methods, including water boarding and beatings, used to interrogate suspected terrorists at Guantanamo Bay still in use forty years after *Miranda*.
5 *Thompson v. Oklahoma,*487 U.S. 815 (1988).
6 *Stanford v. Kentucky,* 492 U.S. 361 (1989).
7 *Roper v. Simmons*, 543 U.S. 551 (2005).
8 Of that number, 18 had laws on their books that permitted the execution of juveniles but included provisions for judicial interpretation that effectively barred them from being put to death.
9 *Miller v. Alabama*,132 S.Ct. 2455 (2012).
10 From "Won't Get Fooled Again" with apologies to The Who.
11 Cf. Cardinal John Henry Newman's classic essay "The Idea of a University" from his *Apologia Pro Vita Sua*.
12 Nagelsen's assessment of this man's potential has been confirmed. He has been paroled for 15 years, is married with a family and works with no further contact with law enforcement.

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