



Cruel and unusual — a test case

By [George F. Will](#), Published: April 20, 2012

In the summer of 1787, just 94 years after the Salem witch trials, as paragons of the Enlightenment such as James Madison, George Washington and Benjamin Franklin deliberated in the Constitutional Convention in Philadelphia, a mob pelted and otherwise tormented to death a woman accused of being a witch. Prosecution of alleged witches, writes historian Edmund Morgan, had ceased in the colonies long before the English statute criminalizing witchcraft was repealed in 1736. Some popular sentiment, however, lagged.

Today, 221 years after the Bill of Rights was added to the Constitution, the Supreme Court is again [pondering the Eighth Amendment's proscription of "cruel and unusual punishments."](#) The case illustrates the complexity of construing some constitutional language in changing contexts of social science and brain science.

Evan Miller, whose five suicide attempts surely had something to do with the serious domestic abuse he suffered, was complicit in a brutal murder and in 2006 was sentenced to life in an Alabama prison without the possibility of parole. Kuntrell Jackson was involved in a video store robbery during which an accomplice fatally shot the store clerk. In 2003, Jackson was sentenced to life in an Arkansas prison without the possibility of parole. Miller and Jackson were 14 when they committed their crimes. Both were tried as adults before judges who had no discretion to impose any other sentence. Such mandatory sentences preclude judges weighing a consideration of Eighth Amendment jurisprudence — proportionality.

Before its June 26 recess, the Supreme Court will decide whether sentencing children to die in prison is cruel. It certainly is unusual: Although 2,300 current prisoners have been sentenced to life without parole for crimes committed as juveniles (age 17 or younger), just 79 prisoners in 18 states are serving sentences of life without parole for crimes committed when they were 13 or 14.

The court must consider not only what is society's sense of cruelty but also how that sense *should* be shaped by what some new technologies reveal about adolescent brain biology. Shakespeare's shepherd in "The Winter's Tale" did not need to see brain scans to wish that "there were no age between ten and three-and-twenty, or that youth

would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancients, stealing, fighting.”

And with age-related laws restricting the right to drink, drive, marry, serve on juries, etc., all American states have long acknowledged adolescents’ developmental shortcomings. Neuroscience, however, now helps explain *why* aspects of adolescents’ brains make young people susceptible to impulsive behavior and to failing to anticipate and understand the consequences of it.

Without opening the floodgates to “excuse abuse,” the Supreme Court has accommodated what science teaches. In 2005, the court proscribed [imposing the death penalty](#) on someone who committed a murder as a juvenile, arguing that “the susceptibility of juveniles to immature and irresponsible behavior” can diminish the reprehensible nature of their crimes. In 2010, the court [proscribed sentences of life without parole for juveniles](#) convicted of a crime other than homicide, arguing that such sentences improperly deny juvenile offenders “a chance to demonstrate growth and maturity.”

In both cases, the sentences were judged cruel and unusual because they were disproportional to actual culpability. Increasingly, the criminal justice system acknowledges the importance of scientific findings about adolescents’ entangled neurological, physiological and psychological developments. Such findings condition how we read some constitutional language.

In 1958, the court said: “[The \[Eighth\] Amendment must draw its meaning from the evolving standards of decency](#) that mark the progress of a maturing society.” Justice Antonin Scalia has warned: “A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.” But even the “[originalist](#)” [Scalia](#), although disposed to construe the Constitution’s terms as they were understood when ratified, would today proscribe some late-18th-century punishments, such as public lashing and branding.

Denying juveniles even a *chance* for parole defeats the penal objective of rehabilitation. It deprives prisoners of the incentive to reform themselves. Some prisons withhold education, counseling and other rehabilitation programs from prisoners ineligible for parole. Denying these to adolescents in a period of life crucial to social and psychological growth stunts what the court in 2005 called the prisoner’s “potential to attain a mature understanding of his own humanity.” Which seems, in a word — actually, three words — “cruel and unusual.”

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