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Abandoning Objective Indicia

The Supreme Court recently held, in Miller v. Alabama, that mandatory life without parole for juveniles violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. This Essay argues that, although the case's result is important, Miller will gain long-term significance not because of what it holds, but because of what it heralds: a fundamental shift in the Court's Eighth Amendment methodology—specifically, a move away from using “objective indicia” to determine society's evolving standards. The Essay suggests that the Supreme Court replace its objective indicia analysis with the application of heightened scrutiny to “suspect categories” of punishment, namely, categories for which we have reason to be skeptical of the legislature's claim that a severe punishment is proportional to the offense and offender.

INTRODUCTION

The final week of the Supreme Court's 2011 Term will be remembered for the “Obamacare” decision, *National Federation of Independent Business v. Sebelius*¹ (*NFIB*), in which the Court substantially upheld the federal Patient Protection and Affordable Care Act.² But *NFIB* was not the only significant case that the Court handed down that week. Three days prior to *NFIB*, the Court decided *Miller v. Alabama*, holding that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on ‘cruel and unusual punishments.’”³ In this Essay,

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1. 132 S. Ct. 2566 (2012).
 2. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified primarily in scattered sections of 20, 26, and 42 U.S.C.).
 3. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

I argue that, despite the Court's narrow framing, *Miller* suggests a fundamental shift in the Court's Eighth Amendment methodology.

While important, the actual result in *Miller* was not unheralded. The Supreme Court had previously struck down, as cruel and unusual, severe punishments applied to juveniles, the mentally ill, and offenders convicted of nonhomicide offenses.⁴ The real significance of *Miller* lies less in the result and more in the method employed—or, more precisely, the method *not* employed. Prior to *Miller*, the Supreme Court consistently relied on “objective indicia,” such as legislative enactments and sentencing practices, to determine contemporary social norms—and, consequently, to ascertain the meaning of “cruel and unusual.” But Justice Kagan, writing for the *Miller* Court, declined to apply objective indicia analysis.

Justice Kagan's opinion positions *Miller* as an exception to the methodological rule, but I argue that *Miller* signals that the Court may be poised to abandon objective indicia analysis across all of its Eighth Amendment decisions. I propose that, in place of objective indicia analysis, the Court should adopt what I call a “suspect categories” approach to applying the Eighth Amendment. Under this approach, heightened scrutiny would apply both to those categories of defendant and crime for which we have particular reason to suspect the punishment to be excessive or disproportionate, and to those punishments—such as the death penalty—that may be inherently excessive or disproportionate.

I begin this Essay by outlining the Court's standard model for determining whether a punishment is cruel and unusual. I then describe the holding and rationale of *Miller* and contrast the majority's approach in *Miller* with the standard model. Although *Miller*, on its terms, falls short of a wholesale repudiation of objective indicia analysis, Justice Kagan's opinion offers several indications of a broad attitudinal change toward the Eighth Amendment. Further, given the fatal shortcomings of objective indicia analysis, we should encourage and applaud the Court's nascent rejection of that approach. Although the Court ought to continue to view the meaning of “cruel and unusual” through the lens of evolving standards of decency, the Court should

4. See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide”); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the Constitution prohibits the death penalty for the offense of raping a child); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that the Eighth Amendment prohibits “the imposition of the death penalty on juvenile offenders under 18”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded offenders).

implement that interpretive standard by applying different levels of scrutiny (and deference) to different categories of punishment, crime, and offender.⁵ This “suspect categories” approach, I argue, coheres with Justice Kagan’s approach toward the Eighth Amendment, as demonstrated by her majority opinion in *Miller*.

I. THE COURT’S STANDARD APPROACH

The overarching theme of Eighth Amendment interpretation has long been that the meaning of “cruel and unusual” is determined in light of “the evolving standards of decency that mark the progress of a maturing society.”⁶ The Court’s application of this principle has not always been consistent, but over the past decade the Court has developed a specific method for determining whether the Eighth Amendment prohibits a particular punishment from being applied to a class of offenders.⁷ In each of these rulings, the Court employed a two-pronged approach to assessing whether a punishment is cruel and unusual. I call these two prongs the “objective indicia analysis” and the “independent judgment analysis.”

By employing objective indicia analysis, the Court avoids the charge that the Justices (free from the constraints that the original meaning of the Clause would provide) impose their individual moral views under the guise of society’s evolving standards. The Court considers quantifiable factors—such as the number of jurisdictions that allow or prohibit the practice and the frequency with which the sentence is applied—that (so the argument goes) reflect the community’s contemporary standards about the relevant punishment practice. If enough states prohibit a practice, or allow the practice but do not apply it, then there is a national consensus against the punishment, which in turn shows that the punishment is cruel and unusual.⁸

But the Court has also insisted that the objective indicia analysis should not dispose of the constitutional question. Rather, the Constitution contemplates a

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5. I fully explicate this “suspect categories” approach in a forthcoming article, Ian P. Farrell, *Strict Scrutiny and the Eighth Amendment*, 40 FLA. ST. U. L. REV. (forthcoming 2013) (on file with author). For present purposes, I content myself with providing a lean sketch of the approach.
 6. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (holding that “the Eighth Amendment forbids Congress to punish [a deserter] by taking away citizenship”).
 7. See *supra* note 4.
 8. See, e.g., *Graham*, 130 S. Ct. at 2023-26; *Kennedy*, 554 U.S. at 421-34; *Roper*, 543 U.S. at 564-75; *Atkins*, 536 U.S. at 312-17.

role for the Justices' "independent judgment"⁹ whether the punishment practice is cruel and unusual. Hence the second line of analysis, in which the Justices bring to bear their own judgments whether the punishment in question is disproportionate or excessive.

In theory, the Justices' independent judgments whether a given punishment is cruel and unusual may diverge from the national consensus. The Court has never adequately explained how these two potentially conflicting lines of inquiry fit together to form a coherent methodology.¹⁰ It is unclear, for instance, which prong of analysis has priority if the two lead to divergent conclusions. Nor is it obvious how objective indicia analysis provides a meaningful constraint on independent, subjective judicial morals if the objective data are not dispositive. As it happens, the Court has never been pressed to clarify the tension between the two prongs, which have never led to divergent conclusions. In every case involving both objective indicia analysis and independent judgment analysis, the results of each inquiry have converged: either the objective indicia and the Justices' independent judgment have both supported upholding the relevant punishment practice, or the two methods have supported striking it down.¹¹ Apparently, each Justice's

9. See, e.g., *Graham*, 130 S. Ct. at 2026-30; *Kennedy*, 554 U.S. at 421, 434-46; *Roper*, 543 U.S. at 564, 575-78; *Atkins*, 536 U.S. at 313, 317-21.

10. The Court's pronouncements on the relationship between objective analysis and the Justices' independent judgments have been vague and somewhat inconsistent. The Court has declared, for instance, that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). Similarly, the Court has stated that the starting point of its Eighth Amendment analysis "is a review of objective indicia of consensus" and that "[t]hese data give us essential instruction," *Roper*, 543 U.S. at 564. On the other hand, the Court has stated that "[c]ommunity consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual," *Graham*, 130 S. Ct. at 2026 (quoting *Kennedy*, 554 U.S. at 484), and that "the task of interpreting the Eighth Amendment remains our responsibility." *Roper*, 543 U.S. at 575. The Court has also vacillated between whether the Court's independent judgment is used to confirm the objective indicia, or the other way around. For example, in *Kennedy*, the Court stated that the "'objective evidence of the country's present judgment' . . . confirmed the Court's independent judgment." 554 U.S. at 427 (quoting *Coker*, 433 U.S. at 593). In *Atkins*, by contrast, the Court asserted that, "in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." 536 U.S. at 313 (quoting *Coker*, 433 U.S. at 597). These pronouncements fall far short of providing a coherent explanation of the relative weight of, or even how to reconcile, objective indicia and independent judgment.

11. See, e.g., *Kennedy*, 554 U.S. at 421 ("Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the

independent judgment always accords with (that Justice’s understanding of) society’s judgment—even when that Justice’s independent judgment conflicts with those of his or her colleagues.¹²

II. *MILLER V. ALABAMA*

In *Miller*, the Court held that mandatory life without parole for juvenile offenders violates the Eighth Amendment. Justice Kagan, writing for the Court, reiterated the directive that “cruel and unusual” be understood in light of evolving societal standards of decency.¹³ But the Court eschewed the use of

Eighth and Fourteenth Amendments.”); *Atkins*, 536 U.S. at 316, 321 (concluding that objective indicia “provide[s] powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal” and also declaring that “[w]e are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty”); *see also Miller*, 132 St. Ct. at 2464, 2471 (arguing that life without parole is an excessive punishment for juvenile offenders because “juveniles have diminished capacity and greater prospects for reform” and asserting that, even if objective indicia are not relevant, “[i]n any event, the ‘objective indicia’ that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment.”). Tonja Jacobi made a similar observation regarding the Supreme Court’s decisions prior to 2006. Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1103-04 (2006) (“The Court has never explained what its conclusion would be if the various methodologies suggested conflicting conclusions. It has never had to. In each case, both the majority and dissents have always found that the national consensus confirms their proportionality, culpability and international law conclusions.”). What was true in 2006 is true today. The Court has kept its hitting streak alive through *Kennedy*, *Graham*, and *Miller*.

12. The same observation applies to the opinions of the dissenting Justices who have both analyzed the objective indicia and applied their independent judgments: each dissenting Justice’s analysis of the objective indicia of societal standards accord, in every case, with his or her own independent judgment. *See, e.g., Graham*, 130 S. Ct. at 2048 (Thomas, J., joined by Scalia & Alito, JJ., dissenting) (declaring that “neither objective evidence of national consensus nor the notions of culpability on which the Court’s ‘independent judgment’ relies can justify the categorical rule it declares here”); *Roper*, 543 U.S. at 587 (O’Connor, J., dissenting) (“The Court’s decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court’s moral proportionality analysis, nor the two in tandem suffice to justify this ruling.”); *Roper*, 543 U.S. at 609 (Scalia, J., dissenting) (arguing that “[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus”); *Roper*, 543 U.S. at 617 (Scalia, J., dissenting) (citing “studies contradicting the Court’s conclusions” about the appropriateness of the death penalty for juveniles).

13. *Miller*, 132 S. Ct. at 2455.

objective indicia to determine current societal standards. Rather, Justice Kagan's opinion asserted that "the confluence of these two lines of precedent leads to the conclusion" that such sentences are unconstitutional.¹⁴ The first line of precedent involves categorical bans on a particular punishment for a class of offenders, the most recent and relevant being *Graham v. Florida*,¹⁵ in which the Court banned life without parole for nonhomicide juvenile offenders. The second line of precedent consists of those cases prohibiting mandatory imposition of capital punishment, beginning with *Woodson v. North Carolina*.¹⁶ From the former set of cases, the *Miller* majority discerned the principle that life without parole is to juveniles as the death penalty is to adult offenders.¹⁷ From the latter line of cases, the majority identified a requirement for "individualized sentencing" when imposing the death penalty.¹⁸ The synthesis of those two principles led the Court to conclude that imposing life without parole on a juvenile requires consideration of individual factors, including, most importantly, the youth of the offender and the implications for his or her culpability.¹⁹

Perhaps the most striking aspect of *Miller* is the majority's assertion that objective indicia analysis was inapposite in this case. The Court argued that *Miller* and its companion case²⁰ were "different from the typical one in which we have tallied legislative enactments."²¹ The typical tallying case, Justice Kagan maintained, involves a categorical bar to imposing a penalty on a class of offenders or offense, whereas *Miller* "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."²²

By adopting that position, the *Miller* Court avoided justifying its stance by reference to the number of states that subject juveniles to mandatory life without parole. Justice Kagan's opinion only referred to the data to counter the

14. *Id.* at 2456.

15. 130 S. Ct. at 2034.

16. 428 U.S. 280 (1976).

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

18. *Id.* at 2468.

19. *Id.* at 2465-66.

20. *Jackson v. Hobbs*, No. 10-9647 (U.S. June 25, 2012). The Court decided *Miller* and *Jackson* in tandem.

21. *Miller*, 132 S. Ct. at 2471.

22. *Id.*

claim that the objective indicia support upholding the punishment.²³ But the *Miller* Court did not explicitly declare that objective indicia analysis would no longer be employed in other types of Eighth Amendment cases, most notably cases involving a categorical bar.²⁴ There are, however, several reasons that suggest the Court may—and should—extend *Miller*'s approach and disavow objective indicia analysis in all Eighth Amendment cases.

III. ABANDONING OBJECTIVE INDICIA ANALYSIS

Despite Justice Kagan's framing of *Miller* as addressing only the mandatory imposition of juvenile life without parole, there are strong indications that the Court will forsake objective indicia analysis in a broader range of cases, including those involving a categorical bar.

The Court's recent history demonstrates a steady extension in the Eighth Amendment's reach. When the Court has imposed a bar to punishment, it has framed its holding narrowly, carefully distinguishing the set of practices to which the ban applies from the broader set of practices not affected by the holding.²⁵ But when the Court has later confronted a punishment of the kind distinguished in a prior case, it has routinely construed the prior decision as *not* ruling that *only* the punishments banned by the prior holding are cruel and unusual. Justice Kagan's treatment of *Graham* is a case in point. The *Miller* Court acknowledged that "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those

23. *Id.* ("In any event, the 'objective indicia' that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment.").

24. According to *Graham*, the "Court's cases addressing the proportionality of sentences fall within two general classifications." *Graham*, 130 S. Ct. at 2021. In the first class of cases, the Court considers whether a "*particular defendant's sentence*," *id.* at 2022 (emphasis added), is disproportionate to that defendant's crime, taking into consideration "all of the circumstances of the case," *id.* at 2021. In the second class of cases, the Court considers a challenge, not to a single sentence, but to "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.* at 2022-23. For this latter class of cases, in which the Court considers whether to impose a "categorical bar" to a type of punishment practice, the appropriate approach is to employ both objective indicia analysis and independent judgment. *Id.* It is worth noting that the distinction described in *Graham* is not based on the difference between substantive and procedural rules, but rather between challenges to individual sentences and challenges to a *type* of punishment practice as applied to a *class* of offenders.

25. *See, e.g., id.* at 2027 (holding that the Eighth Amendment prohibits life without parole for juvenile nonhomicide offenses, and asserting that because "serious nonhomicide crimes . . . cannot be compared to murder in their severity and irrevocability," all other crimes "differ from homicide crimes in a moral sense" (internal citations omitted)).

offenses from murder, based on both moral culpability and consequential harm.”²⁶ But the majority in *Miller* argued that none of what *Graham* had said about child offenders—“about their distinctive (and transitory) mental traits and environmental vulnerabilities”—was limited to nonhomicide offenses.²⁷ Those factors applied equally to juveniles convicted of homicide. Even though *Graham*’s holding was expressly limited to juvenile nonhomicide cases, *Graham*’s rationale also supported a ban encompassing juvenile homicide offenders.

We can expect a similar fate for *Miller*. Although the *Miller* Court limited its methodology to “process” cases, and expressly distinguished “categorical bar” cases, future cases are unlikely to preserve this distinction. First, the majority did not conclusively distinguish *Miller* from the objective indicia analysis. As we have discussed, Justice Kagan argued that *Miller* differed from the typical objective indicia case because *Miller* involves prohibiting a process—mandatory imposition of a punishment—rather than a category of punishments. But the majority’s description of categorical-bar cases did not match the Court’s previous account of categorical-bar cases. In earlier cases, including *Graham*, the Court distinguished cases involving a *category* of punishments from cases in which a *particular defendant’s* sentence is challenged; the Court did not distinguish between categorical-bar cases and process cases.²⁸ The majority opinion also did not note that the paradigmatic process case, *Woodson v. North Carolina*, itself employed objective indicia analysis.²⁹ And none of the cases following *Woodson* suggest that objective indicia analysis does not apply to determining the constitutionality of mandatory punishments.³⁰ In other words, there is no doctrinal reason to apply a different methodology in

26. *Miller*, 132 S. Ct. at 2465.

27. *Id.*

28. See *supra* note 24.

29. See *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (“Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg v. Georgia*, [428 U.S. 153, 176-82 (1976)] . . . indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.” (footnotes omitted)).

30. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (striking down a statute imposing a mandatory death sentence for murder committed while serving life without parole); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (holding that state courts must consider difficult upbringing as a mitigating circumstance when determining whether to impose the death penalty); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (invalidating a statute for not permitting the requisite individualized consideration of mitigating circumstances in imposing the death penalty).

process cases. The force of prior mandatory-sentencing cases is quite to the contrary.

In addition, the rationale for applying objective indicia analysis applies equally to both process and categorical-bar cases. The Court’s opinion in *Miller* affirmed that the meaning of “cruel and unusual” is always determined in light of evolving standards of decency. That is, the *Miller* Court accepted that “evolving standards of decency” is the appropriate standard for assessing Eighth Amendment challenges both to substantive categories of punishment and to the processes by which punishments are imposed—including mandatory imposition, as in *Miller* itself. The Court has never suggested, and did not suggest in *Miller*, that whether a punishment procedure is cruel and unusual is determined by the original understanding of “cruel and unusual,” rather than evolving standards. In other words, whether mandatory juvenile life without parole is cruel and unusual, even if it is characterized as a procedural rule, depends on contemporary standards of decency. The justification for objective indicia analysis is that it provides a barometer of current standards of decency, based on factors independent of the Justices’ individual moral preferences.³¹ It is far from self-evident, however, why the Court would require that objective guidance to determine whether a category of punishment accords with current standards, even though the Court would not need objective data to determine contemporary social views about the permissibility of punishment processes. Since the Court has retained “evolving standards of decency” as an interpretive principle, it makes little sense to reject objective indicia analysis in process cases, but continue to employ it in categorical-bar cases.

In combination, these two factors—(1) the trend of extending the Eighth Amendment’s application and (2) the weakness of justifications for cabining *Miller*’s methodology to process challenges—suggest that the Court will likely follow *Miller* and decline to employ objective indicia analysis in other cases, ultimately abandoning the methodology entirely. In the following Part, I briefly discuss why this predicted development is a salutary one.

IV. THE SHORTCOMINGS OF OBJECTIVE INDICIA ANALYSIS

The Court’s use of objective indicia to determine whether a punishment practice is contrary to contemporary standards of decency has numerous

31. See, e.g., *Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting) (“We look to these ‘objective indicia’ to ensure that we are not simply following our own subjective values or beliefs.”).

shortcomings. I will mention four of the problems, some of which have been described in detail by other scholars.³²

First, objective indicia analysis makes the meaning of the Eighth Amendment dependent on legislative action, which contradicts the nature of the Amendment as a limitation on legislatures' power to punish.³³ If, tomorrow, every state were to enact legislation endorsing some punishment practice—any punishment practice—then objective indicia analysis would support the constitutional validity of that practice. By acting together, states could, at least in theory, constitutionalize their enactments through the very fact of enacting them. Even if courts were to use other indicia of society's preferences (including jury decisions), the problem would remain that the majority's preferences would define a counter-majoritarian right.³⁴

Second, objective indicia analysis raises federalism concerns. The legislatures of a majority of states could, in effect, dictate the law of a minority of states. If a previously valid punishment were prohibited by a majority of state legislatures, then the practice would become cruel and unusual and so could not be applied even in the minority of states whose legislatures wish to retain the punishment.³⁵

Third, objective indicia analysis is not really objective in the relevant sense. The data are highly malleable, with enormous discretion involved in determining whether enough states prohibit a punishment (or few enough states allow, or have recently imposed, the punishment) that a national moral

32. See, e.g., Jacobi, *supra* note 11, at 1089; John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753-54 (2008) (arguing that reliance on objective indicia as a measure of evolving standards of decency "appears to make the rights of criminal defendants dependent upon public opinion").

33. See, e.g., William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328-29 (1986) ("At the outset, it seems to me beyond dispute that we should not permit the legislature to define for us the scope of permissible punishment. . . . It would effectively write the clause out of the Bill of Rights were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching.").

34. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 69 (1980) ("[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) ("The preferences of the majority should not determine the nature of the eighth amendment or of any other constitutional right."); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 63 (2008) ("What is the worth of a right good against the majority when that same majority interprets that right?").

35. See Jacobi, *supra* note 11.

consensus exists against the punishment. With such latitude allowed, objective indicia analysis does not provide the meaningful constraint on Justices that is its *raison d'être*: it does not ensure that judges apply social mores and not their own personal values.³⁶ One need only recall that a majority of the Supreme Court has never held that a punishment *is* cruel and unusual according to the Justices' individual judgments, but *not* cruel and unusual according to the objective indicia (or vice versa). Either that fact is an extraordinary coincidence, or it is evidence that the Court manipulates objective indicia analysis to support its desired outcome.

Finally, whether a state imposes, allows, or prohibits a punishment may not reflect the moral views or standards of the people of the state. There is a wide range of explanations, other than community standards, why a state legislature would enact or not enact a particular law. For example, a state may decline to impose the death penalty on a certain class of offenders because state legislators believe that the punishment would be struck down as unconstitutional.³⁷ If so, the lack of legislation tells us nothing about whether the state's citizenry believes the punishment to be morally impermissible. In other words, the punishment practices of state legislatures and sentencing bodies do not necessarily reflect underlying social norms.

V. A NEW EIGHTH AMENDMENT METHODOLOGY

If the Supreme Court is moving to abandon objective indicia analysis, the pressing question is: what methodology will take its place? The Court's *Miller* opinion does not provide a complete answer. The core of the Court's reasoning is simply that the result in *Miller* flows inevitably from the confluence of the two lines of precedent discussed above. The *Miller* opinion does, however, contain some hints as to how the Court will assess whether a punishment is cruel and unusual in cases that the Court cannot claim are so directly controlled by precedent.

The *Miller* Court endorses the view that the central concept of the Eighth Amendment is that punishment must not be excessive, but instead must be proportional to the offender and to the offense.³⁸ A punishment is excessive if it

36. *But see, e.g., Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting).

37. *See, e.g., Stinneford, supra* note 32, at 1753 (suggesting that a legislature's decision to impose the death penalty for murder but not for rape might "merely reflect the pragmatic decision that imposition of the death penalty for rape is likely to be struck down by the Supreme Court").

38. *Miller*, 132 S. Ct. at 2463 (citing *Kennedy v. Louisiana*, 544 U.S. 407 (2008); *Atkins v. Virginia*, 535 U.S. 504 (2002)).

goes beyond what is necessary to achieve the legitimate penological goals of punishment, such as retribution, deterrence, and incapacitation.³⁹ But it is incredibly difficult to calibrate the precise level of punishment that is required (or allowed) by these justifications for a given offense or offender, and there is room for reasonable people to disagree.⁴⁰ The independent judgment portions of the Justices' opinions, which essentially consist of the Justice's judgment whether legitimate penological goals justify a punishment, reflect that disagreement. Hence the recourse to objective indicia analysis. But since this analysis is neither objective nor indicative of social standards, we need an alternative decision rule to resolve reasonable disagreements.

The Court's opinion in *Miller* suggests a different way to resolve the issue. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," Justice Kagan wrote, "such a scheme poses *too great a risk* of disproportionate punishment."⁴¹ That claim reflects the notion that, for some sets of punishments, offenses, and offenders, we have specific reasons to suspect that the punishment will be disproportionate in an individual case—just as we have reason to suspect, in equal protection analysis, that distinctions based on race or gender are illegitimate. In the Eighth Amendment context, one such set is juvenile offenders, who as a class lack the mental capacity of adults. As a result, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders."⁴² We thus have reason to suspect that a legislative determination that a harsh punishment usually reserved for the worst of the worst, such as death or life without parole, is disproportionate for juvenile offenders. Moreover, the basis for treating juvenile offenders as a suspect category—their diminished capacity and moral culpability compared with adults—is both a general principle of modern law and a view widely shared by and reflected in contemporary societal standards.⁴³ The uncontroversial notion that juveniles are, as a class, less

39. See, e.g., *id.* at 2465-66.

40. This notion is especially true of cases involving a sentence for a term of years, which is one reason that the Supreme Court has shown great deference to legislative determinations that a punishment of a term of years is proportional for a given offense.

41. *Miller*, 132 S. Ct. at 2469 (emphasis added).

42. *Id.* at 2458.

43. See, e.g., FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 76-80 (1998) (describing the generally accepted characteristics of juvenile development that may render youth less culpable than adults for the same behavior, including the lack of fully developed cognitive abilities and a lower capacity to control impulsiveness); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 542 (2003) ("As a matter of crime policy, youths' developmentally diminished responsibility and limited adjudicative competence render them less culpable

culpable than adults therefore provides an indication of evolving norms—one that is grounded in something more tangible than the subjective value judgments of individual Justices, yet also avoids the state nose-counting that characterizes objective indicia analysis.

Juveniles are not the only class of offenders for whom we have reason to suspect that a harsh punishment may be disproportionate. Mentally retarded individuals are generally accepted as having less capacity, and accordingly less moral culpability, than nonretarded adults.⁴⁴ Similarly, there are classes of offenses that are treated as generally involving less culpability than others, such as crimes of omission.⁴⁵ Because we consider crimes of omission, as a class, to be less reprehensible than crimes of commission, we have reason to be skeptical that a harsh punishment is proportional to an omission offense—such as, for example, mandatory life imprisonment for failure to register as a sex offender.⁴⁶

than adult offenders; as a matter of youth policy, adolescence is a period of rapid growth and transition, and youths are ‘works in progress’ who have not yet become the people they will be as adults.”); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 825 (2003) (noting that society views young actors as less culpable than adult criminals because of juveniles’ unformed and evolving moral character).

44. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 420 (1985) (attributing reform of the criminal justice system’s treatment of mentally retarded offenders to a more general movement toward fuller recognition of the rights of retarded people in all areas of American law in the 1960s and 1970s); Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 307 (2002) (noting that the common law has recognized for centuries that mental retardation is an attribute that may affect an individual’s capacity to be held liable for criminal conduct or correspondingly be subjected to criminal punishment); Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2570 (2003) (stating that mental health research “has unquestionably contributed to the existing consensus regarding the suitability of execution for the mentally retarded: many of the current state bans adopt medical definitions of mental retardation nearly word for word”).
45. See, e.g., Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 385 (2008) (“Anglo-American criminal law generally has not criminalized omissions. Perhaps because of the deontological constraint against appropriating the bodies and labor of some to reduce the risks faced by others, and perhaps as well because of the difficulties in administrability, affirmative acts are rarely mandated by the criminal law.”); Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1207 (2009) (“The prospect of liability for ‘inchoate omissions’—involving no act and no harm—exists at the frontier of the state’s authority to criminalize conduct and, whether allowed or rejected, effectively determines the outer boundaries of that authority.”); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 590 (1958) (noting that “our criminal law in its progress has only occasionally and almost reluctantly admitted the offense of omission within its scope.”).
46. See, e.g., *Bradshaw v. State*, 671 S.E.2d 485, 492 (Ga. 2008) (“We conclude that the imposition of a sentence is so harsh in proportion to the crime for which it was imposed that it is unconstitutional.”).

In light of this, I suggest that the Court should decide Eighth Amendment cases under a model inspired by—but not identical to—the “tiers of scrutiny” review applied under the Fourteenth Amendment. In situations in which there is reason to suspect that the punishment is disproportionate—such as when the punishment is especially harsh, when the offender is a juvenile or mentally retarded, and when the offense is an omission—then the Court should apply strict scrutiny to the legislature’s implicit claim that the punishment is justified by legitimate penological goals. For example, the death penalty and life without parole are generally considered proportional only for the small number of the most morally culpable, irredeemable offenders who commit the most extreme crimes. Consequently, if a legislature allows that punishment to be imposed on a category of offenders who, as a general rule, have comparatively low moral culpability, the Court should scrutinize the punishment strictly.

This heightened scrutiny could place a heavy burden on the legislature to show that the aims of retribution, incapacitation, or deterrence require the harsh punishment. In situations that do not involve suspect categories (for example, an adult with full capacity sentenced to a term of years) courts would generally defer to the legislature’s view that the punishment is proportional. The party challenging the punishment would have a high burden to show that it is excessive. In cases in which reasonable people disagree about which punishment penological goals require in a particular case, whether a suspect category is involved—and hence who bears the burden of persuasion—will often be decisive. This dynamic again mirrors the tiers-of-scrutiny approach to the Equal Protection Clause, with strict scrutiny almost impossible to pass and rational basis review commonly satisfied.

I must stress, however, that the analogy between my proposal for the Eighth Amendment and Equal Protection Clause tiers of scrutiny should not be mistaken for wholesale incorporation. The Equal Protection Clause approach serves merely as a guiding model, in two ways. First, the equal protection experience demonstrates that it is possible to interpret a broad constitutional provision in a manner that reflects contemporary norms without allowing the majority to dictate the provision’s meaning. When the Supreme Court held that an antiscegenation law violated equal protection, for example, it did so on the basis that the law failed to satisfy the requirements of strict scrutiny; it did not determine the constitutional issue by merely analyzing the number of states that prohibited interracial marriage.⁴⁷ Second, Equal Protection Clause

47. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a law restricting freedom to marry on the basis of race failed to satisfy strict scrutiny).

doctrine provides an example of different levels of scrutiny being triggered by the existence of a reason to be suspicious of a legislative classification.

But the analogy only goes so far: the classes I propose as “suspect” for Eighth Amendment purposes are not the same classes considered “suspect” under the Equal Protection Clause. Nor is the *reason* for heightened scrutiny the same in each case. Under a tiers-of-scrutiny approach to the Eighth Amendment, a class of offenders or offenses is suspect when we have a category-related reason to be skeptical that the punishment is proportional to the crime, not when the class has been historically subordinated, or is a “discrete and insular” minority.⁴⁸ The specific critiques of current equal protection doctrine⁴⁹ therefore do not automatically apply to a tiers-of-scrutiny approach to the Eighth Amendment.

CONCLUSION

By holding that mandatory life without parole is cruel and unusual punishment, *Miller* continues the Supreme Court’s gradual expansion of the Eighth Amendment’s scope over the past ten years. But it does so by departing from the Court’s now familiar methodology. Unlike its predecessors, *Miller* does not rely on objective indicia of evolving standards of decency. The Court’s opinion purports to distinguish *Miller* from earlier cases involving objective indicia, but that distinction will not last long. The Court, led in this instance by Justice Kagan, may be moving toward abandoning objective indicia when applying the Cruel and Unusual Punishments Clause. Justice Kagan has not yet set forth a fully developed alternative methodology, but her majority opinion in *Miller* suggests a “suspect categories” approach to the Eighth Amendment. According to this approach, the Court would apply heightened scrutiny when considering a category of crime or offender that contemporary society, and the modern legal system, generally regards as involving less moral culpability. This approach not only reflects evolving standards of decency, but also provides a means to decide Eighth Amendment cases even though reasonable persons may differ whether the punishment at issue is excessive.

48. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that classifications involving “discrete and insular minorities” may warrant “more searching judicial inquiry”).

49. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484 (2008) (critiquing the current structure of equal protection doctrine and proposing that the tiers of review be replaced with a single standard).

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