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HOW TO END MASS IMPRISONMENT: THE LEGAL AND CULTURAL STRATEGIES OF BRYAN STEVENSON†

Review Essay of *Just Mercy*, Bryan Stevenson (Random House, 2014) ISBN 978-0-8129

Bryan Stevenson's Just Mercy, *which is part legal history and part memoir, arrives at a moment when the tides may be turning in US criminal justice. Stevenson is a singular catalyst in the emergence of a movement against mass imprisonment, and the topics he is focused on are central to the prospect of lasting systemic reform. In his work as litigator, professor, and public figure, Stevenson has helped to usher in a new common sense that far-reaching reforms to US criminal justice are both required and imminent. Stevenson's work becomes all the more significant when we consider the scope of change that structural reform requires. He has helped to draw the US Supreme Court away from a stance of extreme deference to legislative judgment in non-capital sentencing review – a meaningful shift in the direction of legal limits on the politics of tough punishment. This review contextualizes the publication of* Just Mercy *as a component of Stevenson's legal and cultural strategies aimed at consolidating the reform movement against US mass imprisonment.*

Keywords: Bryan Stevenson, death penalty, life without parole, mass imprisonment, constitutional law, sentencing

I *Broken lawyering*

Bryan Stevenson is now the leading US voice on the need for greater mercy and fairness in criminal justice. *Just Mercy* is a compelling account of his experiences working with defendants facing the most extreme penal sanctions in a country that is highly punitive in terms of both the comparative and historical record. The central narrative in the book, which is written for a popular audience, focuses on the exoneration of an innocent black man, Walter McMillian, convicted of the 1986 murder of a white woman. The investigation, trial, and appeals in McMillian's case are each marked by stunning features of racial bias and judicial

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neglect in a southern state that outwardly denies and disavows ongoing structures of racial subordination.

While mainstream attention to the criminal justice system tends to thrive on stories of wrongful conviction – which may partly explain the central place of this particular story in the narrative of *Just Mercy* – Stevenson is also intensely engaged in high-level strategic litigation designed to narrow and prohibit extreme punishments for those who are guilty of serious crimes. *Just Mercy* outlines this work as well, although it does not detail Stevenson's remarkable contributions to US Supreme Court jurisprudence limiting the penalty of life imprisonment without parole for juveniles. This review aims to foreground and illuminate that legal-doctrinal story, so as to read *Just Mercy* with a fuller appreciation of Stevenson's work as a litigator. *Just Mercy* should be read as a single component of Stevenson's legal and cultural strategies aimed at consolidating the reform movement against US mass imprisonment.

Stevenson is the founder of the Equal Justice Initiative (EJI) in Alabama, a non-profit organization that provides legal representation to indigent defendants and prisoners with a focus on capital punishment, wrongful conviction, and juvenile imprisonment. Stevenson is also a professor of clinical law at New York University (where he often teaches with a suitcase on hand, ready to leave for the airport and his next court appearance), the star of the most-watched TED Talk by a lawyer (viewed five million times on the Internet), and the protégé of great death penalty lawyers like Stephen Bright and Anthony Amsterdam. He is now probably best known for his ability to bring mainstream cultural attention to the excesses of the American criminal justice system.[1]

Whether in the classroom or on national stages, whether in conversation with John Legend, Oprah Winfrey, or Paul Holdengraber, Stevenson is relentlessly focused on raising public consciousness about the extreme lived realities of American punishment. He repeats his mantra at every chance: that the United States has a criminal justice system that 'treats you better if you are rich and guilty, than if you are poor and

1 As David Cole remarks, Stevenson is 'one of the nation's most influential and inspiring advocates against the death penalty.' David Cole, 'The Disgrace of Our Criminal Justice' *New York Review of Books* (4 December 2014). Another commentator notes that Stevenson 'has done as much as any other living American to vindicate the innocent and temper justice with mercy for the guilty.' Rob Warden, 'Book Review of *Just Mercy*' *Washington Post* (23 October 2014). Jeffrey Toobin quotes several of the leading figures in public service lawyering who make similar statements, such as Chris Stone, the president of George Soros's Open Society Foundations, who describes Stevenson as follows: 'He is a modest, straightforward, ordinary person, and yet he is magical. He is a gift to this country and to a cause that would not be the same without him.' Jeffrey Toobin, 'The Legacy of Lynching, on Death Row' *The New Yorker* (22 August 2016).

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innocent. Wealth, not culpability, shapes outcomes.'[2] When a conversation strays from that core vision, Stevenson steers it warmly but swiftly back.

Stevenson often counsels that you have to 'get close' to suffering – that you have to get adjacent to it.[3] In the United States today, this means getting adjacent to extreme sanctions like the death penalty and life without parole for juveniles, most often imposed on individuals whose life stories could just as easily elicit sympathy as revenge. In the pages of *Just Mercy,* Stevenson is also willing to get close to the state officials who, with varying degrees of humanity and bigotry, arrest, prosecute, convict, and imprison his clients. He treats this cast with the same even-handed compassion that he grants to prisoners on death row: the judge who refuses to review a patently erroneous verdict that could soon cause an innocent man's death; the corrections worker with racially violent bumper stickers who does an unexpected act of kindness for a disabled prisoner; the execution team members who work to ensure that the final hours of a condemned man's life are as dignified as possible before putting him to death. Stevenson argues that we must seek reforms in ways that embrace everyone, including all those who have been misled and misdirected by the American history of racial inequality, whether the keepers or the kept.

When Stevenson is asked to explain what motivates his work and the difficult, often ascetic life conditions that he has endured in order to do it, he commonly replies that he does it partly because he is 'broken.' His audience often seems mesmerized by this – by the idea that this brilliant lawyer and humble civil rights hero could be anything but flawlessly and virtuously self-possessed. Stevenson allows his listeners to wonder – in what way could he be broken?

As the biographical portrait in *Just Mercy* reveals, it could have been the years of Stevenson's exposure to the dysfunctional legal machinery that sustains the American death penalty. It could be his relentless investigations into the trauma and poverty that tends to precede one's candidacy for the harshest forms of punishment. Or the reasons might run more personal and may be connected to Stevenson's startling life trajectory from segregated southern schools to degrees from Harvard Law School and the Kennedy School of Government, to receiving a MacArthur 'genius' grant. It could be the relatives who died of alcohol-related disease or the grandfather murdered by teenagers looking to steal a black-and-white television. It could be his beloved mother and the

2 Bryan Stevenson, 'We Need to Talk about an Injustice,' Ted Talk (5 March 2012).

3 See generally Bryan Stevenson, *Just Mercy* (New York: Random House, 2014) ch 15, 'Broken,' at 275–94 [Stevenson, *Just Mercy*].

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memory of her enduring racial insults from medical staff while struggling to obtain polio vaccines for her children.

In a chapter called 'Broken,' Stevenson writes in *Just Mercy* that he is simply acknowledging the position we all find ourselves in:

> Being close to suffering, death, executions, and cruel punishments didn't just illuminate the brokenness of others; in a moment of anguish and heartbreak, it also exposed my own brokenness. . . . We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent.[4]

In an interview with Oprah Winfrey – a rare instance in which we see Winfrey's attention publicly drawn to capital punishment and the American prison system – Stevenson explains the importance of this process of personal identification with suffering. When we recognize our own 'brokenness,' he tells her, we recognize the need 'to stand up, to recover, to redeem ourselves, and to redeem others.'[5]

Just Mercy focuses on the human stories of Stevenson's life in the law that will interest a general audience. The central narrative is the conviction of an innocent black man, Walter McMillian, in Monroeville, Alabama. As Stevenson emphasizes, Monroeville prides itself as the birthplace of Harper Lee, and yet the late twentieth-century McMillian prosecution is strikingly reminiscent of the false accusations and racism at the heart of the town's cherished *To Kill a Mockingbird* (1960). Stevenson has more success than Atticus Finch. McMillian is exonerated when Stevenson's team is able to show that the flimsy evidence used to convict McMillian at trial was largely coerced and fabricated by breathtakingly incompetent and corrupt police and prosecutors.

But there is a jurisprudential story that looms in the background of *Just Mercy*, and this aspect of Stevenson's work is in a sense far more difficult – legally and culturally – than winning exonerations for innocent men. Stevenson and the EJI are also working to secure legal limits on extreme punishments for serious offenders in a country where the judiciary has been comparatively unwilling to apply constitutional standards to that end. The doctrinal story, which is the focus of this review, helps to bring the contributions Stevenson has made to US legal thought and constitutional doctrine into focus. The popular figure of Bryan Stevenson is better known than this complex story of what he has achieved in court.

4 Ibid at 289.

5 Interview with Oprah Winfrey (1 November 2015), online: <http://www.supersoul.tv/supersoul-sunday/what-attorney-bryan-stevenson-learned-about-mercy-from-his-prisoner-clients/>.

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In concert with other lawyers, Stevenson has managed to tap into a strain of jurisprudence that had been applied exclusively to the death penalty, expanding it to non-death cases. For decades, proportionality review in non-capital cases had been hamstrung by a series of conservative precedents, cases that suggested that courts would defer uncritically to even extraordinarily long prison sentences. Rachel Barkow has explained how the US Supreme Court has interpreted the Eighth Amendment outside the capital context to be essentially meaningless.[6] Careful constitutional protections have been reserved for the death penalty. So long as the sanction was not death, US courts largely condoned the long prison terms generated by the punitive politics of the times.

Stevenson developed a way to navigate around these deferential approaches. In two key cases, *Graham v Florida*[7] and *Miller v Alabama*,[8] the US Supreme Court emphasized the need for individualized, discretionary sentencing for the first time in non-capital cases and endorsed the expansive treatment of evidence that might suggest the need for mitigation in punishment. The cases also solidified a new approach to Eighth Amendment non-capital review known as 'national consensus' analysis, where the court traces the winds of penological change and uses evidence of emerging sensibilities to insist that certain categories of harsh punishment be abolished nationwide. These legal rulings are explored in the next Part of this article, but before I turn to these cases and the role that Stevenson played in them, let me introduce in more detail the state of the current criminal justice reform discussion, which helps to give context to Stevenson's contribution.

II *Reform prospects: the limits of cost and race*

A disorienting hopefulness has emerged in the field of US criminal justice. For several years, the imprisonment rate has dropped.[9] High-profile conservatives like Ted Cruz and Rand Paul have criticized the expense of the prison system and are willing to contemplate bipartisan coalitions that support sentencing reform.[10] The Brennan Center for Justice at

6 Rachel Barkow, 'The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity' (2009) 107 Mich L Rev 1145 [Barkow, 'The Court of Life and Death'].

7 Graham v Florida, 560 US 48 (2010) [Graham].

8 132 S Ct 2455 (2012).

9 International Centre for Prison Studies, 'World Prison Brief: United States of America' (2014), online: <http://www.prisonstudies.org/country/united-states-america>.

10 Carl Hulse & Jennifer Steinhauer, 'Sentencing Overhaul Proposed in Senate with Bipartisan Backing' *New York Times* (1 October 2015).

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New York University – a non-partisan public policy and law institute focused on democracy and justice – recently published a report featuring essays by many of the 2016 primary presidential candidates, and all of them expressed a commitment to limit prison growth and to reform sentencing.[11] Jonathan Simon, a scholar best known for a 2006 book that explains how elected officials in the 1970s began to offer tough punishment rather than social welfare to their constituents,[12] recently published a book tracing how legal boundaries on mass imprisonment are finally trickling down from the US Supreme Court.[13] David Green has noted an unmistakable 'penal optimism' in the rhetorical claims made by reform advocates, which he defines as the return of an older welfarist idea that it is possible to intervene productively in the lives of offenders and thereby reduce recidivism.[14]

These various indicators of reform were unthinkable in the preceding few decades. Since the early 1970s, the US prison system has done little but grow, and scholars have been largely absorbed with tracing how and why.[15] In 2001, the phrase 'mass imprisonment' was coined to describe a system with two features: a rate of incarceration markedly above the historical and comparative norm for societies of this type and the systematic

11 Brennan Center for Justice, *Solutions: American Leaders Speak Out on Criminal Justice* (2015), online: <https://www.brennancenter.org/sites/default/files/publications/Solutions_American_Leaders_Speak_Out.pdf>. President-elect Donald Trump was not among the essayists in the Brennan Center collection, and the specifics and impact of his criminal justice policy remains to be seen. Perhaps mitigating this uncertainty is the argument from John Pfaff that the most important factors driving incarceration rates do not flow directly from the federal government. See e.g. John Pfaff, 'The War on Drugs and Prison Growth: Limited Importance, and Limited Legislative Options' (2015) 52 Harv J Legis 173.

12 Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007) [Simon, *Governing through Crime*].

13 Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014), pointing to the decision in *Brown v Plata*, 131 S Ct 1910 (2011) which upheld an extensive prisoner release order in California, as evidence of the revitalization of dignity as a value in constitutional jurisprudence. The decision was a culmination of more than twenty years of litigation about the systemic shortcomings of medical and mental health care in California's prison system.

14 David Green, 'Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform' (2013) 15:2 Punishment and Society 123.

15 For leading accounts, see e.g. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Simon, *Governing through Crime*, supra note 12. Loïc Wacquant, *Punishing the Poor* (Durham, NC: Duke University Press, 2009); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colour Blindness* (New York: New Press, 2010) [Alexander, *New Jim Crow*].

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imprisonment of whole groups of the population.[16] In 2011, the final book of the late William Stuntz described a dysfunctional and illegitimate criminal justice system, one in which 'prosecutors decide' who to punish; most accused never face a jury; policing is inconsistent; plea bargaining is the norm; and 'draconian sentences' fill prisons with mostly minority defendants.[17] Not only is the front end of the criminal justice system arbitrary and lawless in these ways, the back-end prison system has become famously large.[18]

The fact that a new reform discourse has emerged is clearly a significant turn in the road. Less clear is whether real change is likely to follow, given both the scale and complexity of the problem. In David Green's analysis, the critical question is whether the indicators of reform enthusiasm represent a 'structural reordering' of the penal field or if they are merely 'benevolent counter-tendencies' set within the same carceral paradigm of the past forty years.[19] A new discourse of change does not equal change in policies or practices.

Marie Gottschalk is a leading sceptical voice about current reform prospects, based on her view that the debates have thus far gravitated toward two different poles.[20] The first pole, catalyzed by Michelle Alexander's blockbuster book, *The New Jim Crow*, emphasizes racial disparities in the criminal justice system.[21] As the title suggests, Alexander argues that today's criminal justice system is akin to the systematic denial of civil rights that characterized life for African-Americans under the Jim Crow laws formally abolished in 1965. Gottschalk argues that the impression left by Alexander's powerful book is that the majority of people in US prisons are black men being held for a non-violent drug offence. But Gottschalk

16 David Garland, *Mass Imprisonment: Social Causes and Consequences* (New York: Sage Publications, 2001) introduction. For the concentration of imprisonment on black males without a high-school diploma, see Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006).

17 William Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press, 2011) at 39, 271, 286, 295.

18 Over two million people are incarcerated in the United States. Much of the growth occurred between 1973 and 2009, when the state and federal prison populations rose from about 200,000 to 1.5 million. With nearly 1 of every 100 adults in prison or jail, the US rate of incarceration is five to ten times higher than rates in Western Europe and other democracies. See Jeremy Travis & Bruce Western, eds, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: National Academies Press, 2014) at 2.

19 David Green, 'US Penal-Reform Catalysts, Drivers and Prospects' (2015) 17:3 Punishment and Society 271.

20 Marie Gottschalk, *Caught: The Prison State and the Lockdown of American* (Princeton, NJ: Princeton University Press, 2016) [Gottschalk, *Caught*].

21 Alexander, *New Jim Crow*, supra note 15.

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emphasizes that about half of all state prison inmates are being held for committing a violent primary offence.[22] Moreover, the economic and social marginalization that sustains the black imprisonment rate also impacts 'certain whites, Latinos, immigrants and members of other demographic groups.'[23] In sum, to Gottschalk, releasing black males from custody would not solve the imprisonment crisis.[24] Framing the problem as a racially tinged incarceration binge caused by the war on drugs is thus unlikely to generate sufficient reforms.[25]

The second pole of reform discourse focuses on the fiscal burdens of the prison system. Conservative coalitions have embraced penal excess as a 'dollars-and-cents issue that begs for a bipartisan solution.'[26] Gottschalk has multiple worries about the financial argument too, the first being that these arguments can just as easily push in the direction of both prison privatization and greater austerity in prison conditions.[27] Gottschalk also notes that the percentage of state budgets allocated to prisons is often overstated. In most states, prison spending is still less than half of what states spend on highways, meaning that the fiscal pressure in many jurisdictions is not as significant as the economically driven reform discourse suggests.[28] Moreover, the reform movement could simply collapse when the economy recovers. As Gottschalk sees it, the imprisonment crisis will not be solved without addressing certain thorny problems, such as the numbers of people held in US prisons for violent crimes or the extraordinary number of people serving life without parole (LWOP) sentences.

But there is little reform discussion focused on LWOP sentences. Before the 1970s, LWOP hardly existed as a sanction. In the Progressive era that persisted from the beginning of the twentieth century to the

22 Gottschalk, *Caught*, supra note 20 at 5.

23 Ibid at 4.

24 Gottschalk points out that the incarceration rates of women, immigrants, and Latinos are rapidly expanding. Sentences for certain categories of crime like 'sex offenders' – or what Gottschalk calls 'the new untouchables' – are becoming more, rather than less, severe. Ibid at 196–214.

25 On this point, and for additional critique of the perspective of Michelle Alexander, see James Forman, Jr, 'Racial Critiques of Mass Incarceration: Beyond the New Jim Crow' (2012) 87 NYU L Rev 101.

26 Gottschalk, *Caught*, supra note 20 at 7.

27 On this point, see also Hadar Aviram, *Cheap on Crime: Recession-Era Politics and the Transformation of American Punishment* (Oakland, CA: University of California Press, 2015), discussing the range of mechanisms that have emerged in the recession-era United States to deal with the costs of incarceration, many of which are disturbing attempts to pass the costs of criminal punishment on to offenders, adding to the deprivations experienced as a result of conviction.

28 Gottschalk, *Caught*, supra note 20 at 9.

1960s, a correctionalist ethos emphasized the need for structured early release and placed limits on how much of a 'life' sentence would be served in prison. While the incarceration rate quadrupled in the three decades before the close of the twentieth century, the LWOP population increased a hundredfold.[29] Today, forty-nine states have a form of LWOP on the books, up from sixteen in the 1990s.[30] And, as Gottschalk emphasizes, not only has the US public been 'largely indifferent to the proliferation of life sentences,' but the sanction is often endorsed as the acceptable alternative to the death penalty, notwithstanding its absence in other developed democracies that have long abolished the death penalty.[31] So while there seems to be widespread public support for Michelle Alexander's idea that African-American men should not be incarcerated for non-violent crimes related to drug addiction, the reform movement will have to take on tougher topics if it is to roll back the policies that created, and that now underpin, mass incarceration.

In sum, legal limits on extreme punishments like LWOP will require that US courts begin to perform more searching proportionality review of non-capital sentencing. As I detail below, this is a role that the US Supreme Court has largely declined, despite limits mandated by the Eighth Amendment.[32] As Gottschalk predicts, this is a topic that will remain untouched by politicians focused on cost reduction and the removal of only non-serious drug offenders from minimum security prisons. Courts will have to play a role, and the public conversation will have to broaden sufficiently. Here, Gottschalk's perspective underscores the significance of Bryan Stevenson's work, revealing that the United States not only needs reformers to push for a large-scale social movement required both to raise public consciousness and elevate the reform

29 Catherine Appleton & Bent Grover, 'The Pros and Cons of Life without Parole' (2007) 47:4 British Journal of Criminology 597 at 599–600.

30 Ashley Nellis & Ryan S King, *No Exit: The Expanding Use of Life Sentencing in America* (Washington, DC: Sentencing Project, 2009) at 3 [Nellis & King, *No Exit*].

31 Gottschalk, *Caught*, supra note 20 at 171–2. See also Carol S Steiker & Jordan M Steiker, 'Opening a Window or Building a Wall? The Effect of the Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly' (2008) 11 U PA J Const L 155 at 175–90, discussing ways in which death penalty opponents have strengthened and normalized penalties of life without parole (LWOP) as well of risks of 'death is different' doctrine insulating non-capital sanctions from proportionality review.

32 The Eighth Amendment states that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' To determine whether a punishment is cruel and unusual, courts must look to 'the evolving standards of decency that mark the progress of a maturing society.' See e.g. *Estelle v Gamble*, 429 US 97, 102 (1976), quoting *Trop v Dulles*, 356 US 86, 101 (1958) (plurality opinion).

conversation to the mainstream, but it also needs the legal doctrinal change required to generate concrete limits on the toughest policies, which are unlikely to be touched by even the most reform-minded politicians and prosecutors.

III *Scaling back moral panics:* Graham *and* Sullivan

While much of Stevenson's work has been focused on wrongful convictions and the death penalty, his most significant jurisprudential contributions have arisen in his work undertaken on behalf of children. The background is that the punishment of juveniles became especially severe in recent decades, due to a confluence of two factors. The first was the legislative proliferation of LWOP as a sanction for adult offenders, noted above. The second was the passage of 'adultification' statutes designed to try children as adults, thereby subjecting them to penalties passed by lawmakers with adults in mind.[33] Stevenson's colleague at New York University, death penalty litigator and clinical law professor Randy Hertz, describes the wave of pseudo-scholarly commentary on child 'super-predators' that triggered a rush to transfer children into adult court:

> In the 1990s, a small group of academics capitalized on and galvanized a growing hysteria about violent crime by youths, speculating that an anticipated rise in the youth population, coupled with spurious theories about the exceptional deviance of children of color growing up poor, would lead to a new generation of 'severely morally impoverished juvenile super-predators . . . capable of committing the most heinous acts of physical violence for the most trivial reasons.' Fearing that the rehabilitation-focused juvenile justice system would be inadequate to protect society from this impending menace, lawmakers passed laws that circumvented juvenile court and sent kids to criminal court for prosecution as adults.[34]

John DiIulio, the Princeton political scientist who coined the term 'super-predator,'[35] has since recanted his views.[36] Indeed, in amicus briefs to the US Supreme Court in support of juvenile litigants, DiIulio and several other criminologists have explained that the juvenile crime

33 Currently, fourteen states have no minimum age for trying children as adults. Some states set the minimum age at ten, twelve, or thirteen. See 'Children in Prison,' online: Equal Justice Initiative <http://eji.org/children-prison>.

34 Randy Hertz, 'Why Life without Parole Is Wrong for Children' *The Nation* (13 March 2012) [Hertz, 'Why Life without Parole'].

35 John DiIulio, 'The Coming of the Super-Predators' *The Weekly Standard* (27 November 1995) at 23–30.

36 See 'Echoes of the Superpredator' *New York Times* (13 April 2014).

rates actually dropped from 1994 to 2000. But the damage of earlier concerns had long since been done, as the laws enacted in the wake of this moral panic remained on the books. As Hertz describes, a small handful of children accused of serious crimes found themselves 'caught permanently in the web spun by academics and politicians, sentenced to die in prison with no hope of release no matter how they might transform and reform themselves.'[37] That is how Stevenson came to represent children sentenced to life imprisonment without the possibility of parole.

The cases of *Graham v Florida* and *Sullivan v Florida*, which raised similar legal issues, were argued on the same day on 9 November 2009. Terrance Graham was sixteen years old when he and a co-defendant tried to rob a store, and the co-defendant hit the store manager with a pipe.[38] Graham was charged with armed burglary and attempted armed robbery. He had no prior criminal record and, in exchange for a guilty plea, was sentenced to three years probation. Then, at seventeen, Graham was accused of committing a home invasion robbery with two twenty-year-old men. He denied involvement in the crime. No jury trial was held. The trial judge found by a preponderance of the evidence (not beyond a reasonable doubt) that Graham committed the robbery, which was all that was required to find that he violated his probation. The trial court sentenced Graham to LWOP for the original armed burglary charge. At his US Supreme Court hearing, Graham's lawyers argued that his sentence for a non-homicide committed as a juvenile violated the Constitution, emphasizing that only about 7 per cent of the juveniles nationwide sentenced to LWOP were sentenced for non-homicide offences. Justice Kennedy, writing for the six-to-three *Graham* majority, agreed, for reasons examined in more detail below.

Stevenson was counsel for Joe Sullivan in the related case. Sullivan was one of only two thirteen year olds in the country sentenced to LWOP for a serious offence that did not involve a killing, after being tried in adult court.[39] Even though he was the youngest person in the country sentenced to LWOP for a non-homicide, his appointed lawyer filed a brief on appeal saying there were no issues to challenge in his case and was then permitted to withdraw. Stevenson and the EJI then took over Sullivan's appeals. In some of the most difficult passages in *Just Mercy* to read, Stevenson describes how a vulnerable Sullivan was sent to an adult prison when he was fourteen, where he eventually developed multiple

37 Hertz, 'Why Life without Parole,' supra note 34.

38 *Graham*, supra note 7.

39 For a depiction of the Joe Sullivan case and the details of a prosecution that lasted a single day, see the posts from the Equal Justice Initiative. E.g. '*Graham v. Florida*,' online: Equal Justice Initiative <http://eji.org/graham-v-florida>.

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sclerosis that placed him in a wheelchair. Doctors thought the neurological disorder might have been triggered by prison trauma.[40]

The Sullivan petition was ultimately denied for a technical reason, but the decision in *Graham* entitled Sullivan to a new sentence. Stevenson made many of the arguments in *Sullivan* that the court endorsed in *Graham*, emphasizing the differences between children and adults that required shielding children from extreme sanctions. These cases amounted to a significant victory for the EJI, following years of effort to raise public consciousness about children sentenced to live their entire lives in US prisons with no prospect of release and after filing similar cases in about a dozen states. Sullivan and other juvenile offenders are now using *Graham* to obtain sentence reviews that abide by the court's requirement of a realistic opportunity to obtain release. Understanding the legal significance of the approach argued in *Sullivan* and endorsed in *Graham* requires some background. The starting point is the special rules that were first developed in the context of constitutional review of the contemporary American death penalty. *Graham* and its progeny are ultimately about extending capital Eighth Amendment review to other severe, but non-capital, sanctions.

IV *The Eighth Amendment of life and death*

A THE PAST: DEATH IS DIFFERENT

The United States has retained the death penalty well past the time that similarly situated democracies have abolished it. The topic of why retention persists is the subject of a vast scholarly literature. Leading accounts point to the unique design of American political institutions and the persistence of local and highly democratic controls over punishment.[41] These explanations tend to be paired with a focus on America's history of slavery and racial violence and the related ongoing Southern claims for states' sovereignty.[42] The ongoing presence of the death penalty has had a doctrinal effect on adjacent areas of law. In 1972, a fractured court in *Furman v Georgia* held that the existing death penalty operated in ways that were too arbitrary to be constitutional.[43] In the wake of *Furman*, multiple states enacted new capital punishment schemes, which the

40 For the full depiction of Joe Sullivan's offence and prison experience, see Stevenson, *Just Mercy*, supra note 3 at 256–74.

41 See e.g. David Garland, *Peculiar Institution: The American Death Penalty in an Age of Abolition* (Cambridge, MA: Harvard University Press, 2010).

42 See e.g. Frank Zimring, *The Contradictions of American Capital Punishment* (Oxford: Oxford University Press, 2003).

43 408 US 238 (1972).

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court basically endorsed in 1976 in *Gregg v Georgia*.[44] Rather than declaring the death penalty unconstitutional once and for all – an option that *Furman* had left open – the court held that special rules in state schemes could render capital punishment an acceptable institution. The court also incorporated detailed proportionality review into the analysis of whether capital punishment violates the prohibition on cruel and unusual punishment in the Eighth Amendment. Subsequently, the idea that 'death is different' took hold – a line of reasoning that meant that non-capital cases required less robust review.[45]

The upshot was that non-capital cases did not require the same gold-plated substantive and procedural protections that were mandated in the capital setting in the post-*Furman/Gregg* era. Two tracks of constitutional sentencing law emerged – 'the court of life and death,' as Rachel Barkow puts it.[46] Measures designed to legitimate the contemporary death penalty were seen as unnecessary in the context of 'lesser' sanctions, even where those 'lesser' sanctions included a lengthy term of imprisonment or even a LWOP sentence. In other words, the presence of the death penalty on the spectrum of punishments doled out under American law meant that other extreme sanctions received less legal attention and scrutiny. The energy of Eighth Amendment review was exhausted, it seemed, by careful review of cases that typically generated a few dozen executions each year. Meanwhile, the number of inmates serving LWOP sentences tripled from the early 1990s to 41,000 inmates in 2008.[47]

B THE NEW PRESENT: EXTENDING DEATH REVIEW

There are two main sets of Eighth Amendment precedents: those concerned with the method of punishment and those concerned with the proportionality or amount of punishment in relation to the severity of the crime. The first set prohibits the imposition of 'inherently barbaric'

44 428 US 153 (1976).

45 'The death penalty is different from other punishments in kind rather than degree.' *Solem v Helm*, 463 US 277 (1983) at 294.

46 Barkow, 'The Court of Life and Death,' supra note 6. For an additional critique, see 'The Rhetoric of Difference and the Legitimacy of Capital Punishment' (2011) 114 Harv L Rev 1599 at 1621. See also Youngjae Lee who criticizes the 'death is different' mantra as looking 'more like an excuse for the Court's nonintervention in noncapital cases than a principle to justify aggressive interventions in capital cases.' Youngjae Lee, 'The Purposes of Punishment Test' (2010) 23:1 Federal Sentencing Reporter 58 at 58.

47 Nellis & King, *No Exit*, supra note 30 at 9–10. See also Sharon Dolovich, 'Creating the Permanent Prisoner' in Charles J Ogletree, Jr, & Austin Sarat, eds, *Life without Parole: America's New Death Penalty?* (New York: New York University Press, 2012) 96.

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punishments in all circumstances.[48] A second, more prevalent set of precedents considers punishments challenged as disproportionate to the crime, based on the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'[49] Under the proportionality heading, there are a further two subsets, discussed below. The first involves a non-capital topic: the length of prison sentences. The second articulates rules for when particular types of punishment – like capital punishment – are too severe for particular categories of cases. Non-capital review of sentence lengths has been extremely limited in American law. The second, more capacious law on categorical exemptions in the capital context is what Stevenson and his allies have managed to transport to the non-capital context.

1 *non-capital review: proportionality and time*

In 1983, in one of the few successful cases under this heading, the US Supreme Court struck down a LWOP sentence for a seventh non-violent felony, specifically the passing of a worthless check.[50] More often, defendants challenging long prison terms do not succeed.[51] In the 1991 case of *Harmelin v Michigan*, a fractured Supreme Court upheld an LWOP sentence for the possession of 672 grams of cocaine.[52] The controlling opinion in *Harmelin* endorsed an approach that involved, first, comparing the gravity of the punishment to the severity of the offence. Then, where this threshold comparison leads to an inference of gross disproportionality, the court would then compare the defendant's sentence with sentences imposed for the same crime in other US states. If this comparative analysis validates the initial judgment that the sentence is grossly disproportionate, then the sentence is found to be cruel and unusual.

The comparison between gravity and severity is notoriously subjective in any sentencing system, and in conducting it, US courts seem to uncritically accept whatever justifications for the sanctions are advanced by state legislatures. For example, the *Harmelin* test required the Court in *Ewing v California* to examine the gravity of the offence in relation to the

48 See e.g. *Hope v Pelzer*, 536 US 730 (2002), which concerned the Alabama Department of Correction's use of a 'hitching post' whereby inmates were immobilized for long periods of time.

49 *Weems v United States*, 217 US 349, 367 (1910).

50 *Solem v Helm*, 463 US 277 (1983).

51 See e.g. *Rummel v Estelle*, 445 US 263 (1980), upholding a sentence of life with the possibility of parole for a third non-violent felony, obtaining money by false pretenses; *Hutto v Davis*, 454 US 370 (1982) (per curiam) upholding a sentence of forty years for possession of marijuana with intent to distribute and distribution of marijuana.

52 501 US 957 (1991).

severity of the punishment, but, instead, the *Ewing* plurality opinion simply concluded that the sentence reflects 'a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.'[53] Many scholars have criticized the approach. For example, as Youngjae Lee argues, rather than evaluating how the crime and the length of the prison term related to one another, the Court simply 'changed the subject' and asked whether the legislature's policy judgment bore a 'rational relationship to a legitimate government purpose.'[54] The *Ewing* court upheld California's 'three-strikes' law as it applied to a defendant whose third strike was a minor shoplifting offence.

Justice O'Connor's plurality decision in *Ewing* also avoided careful examination of the severity of the penalty in relation to the gravity of the offence and, instead, emphasized that punishing repeat offenders harshly is an acceptable policy option open to state legislatures. She held that the Eighth Amendment only requires striking down an extreme non-capital sentence, and she offered the example of a life sentence for overtime parking. The Constitution requires asking only whether the state has a 'reasonable basis for believing' that the sentence would serve deterrent, retributive, rehabilitative, or incapacitative goals.[55] In sum, the state is entitled to pick from a menu of penological goals and need only show a reasonable basis for believing the sentence will in fact serve that named goal. This is the landscape of judicial deference that Stevenson had to either alter or find a way to navigate around.

2 *death review: categorical exemptions*

Stevenson succeeded by accessing a second subset of proportionality jurisprudence concerned with identifying entire categories of cases in which a particular punishment is prohibited. Until *Graham*, categorical rules in recent decades had been limited to capital punishment. One line of cases articulated categorical limits on the death penalty in light of the nature of the offence. Under this heading, several cases in the late twentieth century slowly abolished capital punishment for all non-homicide crimes.[56] Another line has been concerned with the characteristics of

53 *Ewing v California*, 538 US 11 (2003) at 30 [*Ewing*] (plurality opinion).

54 Youngjae Lee, 'The Constitutional Right against Excessive Punishment' (2005) 91 Va L Rev 677.

55 *Ewing*, supra note 53 (plurality opinion).

56 See e.g. *Coker v Georgia*, 433 US 584 (1977) (holding that the Eighth Amendment forbids the death penalty for the crime of rape); *Enmund v Florida*, 458 US 782 (1982) (holding that the Eighth Amendment forbids the death penalty for the driver of a getaway vehicle who aided and abetted a felony in the course of which a murder was

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an offender. Here, a number of more recent cases narrowed the death penalty's use by prohibiting its imposition on defendants who had committed their crimes before the age of eighteen[57] or whose intellectual functioning was in a low range.[58] The idea is that given the limited culpability of these offenders, a sanction of death will always be grossly disproportionate.

When articulating categorical limits on capital punishment, the approach is different than the *Harmelin* methodology outlined above. Here, the test looks, first, at 'objective indicia of society's standards, as expressed in legislative enactments and state practice.'[59] Second, the court applies its 'own independent judgment' of the crime and the category of the offender.[60] This amounts to a more searching review than the method in *Harmelin* and *Ewing*, which involved, first, a threshold comparison of the gravity of the offence and the severity of the sentence and, only then, a more objective comparison of the sentence imposed with sentences in other cases and across jurisdictions. The capital case approach is different; the court begins with the more objective, inter-jurisdictional component and then moves to an 'independent judgment' regarding the culpability of the offender and the severity of the punishment.

Graham v Florida declared a non-capital sentence unconstitutional for the first time in almost three decades. As Barkow observes, 'both the result and the methodology of the decision are historic.'[61] Prior to *Graham*, many thought that categorical exemptions were in fact unique to the death penalty context—it was one of the places where 'death is different.' But in his opinion for the six-to-three majority in *Graham*, Justice Kennedy distinguished cases like *Harmelin* and *Ewing* as challenges to a particular defendant's sentence rather than to a sentencing practice itself. The *Graham* case, in contrast, 'implicates a particular type of sentence as it applies to an entire class of offender who have committed a range of crimes.'[62] The question was whether this type of punishment (LWOP) was permissible for this type of offender (juveniles). Justice Kennedy emphasized the conceptual similarity raised by the life imprisonment

committed by others but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed); *Kennedy v Louisiana*, 128 S Ct 2641 (2008) (holding that the Eighth Amendment forbids the death penalty for the rape of a child).

57 *Roper v Simmons*, 543 US 551 (2005) [*Roper*].

58 *Atkins v Virginia,* 536 US 304 (2002).

59 *Roper*, supra note 57 at 563.

60 Ibid at 564.

61 Barkow, 'Categorizing *Graham*' (2010) 23:1 Federal Sentencing Reporter 49.

62 *Graham*, supra note 38 at 2020.

of a juvenile and the execution of an adult: '[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences.'[63] The idea is that a LWOP sentence is one that 'alters the offender's life by a forfeiture that is irrevocable.'[64]

Given the limits of the non-capital analysis noted above, distinguishing the *Ewing*-type cases marked a real step forward for challenging severity in cases where the punishment is something short of death. Justice Kennedy said that the regular non-capital analysis does not help because a comparison between 'the severity of the penalty and the gravity of the crime does not advance the analysis.'[65] Rather, Justice Kennedy looked first at the penal law landscape and saw that thirty-seven states, the District of Columbia, and the federal system all theoretically permitted sentences of life without parole for juvenile non-homicide offenders.[66] However, of these, only eleven jurisdictions actually impose the sanction and even then it is rare.[67] Then, Justice Kennedy drew from evidence adduced by amici in the capital case of *Roper v Simmons*, which showed the limited culpability of juveniles and the fact that their mental development is not complete. Following the *Roper* logic, *Graham* held that a juvenile defendant must be afforded 'some realistic opportunity to obtain release' that reflects their capacity for change.[68] The juvenile may turn out to be irredeemably incorrigible, but the *Graham* majority holds that a state may not make that judgment 'at the outset.'[69] These are unmistakable echoes of Stevenson's arguments advanced for young people like Joe Sullivan.

V *Analysis: the prospects of just mercy*

While many scholars have written in support of these rulings, they question certain aspects of the reasoning. Michael O'Hear queries how the *Graham* court justified its use of the categorical approach by characterizing the case as a challenge to a 'sentencing practice' rather than a particular sentence.[70] The question is whether this is likely to be a durable distinction, as any challenge to a sentence could be recharacterized as a

63 Ibid at 2027.
64 Ibid.
65 Ibid.
66 Ibid at 2023.
67 Ibid at 2024.
68 Ibid at 2027.
69 Ibid at 2030.
70 Michael M O'Hear, 'The Beginning of the End for Life without Parole?' (2010) 23:1 Federal Sentencing Reporter 1 at 3 [O'Hear, 'The Beginning of the End'].

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challenge to a practice. Alice Ristroph challenges the distinction in *Graham* between 'revocable' and 'irrevocable' punishments, arguing that irrevocability does not actually distinguish death – or LWOP – from other prison sentences. Ristroph writes: 'Once a defendant has spent a year, a month, or even a day in prison, that time cannot be restored to him if his conviction is later overturned. We cannot revive the dead, but nor can we turn back time.'[71] More compelling to Ristroph is the idea that what is distinct about an LWOP sentence is the absence of hope. Unlike indeterminate prison terms subject to periodic parole review, LWOP deprives the prisoner of any possibility of future freedom.[72]

However *Graham* is categorized, it signals a new willingness among some members of the US Supreme Court to perform a more careful review of legislative action in the field of sentencing, which comes at a time when the costs and consequences of the criminal justice system have become far less acceptable. And many scholars have noted the potentially broad implications. The holding in *Graham* was officially limited to a non-homicide crime and a juvenile offender, but as O'Hear points out, the courts could opt to constitutionalize a larger number of traditional sentencing distinctions such as between violent and non-violent offences, first-time offenders and recidivists, and various degrees of *mens rea*.[73] Juvenile LWOP inmates constitute only 5 per cent of LWOP inmates nationally,[74] but as the dissent in *Graham* worried, there is no 'reliable limiting principle' to stop the court from applying categorical prohibitions to other non-capital sanctions.[75] A future case could extend the reasoning to find that adult LWOP for non-violent offences is unconstitutional. Under the categorical exemption approach that was finally borrowed from the capital context, non-capital sentencing beyond LWOP could face a more searching standard of review.

Indeed, the court subsequently articulated yet another legal limit to extreme punishment but, now, in the context of more serious young offenders convicted of homicide. Bryan Stevenson was counsel for Evan Miller in *Miller v Alabama* and for Kuntrell Jackson in the companion case of *Jackson v Hobbs*.[76] When Miller was fourteen years old in July

71 Alice Ristroph, 'Hope, Imprisonment and the Constitution' (2010) 23:1 Federal Sentencing Reporter 75 at 75.

72 Ibid at 76. As the court states, '[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope' (ibid at 2032).

73 O'Hear, 'The Beginning of the End,' supra note 70.

74 Nellis & King, *No Exit*, supra note 30 at 19.

75 *Graham* SC, supra note 7 at 2046 (Thomas J dissenting).

76 *Evan Miller, Petitioner v Alabama; Kuntrell Jackson, Petitioner v Ray Hobbs, Director, Arkansas Department of Correction*, 567 US ___ (2012).

2003, he and a friend killed Cole Cannon by beating him with a baseball bat and burning his trailer while he was inside. Miller was tried as an adult for capital murder during the course of an arson. At trial, the jury returned a verdict of guilty, and Miller was sentenced to a mandatory LWOP sentence. With the help of Stevenson and the EJI, Miller sought multiple legal reviews, none of which was successful until they arrived at the US Supreme Court. Writing for a five-to-four majority, Justice Kagan reversed the Arkansas and Alabama Supreme Courts' decisions, denying relief to Miller and remanded. The court held that the Eighth Amendment's prohibition against cruel and unusual punishment forbids a mandatory sentence of LWOP for juvenile homicide offenders, observing once again that children are constitutionally different from adults for sentencing purposes.[77]

Miller did not ban juvenile LWOP entirely but held that a judge cannot impose the sentence without considering how children are different and how those differences counsel against an irrevocable life sentence.[78] Since *Miller* was decided, thirteen states have abolished juvenile LWOP. In 2016, the US Supreme Court confirmed in *Montgomery v Louisiana* that *Miller* did not simply announce a procedural rule. Rather, it rendered LWOP an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the 'transient immaturity of youth.'[79] According to *Montgomery,* every juvenile who received a sentence in violation of *Miller* is entitled to a sentence review. The complex consequences of these holdings continue to be worked out in courts and legislatures across the US.

The stories of Joe Sullivan and Evan Miller both appear in Chapter 14 of *Just Mercy*, alongside the story of the murder of Stevenson's eighty-six-year-old grandfather by several teens looking to steal his television. Stevenson describes the formation of a legal strategy that emphasized the neurological, psychological, and sociological evidence that adolescents are impaired by 'immature judgment, an underdeveloped capacity for self-regulation and responsibility, vulnerability to negative influences and outside pressures, and a lack of control over their own impulses and their environment.'[80] At the core of the doctrinal shifts in decisions like

77 Roberts CJC filed a dissenting opinion, emphasizing that the court's role is to apply the law, not to answer questions about morality and social policy. He wrote that the majority did not sufficiently characterize the punishment as unusual, therefore the punishment did not violate the Eighth Amendment. Justices Scalia, Thomas, and Alito joined in the dissent.

78 For discussion, see Marcia Coyle, 'New Look at Juvenile Sentencing; Categorical Bar on Life without Parole Urged' (2015) 37:52 National LJ 1.

79 *Montgomery v Louisiana*, 577 US __ (2016).

80 Stevenson, *Just Mercy*, supra note 3 at 267–8.

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Graham and *Miller* is an idea that Stevenson has repeated for years in lectures around the world: '[P]eople are more than the worst thing they've done.'

On stages and in courtrooms across the United States, and now in the pages of *Just Mercy*, Stevenson has pressed for legal rules that respond to the nuances of individual culpability, often on behalf of children and adolescents, but in ways that could eventually, and logically, extend to all sentencing decisions. The full-blown consequences of the direction in which he is pushing the law would be profound and would extend far beyond the policy tweaks likely to follow from bipartisan coalitions focused on reducing costs and scaling back the war on drugs. The Stevenson doctrine insists on the idea that criminal sentencing should canvass the full range of evidence relevant to the culpability of defendants – even those who have committed the most serious crimes – and that courts should require state punishment to contemplate the reform and return of individuals capable of change. He has seen rare success in bringing this message to both courtrooms and the wider public – the two venues most critical to the hope of real reform.

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