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THE ILLUSORY EIGHTH AMENDMENT

JOHN F. STINNEFORD*

Although there is no obvious doctrinal connection between the Supreme Court's Miranda *jurisprudence and its Eighth Amendment excessive punishments jurisprudence, the two are deeply connected at the level of methodology. In both areas, the Supreme Court has been criticized for creating "prophylactic" rules that invalidate government actions because they create a mere risk of constitutional violation. In reality, however, both sets of rules deny constitutional protection to a far greater number of individuals with plausible claims of unconstitutional treatment than they protect.*

This dysfunctional combination of over- and underprotection arises from the Supreme Court's use of implementation rules as a substitute for constitutional interpretation. A growing body of scholarship has shown that constitutional adjudication involves at least two distinct judicial activities: interpretation and implementation. Prophylactic rules are defensible as implementation tools that are necessary to reduce error costs in constitutional adjudication. This Article contributes to implementation rules theory by showing that constitutional interpretation, defined as a receptive and non-instrumental effort to understand constitutional meaning, normally must precede constitutional implementation. When the Supreme Court constructs implementation rules without first interpreting the Constitution, the rules appear arbitrary and overreaching because they do not have a demonstrable connection to constitutional meaning. Such rules also narrow the scope of the Constitution itself, denying protection to any claimant who does not come within the rules. The only way to remedy this dysfunction and provide

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meaningful protection across a broad range of cases is to interpret the Constitution before implementing it.

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INTRODUCTION

The Supreme Court's current approach to the Eighth Amendment is often described as a paradigm of improper judicial legislation.[1]

1. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, C.J., dissenting) (criticizing the Court for invalidating mandatory life sentences for juvenile offenders, on the ground that that "determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy" and that the courts' role " is to apply the law, not to answer such questions"); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword:*

The Court has invalidated the sentencing practices of dozens of states and the federal government by declaring that imposition of the death penalty or life sentences with no possibility of parole for various classes of offense or offender is unconstitutional,[2] while boldly proclaiming its own independence from the Eighth Amendment's original meaning[3] and even—increasingly—from current societal standards of decency.[4] It is less often noted, however, that these decisions cover only a tiny subset of felony cases. Outside this group, the Court takes precisely the opposite approach to claims of excessive punishment. It not only refrains from judicial legislation, but has abandoned judicial review altogether.[5] In such cases, the Court defers to the legislature not only as to whether a given punishment is excessive, but as to the definition of excessiveness itself.[6]

The appearance of judicial activism has provoked inter-branch resentment and reaction, fueling our ongoing societal pathology of overcriminalization and overpunishment.[7] The extreme deference

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A Political Court, 119 HARV. L. REV. 31, 90 (2005) (describing Roper v. Simmons, 543 U.S. 551 (2005), which invalidated the death penalty for juveniles, as "a naked political judgment"); Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 747 (2009) ("The problem with decisions like . . . *Roper* . . . is that they demonstrate that the Supreme Court quite often fails to act like a Court and instead behaves like some other kind of political institution.").

2. *See, e.g.*, *Miller*, 132 S. Ct. at 2460, 2474–75 (invalidating the sentencing practices of twenty-eight states and the federal government concerning mandatory life sentences for juvenile homicide offenders); Graham v. Florida, 130 S. Ct. 2011, 2023, 2034 (2010) (invalidating the sentencing practices of thirty-seven states, the District of Columbia, and the federal government concerning life sentences for juvenile non-homicide offenders); Kennedy v. Louisiana, 554 U.S. 407, 426, 447 (invalidating the six state statutes authorizing the death penalty for non-homicide offenses against individuals), *modified on denial of reh'g*, 554 U.S. 945 (2008); *Roper*, 543 U.S. at 564, 568 (invalidating the sentencing practices of twenty states concerning the death penalty for offenders who were younger than eighteen when they committed the offense).

3. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail."); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (asserting that the Eighth Amendment should be interpreted according to "the evolving standards of decency that mark the progress of a maturing society").

4. *See, e.g.*, *Graham*, 130 S. Ct. at 2026 ("Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual." (internal quotation marks omitted)); *Kennedy*, 554 U.S. at 421 ("Consensus is not dispositive."); *Atkins*, 536 U.S. at 313 ("[I]n 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." (citation omitted)).

5. *See infra* Part III.A.

6. *See infra* Part III.C.

7. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 849–50 (2006) [hereinafter Stuntz, *Political Constitution*] ("The Supreme Court decided to regulate policing and procedure, and the politicians responded with a

underlying this appearance has prevented the courts from protecting criminal offenders from the harsher sentences that this pathology has caused.[8] For most offenders, the Eighth Amendment is an illusion, and a harmful one at that.

This Article shows that the illusory Eighth Amendment is the result of the Supreme Court's decision to use implementation rules as a substitute for constitutional interpretation. For the purposes of this Article, an implementation rule is a rule for adjudicating constitutional cases that is not itself required or logically entailed by the meaning of the Constitution. Over the past thirty years, scholars have shown that implementation rules are a necessary and even ubiquitous feature of constitutional adjudication.[9] The primary purpose of such rules is to minimize cost, including both the cost of adjudicative error and the social cost arising from the underlying constitutional violation.[10]

Surprisingly, the implementation rules literature has paid little attention to the nature of constitutional interpretation beyond defining it as the effort to determine constitutional meaning.[11] This

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forty-year backlash of overcriminalization and overpunishment."); *see also, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (describing the overcriminalization phenomenon and critiquing it from a libertarian perspective); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012) (arguing that courts have contributed to the overcriminalization phenomenon by construing poorly phrased criminal statutes expansively); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001) [hereinafter Stuntz, *Pathological Politics*] (arguing that criminal liability continues to expand at the state and federal level because prosecutorial discretion, coupled with the deference afforded to the legislature, prevents courts from limiting it).

8. *See infra* Part III.C.

9. *See infra* Part I.B.

10. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 192, 193 & n.12 (1988) (arguing that courts regularly devise rules to account for both "constitutional values . . . [and] the institutional difficulties that courts face in advancing those values").

11. *See infra* Part II.A. The distinction between interpretation and implementation is similar to the distinction that "new originalist" scholars such as Randy Barnett, Lawrence Solum, and Keith Whittington make between interpretation and construction. *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (advocating the "new originalist" distinction between constitutional interpretation and construction); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 973 (2009) (describing interpretation as "[t]he activity of determining the linguistic meaning—or semantic content—of a legal text" and construction as "[t]he activity of translating the semantic content of a legal text into legal rules, paradigmatically in cases where the meaning of the text is vague"); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–21 (2010) ("There will be occasions . . . when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction. The process of interpretation may be able to constrain the

is an important gap in the literature because the use of implementation rules raises legitimacy and efficacy questions that can only be answered with reference to interpretation.[12] An implementation rule enjoys the strongest claim to legitimacy if it implements the meaning of the Constitution rather than the court's own substantive policy judgment.[13] An implementation rule is effective to the extent it minimizes the costs arising from erroneous application of constitutional meaning.[14] Neither legitimacy nor efficacy questions can be answered without some understanding of the nature of constitutional meaning and the proper methods to interpret it.[15]

This Article argues that the purpose of constitutional interpretation is to determine "voter's meaning."[16] Voter's meaning is the meaning imparted to the text by those bodies of lawmakers with authority to ratify the Constitution or constitutional amendments.[17] Voter's meaning does not include the private intentions of the various lawmakers involved in framing and ratification.[18] A vote in favor of the Constitution, like a vote in favor of any other law, signifies that the voter knows and consents to the fact that the public meaning of the text will have legal force.[19] Interpretation of the original public meaning of the document is thus sufficient to determine both the substantive policy judgments contained in the text and the manner in which the text directs those

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available readings of the text and limit the permissible set of political options, but the interpreter may not be able to say that the text demands a specific result.").

Although the present Article ultimately concludes, consistent with the "new originalist" position, that interpretation is properly understood as discernment of the Constitution's original public meaning, it does not adopt this position as a starting point. Rather, this Article starts from the perspective of implementation rules theory. It argues that implementation rules, as described by scholars such as Mitchell Berman, Richard Fallon Jr. and Kermit Roosevelt III, can neither perform their accuracy-enhancing function nor establish their own legitimacy without reference to a conception of constitutional interpretation that is distinct from constitutional implementation. This Article further argues that the conception of constitutional interpretation that best serves implementation rules theory is the discernment of original public meaning. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part I.B.1.

14. *See* Strauss, *supra* note 10, at 193.

15. *See infra* Part I.B.

16. "Voter's meaning," as used in this Article, is a particular instance of "utterer's meaning," described more fully below. *Infra* Part II.A.1.

17. *See infra* Part II.A.1; *see also,* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("[T]he intention of the ratifiers, not the Framers, is in principle decisive . . . .").

18. *See infra* Part II.A.1.

19. *See infra* Part II.A.1.

judgments to be embodied in practice.[20] At a minimum, this requires an effort to determine the semantic content, grammatical and structural relations, and historical context of the words contained in this document.

Implementation rules are what courts use when something more is needed after constitutional interpretation has been exhausted. The efficacy and legitimacy of such rules depend on the Court's effort to obtain everything it can from interpretation before having recourse to rulemaking. Without such an effort, courts cannot reliably use implementation rules to minimize error costs because such rules' relationship to constitutional meaning will be unknown. Worse, unless courts adequately interpret the Constitution before creating implementation rules, such rules will necessarily reflect the substantive policy judgment of some current governmental actor (usually the Court or the legislature) rather than the judgment embodied in the Constitution itself.[21]

This brings us back to the illusory Eighth Amendment. A closer look at the Supreme Court's Cruel and Unusual Punishments Clause jurisprudence reveals two important interpretive failures: First, the Court failed to interpret the term "unusual," transforming the Clause into an irredeemably vague prohibition of "cruel punishments."[22] Second, as a result of this failure, the Court withdrew its traditional definition of "excessive" punishments, which is the most important category of cruel and unusual punishments.[23] The Court has replaced the meaning of these concepts with two opposing implementation rules. In cases involving imprisonment of adults,[24]

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20. *See infra* Part II.A.1. This Article does not address the question of whether the "legal meaning" of the Constitution is fully exhausted by the semantic meaning of the text. Rather, it makes the more modest claim (in line with Lawrence Solum and other originalist scholars) that the semantic meaning of the text contributes to the Constitution's legal meaning, so that any effort to adjudicate constitutional questions without resorting to textual interpretation will lead to serious dysfunction. *See, e.g.*, Solum, *supra* note 11, at 953 ("We can use the term 'contribution' to denote the relationship between semantic content—the linguistic meaning of the text—and legal content—the doctrines or rules of constitutional law."); *cf.* Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 966 (2009) (arguing that the Constitution, viewed in light of its original meaning, "embodies numerous authoritative, prudential, social-ordering decisions that have permitted our society to pursue the common good in a reasonably effective manner").

21. *See infra* Part II.A.

22. *See infra* Part III.A.

23. *See infra* Part III.C.

24. This category includes juveniles convicted in the adult system, so long as they are sentenced to terms less severe than life imprisonment without the possibility of parole. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (invalidating mandatory

the Court applies an apparently irrebuttable presumption of constitutionality.[25] In cases involving the death penalty for non-homicide offenses, for juveniles and for the intellectually disabled, and in cases involving juveniles sentenced to life without possibility of parole, the Court applies an apparently irrebuttable presumption of unconstitutional excessiveness.[26] These presumptions, given in the absence of interpretation, amount to a delegation of substantive policymaking from the Constitution to a current governmental actor. In one set of cases, the legislature gets to decide what the constitutional limits of punishment are; in the other, the Court does. In neither case does constitutional meaning drive the decision. As a result, the legitimacy and efficacy of both presumptions are highly questionable.

This problem will not be resolved by more rulemaking, but only by more interpretation.[27] As I have previously shown, the word "unusual" in the Eighth Amendment does have independent meaning: it means "contrary to long usage."[28] The Eighth Amendment does not vaguely forbid *cruel punishments*: it specifically forbids punishments that are *cruel and contrary to long usage* or *cruel and new*.[29] Recognition of this additional meaning would enable the Court to decide questions of ordinal and cardinal proportionality more accurately and without unduly broad presumptions of constitutionality or unconstitutionality.[30] As a result, the Cruel and Unusual Punishments Clause would be more effective, and the politics of criminal law would be at least slightly less pathological.[31]

Part I of this Article describes the central claims of implementation rules theory, using the paradigmatic case of *Miranda v. Arizona*[32] as the primary lens through which to view this area of scholarship. Part II describes the characteristics that distinguish interpretation from

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life sentences without the possibility of parole for juvenile homicide offenders); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (invalidating life sentences without the possibility of parole for juvenile non-homicide offenders); Roper v. Simmons, 543 U.S. 551, 568 (2005) (invalidating the death penalty for juveniles).

25. *See infra* Part III.D.1.

26. *See infra* Part III.D.2.

27. *See infra* Part III.F.

28. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) (internal quotation marks omitted).

29. *See id.* at 1745–46; *see also infra* Part III.F.

30. *See infra* Part III.F.

31. *See* Stuntz, *Pathological Politics*, *supra* note 7, at 509–10 (describing several pathologies associated with the American criminal justice system).

32. 384 U.S. 436 (1966).

implementation, demonstrates that the Supreme Court laid down implementation rules in *Miranda* without first interpreting the meaning of "compelled," and links much of the subsequent dysfunction surrounding *Miranda* to this interpretive failure. Part III shows that the Supreme Court's "excessive punishment" cases under the Cruel and Unusual Punishments Clause involve the same kind of interpretive failure that occurred in *Miranda* and seem to be on track for creating the same kinds of dysfunction. This Part also shows how interpretation of the Cruel and Unusual Punishments Clause can resolve the worst elements of this dysfunction.

I. IMPLEMENTATION RULES

A. Miranda *and the Debate over Prophylactic Rules*

In *Miranda v. Arizona*, the Supreme Court held that when an individual is subjected to custodial interrogation, the police must warn him that he has the right to remain silent, that anything he says will be used against him in court, that he has the right to an attorney, and that the state will pay for an attorney if he cannot afford one.[33] If the individual invokes his right to silence or to counsel, all questioning must stop.[34] The police may interrogate the individual only if they obtain a valid waiver of his rights to silence and counsel.[35] If the police violate these rules, any statements obtained from such interrogation will be excluded from evidence at trial.[36] The basis of the Court's ruling was the Fifth Amendment privilege against compelled self-incrimination.[37]

The Supreme Court's decision in *Miranda* was unusual in many respects. The opinion was almost entirely forward-looking. The Court did not discuss the facts surrounding the confessions under review until the very end of the opinion[38] and made no finding that these confessions had been given involuntarily.[39] Instead, it held that the risk arising from the "inherently compelling pressures" associated with custodial interrogation required the use of the "procedural safeguards" described above.[40] The Court asserted that, in the future,

33. *Id.* at 444.
34. *Id.* at 444–45.
35. *Id.* at 444.
36. *See id.*
37. *See id.* at 439.
38. *See id.* at 491–99.
39. *See id.* at 457 ("In these cases, we might not find the defendants' statements to have been involuntary in traditional terms.").
40. *Id.* at 444, 467; *see supra* note 33.

it would order the exclusion of any statement obtained in violation of these safeguards even if it could be shown that the defendant was fully aware of his rights.[41] Finally, the Court seemed to offer Congress and state legislatures a limited power to revise its holding, stating that they "are free to develop their own safeguards for the privilege, so long as they are fully as effective" as those imposed by the Court.[42]

Miranda provoked a wide range of responses in both the political and legal realms.[43] Two of the most important responses may be described as a structural critique and a pragmatic defense. Proponents of the structural critique accused the *Miranda* Court of engaging in judicial legislation that violated the Constitution's structural limitations on the judicial role.[44] The basic idea,

41. *See Miranda*, 384 U.S. at 468 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.").

42. *Id.* at 490.

43. *See, e.g.*, THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998) (collecting articles debating the legitimacy and efficacy of *Miranda*); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1419 (1985) ("*Miranda* was not a wise or necessary decision, nor has *Miranda* proved to be, as is generally contended, a harmless one." (footnote omitted)); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996) (arguing that "*Miranda* has significantly harmed law enforcement efforts in this country"); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101 (1985) (arguing that the Supreme Court's use of "prophylactic rules" in *Miranda* and other cases "raise[s] a question of constitutional legitimacy"); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (arguing that cases like *Miranda* demonstrate that "a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law"); Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 585 (2007) (arguing that *Miranda* directly and effectively prevents compulsion in custodial interrogation); George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1083 (2001) (arguing the *Miranda* and its progeny can best be understood as "due process notice" cases); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 505–06 (1996) [hereinafter Schulhofer, Miranda*'s Practical Effect*] (challenging Paul Cassell's claim that *Miranda* harms law enforcement); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987) [hereinafter Schulhofer, *Reconsidering* Miranda] (defending *Miranda* against a U.S. Department of Justice report that called for it to be overruled); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) [hereinafter Weisselberg, *Mourning* Miranda] (arguing that *Miranda* is "largely dead" as a source of protection for criminal suspects); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 112 (1998) [hereinafter Weisselberg, *Saving* Miranda] (arguing that the Supreme Court should characterize *Miranda* rules as constitutionally required rather than prophylactic and should expand the scope of evidence excluded under *Miranda*).

44. This critique was vividly illustrated by Judge Henry Friendly, who "translate[d]" *Miranda* into the form of a statute entitled, "An Act to implement the provision of the Fifth Amendment that 'No person . . . shall be compelled in any criminal case to be a witness against himself.'" HENRY J. FRIENDLY, BENCHMARKS 267–

articulated most forcefully by legal scholar Joseph Grano and Justice Scalia, is that *Miranda* improperly required federal and state law enforcement to follow a set of "prophylactic rules"—that is, "court-created rule[s] that can be violated without violating the Constitution itself."[45] Such rules are improper because the Constitution does not empower judges to create extra-constitutional rules and enforce them against other governmental actors; it only empowers judges to enforce the Constitution itself.[46] *Miranda*'s prophylactic rules thus violated principles of separation of powers and federalism.[47]

Defenders of *Miranda*, most notably Professor David Strauss, answered the structural critique with a pragmatic defense. In an essay entitled *The Ubiquity of Prophylactic Rules*, Strauss asserted that rules like those articulated in *Miranda* "are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law."[48] Strauss argued that courts deciding constitutional cases regularly devise rules that take into account "not only the constitutional values at stake, but also the institutional difficulties that courts face in advancing those values."[49] Such

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68 (1967); *see also, e.g.*, *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) (arguing that the new required procedural safeguards discourage confessions and demonstrate a lack of judicial restraint); Raymond L. Spring, *The Nebulous Nexus:* Escobedo, Miranda*, and the New 5th Amendment*, 6 WASHBURN L.J. 428, 442 (1967) ("[T]he court has allowed its moral judgment to force it beyond interpretation of the Constitution and into the realm of amendment.").

45. Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176–77 (1988) (arguing that the prophylactic nature of the *Miranda* rules undermines their legitimacy); *see* Dickerson v. United States, 530 U.S. 428, 445–46 (2000) (Scalia, J., dissenting) (arguing that the *Dickerson* majority's reading of *Miranda* wrongly implied that the Supreme Court "has the power, not merely to apply the Constitution but to expand it"). Other scholars have also described the *Miranda* rules as prophylactic. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 141 n.34 (2001) (noting that the Supreme Court itself has referred to *Miranda*'s prescriptions as "prophylactic"); David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 55–56 (describing *Miranda* as a "noteworthy example[]" of the Supreme Court's power to create prophylactic rules); David Huitema, Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261, 263–64 (2000) (defending the Supreme Court's authority to create prophylactic *Miranda* rules); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L. REV. 465, 471 (1999) ("A 'prophylactic' rule is not a dirty word. Sometimes such rules are necessary and proper. The privilege against self-incrimination, no less than other constitutional rights, needs 'breathing space.' And prophylactic rules may be the best way to provide it.").

46. *See Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting) (describing the claimed power to create constitutional prophylactic rules as "an immense and frightening anti-democratic power [that] does not exist").

47. *See* Grano, *supra* note 44, at 123–24 (arguing that the Supreme Court does not have supervisory authority over state courts and may not legitimately impose prophylactic rules to govern their procedures).

48. Strauss, *supra* note 10, at 190.

49. *Id.* at 192.

difficulties include "error costs,"[50] "administrative costs,"[51] and "institutional capacities."[52] Strauss argued that instrumental considerations permeate virtually all constitutional doctrine and therefore there is nothing illegitimate or even noteworthy about the *Miranda* rules.[53] Strauss's argument has been read to imply that it is pointless even to distinguish between the "meaning" of the Constitution and the rules judges devise to implement or enforce it.[54] From a pragmatic perspective, the Constitution's meaning *is* its implementation—and therefore there is no such thing as a "prophylactic rule."[55]

Miranda's structural critique and pragmatic defense largely talked past each other. Each made points the other could not answer. It is undoubtedly true that judges—including "originalists" like Justice Scalia—use rules to implement the Constitution that could be characterized as prophylactic.[56] But it is also true, as Grano and Scalia argued, that the Constitution does not give judges a free-floating power to create new extra-constitutional rights.[57]

B. Breaking the Impasse: Constitutional Implementation Rules

The debate described above presented itself as a battle over the proper methods of constitutional interpretation: must judges restrict themselves to enforcing the meaning of the constitutional text, or may they announce constitutional rules that sweep more broadly than the text? In recent years, however, scholars have increasingly recognized that constitutional adjudication involves at least two

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50. *Id.* at 193.
51. *Id.*
52. *Id.* at 207.
53. *See id.* at 204 (arguing that the "prophylactic approach" is a "normal part of constitutional law").
54. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 45–46 (2004) ("Prophylactic rules are ubiquitous, [Strauss] says, *not* because court-announced doctrine consists of lots of outputs that overprotect court-interpreted constitutional meaning, but because there is only *one* sort of output—'constitutional doctrine'—much of which has the same 'prophylactic' relationship to 'the real, noumenal Constitution' as does *Miranda*. Viewed in this light, then, Strauss's contention is not so much that prophylactic rules (in Grano's sense) are ubiquitous, but that they are nonexistent." (footnotes omitted) (quoting Strauss, *supra* note 10, at 207–08)).
55. *Id.*
56. *See* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1670–71 (2005) (describing Justice Scalia's implicit endorsement of a prophylactic constitutional rule in Smith v. Robbins, 528 U.S. 259 (2000)).
57. *See supra* note 45 and accompanying text. Strauss himself acknowledged that a constitutional rule based simply on the Court's judgment that it will make the world "a better place" would have a "legitimacy problem." Strauss, *supra* note 10, at 194.

distinct judicial activities: interpretation and implementation.[58] The key insight is that even the most concrete constitutional provision cannot be enforced without the use of judicially created rules that help us determine whether the provision has been violated.[59] For example, although the Constitution's age requirement for United States senators is clear and unambiguous,[60] a court could not decide a case challenging a candidate's compliance with this requirement without employing implementation rules that do not themselves flow directly from the Constitution. For example, who should bear the burden of proof? How strong should that burden be? Should the court employ a presumption of compliance or noncompliance? If so, should such a presumption either limit or broaden the types of evidence considered sufficient to establish or negate the claim? None of these questions can be answered simply through interpretation of Article I, Section 3—but they must be answered to adjudicate the claim. Even in cases presenting no interpretive problem, implementation rules are necessary and (to quote Strauss) "ubiquitous."[61]

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58. *See, e.g.*, Berman, *supra* note 54, at 58 & n.192 (distinguishing between "constitutional operative proposition[s]" and "constitutional decision rule[s]"); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) ("[I]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

59. *See, e.g.*, Berman, *supra* note 54, at 35 ("[T]he application of constitutional meaning to the facts of a given 'case or controversy' is often mediated by judge-made tests of constitutional law that are not most fairly understood as themselves products of judicial constitutional interpretation."). Two of the most important early proponents of the distinction between constitutional meaning and constitutional doctrine were Professors Lawrence Sager and Henry Monaghan. *See generally* Monaghan, *supra* note 43; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Numerous scholars accept the distinction between constitutional meaning and constitutional doctrine. *See, e.g.*, Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 79 (2000) (arguing that Article III envisions that "judges will offer interpretations of [the Constitution's] meaning, give reasons for those interpretations, develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law"); Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994) (describing "constitutional doctrine" as "the "rules and principles of constitutional law . . . that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996) (arguing that in practice, constitutional doctrine has priority over constitutional text).

60. *See* U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . .").

61. Berman, *supra* note 54, at 13–14 (citing Strauss, *supra* note 10).

1. The functions of implementation rules

Professor Mitchell Berman, one of the foremost implementation rules theorists, distinguishes between "constitutional operative propositions" and "constitutional decision rules."[62] Berman defines a "constitutional operative proposition" as "the judicial statement or understanding of constitutional meaning."[63] In other words, it is the product of constitutional interpretation. A constitutional decision rule, on the other hand, "states the test for deciding whether the terms of the operative proposition are satisfied."[64] In other words, a constitutional decision rule is a judicial implementation rule.

Berman argues that the primary function of a constitutional decision rule is to enhance the accuracy of constitutional adjudication.[65] To borrow the terminology of science, the function of such a rule is to minimize the sum of error costs resulting from "false negatives" (judicial failures to recognize a constitutional violation where one has occurred) and "false positives" (judicial findings of a constitutional violation where none has occurred).[66]

Error costs need not be measured in a purely quantitative fashion because sometimes a false negative can cause greater harm than a false positive (and vice versa).[67] For example, if the Equal Protection Clause means that the government may not treat one group of people worse than another for illegitimate reasons, the rule requiring strict scrutiny of racial classifications is likely to result in an increased number of false positives.[68] Under this standard, the Court will treat virtually any law that makes a racial classification as unconstitutional even if the classification furthers a legitimate, not invidious,

62. *Id.* at 9.
63. *Id.* at 79–80.
64. *Id.* at 80.
65. *See id.* at 98 ("The consideration that would seem to enjoy the strongest claim to legitimacy is an interest in reducing adjudicatory error.").
66. *See id.* at 93 ("The most obvious factor that a decision-rule-maker should consider, then, is how best to minimize . . . the sum of false positives and false negatives.").
67. *Id.* ("A court could think that a particular decision rule is likely to minimize either the sum total of adjudicatory errors, or the sum total of weighted errors, taking account of a difference in perceived social disutility between false negatives and false positives."); *see also* Roosevelt, *supra* note 56, at 1662 (arguing that in formulating decision rules, courts may "assess the costs of error—things such as the harm to the individual, the importance of the governmental interest likely to be thwarted, the ability of the government to achieve its legitimate aims by other means—and adopt a decision rule reflecting the relative costs of each kind of error").
68. *See, e.g.*, Roosevelt, *supra* note 56, at 1661 (describing strict scrutiny as an implementation "rule that predictably strikes down valid laws but upholds almost no violations").

purpose.[69] But because of the great social harm that flows from laws perpetuating racial subordination, a larger number of false positives may be less costly than a smaller number of false negatives.[70] Likewise, the strong deference that courts normally give the legislative and executive branches in cases involving war powers obviously increases the likelihood of false negatives.[71] Courts will treat Congress and the President as though they acted within the range of their constitutional authority in some cases where they have actually exceeded it. Still, this may be the least costly approach to the issue, given the great harm that may flow from erroneous judicial interference with battlefield decisions. In this context, false negatives" may be less costly than false positives."

Berman also argues that courts may properly consider the effect a decision rule will have on the likelihood that governmental actors will violate the Constitution in the first place.[72] A rule that creates a substantial number of false negatives may not adequately deter government officials from violating the Constitution.[73] Similarly, a rule that creates a substantial number of false positives may over-deter or "chill[]" the actions of government officials in a way that undermines their capacity to do their jobs effectively.[74] If greater social harm is likely to flow from a given constitutional violation than from the threat of overdeterrence, the Court may appropriately employ a more protective rule. If the balance of harms leans the other way, the Court may appropriately employ a less protective rule.

Some considerations that are unrelated to accuracy still have a claim to legitimacy. Among these are what Berman calls "fiscal" and "institutional" concerns.[75] Courts sometimes devise rules designed, in part, to reduce the cost of litigation to the parties or

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69. Gerald Gunther famously described strict scrutiny as "strict in theory and fatal in fact" because the Supreme Court's decisions that use strict scrutiny virtually always result in invalidation of the statute at issue. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

70. *See* Roosevelt, *supra* note 56, at 1662–63 ("Cost-benefit analysis . . . offers one explanation for strict scrutiny: Judges look more closely at laws that inflict greater harms.").

71. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (stating that "judicial deference . . . is at its apogee" when Congress exercises its war powers); United States v. Nixon, 418 U.S. 683, 710 (1974) (noting that courts give "utmost deference" to the President in cases involving national security).

72. *See* Berman, *supra* note 54, at 93; *see also* Roosevelt, *supra* note 56, at 1666–67 (arguing that it is appropriate for the Supreme Court to consider how its implementation rule is likely to affect the conduct of governmental actors).

73. *See* Berman, *supra* note 54, at 93.

74. *See id.* at 94 (highlighting the negative effects of "overdeterrence").

75. *See id.* at 95.

to the court, to preserve the court's "moral authority" or to minimize "interbranch friction."[76]

The concern with the weakest claim to legitimacy is what Berman calls a "substantive" consideration, meaning a decision to supplement or replace a constitutional norm with the judge's own substantive value or policy judgment.[77] Like Strauss before him, Berman recognizes that a decision rule based purely on the judge's belief that it will make the world a better place is improper, although he expresses doubt that rules based on such considerations are common.[78]

2. The Miranda *rules as implementation rules*

It is now time to turn back to *Miranda v. Arizona*, the case that gave rise to the structural/pragmatic impasse described above. Can the *Miranda* rules be justified as implementation rules?

Professor Mitchell Berman thinks they can. He argues that *Miranda* can be read as announcing two constitutional "operative propositions" (interpretations of constitutional meaning) and a set of accuracy-enhancing constitutional decision rules (implementation rules).[79] As noted above, *Miranda* was based on the Fifth Amendment privilege against compelled self-incrimination. According to Berman, *Miranda*'s operative propositions are that (1) courts should not admit into evidence statements that have been compelled by the police,[80] and (2) "compel" means the use of pressure inconsistent with principles of personal freedom or dignity, even though such pressure may not be strong enough to make the statement involuntary under the Due Process Clause.[81]

Miranda's implementation rule is that statements obtained through custodial interrogation will be presumed to be compelled unless police follow the detailed set of "procedural safeguards" described above, including the requirements of warning and waiver.[82] Berman argues that these safeguards are best seen as accuracy-enhancing

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76. *Id.*; *see also* Roosevelt, *supra* note 56, at 1665 ("Some constitutional operative propositions may require courts to decide questions that they simply cannot, or that they cannot without burdensome or intrusive evidence-gathering.").

77. Berman, *supra* note 54, at 95.

78. *See id.* at 97 ("[I]t is hard to credit that courts should enjoy effectively unconstrained authority to craft constitutional decision rules."); *see also* Strauss, *supra* note 10, at 194 (asserting that *Miranda* would have a "legitimacy problem" if it were simply based on the Supreme Court's belief that the *Miranda* rules would make the world "a better place").

79. Berman, *supra* note 54, at 51.

80. *See id.* at 117–18.

81. *See id.* at 120–23 & n.366.

82. *Id.* at 126; *see* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

decision rules.[83] The Supreme Court noted in *Miranda* that it is difficult for courts to tell what actually happens during custodial interrogation because it generally happens behind closed doors.[84] Thus, in any given case, it is hard to tell whether the police have used custodial interrogation to compel a statement from a suspect.[85] The problem was exacerbated by the fact that the *Miranda* Court interpreted "compelled" broadly, making case-by-case sorting of compelled and non-compelled statements difficult.[86] *Miranda*'s procedural safeguards were supposed to help solve this problem by reducing the likelihood that a statement obtained during custodial interrogation will actually be compelled.[87] If a defendant knows of his right to silence and right to an attorney, Berman argues, and the police are required to respect invocation of such a right, custodial interrogation can be expected to produce fewer compelled statements than it would without the safeguards.[88] By reducing the likelihood of actual compulsion, the *Miranda* rules reduce the likelihood that a court will mistakenly admit a compelled statement into evidence. Of course, sometimes there will be a question of compulsion even where the procedural safeguards are followed, but courts can decide such issues on a case-by-case basis.[89]

Professor Berman's reading of *Miranda* as an "implementation rules" case is clear and powerful. Whether it is based on the most plausible reading of *Miranda* will be discussed more fully below.

II. DISTINGUISHING INTERPRETATION FROM IMPLEMENTATION: THE CASE OF *MIRANDA V. ARIZONA*

A. Implementation Versus Interpretation

As discussed above,[90] implementation-rules theory is premised on two related propositions: First, the primary function of implementation rules is to reduce the risk that constitutional meaning will be applied erroneously in constitutional litigation. Second, it is improper for judges to devise implementation rules based on "substantive considerations," defined as the judges' own

83. *See* Berman, *supra* note 54, at 132 (identifying the purpose of "deterring police overreaching").
84. 384 U.S. at 448.
85. Berman, *supra* note 54, at 127.
86. *Id.*
87. *Id.* at 127–28.
88. *See id.* at 128.
89. *See id.*
90. *See supra* Part I.B.1.

substantive policy preferences separate and apart from those embodied in the Constitution itself.

These propositions imply that constitutional interpretation, defined as the effort to discern constitutional meaning, is a vitally important activity that is necessarily distinct from constitutional implementation. We cannot tell whether an implementation rule reduces the risk that constitutional meaning will be applied erroneously unless we start with some idea of what the Constitution means.[91] Similarly, we cannot tell whether an implementation rule is based on the judges' own substantive policy preferences or the policy preferences embodied in the Constitution unless we have some method for determining what the Constitution means. If implementation rules theory is to be useful, interpretation and implementation must be distinguished from each other.[92]

Surprisingly, implementation rules theorists have said little about the nature of interpretation. For example, Mitchell Berman writes that interpretation is the process of determining "constitutional meaning," whereas implementation is the process of determining whether a given action comports with that meaning.[93] But he then

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91. *See* Roosevelt, *supra* note 56, at 1711–12 ("Repeatedly, the Court has come to treat its decision rules as if they were operative propositions, and repeatedly the confusion has warped the doctrine."). Roosevelt calls the tendency to equate Supreme Court doctrine with the actual meaning of the Constitution "the fallacy of perfect enforcement." *See id.* at 1651.

92. Understanding the distinction between interpretation and implementation may also enable implementation rules theory to perform its intended function of improving constitutional culture. Several proponents of implementation rules theory have expressed the hope that recognition that certain constitutional doctrines are actually implementation rules will allow the Court to modify the rules when their premises no longer obtain. Such recognition may also permit more interplay between judicial and legislative branches in determining the proper means of constitutional implementation. *See, e.g.*, Berman, *supra* note 54, at 16 ("[W]e might find our political culture enriched by being able to contemplate constitutional operative propositions alone, divorced from the constitutional decision rules which are designed solely to govern litigation."); *id.* at 101–02 ("[T]he distinction between constitutional operative propositions and decision rules makes clear that courts could afford Congress a more substantial role in [implementing the Constitution] even if they choose not to defer to congressional interpretations of constitutional meaning."); Roosevelt, *supra* note 56, at 1716 ("One of the virtues of the decision rules perspective is that it allows us to see how judicial supremacy in constitutional interpretation can coexist with fairly robust forms of departmentalism or popular constitutionalism."); Sager, *supra* note 59, at 1240 (advocating for "a vision of judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . can come to be applied"). *See generally* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 28 (2003) ("The Constitution . . . does not live in our society as mere ukase. Disputes about the Constitution often raise deep questions of social meaning and collective identity . . . . [A]lthough constitutional law may be useful for settling disputes, the Constitution itself is not reducible to this function.").

93. *See* Berman, *supra* note 54, at 9.

asserts that because there are different "plausible conceptions of constitutional meaning," the line between interpretation and implementation cannot be clearly defined.[94] If one believes that constitutional interpretation should be non-instrumental, one is likely to draw the line between interpretation and implementation differently than would a pragmatist who believes that interpretation is just as instrumental as implementation. Because Berman considers both approaches to constitutional interpretation "plausible," he avoids defining interpretation in a manner that would exclude either approach.[95]

This avoidance is costly. As noted above, the legitimacy and utility of implementation rules depend largely on their relation to a correct understanding of constitutional meaning. Unless there is some real difference between the act of discerning constitutional meaning and the act of implementing it, there seems to be little point to implementation rules theory. Put differently, implementation rules theory cannot get us beyond the structural/pragmatic impasse described above in Part I.A if constitutional interpretation and implementation involve exactly the same practical and political concerns.

Constitutional interpretation, conceived as the first step in an adjudicative process that involves both interpretation and implementation, is a receptive rather than a creative activity. The Constitution is a form of communication analogous to an ordinary speech act.[96] In both cases, the first step a reader must take in order to deal with the speech act is to attempt to understand the meaning it contains.[97] This effort is receptive and non-instrumental. It involves the use of ordinary interpretive tools, including determination of

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94. *Id.* at 80.

95. *See id.*

96. Numerous scholars have seen a useful analogy between constitutional or statutory text and an ordinary speech act. For some notable examples, see Larry Alexander, *All or Nothing at All? The Intentions of Authority and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357 (Andrei Marmor, ed., 1995); Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention-Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982); Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651 (2005); Steven Knapp & Walter Benn Michaels, *A Reply to Our Critics*, 9 CRITICAL INQUIRY 790 (1983). *But see* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSPOHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011).

97. *See infra* Part II.A.1.

semantic content and analysis of grammatical and logical structure.[98] It also involves the use of history and inquiry into the speaker's purpose. But the overall effort is directed at determining the speaker's meaning. Although knowledge of history or of the speaker's purpose may assist in determining the speaker's meaning, it may not appropriately be substituted for the speaker's meaning.[99] By contrast, the act of constitutional implementation is the effort to "deal with" the meaning discerned through interpretation. As described in Part I, above, this effort may appropriately be creative and instrumental, so long as its overall orientation is to reduce the costs associated with erroneous application of constitutional meaning.

The following subsections sketch out a distinction between interpretation and implementation by focusing on the purposive nature of the act of interpretation, the particular problems associated with determining the meaning of the constitutional text, and the methods appropriate to the effectuation of the interpreter's purpose.

1. The meaning of "meaning"

Practitioners of implementation rules theory have defined interpretation as the act of discerning constitutional meaning. This subsection's purpose is not to provide a comprehensive theory of interpretation, but to focus more narrowly on what differentiates interpretation from implementation. Still, it is worthwhile to pause at the outset and consider what "meaning" really means.

Mitchell Berman has identified several possible definitions of "meaning." These include "[u]tterer's meaning," "[w]ord-sequence meaning," and "[u]tterance meaning."[100] Utterer's meaning is the meaning that a speaker or writer intends to convey through words.[101] Word-sequence meaning is the meaning that could plausibly be derived from the semantic content and syntactic relations of a series of words, irrespective of the intent of the speaker.[102] Finally, utterance meaning is the meaning that an interpreter ends up taking

98. For a classic discussion of the ways in which constitutional interpretation relies on both semantic and structural analysis, see Charles L. Black, Jr., Structure and Relationship in Constitutional Law 8 (1969) (noting "a close and perpetual interworking between the textual and the relational and structural modes of reasoning"). *See also* Philip Bobbitt, Constitutional Fate: Theory of the Constitution 74–92 (1982).

99. *See infra* Part II.A.2.

100. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 43 (2009).

101. *Id.*

102. *Id.*

from the text, in light of the interpreter's overall knowledge of the utterance, utterer, and other relevant context.[103]

Word-sequence meaning is obviously not an adequate basis for constitutional interpretation. As Steven Knapp and Walter Benn Michaels pointed out over thirty years ago, language is only subject to interpretation because it is supposed to communicate meaning from a speaker or set of speakers to a listener or set of listeners.[104] For example, imagine that you come across a rock formation containing a pattern that appears to spell out, "Beware of the dog." If you attribute "meaning" to this pattern, you will only do so because you posit some person—natural or supernatural—who placed it there for the purpose of conveying a message. If you understand the pattern to be an accidental occurrence, it would make no sense to interpret the "meaning" of the apparent words. "Word-sequence meaning" thus does not appear to be a true alternative to "utterer's meaning." Rather, it appears to be a description of one of the means by which the utterer's meaning may be conveyed to the interpreter.

The same goes for "utterance meaning." As noted above, Berman describes "utterance meaning" as the meaning an interpreter actually draws from an utterance, given the interpreter's knowledge of semantic and syntactic conventions and of all relevant context.[105] Although interpretation based on utterance meaning draws on a broader range of tools than word-sequence meaning—as it includes all relevant context—the overall purpose of interpretation still seems to be discernment of the speaker's meaning.

Berman denies that this is so. To illustrate his point, he imagines a radio station contest for free Rolling Stones tickets.[106] The contest organizer announces that it will not accept entries "received before 12:00 a.m. Thursday," mistakenly believing that "12:00 a.m." is a synonym for noon.[107] What is the "meaning" of the announcement? As a matter of "word-sequence meaning," the entries can be received any time after midnight.[108] As a matter of "utterer's meaning," the

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103. *Id.* Berman also identifies a form of meaning he calls "[l]udic meaning," which he defines as "any meanings that can be attributed to either a brute text (a word sequence in a language), or a text-as-utterance, in virtue of interpretive play constrained by only the loosest requirements of plausibility, intelligibility, or interest." *Id.* Ludic meaning appears to be a category that encompasses the other three, but with looser—and essentially undefined—constraints. For this reason, I do not discuss it as a separate category of potential "meaning."

104. *See* Knapp & Michaels, *supra* note 96, at 724.

105. *See supra* text accompanying note 103.

106. Berman, *supra* note 100, at 45.

107. *Id.*

108. *Id.*

entries cannot be received until noon.[109] As a matter of "utterance meaning," the entries may be received at either noon or midnight, depending on the interpreter's knowledge of context.[110] Berman argues that in this situation, nonintentionalist approaches to meaning (word-sequence or utterance meaning) are more plausible than the intentionalist (utterance meaning) approach.[111] The announcement means what it says, not what the author intended it to say.

The problem with Berman's analysis is that it ignores the purposive nature of both the act of utterance and the act of interpretation, and the ways in which these purposes interrelate. When a person speaks to another person, the speaker's purpose is to convey a meaning or set of meanings through words. Similarly, when a person interprets the words of another, her purpose is to understand the meaning the utterer intends to convey. Meaning does not inhere in words themselves. Words are more accurately thought of as vessels that carry meaning, or signs that point to it.[112]

These points may be illustrated by looking more closely at Berman's radio station contest. In this hypothetical, the contest organizer meant to communicate an intention, namely, the time at which the radio station planned to start accepting entries. The contestants' purpose in interpreting the announcement was to learn the same intention that the speaker was communicating, so that they could turn in their entries at the right time. The speaker's use of the wrong semantic convention ("12:00 a.m." instead of "12:00 p.m.") made fulfillment of both the speaker's and the interpreters' purpose more difficult. But did it change the announcement's "meaning"?

Imagine first that every person who hears the announcement understands that the radio station actually intends to accept applications starting at noon. Perhaps they all assume that that "a.m." is just a typo, or perhaps they all know that the concert organizer habitually makes this mistake. Where the word-sequence reflects neither the speaker's intended meaning nor the hearer's understanding of the speaker's meaning, can it be said to reflect the "meaning" of the announcement? Presumably not. The organizer's use of "a.m." is like the natural rock formation that says, "Beware of the dog." Because neither the speaker nor the interpreter

109. *Id.*
110. *Id.* at 45–46.
111. *Id.* at 47.
112. *See generally, e.g.*, SAINT AUGUSTINE, ON CHRISTIAN DOCTRINE (R.P.H. Green, trans., Oxford Univ. Press 1997) (describing language as consisting of signs—that is, things that point to other things).

understands this word-sequence to reflect the speaker's intended meaning, it is not a bearer of meaning.

Now imagine that some listeners understand that the contest starts at noon, while others think it starts at midnight. Whose understanding accurately reflects the meaning of the announcement? Berman thinks that it is more plausible to say that the "meaning" of the announcement is that the contest starts at midnight, even though this "meaning" does not reflect the organizer's intention, because it is "the most equitable resolution" and "is most consistent with the functions that public announcements are designed to serve—to provide clear notice and certainty, without requiring the addressees to inquire deeply beyond the face of the document."[113] But public announcements are, of course, not designed to provide "notice" in the abstract; they are designed to provide notice of *something*. In Berman's hypothetical, the "something" is the time at which the radio station intends to start taking applications. The "word-sequence meaning" of the announcement misstates this. It seems strange to say that the listeners who interpreted the announcement according to its word-sequence meaning correctly interpreted the meaning of the message, despite the fact that they failed to learn the "something"—the time at which the radio station intended to start accepting applications—they sought. It seems more plausible simply to say that, with respect to this group of listeners, the announcement failed to communicate the organizer's meaning.

This is where the distinction between interpretation and implementation comes in. The question arising from Berman's radio station contest is not, "What did the announcement mean?" but, "What should we do in light of the fact that the speaker failed to communicate his message?" Should we enforce the meaning the speaker intended but failed to communicate, or should we do something else? In the case of the radio station contest, should we only allow those entries that were submitted after noon, or should we also permit entries by those participants who submitted entries between 12:00 a.m. and noon? These are very important questions, and versions of them arise in all sorts of legal contexts.[114] But they are not questions of interpretation. They are questions of what to do when communication (and therefore interpretation) fails.

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113. Berman, *supra* note 100, at 46–47.

114. For example, even textualists like Justice Scalia recognize the doctrine of "scrivener's error," which allows the Court to depart from the plain meaning of a statutory or constitutional text where "the meaning genuinely intended" by the legislature is "absolutely clear" but "inadequately expressed." United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

As this example illustrates, the core purpose of interpretation is to determine the meaning that a speaker or set of speakers has attempted to communicate to an interpreter through some form of communicative convention.

2. Determining the meaning of the constitutional text

Establishing that "meaning" means "utterer's meaning" does not solve the problem of constitutional interpretation, for the Constitution presents two interpretive problems we do not encounter when dealing with an ordinary speech act. First, who counts as the "utterer" of the Constitution? The individuals who drafted it? The Constitutional Convention that proposed it to the states for ratification? The various State Ratifying Conventions? Some combination thereof? Second, assuming we identify the relevant groups of "utterers," how do we determine the subjective intentions of any multi-member body?[115]

The first problem—the identity of the "utterer" of the Constitution—is not difficult to solve. In principle, the utterer whose meaning matters is the utterer who has authority to speak with the force of law. In the case of ordinary legislation, the relevant utterer is the legislature empowered to enact legislation. In the case of the U.S. Constitution, the relevant utterers are the state conventions that ratified the Constitution and thus made it the supreme law of the land.[116] In the case of the Bill of Rights, the relevant utterers are the

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115. One commonly stated objection to viewing the Constitution as an expression of a speaker's purpose is that numerous individuals with various motives and understandings were involved in drafting and ratifying the Constitution, such that the Framers' and ratifiers' "intent" or "purpose" is not discernible. *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374 (2000) ("Notwithstanding the common scholarly habit . . . of referring to the 'purposes' or 'intentions' or 'motivations' of legal bodies, there typically is no such thing (at least for multimember bodies such as courts or legislatures)." (footnote omitted)); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 351 (1985) (expressing skepticism about the idea of legislative intent); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 353 (Andrei Marmor ed., 1995) (same). Some scholars have argued that it is possible to speak meaningfully of the underlying "purpose" of a document issued by a multi-member body. *See, e.g.*, Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1517 & n.132 (2004) ("*Of course* the actions produced by multimember bodies consisting of human agents can be produced for purposes."). I am discussing a narrower sort of purpose here: the purpose to convey the meaning of the statement issued by the multi-member body.

116. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 445 (2007) ("[S]urely it was the ratifiers' views that counted because only they had the authority to make the proposed Constitution law."); Monaghan, *supra* note 17, at 375 n.130 (noting that "the intention of the ratifiers, not the Framers, is in principle decisive," but expressing doubt as to whether such

First Congress and the state legislatures that authorized amending the Constitution.

The second problem—the difficulty in ascertaining the subjective intentions of the relevant group of utters—is only a problem because "legislative intent" is often conceived in imprecise and even incoherent terms. A member of Congress, a state legislature, or a state ratifying convention may have many different motivations to vote for the Constitution or a constitutional amendment. The member may do so out of a hope that the provision will have some specific real-world effect, or out of a desire to show support for a given party or platform, or with no specific end in mind at all. The member might even vote for the provision without reading it or knowing specifically what it says. But neither the hopes, nor the motivations, nor the subjective understandings of the various legislators involved in enacting a constitutional provision are directly legally relevant. All that matters is what the members intended to *say* through their vote.

The best way to understand this distinction is by analogizing a vote to approve a constitutional amendment to a vote for a given presidential candidate. In the 2000 presidential election, many people voted for Ralph Nader.[117] Some of these voters may have actually wanted Nader to be elected President. Others definitely did not want Nader to be elected President, but voted for him to register dissatisfaction with the major political parties.[118] Still others may not have known who Nader was, but voted for him simply because they liked his name. Although these voters had many different—often conflicting—intentions in casting votes for Nader, they shared one

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intentions can actually be discerned); Strang, *supra* note 20, at 966 ("The Constitution's original meaning is the meaning that enables the Framers and Ratifiers to communicate their decisions to us, and for Americans to coordinate their actions in accord with those decisions.").

117. *See 2000 Official Presidential General Election Results*, FED. ELECTION COMMISSION (Dec. 2001), http://www.fec.gov/pubrec/2000presgeresults.htm (indicating that 2,882,955 individuals (2.74%) voted for Ralph Nader).

118. *See* Andrew Cohen, *The Case Against Protest Voting (Remember Ralph Nader)*, THE ATLANTIC (Oct. 18, 2012, 11:30 AM), http://www.theatlantic.com/politics/archive/2012/10/the-case-against-protest-voting-remember-ralph-nader/263721 (asserting that those who cast "protest votes" for Ralph Nader deprived Al Gore of the election); Ellen Willis, *Vote for Ralph Nader!*, SALON (Nov. 6, 2000, 3:36 PM), http://www.salon.com/2000/11/06/willis_2 ("I'm voting for Ralph Nader . . . in the hope that the Green Party will get 5 percent of the vote."); Phillip Locker, *Is a Nader Vote a Wasted Vote?—The Case Against Lesser-Evilism*, SOCIALIST ALTERNATIVE (Aug. 28, 2008), http://www.socialistalternative.org/news/article10.php?id=902 ("The best way to gain the maximum concessions from the political establishment is to build the strongest challenge to them. A strong vote for Nader could bring real pressure to bear on whichever corporate candidate is elected to deliver concessions or else risk a further erosion of their base to left-wing political challengers.").

intention in common: each knew and consented to the fact that his or her vote would count toward the election of Nader and that if he garnered a majority of votes he would be elected President. They may not have wanted Nader to garner a majority of votes, and they may not have believed it was within the realm of reasonable possibility. But they knew what the effect would be if a majority voted for Nader, and they consented to this fact. When it comes to voters, this is the only intention that matters: knowledge of and consent to the fact that the words for which you vote will have legal effect if a sufficient number of people vote the same way.

The same principle applies to members of Congress, state legislatures, or state ratifying conventions who vote for the Constitution or a constitutional amendment. They know that if a sufficient number of the relevant lawmakers vote for the provision at issue, it will have the force of law. Because the Constitution conveys meaning through a widely shared set of semantic and syntactic conventions, it is not important to determine what the private intentions or motivations of the ratifiers might have been. The decision to vote for a constitutional amendment—like the decision to vote for Ralph Nader—represents the intention to approve the meaning ordinarily conveyed by the semantic and syntactic conventions employed within the document, within the overall context of the document's promulgation. Thus, the important question in constitutional interpretation is what meaning the Constitution actually conveys, not what intentions or motivations lay underneath it.[119]

3. Meaning, purpose, and "instrumental" interpretation

If interpretation is the effort to discern meaning that a speaker communicates, myriad questions about the proper modes of

119. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean."); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341–42 (1998) ("Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention 'to say what one would be normally understood as saying, given the circumstances in which one said it.'" (quoting Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 268 (Robert P. George ed., 1996))). *See generally* Barnett, *supra* note 11, at 66 ("Although we can choose to use words however we wish, as Alice discovered in Wonderland, the social or interpersonal linguistic meaning of words is an empirical fact beyond the will or control of any given speaker . . . . Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation.").

interpretation remain. This subsection does not attempt to answer them all, but focuses on the minimum requirements one would expect for a good-faith interpretation of an utterance. This effort involves the use of ordinary interpretive tools, including determination of semantic content, analysis of grammatical and logical structure, knowledge of history, and inquiry into the speaker's purpose. The speaker's purpose may not appropriately be substituted for the speaker's meaning, although the "meaning" of broadly worded pronouncements may sometimes be virtually identical to their "purpose." At its core, a good faith act of interpretation is receptive and non-instrumental. These points may best be established through hypothetical examples involving an ordinary speech act.

Hypothetical # 1: Imagine you are a mother with a teenage son. You leave a note for the teenager that says: "Instructions for Grandpa's Birthday Party: 1. Get a haircut before the party. 2. Wear that new suit I bought you. 3. Let's do this party the 'family way.'" If your teenager is to interpret your command in good faith, what tools would you expect him to use? At a minimum, you would probably expect the teenager to determine its semantic content (the meaning of "birthday," "party," "haircut," "suit," etc.) and its structural and grammatical relationships (the haircut should come before the birthday party, etc.). You would probably also expect him to take into account factors such as history and purpose, particularly when dealing with the broadly worded third instruction. You would expect him to remember that in the past, when he was cheerful and loving and open with others, you congratulated him on acting in the "family way," and that when he has been petulant or disagreeable, you have given him the admonition: "That's not the family way." Finally, you would expect him to understand that the purpose of the instructions is to make for a pleasant birthday party for Grandpa and that you have decided that a cheerful, loving, and open grandson with short hair and a suit is likely to make for such a party. Notice that the teenager's expected act of good-faith interpretation is receptive and non-instrumental. You expect that your teenager will use a combination of background knowledge and linguistic tools to understand the meaning you have transmitted through your message.

Hypothetical # 2: Now imagine that the teenager only reads instruction number three. He shows up at the party in long hair and a t-shirt, but is cheerful, loving, and open. He is not purposefully defying instructions one and two; he simply did not read them. Imagine further that the party turns out to be a pleasant one, so your

overall purpose is fulfilled. Did the teenager adequately interpret your note? He understood your purpose and fulfilled it. But he did not fulfill your purpose in the manner in which you instructed him, because he never discerned the meaning of instructions one and two. Although you are relieved that the party went well, you are likely to have a "talk" with your son afterwards.

Hypothetical # 3: Now imagine that the teenager reads all three instructions and understands the meaning you intended to communicate, but he is unhappy about instructions one and two. He thinks to himself, "Mom doesn't understand today's fashion! If I get a short haircut, my friends will tease me and I'll never get a date." He may also have thoughts like, "The party will be no fun if I follow instructions one and two," and "Why should I be bound by the desires of a couple of old people who have already lived their lives?" Finally, imagine that he thinks, "I am going to focus on the overall purpose of the party. It will be a lot more pleasant if I follow instruction three but treat instructions one and two as optional." As in hypothetical # 2, he shows up in long hair and a t-shirt but acts cheerfully and lovingly, and the party goes well. Has the teenager adequately interpreted your note? He understood the semantic content of it, and in this sense did better than the teenager in hypothetical #2. But at the same time, he replaced the note's meaning with its purpose. He also acted instrumentally, allowing his own concerns to alter his reading of the note's meaning. Finally, he rejected your authority as a speaker, declaring to himself that he should not be bound by your first two instructions. In this case, the teenager's act of interpretation looks more like an act of defiance because his reading of the note is creative and instrumental rather than receptive and non-instrumental.

Although the teenager may not appropriately be creative and instrumental in interpreting his mother's request, he can certainly be creative and instrumental in deciding how to implement it. For example, when he tells the barber what kind of haircut he wants, he can in good faith try to strike a balance between his grandfather's desire that the hair be "short" and his own desire that it not be "too short." Obviously, there is some risk of error—and if he gets the balance wrong his mother will not be happy with him. But the disagreement will be over the best way to strike a balance among competing interests, not over whether it was appropriate for the teenager to consider his own interests at all. In short, it will be a disagreement over implementation, not interpretation.

B. Do the Miranda *Rules Implement Constitutional Meaning?*

As described above, Mitchell Berman has argued that the *Miranda* rules may properly be understood as rules for implementing the meaning of the Fifth Amendment privilege against compelled self-incrimination in the context of custodial interrogation.[120] Berman argues that the *Miranda* Court interpreted "compelled" to mean the use of offensive police tactics that are inconsistent with the suspect's personal dignity.[121] Because it is difficult for a court to discern whether compulsion actually occurred during custodial interrogation, the *Miranda* Court decided to use implementation rules (the warning and waiver requirements) that would reduce the likelihood that compulsion would occur in the first place.[122]

The only problem with Professor Berman's reading of *Miranda* is that it is counterfactual. In reality, like the teenager in hypothetical #2, above, the *Miranda* Court never interpreted the meaning of the term "compelled."[123] Therefore the Court did not use the *Miranda* rules to *implement* constitutional meaning, but as a *substitute* for constitutional meaning. The interpretive emptiness at the heart of *Miranda* goes a long way toward explaining the dysfunction that has been associated with that case almost from the moment it was decided.

As detailed more fully below, the *Miranda* Court flirted with at least three possible definitions of "compelled": (1) involuntary; (2) resulting from improper pressure or trickery; or (3) caused by custodial interrogation, regardless of whether improper pressure was employed. It ultimately chose none of these definitions.

A holding that "compelled" means the same thing as "involuntary" would have made *Miranda* an extension of the Court's long line of due process voluntariness cases. In these cases, the Supreme Court held that it violates the Due Process Clause to use involuntary confessions as evidence in a criminal case.[124] The Court considered a

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120. *Supra* Part II.B.2.
121. *Supra* note 81 and accompanying text.
122. *Supra* notes 82–89 and accompanying text.
123. For this reason, the *Miranda* Court's interpretation of the Fifth Amendment privilege against self-incrimination has always been notoriously difficult to nail down. *See, e.g.*, Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2629 (1996) ("No one really knows what *Miranda* means.").
124. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 433–34 (2000) ("[F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in some 30 different cases decided during [that] era . . . ." (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)) (internal quotation marks omitted)); *see also* Mark A. Godsey, *Rethinking the Involuntary*

confession involuntary if the police had obtained it by "overbearing the will" of the defendant.[125] These cases focused both on the offensive nature of the police conduct and the perceived strength or weakness of the defendant's will.[126] In cases in which the defendant was perceived as relatively strong and impervious to police pressure, the Court might admit the confession even if the police engaged in wrongful and even illegal conduct.[127] Conversely, where the defendant was perceived as relatively weak and vulnerable, the confession might be excluded even though the level of pressure and trickery was relatively low.[128]

The *Miranda* Court did use language that sometimes implied that "compelled" and "involuntary" are synonyms.[129] But at the same time, the Court explicitly denied that the two terms mean the same thing, holding that a confession obtained through custodial interrogation

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Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 CALIF. L. REV. 465, 489–90 (2005) (describing the development of the due process voluntariness test).

125. *See, e.g.*, *Schneckloth*, 412 U.S. at 225 ("The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion))).

126. *See id.* at 225–26.

127. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 240 (1941) (determining that prolonged interrogation of a prisoner involving sleep deprivation, at least one assault, and denial of a request for counsel was illegal but did not constitute an "infringement of due process" because these actions were not the cause of the defendant's decision to confess).

128. *See, e.g.*, Spano v. New York, 360 U.S. 315, 322–23 (1959) (holding that an eight-hour interrogation involving some sleep deprivation and trickery violated due process because the defendant was poorly educated, emotionally unstable, and generally vulnerable). Because the voluntariness analysis focused the Court's attention on largely unknowable questions of free will, it was notoriously unpredictable in practice and was not considered an adequate means of controlling police misconduct. *See, e.g.*, YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 25 (1980) (arguing that the Court should "scrap the 'voluntariness' terminology altogether"); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (describing "the intolerable uncertainty . . . of the due process voluntariness doctrine"); George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 245 & n.14 (1991) (describing the difficulty of applying the prohibition against involuntary confessions and citing numerous sources to same effect).

129. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (noting that the Fifth Amendment prohibits the government from using "the cruel, simple expedient of compelling [a confession] from [the suspect's] own mouth," and that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'" (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964))); *see also id.* at 467 (stating that custodial interrogation involves "in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").

could violate the Fifth Amendment even if it would be considered voluntary under the Due Process Clause.[130] Although the concern about "compelled" self-incrimination arose from similar facts as the concern about "involuntary" confessions, the *Miranda* Court was reasonably clear that the one thing was not the same as the other.[131]

The second possibility, which is similar to the one adopted by Professor Berman, is that the term "compelled" focuses solely on police conduct. If the police obtain a confession using offensive techniques that are inconsistent with the suspect's human dignity, they have "compelled" that confession.[132] This approach differs from the "voluntariness" approach in that it focuses on police conduct and spares courts from making difficult inquiries into the question of the suspect's free will.

Once again, there are aspects of the *Miranda* opinion that support this reading of "compelled." The Court discussed the need to "eradicate" offensive police practices.[133] It quoted with evident approval *Bram v. United States*,[134] a case from 1897 that equated compulsion with the use of promises and threats to obtain a confession.[135] Perhaps most importantly, the *Miranda* Court devoted a full seven pages describing techniques that "police manuals" advised officers to use in order to "persuade, trick, or cajole" the

130. *See id.* at 457 ("In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.").

131. *See id.*; *see also* Schulhofer, *Reconsidering Miranda*, *supra* note 43, at 443 ("[C]ompulsion for self-incrimination purposes and involuntariness for due process purposes cannot mean the same thing.").

132. Of the three definitions of "compulsion" that float through the *Miranda* opinion, this one may be the closest to the Supreme Court's treatment of compulsion under the Fifth Amendment in the decades leading up to this case. *See* Griffin v. California, 380 U.S. 609, 614 (1965) ("[Prosecutorial] comment on the refusal to testify is . . . a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."); Bram v. United States, 168 U.S. 532, 542–43 (1897) (asserting that confessions "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence" (quoting 3 WILLIAM OLDNALL RUSSELL ET AL., A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896))).

133. *See Miranda*, 384 U.S. at 447 ("Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.").

134. 168 U.S. 532 (1897).

135. *Miranda*, 384 U.S. at 461–62 (focusing on whether the interrogator used methods that "the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged" (quoting *Bram*, 168 U.S. at 549)).

defendant into talking.[136] The Court's focus on these techniques implied that techniques involving pressure, trickery, promises, or threats constitute compulsion. But the *Miranda* Court never actually *held* that such techniques constituted compulsion, and it never forbade their use. Moreover, the *Miranda* Court strongly implied that the Fifth Amendment can be violated even if the police do not use pressure or trickery: "Even without employing brutality, the 'third degree' or the specific stratagems [from police manuals], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[137] If techniques of improper pressure and trickery are neither necessary nor sufficient to violate the Fifth Amendment, they cannot be equated with compulsion.

The final possible meaning of "compelled" in *Miranda* is simply "caused by custodial interrogation." This reading of "compelled" implies that it is unconstitutional for police to engage in custodial interrogation at all, even if they do not use improper pressure.[138] This reading is supported by the Court's discussion of the Fifth Amendment as establishing a "right to a private enclave where [the suspect] may lead a private life" and as "requir[ing] the government to shoulder the entire load" in a criminal case and to "produce the evidence against [the defendant] by its own independent labors."[139] This reading is also supported by the fact that the opinion repeatedly mentions a "right of silence" (as opposed to a right not to be compelled to speak) and a "privilege against self-incrimination" (as opposed to a privilege against compelled self-incrimination).[140]

The Supreme Court did not choose this meaning for "compelled" either. If the police engage in compulsion any time they ask questions of a suspect who is in custody, the logical response would be to forbid custodial interrogation altogether. The *Miranda* Court did not do this. Rather, the Court allowed custodial interrogation to continue so long as police followed the Court-prescribed "procedural safeguards" of warning and waiver.[141]

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136. *Id.* at 448–55.
137. *Id.* at 455.
138. This reading of *Miranda* is similar to the one offered by Stephen Schulhofer. *See* Schulhofer, *Reconsidering Miranda*, *supra* note 43, at 447 ("The Court did not hold that a brief period of interrogation *can* involve compulsion. The Court held that the briefest period of interrogation necessarily *will* involve compulsion."). .
139. *Miranda*, 384 U.S. at 460 (internal quotation marks omitted).
140. *Id.* at 444.
141. *See id.*

The truth of the matter is that the Supreme Court in *Miranda* did not particularly care what the term "compelled" means. The Court was interested in enforcing its own instrumental concerns, not those embodied in the constitutional text, and therefore, it used implementation as a substitute for interpretation. For more than thirty years prior to *Miranda*, the Court had tried to find an effective way to regulate police interrogation, first through the Due Process Clause, then through the Fourth and Sixth Amendments, and finally through the Fifth Amendment privilege against compelled self-incrimination.[142] The Court did not like the fact that police sometimes used brutality or improper pressure.[143] But it also did not like the fact that the process disadvantaged ignorant, weak, and poor defendants.[144] The Court also disliked the fact that wealthy (often white) defendants with the money and presence of mind to hire an attorney tended to do better than poor (often black or Hispanic) defendants who did not.[145] Some of these concerns revolved around the idea of compulsion, but some revolved around a more general concern for societal power disparities and fairness.

For this reason, the *Miranda* Court was much more interested in the "procedural safeguards" it was creating than in interpreting the Constitution. By requiring police to warn suspects of their right to silence, of the fact that their statements would be used against them, of their right to counsel, and of the fact that an attorney would be appointed if they were indigent, the Court sought to "level the playing field" not only between the suspect and the police, but between poor, ignorant suspects, and wealthy, knowledgeable ones.[146] The hope was that these warnings would not only reduce the incidence of police brutality and improper pressure, but would make the system fairer generally.

This was a noble goal, and one that was in some ways achieved. But it was not built on an interpretation of the term "compelled." This reality has had several serious effects on *Miranda*'s legacy.

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142. *See, e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 866–87 (1981) (book review) (describing the Supreme Court's efforts to regulate police interrogation through the Due Process Clause and the Fourth, Fifth, and Sixth Amendments).

143. *See* George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 7–8 (2000) (discussing the Supreme Court's concern about coercive police tactics).

144. *See id.* at 3, 6 (elaborating upon the Supreme Court's desire to create a level playing field in the context of interrogation).

145. *See id.* at 2–3 (characterizing the *Miranda* Court as intending to make the most vulnerable suspects "more equal to police officers (and more affluent suspects)").

146. *Id.* at 3.

C. Miranda*'s Legacy*

The *Miranda* Court's decision to create implementation rules to prevent compelled self-incrimination without first interpreting the term "compelled" has had several consequences. First and most importantly, it is impossible to discern the *Miranda* rules' relationship to constitutional meaning, and therefore it is impossible to tell whether they over-enforce, under-enforce, or perfectly enforce the Constitution.[147] One cannot make such a determination without knowing the meaning of the constitutional provisions the rules are meant to enforce.[148]

Second, the *Miranda* rules create the (very likely false) appearance of over-enforcement or prophylaxis. When the Court tells the police that they are constitutionally bound to do (or to not do) something but makes little effort to demonstrate why the Constitution demands this, the Court's order is bound to appear arbitrary and overreaching.[149] This is the fundamental reason judges write opinions: to justify their orders by showing how they flow from interpreted constitutional or statutory meaning. Although the *Miranda* Court described many aspects of custodial interrogation that it disliked or considered pernicious, it never tied these back to the meaning of "compelled."[150] As a result, the decision appeared to many to be nothing more than a judicial fiat.

When the Court uses what appears to be an over-enforcing or prophylactic decision rule, this is likely to diminish the role of other constitutional actors in implementing the Constitution in at least two ways. First, the perception that implementation rules over-enforce the Constitution is likely to generate hostility from the constitutional actors those rules govern to the extent that such rules imply that the actors they govern are either incompetent or biased against the constitutional provision the rules are meant to enforce.[151] As a result,

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147. *Cf.* Roosevelt, *supra* note 56, at 1711–12 (arguing that confusion between "decision rules" and "operative propositions" tends to "warp[]" constitutional doctrine.

148. *See supra* Part II.A.

149. *Cf.* Roosevelt, *supra* note 56, at 1717 ("When the Court . . . comes to believe that the meaning of the Constitution is exhaustively specified by a list of what judges will uphold or strike down[,] it denies nonjudicial actors their appropriate role in implementing the Constitution.").

150. *See supra* Part II.B.

151. For example, Richard Leo cited several studies of police attitudes in the years after *Miranda* was decided indicating that police "resented" the *Miranda* rules because they believed these rules were "artificial, unnecessary and generally impugning of police integrity" and "undermin[ed] the authoritativeness of their relations with criminal suspects." Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1003, 1003 n.14 (2001) (citing NEIL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF *MIRANDA* 219

such actors are likely to do the minimum necessary to comply with the rules and to look for ways to get around them.[152] The post-*Miranda* history of custodial interrogation is replete with examples of such police conduct.[153] The fact that the Supreme Court has been willing to approve or encourage many of these efforts to get around or minimize the effect of *Miranda* indicates that the Court itself seems to believe that *Miranda* went too far.[154]

More seriously, the appearance that rules are prophylactic tends to make the constitutional provision the rules are meant to enforce disappear. If everyone (including the police and the courts) believes that compliance with the rules ensures compliance with the Constitution, then compliance with the rules will be the only question that gets adjudicated.[155] As Professor Kermit Roosevelt III has shown,

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(1971); Otis H. Stephens et al., *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L. REV. 407, 423 (1972); Michael Wald et al., Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1610–11 (1967)).

152. *See* Leo, *supra* note 151, at 1016.

153. *See id.* at 1010 ("[I]n some jurisdictions police are systematically trained to violate *Miranda* by questioning "outside *Miranda*" (i.e., by continuing to question suspects who have invoked the right to counsel or the right to remain silent)"); *see also id.* at 1016 ("[P]olice have devised multiple strategies to avoid, circumvent, nullify or simply violate *Miranda* and its invocation rules in their pursuit of confession evidence."); Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 447–50 (1999) (describing police techniques for getting around difficulties posed by *Miranda* requirements); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1135–54 (2001) (describing phenomenon of police questioning "outside *Miranda*" and arguing that this practice should decrease after *Miranda*'s reaffirmation in *Dickerson*); Weisselberg, *Saving* Miranda, *supra* note 46, at 112, 177–88 (arguing that the Supreme Court should "re-consitutionalize" *Miranda* and expand the exclusionary rule associated with *Miranda* violations).

154. *See, e.g.*, United States v. Patane, 542 U.S. 630, 633–34 (2004) (plurality opinion) (finding that physical evidence obtained as the result of a *Miranda* violation, unlike the physical fruits of an involuntary confession, can be introduced as evidence at trial); Oregon v. Elstad, 470 U.S. 298, 318 (1985) ("[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."); Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that statements obtained in violation of *Miranda*, unlike statements found involuntary under the Due Process Clause, can be used to impeach a defendant at trial). It has been argued that cases like these have "created the incentive" for the police to evade the restrictions imposed by *Miranda*. *See* Leo, *supra* note 151, at 1020. However, the Court has limited police officers' ability to do so. *See* Missouri v. Seibert, 542 U.S. 600, 604, 616 n.7 (2004) (plurality opinion) (holding that a *Miranda* waiver is ineffective where the post-warning statement is obtained as part of a deliberate two-step process involving unwarned interrogation and confession followed immediately by warnings, waiver, and a reiteration of the interrogation and confession).

155. *See* Leo, *supra* note 151, at 1022 (noting that because police can avoid suppression of evidence simply by complying with the *Miranda* rules, "*Miranda* . . . reduces the pressure on police" to eliminate coercive or dishonest interrogation practices "on their own initiative"); *see also* Martin H. Belsky, *Living with* Miranda*: A*

once this occurs, the rules themselves become calcified, freezing and often shrinking the meaning of the Constitution.[156]

This problem is particularly acute when implementation rules are used as a *substitute* for constitutional interpretation. When the Court fails to discern the meaning of a constitutional right before devising implementation rules, there is no way to tell whether police conduct that complies with the rules actually violates the Constitution.[157] Once the rules are complied with, the appearance of prophylaxis is replaced by the reality of deference. The police can do what they want and are unlikely to be found to have violated the Constitution.

Recall that in *Miranda*, the Court flirted with the idea that certain kinds of pressure tactics and trickery might constitute compulsion, but never quite reached this conclusion.[158] The Court also flirted with the idea that custodial interrogation itself might constitute compulsion because of the pressures associated with custodial interrogation, but never quite reached this conclusion.[159] Because the Court never held that these practices constituted compulsion (and indeed, never determined what "compelled" means), many of the practices disliked by the *Miranda* Court are still used today.[160] As long as the police give the requisite warnings and obtain the requisite waiver, they can still keep the defendant alone in a room and question him for hours, using psychological pressure and trickery to induce a confession.[161]

Reply to Professor Grano, 43 DRAKE L. REV. 127, 146 (1994) (arguing that *Miranda* masks the decreasing protection given to individuals in the criminal justice system and reduces pressure to reform police practices); Godsey, *supra* note 124, at 534 (imagining a set of post-*Miranda* police interrogation instructions that tell the officer, "[i]n practice, once you give *Miranda* warnings, courts presume the confession will be voluntary, so you can sometimes get away with applying a lot of pressure as long as it is not really outrageous").

156. Roosevelt, *supra* note 56, at 1651, 1692–93.

157. *See supra* Part II.A.

158. *See* Miranda v. Arizona, 384 U.S. 436, 447–55 (1966); *supra* Part II.B; *see also* Leo, *supra* note 151, at 1015 ("*Miranda* does not restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles, lengthy confinement, or any of the inherently stressful conditions of modern accusatorial interrogation that may lead the suspect to confess.").

159. *See Miranda*, 384 U.S. at 460; *supra* Part II.B.

160. *See* Belsky, *supra* note 155, at 127 ("Interviews, questioning, and interrogations are conducted almost exactly as they had been before *Miranda*, except for the addition of warning cards in formal settings."); Leo, *supra* note 151, at 1021 ("American police continue to use the same psychological methods of persuasion, manipulation, and deception that the Warren Court roundly criticized in *Miranda*."); Patrick A. Malone, "*You Have the Right To Remain Silent":* Miranda *After Twenty Years*, 55 AM. SCHOLAR 367, 367 (1986) (same).

161. *See* Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 387 (1997) ("*Miranda* has actually legitimated moderately coercive interrogation practices."); Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 478 (1998) (arguing that the *Miranda* warnings give police "a potent

Moreover, the evidence regarding post-*Miranda* interrogation demonstrates three important facts: First, after receiving their *Miranda* warnings, the overwhelming majority of suspects waive their *Miranda* rights.[162] Second, once a person waives his *Miranda* rights, he is unlikely to invoke them if the police start ratcheting up the pressure.[163] Third, once a person waives his *Miranda* rights, courts are unlikely to find that any subsequent confession is involuntary, even if the police use pressure tactics that would have resulted in findings of due process violations prior to *Miranda*.[164] These facts indicate that once the police give the *Miranda* warnings and obtain a waiver, they can engage in conduct that actually violates the Constitution, and neither the defendant nor the court is likely to

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weapon to sanitize otherwise questionable confessions"); Leo, *supra* note 151, at 1022 ("*Miranda* has helped the police shield themselves from evidentiary challenges, rendering admissible otherwise questionable and/or involuntary confessions."); Welsh S. White, Miranda*'s Failure To Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1215 (2001) (arguing that police interrogators use techniques that place them "so overwhelmingly in control of the interrogation" that suspects have little real opportunity to exercise their rights).

162. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 860 (1996) (finding that suspects waive their rights about 83% of the time); Leo, *supra* note 151, at 1009 ("[P]olice appear to elicit waivers from suspects in roughly 80% of their interrogations . . . ."). *See generally* Malone, *supra* note 160, at 368 ("*Miranda* warnings have little or no effect on a suspect's propensity to talk. . . . Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society.").

163. *See* Cassell & Hayman, *supra* note 162, at 859–60 (demonstrating that, in a study of 129 interrogations, there were five mid-interrogation invocations out of the 108 suspects who initially waived their rights); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996) (finding that, in a study of 182 interrogations, only two of the 146 suspects who did not initially invoke their *Miranda* rights changed their mind and chose to invoke these rights mid-interrogation); William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 988 (2001) (observing that very few people invoke *Miranda* rights after questioning has begun, even in response to coercive interrogation tactics).

164. *See* Garcia, *supra* note 161, at 475–76, 478 (asserting that *Miranda* warnings provide law enforcement with a "potent weapon to sanitize otherwise questionable confessions"); Leo, *supra* note 151, at 1025–26 (arguing that *Miranda* has not deterred the police from using psychological pressure and trickery, but has "lull[ed] judges into admitting confessions with little inquiry into voluntariness"); Malone, *supra* note 160, at 377–79 (arguing that after *Miranda*, the pertinent inquiry shifted from whether a suspect's confession was voluntarily given to whether he voluntarily waived his *Miranda* rights); Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 744–45 (1992) ("The warning-and-waiver ritual that is at *Miranda*'s core served to insulate the resulting confessions from claims that they were coerced or involuntary."); White, *supra* note 161, at 1220 ("A finding that the police have properly informed the suspect of his *Miranda* rights . . . often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices."). *See generally* Dickerson v. United States, 530 U.S. 428, 444 (2000) (noting that "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting (Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))).

stop them. Because the interpretive heart of *Miranda* is empty, persons subjected to custodial interrogation are given an appearance of overprotection coupled with what is, for many, a reality of under-protection.

III. CRUEL AND UNUSUAL PUNISHMENTS: IMPLEMENTATION WITHOUT INTERPRETATION

The Supreme Court's current approach to excessive punishments under the Cruel and Unusual Punishments Clause is similar to its approach to compelled self-incrimination under the Fifth Amendment. In both cases, the Court has failed or refused to interpret a key constitutional term or concept—"compelled" under the Fifth Amendment; both "unusual" and "excessive" under the Eighth. In both cases, the Court has devised a set of implementation rules that are driven by concerns largely independent of the meaning of the constitutional provision. Finally, in both cases, the Court's approach has created a dysfunctional combination of interbranch resistance and judicial passivity.

The story of the "excessive punishment" implementation rules is more complex than the story of the *Miranda* rules. Whereas the *Miranda* Court failed to interpret an important constitutional term ("compelled"), the excessive punishment cases involve two interpretive failures. The Supreme Court first failed to interpret the term "unusual," then withdrew its traditional interpretation of "excessive." Whereas *Miranda* created a single set of rules that apply in all cases involving custodial interrogation, the excessive punishment cases have created two sets of rules, some of which apply to cases of adult imprisonment and some of which apply to cases involving the death penalty and life sentences for juveniles. Finally, whereas the *Miranda* rules were driven by a set of complementary concerns (the desire to control police misconduct and level the playing field among suspects), the excessive punishment rules are driven by opposing concerns. Rules governing adult imprisonment are driven by a desire to avoid interference with legislative power, while rules governing death penalty and juvenile life imprisonment cases are driven by a desire to limit punishment practices the Supreme Court considers pernicious (although not necessarily excessive).

The Supreme Court's initial failure to interpret the term "unusual" led to a series of implementation problems, which then led to additional failures of interpretation and implementation. This cascading series of failures has resulted in a Cruel and Unusual

Punishments Clause jurisprudence that serves as a symbol of judicial overreaching, despite the fact that it is vastly under-protective in reality.

A. Partial Interpretive Failure: "Unusual" and "Excessive"

Since at least the 1950s, the Supreme Court has refused to interpret the term "unusual" in the Cruel and Unusual Punishments Clause. In *Trop v. Dulles*,[165] a plurality of the Court stated that it was uncertain whether the word "unusual" had any independent meaning.[166] The plurality ultimately concluded, however, that the question was unimportant because the Court's task was "simply [to] examine[] the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'"[167] Although individual justices have occasionally taken a stab at interpreting the term,[168] the Supreme Court as a whole continues, in line with *Trop*, to ignore it. The Cruel and Unusual Punishments Clause has effectively been transformed into the "Cruel Punishments Clause."

The Supreme Court has long recognized that a punishment may be cruel by virtue of being excessive.[169] An excessive punishment differs from "barbaric" or "inherently cruel" methods of punishment in that it is not unacceptably harsh in itself, but is too harsh in relation to its

165. 356 U.S. 86 (1958).
166. *Id.* at 100 n.32 (plurality opinion).
167. *Id.* While the plurality acknowledged that "unusual" might mean "different from that which is generally done," *id.*, it ignored that possible meaning in *Trop* and in subsequent cases.
168. For example, in *Furman v. Georgia*, Justice Stewart implied that the term applied to punishments that were "wantonly and . . . freakishly imposed" and thus comparable to being "struck by lightning." 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) (per curiam). In the same case, Justice Douglas opined that "unusual" means "discriminatory," stating, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242 (Douglas, J., concurring).
169. For nearly 150 years, the Supreme Court has implicitly recognized that excessiveness is a form of unconstitutional cruelty. In *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 479–80 (1866), Pervear was sentenced to a fine and a short prison term for operating an illegal liquor store. He argued that this punishment was cruel and unusual because it was excessive. *Id.* at 479. The Supreme Court declined to decide the case because the Eighth Amendment did not apply to the states, but stated in dicta that Pervear would lose on the merits, not because the Cruel and Unusual Punishments Clause did not prohibit excessive punishments, but because Pervear's punishment was not excessive. *Id.* at 480.

justification in a given case.[170] Traditionally, the Supreme Court has tied the concept of "excessiveness" to the offender's moral culpability for committing the offense.[171] For example, a life sentence would likely be an unconstitutionally excessive punishment for a minor offense like a parking violation, because such offenses do not require any showing of culpability.[172] On the other hand, a life sentence might not be excessive for a major offense like murder,

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170. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 588–97 (2005) (describing the concept of proportionality in Eighth Amendment jurisprudence).

171. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) ("It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))); Weems v. United States, 217 U.S. 349, 366–67 (1910) ("Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."). The Court sometimes divides the culpability analysis into two separate categories: "culpability," meaning the blameworthiness of the offender's state of mind, and "harm," meaning the injury caused or threatened by the crime. These two categories cannot be separated from each other in reality, however, because the blameworthiness of the offender's state of mind depends on the gravity of the harm he intends, knowingly risks, or fails to foresee.

The Supreme Court has described its culpability analysis in various ways. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 292 (1983) (stating that the severity of the punishment should be compared to the gravity of the offense "made in light of the harm caused or threatened to the victim or society, and the culpability of the offender"); Enmund v. Florida, 458 U.S. 782, 798 (1982) ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 162 (1968))); Rummel v. Estelle, 445 U.S. 263, 271 (1980) ("This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."); Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) (characterizing the death penalty as an "extreme sanction, suitable to the most extreme of crimes"); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that it is unconstitutional to punish a person for being a narcotics addict because addiction is an illness, and noting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime."); O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (noting that the state's power to punish is limited by the severity of the crime, and that "[t]he state may . . . make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration").

172. *See Rummel*, 445 U.S. at 274 n.11 (agreeing that the proportionality principal would come into play in this situation).

because murder convictions generally require proof of a high level of culpability.[173]

B. Implementation Failures: Evolving Standards and Independent Judgment

If a punishment is unconstitutionally excessive when it is too harsh in relation to the offender's moral culpability, we are left with a seemingly insoluble implementation problem. Punishment, by definition, involves the intentional infliction of pain.[174] How do we determine whether a given infliction of pain is too harsh? We need some baseline—some implementation rule—to help us sort cruel from non-cruel punishments reliably.

Over the past half-century, the Supreme Court has vacillated between various possible baselines, including most prominently the "evolving standards of decency" test, under which the Court asks whether a given punishment violates a current societal moral consensus, and the Court's own "independent judgment," under which the Court asks whether the Court itself considers a punishment too cruel, irrespective of any societal consensus.[175]

In some early death penalty cases, decided in the 1970s and 1980s, these two tests seemed to work well together. The Supreme Court decided that the death penalty was permissible for intentional murder because this punishment was imposed in a large number of jurisdictions, indicating that it comported with current standards of decency, and because the punishment was proportionate to the crime in the Court's own judgment.[176] The Court struck down the death penalty for simple rape[177] and for felony murder where the defendant neither intended nor directly caused the death because most states

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173. *See, e.g.*, *Gregg*, 428 U.S. at 187 (plurality opinion) (upholding the constitutionality of a statute authorizing the death penalty for murder).

174. For example, the Oxford English Dictionary defines "punish" as "cause (an offender) to suffer for an offence." *Punish Definition*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/154671?redirectedFrom=punish#eid (last visited Nov. 17, 2013).

175. *Compare Gregg*, 428 U.S. at 173–74 (plurality opinion) (using both "evolving standards of decency" and the Court's own judgment to determine whether a punishment is cruel and unusual), *with* Graham v. Florida, 130 S. Ct. 2011, 2021, 2026 (2010) (using both "evolving standards of decency" and the Court's own judgment, but relying much more heavily on the latter), *and* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (using "evolving standards of decency" but pointedly refusing to use the Court's own judgment as part of the test for unconstitutionality).

176. *Gregg*, 428 U.S. at 174, 179–80 (plurality opinion).

177. Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) (expressing the opinion that rapists are not as culpable as murderers).

had eliminated this punishment and because the death penalty was disproportionate in the Court's own judgment.[178]

Outside the death penalty context, however, the Supreme Court found itself unable to implement the prohibition of excessive punishments consistently and effectively.[179] One reason the Court had relatively little difficulty deciding the death penalty cases was that they involved the harshest punishment imposed in the United States. Because this punishment was at the highest end of the harshness scale, it was relatively easy for the Court to conclude that it should only be imposed for those crimes, like murder, that are at the highest end of the culpability scale.[180] But what about punishments less harsh than death and crimes less serious than murder? To determine whether such punishments are excessive for such crimes, the Court would need to find some reliable way to determine where a given crime falls on the culpability scale (sometimes called "ordinal proportionality") and whether there is a permissible fit between the crime and the punishment, (sometimes called "cardinal proportionality").[181]

The difficulty of using either "evolving standards of decency" or "independent judgment" to determine questions of ordinal and cardinal proportionality was demonstrated in two cases decided in the early 1980s, *Rummel v. Estelle*[182] and *Solem v. Helm*.[183] The two cases involved virtually identical facts. Rummel was a recidivist sentenced to life imprisonment after being convicted of obtaining $120.75 by false pretenses.[184] Helm was a recidivist who received a life sentence with no possibility of parole for uttering a no account check worth $100.00.[185] The similarities end there, however, for Rummel's

178. Enmund v. Florida, 458 U.S. 782, 789, 797–98 (1982) ("It is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally. Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed." (citation omitted) (internal quotation marks omitted)).

179. *Compare, e.g.*, Solem v. Helm, 463 U.S. 277, 281, 303 (1983) (finding a constitutional violation based on facts that were nearly identical to those presented in *Rummel*—life imprisonment after being convicted of uttering a "no account" check for $100 following six nonviolent felony convictions), *with* Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (holding that imposing a life sentence on a recidivist convicted of fraudulently obtaining a little over one hundred dollars did not violate the Constitution). These cases are discussed more fully below. *Infra* notes 182–204.

180. *See, e.g.*, *Gregg*, 428 U.S. at 187 (plurality opinion) (describing the death penalty as "an extreme sanction, suitable to the most extreme of crimes").

181. *See, e.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS 18–19 (1993).

182. 445 U.S. 263 (1980).

183. 463 U.S. 277 (1983).

184. *Rummel*, 445 U.S. at 275–76.

185. *Helm*, 463 U.S. at 281–82.

sentence was upheld[186] while Helm's was declared unconstitutional.[187] As these results imply, the opinions in *Rummel* and *Helm* differed drastically as to whether a prison sentence could be judged excessive under either the evolving standards of decency or the independent judgment baseline.

According to the *Rummel* Court, the evolving standards of decency test could not be relied upon to determine questions of ordinal or cardinal proportionality because state practice was too varied to show a societal consensus.[188] Some states treated crimes like Rummel's as felonies, some did not;[189] some treated recidivism more seriously than others.[190] It was not enough to say that Rummel's punishment was harsher than it would be in any other state, because in a federalist system designed to permit varied state practice, "some State will always bear the distinction of treating particular offenders more severely than any other State."[191]

The *Rummel* Court also rejected the idea that courts could determine questions of ordinal and cardinal proportionality by exercising their own independent judgment.[192] Penologists, who make their livings studying punishment practices, disagreed among themselves as to the amount of punishment that was appropriate for a given crime.[193] If the experts could not reach a definitive conclusion as to this issue, neither could the courts—particularly without a "neutral principle of adjudication" that would make excessiveness determinations more than a mere exercise of judicial will.[194]

In *Solem v. Helm*, decided just three years after *Rummel*, the Supreme Court came to precisely the opposite conclusion regarding the workability of the "independent judgment" and "evolving standards of decency" baselines.[195]

In contrast to *Rummel*, the *Helm* Court held that judges were capable of using their independent judgment to determine questions of ordinal proportionality.[196] Judges could consider traditional

186. *Rummel*, 445 U.S. at 265.
187. *Helm*, 463 U.S. at 284.
188. *See Rummel*, 445 U.S. at 281–82.
189. *Id.* at 269 n.9 (listing the thirty-five other states that punish comparable crimes as felonies).
190. *Id.* at 279–82.
191. *Id.* at 282.
192. *Id.* at 274–75.
193. *Id.* at 283.
194. *Id.* at 267.
195. *See* Solem v. Helm, 463 U.S. 277, 292 (1983).
196. *Id.* (arguing that "courts are competent to judge the gravity of an offense, at least on a relative scale").

factors such as actual or threatened harm, the defendant's intent and motive, and the defendant's character (including his history of recidivism).[197] The *Helm* Court recognized, on the other hand, that it is more difficult to determine questions of cardinal proportionality.[198] Although it is relatively clear that a crime like burglary is less serious than murder and more serious than simple larceny, it is harder to do the "line-drawing" necessary to determine whether a twenty-five-year sentence for burglary is unconstitutionally excessive.[199]

This is where the evolving standards of decency test came in. The *Helm* Court held that courts could determine questions of cardinal proportionality by comparing the sentence in a given case to sentences imposed for more serious crimes in the same jurisdiction and for the same crime in other jurisdictions.[200] If a relatively minor crime is being punished with greater severity than more serious crimes in the same jurisdiction, this would be an indication that the punishment is unconstitutionally excessive.[201] Similarly, if the crime is being punished more severely than the same crime is punished in other jurisdictions, this too indicates excessiveness.[202] Because Solem's life sentence was the harshest available under South Dakota law, and his punishment was harsher than punishments given for more serious crimes in South Dakota and for the same crime in other jurisdictions, the Supreme Court found it to be unconstitutionally excessive.[203]

The *Helm* Court did not overturn *Rummel*, but distinguished it on the ground that Rummel had a chance at parole after twelve years, and therefore his sentence was significantly less severe than Helm's.[204] Thus the question of whether the Court's baselines for measuring excessiveness could be effective over a broad range of cases remained unclear.

The Supreme Court's next two non-capital excessiveness cases demonstrated the almost infinite variety of ways in which questions about ordinal and cardinal proportionality could present themselves. *Harmelin v. Michigan*[205] involved a first-time offender sentenced to life

197. *See id.* at 292–96.
198. *See id.* at 294.
199. *Id.*
200. *See id.* at 291–92.
201. *Id.* at 291.
202. *Id.* at 291–92.
203. *Id.* at 302–03.
204. *Id.* at 297.
205. Harmelin v. Michigan, 501 U.S. 957 (1991).

in prison with no possibility of parole for possessing more than 650 grams of cocaine.[206] Harmelin faced the same sentence (life imprisonment with no possibility of parole) as Helm. Was he more culpable or less culpable than Helm? Possession of more than 30,000 doses of cocaine[207] is a much more serious crime than utterance of a no account check for $100. But, on the other hand, Harmelin had no criminal record,[208] and thus had not demonstrated the same level of commitment to a life of crime as had Helm.[209] How do we sort out these conflicting factors? *Ewing v. California*[210] involved a recidivist sentenced to a term of twenty-five years to life for shoplifting three golf clubs worth about $1200.[211] Ewing faced a sentence that was significantly harsher than Rummel's but less harsh than Helm's. His crime was non-violent and involved a relatively small amount of money. But the value of the property he took was more than ten times greater than the money taken by Helm, and his criminal history involved violence.[212] How do we measure Ewing's culpability, and how do we compare it to the severity of his sentence? It was not clear to a majority of the justices in *Harmelin* and *Ewing* that the Court had the capacity to sort out these varying questions of ordinal and cardinal proportionality with the degree of certainty necessary to justify nullification of a legislative enactment, even with the assistance of the "evolving standards of decency" and "independent judgment" baselines.

C. Cascading Failures Part 1—Withdrawn Interpretation

In response to these seemingly insoluble implementation problems, the Supreme Court withdrew its traditional definition of excessive punishments. In *Harmelin v. Michigan*, two Justices (Justice Scalia and Chief Justice Rehnquist) held that the Cruel and Unusual Punishments Clause contains no prohibition of excessive punishments.[213] A controlling opinion written by Justice Kennedy announced that the Eighth Amendment contains a "narrow"

206. *Id.* at 961 (plurality opinion).
207. *Id.* at 1002 (Kennedy, J., concurring in part and concurring in the judgment) (noting that Harmelin possessed a quantity of cocaine with "a potential yield of between 32,500 and 65,000 doses").
208. *Id.* at 994 (majority opinion).
209. *See Helm*, 463 U.S. at 279 (indicating that Helm had been convicted of six nonviolent felonies).
210. 538 U.S. 11 (2003).
211. *Id.* at 17–18, 20 (plurality opinion).
212. *Id.* at 18–19.
213. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion) (asserting that "the Eighth Amendment contains no proportionality guarantee").

prohibition of "grossly disproportionate" punishments.[214] This "narrow" prohibition was, in fact, conceptually empty. Justice Kennedy's *Harmelin* opinion abandoned the traditional tie between excessiveness and moral culpability, holding that "the Eighth Amendment does not mandate adoption of any one penological theory."[215] Legislatures are free, it declared, to make "fundamental choices" about the appropriate justification for punishment and to design the punishment to fit the choices the legislature has made.[216] Punishments would no longer be constitutionally limited by the offender's moral culpability, but could be as harsh as the legislature deemed necessary to further goals of deterrence, incapacitation, rehabilitation, or any other legitimate government purpose.

This approach to the Cruel and Unusual Punishments Clause amounted to total deference to the legislature, not merely as to how to implement the prohibition of excessive punishments, but as to the meaning of excessiveness itself.[217] As discussed above, the term "excessive" does not refer to the absolute harshness of a punishment, but to the punishment's harshness in relation to its justification.[218] By declaring that legislatures are free to use punishment to pursue *any* legitimate purpose, the Supreme Court effectively delegated to the legislature the power to define the meaning of "excessive."

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214. *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).
215. *Id.* at 999.
216. *Id.* at 998.
217. The decision to defer to the legislature as to the *meaning* of a constitutional provision—particularly a constitutional provision designed to constrain legislative power—is exceedingly strange. As Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." Deference is appropriate where another governmental actor has superior legal or epistemic authority concerning a given matter. *See, e.g.*, Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008) ("[D]eference involves a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently."); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000) ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach."). The various state and federal legislatures appear to enjoy no practical or legal advantage over the Supreme Court in determining what the Cruel and Unusual Punishments Clause means.
218. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70–74 (2005) (implying that punishments may differ depending on whether they are justified under a theory of rehabilitation, retribution, incapacitation, general or specific deterrence, denunciation, etc.); *infra* Part III.A.

D. Cascading Failures Part 2—Substitution of Implementation Rules for Interpretation

When the Supreme Court fails to interpret a constitutional provision or concept, it can take one of two approaches to implementation. It can refuse to adjudicate claims arising under that provision, either by declaring the issue nonjusticiable or by adopting implementation rules that are so deferential to the legislature or executive as to make litigation pointless. Alternatively, the Court can adopt anti-deferential implementation rules that allow the Court to invalidate certain categories of government conduct without having to resort to constitutional interpretation.[219] Because such rules are not built upon the interpreted meaning of the Constitution, however, they carry with them an appearance of arbitrariness and overreaching. Very often, such rules further interests that are either unrelated or tangentially related to the constitutional provision or concept at issue.

Since *Harmelin*, the Supreme Court has replaced constitutional interpretation with implementation rules. Because the term "excessive" no longer has inherent constitutional meaning, the Court now employs categorical presumptions of constitutionality or unconstitutionality to resolve excessiveness claims under the Cruel and Unusual Punishments Clause.

1. The presumption of constitutionality

As discussed above, the Supreme Court traditionally interpreted the Cruel and Unusual Punishments Clause to prohibit punishments that were excessive in light of the offender's moral culpability.[220] In *Solem v. Helm*, for example, the Court employed the evolving standards of decency test in conjunction with its own independent judgment to determine issues of ordinal and cardinal proportionality.[221] In addition, the *Helm* Court announced a moderately deferential standard of review for legislatively authorized

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219. The one option that is not available when the Court fails to interpret the operative constitutional provision is a non-deferential standard such as the preponderance of the evidence standard. Such an approach requires actual knowledge of the provision's meaning so the Court can determine whether it is "more likely than not" that the provision has been violated. *See generally* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 329 (2007). Where the Court applies a presumption—whether deferential or anti-deferential—it can decide cases without actual knowledge of the provision's meaning.

220. *Supra* Part III.A.

221. *See* Solem v. Helm, 463 U.S. 277, 292 (1983) (allowing courts to use their own discretion in evaluating the different factors that need to be considered for proportionality).

punishments, declaring that reviewing courts should give "substantial deference" to the authority of the legislature and the trial court to determine appropriate sentences.[222] Under this standard, reviewing courts should not substitute their own judgment for that of the legislature or trial court, but should simply determine whether a given punishment was "within constitutional limits."[223] By using moral judgment in conjunction with analysis of current punishment practices throughout the country, a reviewing court could determine whether a given punishment was unconstitutionally harsh in light of the defendant's moral culpability.

When the pluralities in *Harmelin* and *Ewing* abandoned the Supreme Court's traditional definition of "excessive," they also changed the implementation rules governing excessiveness claims. First, they replaced the "substantial deference" standard of review with the "rational basis" test, an implementation rule that imposes a strong presumption of constitutionality.[224] Under the rational basis test, a statute will be upheld so long as it bears a conceivable rational relationship to a legitimate government interest. Second, the pluralities transformed the Court's independent judgment baseline, which involved comparison of the gravity of the offense to the harshness of the penalty, into a threshold test that would allow the Court to dismiss excessiveness claims without asking whether the punishment at issue violates a current societal moral consensus.[225] Third, by holding that the legislature could use punishment to pursue any governmental interest it chose, the pluralities transformed the question of a crime's "gravity" into a purely legislative decision.[226] In measuring the gravity of a crime against the harshness of a punishment, the pluralities indicated that the Court should examine how serious the *legislature* considered the crime to be, not how serious the crime *actually is*.[227]

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222. *Id.* at 290.

223. *Id.* at 290 n.16.

224. *See* Ewing v. California, 538 U.S. 11, 27–28 (2003) (plurality opinion) (providing that questions about the fit between the punishment and the crime are "appropriately directed at the legislature," not the Court); Harmelin v. Michigan, 501 U.S. 957, 1003–04 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (upholding mandatory life sentence for narcotics offender with no prior record because there was a "rational basis" for the sentence).

225. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment) ("[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

226. *See Ewing*, 538 U.S. at 28–30 (plurality opinion).

227. *See id.* at 27–28 (holding that it is the legislature's prerogative to decide whether a crime is sufficiently serious to justify a given punishment).

After *Harmelin* and *Ewing*, the constitutional prohibition of excessive punishments appeared to be meaningless.[228] If it is solely the legislature's prerogative to decide what interests to pursue through criminal punishment and which crimes are serious in light of these interests, there would seem to be no situation in which a court could find a legislatively authorized punishment unconstitutionally excessive—particularly given the Court's "rational basis" standard of review. In other words, the implementation rules applied in these cases amounted to a strong categorical presumption that legislatively authorized sentences of imprisonment are constitutional. Under these rules, the Supreme Court upheld a mandatory life sentence for a first-time drug offender,[229] a mandatory sentence of twenty-five years to life for a recidivist who shoplifted three golf clubs,[230] and a mandatory sentence of fifty years to life for a recidivist who twice shoplifted videotapes.[231] Lower courts have upheld mandatory sentences of twenty-five years to life for recidivists who commit crimes as minor as stealing a slice of pizza.[232]

2. The presumption of unconstitutionality

And yet, in cases involving what the Court now calls "categorical"[233] challenges to excessive punishments, the Supreme Court has struck down certain punishments as excessive under the Cruel and Unusual Punishments Clause. A categorical challenge arises from the claim that a given punishment is Cruel and Unusual with respect to an entire category of offense or offender.[234] Between 2002 and 2008, the Court held that it is categorically unconstitutional to impose the death penalty on the mentally disabled,[235] on persons who were minors at the time they committed the offense,[236] and on anyone

228. *See* Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (Souter, J., dissenting) (asserting that if the fifty years to life sentence imposed in this companion case to *Ewing* "is not grossly disproportionate, the principle has no meaning").
229. *Harmelin*, 501 U.S. at 997; *see id.* at 961 (plurality opinion).
230. *Ewing*, 538 U.S. at 30–31 (plurality opinion).
231. *Lockyer*, 538 U.S. at 66, 77.
232. *See* Jack Leonard, *'Pizza Thief' Walks the Line*, L.A. TIMES (Feb. 10, 2010), http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10 (describing the use of California's Three Strikes law against a recidivist convicted of stealing a slice of pizza).
233. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).
234. *Id.* (describing the Court's prior use of categorical rules in death penalty cases, and applying such rules in a case involving life sentences with no possibility of parole for juvenile offenders).
235. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
236. Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

convicted of a non-homicide offense against an individual.[237] In 2010, the Court invalidated all life sentences with no possibility of parole for juvenile non-homicide offenders,[238] and in 2012, it banned mandatory life sentences with no possibility of parole for all juvenile offenders.[239]

The Supreme Court has accomplished these results in categorical cases by employing a slightly different interpretive strategy and a vastly different set of implementation rules than it has in cases involving adult sentences of imprisonment.

In categorical cases, the Supreme Court's interpretive strategy is similar to the strategy employed in *Miranda*: the Court flirts with various definitions of "excessive" without ultimately choosing any of them. In some cases, the Court implies that excessiveness should be measured in relation to retributive or deterrent goals.[240] In other cases, the Court adds rehabilitation to the mix.[241] In still others, incapacitation is included as a possible justification for punishment.[242] This approach differs to some degree from the Court's approach in "non-categorical" cases. In the non-categorical cases, the Court implies that legislatures are free to use punishment to further *any* legitimate goal.[243] In the categorical cases, the Court seems to limit the legislature to some or all of the four current mainstream theories of punishment.[244]

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237. Kennedy v. Louisiana, 554 U.S. 407, 447, *modified on denial of reh'g*, 554 U.S. 945 (2008).

238. *Graham*, 130 S. Ct. at 2030.

239. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

240. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) (determining that the death penalty is an excessive punishment for rape because rapists are not as culpable as murderers); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

241. *See, e.g.*, *Kennedy*, 554 U.S. at 420 ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.").

242. *See Graham*, 130 S. Ct. at 2028 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification." (citation omitted)).

243. *See, e.g.*, Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) ("Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."). The idea that legislatures are totally free to choose the justification for punishment comports with the Court's acceptance of so-called "regulatory" offenses, where the legislature creates strict liability crimes to further non-penal goals such as public health. Such crimes impose criminal punishment without requiring any proof of moral culpability. *See generally* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 659–72 (2012) (critiquing the use of strict liability criminal statutes).

244. *See generally* Stinneford, *supra* note 243, at 720 (providing that the four theories are "retribution, deterrence, incapacitation and rehabilitation").

Although the various definitions of "excessive" presented in the categorical cases are more limiting than the total non-definition presented in *Harmelin* and *Ewing*, they are not *much* more limiting. Just as it is difficult to tell whether a statement is compelled when "compelled" might mean involuntary *or* the result of improper police pressure *or* the result of custodial interrogation,[245] it is difficult to tell whether a punishment is excessive when "excessive" might mean harsher than justified by the goal of retribution *or* deterrence *or* rehabilitation *or* incapacitation. The more "ors" added to the definition, the more the definition descends into meaninglessness.[246]

In its categorical cases, as in its non-categorical cases, the Supreme Court has made up for its interpretive failure through implementation rules. But the rules employed in the categorical cases are quite different than those used in the adult imprisonment cases. The rules include most prominently a set of parameters that defines which types of cases will get categorical treatment and which will not, as well as a strong presumption of unconstitutionality for punishments that fall within these parameters.

The Supreme Court uses three main criteria for determining whether a given case qualifies for categorical treatment: the nature of the offense, the characteristics of the offender, and the type of punishment.[247] The most significant of these is the type of

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245. *See supra* Part II.B.

246. The Court's willingness to allow the legislatures to rely on any of these theories as justification for a given punishment makes "excessiveness" meaningless because these theories embody fundamentally different conceptions of what is excessive. Retributive theory concerns the relationship between the punishment and the offender's moral culpability or desert. *See* Frase, *supra* note 218, at 73. Deterrence theory focuses on the relationship between the cost imposed by the punishment and the cost it saves by deterring others from committing a particular crime. *See* Frase, *supra* note 170, at 593–94. Incapacitation theory compares the cost of punishment to the harm prevented by depriving the specific offender of the opportunity to commit a future crime. *See id.* at 594. Finally, proponents of rehabilitation theory argue that punishment is justified to the extent that it reduces the risk that the individual will reoffend once released. *See, e.g.*, Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 8–9 (2003). It is hard to imagine a punishment that could not plausibly be characterized as proportionate under *one* of these theories, even if it would be excessive under other theories. For example, in *Ewing*, 538 U.S. at 25–27 (plurality opinion), a plurality of the Supreme Court seemingly had no trouble upholding a sentence of twenty-five years to life for a small-time recidivist convicted of shoplifting three golf clubs on the ground that it furthered the state's interest in deterrence and incapacitation, despite the fact that the punishment appeared wildly excessive in light of Ewing's moral culpability for shoplifting.

247. *See Graham*, 130 S. Ct. at 2022, 2030 ("The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. . . . This Court now holds that for a juvenile offender who did not commit

punishment. To date, no case has been given categorical treatment that does not involve the death penalty or life imprisonment with no possibility of parole. When a case involves one of these two penalties, the Court will give it categorical treatment if it also involves certain vulnerable classes of defendant (e.g., juveniles and the mentally disabled) or an offense less serious than homicide.

If a case fits within these criteria, the Supreme Court employs a strong presumption of unconstitutionality. For example, in *Graham v. Florida*,[248] the defendant committed several armed robberies between the ages of sixteen and seventeen, the last of which occurred when he was one month shy of his eighteenth birthday.[249] After Graham's final offense, the trial court that had granted him probation for his first robbery revoked the probation and sentenced him to life imprisonment with no possibility of parole.[250] The trial court based this decision on its conclusion that Graham was incorrigible and that life imprisonment was necessary to protect the community.[251]

The Supreme Court invalidated this sentence and held that it is *per se* unconstitutional to impose a life sentence for a non-homicide offense committed as a juvenile unless there is "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[252] The Court reached this conclusion by employing the "evolving standards of decency" and "independent judgment" baselines in a strongly anti-deferential manner.[253]

Regarding evolving standards of decency, the *Graham* Court concluded that there was a societal consensus against the punishment of life without parole for juvenile non-homicide offenders despite the fact that it was authorized by the federal government, thirty-seven states, and the District of Columbia.[254] The Court's rationale for this conclusion was that the punishment was rarely imposed and that imposition was concentrated in a relatively small number of states.[255] This analysis contrasted sharply with the Court's previous "evolving

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homicide the Eighth Amendment forbids the sentence of life without parole."); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012) ("In part because we viewed [life sentences without possibility of parole] for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment.").

248. 130 S. Ct. 2011 (2010).
249. *Id.* at 2019.
250. *Id.* at 2020.
251. *Id.* at 2019–20.
252. *Id.* at 2030.
253. *See id.* at 2045.
254. *Id.* at 2023, 2026.
255. *Id.* at 2023–26.

standards" analysis, under which the Court held that rarity of imposition was not sufficient to demonstrate a societal consensus against a given punishment because rarity might simply indicate that judges and juries believed the punishment should be reserved for the worst cases.[256] Put differently, the *Graham* Court's "evolving standards" analysis involved a presumption of unconstitutionality. Given epistemic uncertainty arising from conflicting facts—the punishment was authorized in a super-majority of states, but was rarely imposed—the Supreme Court chose to let the risk of error fall against a finding of constitutionality.[257]

The *Graham* Court also concluded that the punishment was excessive under the independent judgment baseline.[258] The Court analyzed whether the punishment was justified under any of the four current mainstream theories of punishment, and once again it employed a presumption of unconstitutionality.[259] The Court first held that retribution was not an adequate justification for punishment because of epistemic uncertainty regarding the culpability of juvenile offenders.[260] Even "expert psychologists" have difficulty differentiating between juvenile offenders whose conduct reflects "transient immaturity" and those "whose crime reflects irreparable corruption."[261] Therefore, juveniles "cannot with reliability be classified among the worst offenders."[262] Deterrence was also not a sufficient justification because the "lack of maturity and underdeveloped sense of responsibility" observed in many juveniles "often result in impetuous and ill-considered actions and decisions," thus making juveniles generally "less susceptible to deterrence" than

256. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion) ("[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.").

257. The Supreme Court's other categorical cases also show a presumption of unconstitutionality associated with the evolving standards of decency analysis. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 426, 433 (finding a societal consensus against the death penalty for non-homicide offenses despite a strong legislative trend in its favor), *modified on denial of reh'g*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (finding a societal consensus against the death penalty for minors despite approval of this punishment in a majority of death penalty states); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding a societal consensus against the death penalty for the mentally disabled, despite authorization of this punishment in a majority of death-penalty states).

258. *See Graham*, 130 S. Ct. at 2039–40.

259. *See id.* at 2028.

260. *Id.*

261. *Id.* at 2026.

262. *Id.* (quoting *Roper*, 543 U.S. at 573).

average adults.[263] Incapacitation also was not an adequate justification for life imprisonment with no possibility of parole because it is too difficult to determine at sentencing which juvenile offenders are truly incorrigible and which will grow out of their criminal conduct over time.[264] Finally, the punishment could not be justified on rehabilitative grounds, since the assumption underlying the punishment was that the offender could not be rehabilitated.[265]

The Supreme Court was only able to reach these conclusions by using a presumption against constitutionality. Recall that in *Rummel v. Estelle*, the Supreme Court held that because penologists could not agree on the appropriate sentence for given crimes, the Court should defer to legislative judgment and apply a strong presumption of constitutionality.[266] In categorical cases like *Graham*, the Court employs precisely the opposite presumption: because the Court cannot reliably determine whether a juvenile is immature or corrupt, deterrable or undeterrable, a permanent danger to society or capable of growth and rehabilitation, the punishment is presumed unconstitutional.

E. The Legacy of the Supreme Court's "Categorical" Excessive Punishment Cases

The Supreme Court's categorical approach to excessive punishments is much more recent than *Miranda*, and thus its ultimate legacy is less clear. Nonetheless, three consequences of the Court's decision to use implementation rules as a substitute for interpretation are already coming into focus.

First, as with the *Miranda* rules, it is impossible to tell whether the Supreme Court's rules categorically prohibiting the death penalty or life without parole for certain classes of offenses or offenders over-enforce, under-enforce, or perfectly enforce the meaning of the Eighth Amendment's prohibition of excessive punishments.[267] Because we do not know what "unusual" or "excessive" mean, we cannot tell whether these implementation rules effectively minimize error costs.

It is quite clear, however, that the Supreme Court's categorical rules under-enforce the Constitution in one crucial respect: they

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263. *Id.* at 2028 (quoting *Roper*, 543 U.S. at 571; Johnson v. Texas, 509 U.S. 350, 367 (1993)).
264. *Id.* at 2029.
265. *Id.* at 2029–30.
266. *See* Rummel v. Estelle, 445 U.S. 263, 283–84 (1980); *supra* notes 192–194.
267. *See generally supra* Part II.A.

only cover the small class of cases involving the death penalty or juveniles given life sentences with no possibility of parole. These cases constitute only one one-thousandth of one percent of all felony convictions.[268] The vast majority of criminal offenders come within the strong categorical presumption of constitutionality announced in *Harmelin* and *Ewing*.

Despite their narrow scope, the Supreme Court's categorical rules have created an appearance of over-enforcement that has fueled political and legislative reaction. The categorical presumption of unconstitutionality covers some of the most hotly contested political issues of the day—the death penalty,[269] sex offenders,[270] juvenile crime and punishment[271]—and has generated outrage and resistance by many governmental actors affected by these decisions. After the Supreme Court invalidated mandatory life sentences for juvenile homicide offenders, for example, Iowa Governor Terry Branstad announced that such offenders in his state would be eligible for parole after sixty years.[272] Similarly, Louisiana Governor Bobby Jindal specifically cited the Supreme Court's "atrocious ruling" invalidating the death penalty for non-homicide offenders as justification for signing a new law imposing chemical castration on sex offenders.[273]

Because the Supreme Court's categorical rules were adopted as a substitute for interpretation, the Court has few resources to deal with the resistance described above except through the formulation of more rules. At what point will the Court experience "rules fatigue" and cease intervening when a state comes up with a new way to impose a very harsh punishment that complies with the formal terms of its existing rules? If the experience of *Miranda* is any guide, such fatigue is not far off. When it comes, the existing categorical rules will provide relatively little protection even for those they were meant to protect.

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268. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 902–03, & n.11 (2011) (noting the small number of cases that are actually affected by these rules).

269. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, *modified on denial of reh'g*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

270. *See, e.g.*, *Kennedy*, 554 U.S. at 446–47.

271. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 130 S. Ct. 2011 (2010); *Roper*, 543 U.S. 551.

272. *See Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, GAZETTE (July 16, 2012, 10:05 PM), http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers.

273. *See Governor Signs Chemical Castration Bill, Authorizing the Castration of Sex Offenders in Louisiana*, OFF. GOVERNOR (June 25, 2008), http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=270.

Finally, the substitution of implementation rules for interpretation has left the Court with little capacity for determining whether a punishment imposed on a certain individual for a specific crime is excessive. For example, in 2011, the Supreme Court held that juvenile homicide offenders have a right to individualized determinations that a life sentence without possibility of parole is appropriate.[274] But as the Court previously noted in *Graham v. Florida*, it is extraordinarily difficult to determine whether a given juvenile is sufficiently depraved and dangerous to be considered incapable of rehabilitation and to require lifelong incapacitation.[275] Since the current approach to excessiveness requires courts to consider not only individual culpability but also speculative claims about deterrence, future dangerousness, and capacity for rehabilitation, it is highly unlikely that this effort at individualized determination will be successful. Instead, the Court will almost certainly abandon the individualized sentencing requirement from *Miller v. Alabama*[276] in favor of a categorical presumption of constitutionality or unconstitutionality.[277]

F. Resolving the Dilemma Through Interpretation

As the discussion above indicates, in recent decades, the Supreme Court has taken a bad situation and made it worse. The Court began by partially failing to interpret the Cruel and Unusual Punishments Clause, then found itself unable to implement the Clause effectively, then withdrew the partial interpretation it had previously given the Clause, and finally constructed a set of implementation rules that are highly protective of a tiny class of offenders and completely unprotective of everyone else.

This cascade of failures is the predictable, and even inevitable, result of the Supreme Court's initial failure to interpret the word "unusual" in the Cruel and Unusual Punishments Clause. As discussed above, it is virtually impossible to implement a bare prohibition of "cruel punishments."[278] Pain is the very point of punishment, and the line between justified and unjustified inflictions

274. *Miller*, 132 S. Ct. at 2467–68, 2474–75.
275. *See id.* at 2475 (citing *Graham*, 130 S. Ct. at 2026–27, 2034).
276. 132 S. Ct. 2455 (2012).
277. The Supreme Court hinted at this likelihood in *Miller* itself. *See Miller*, 132 S. Ct. at 2469 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").
278. *See supra* Part III.B.

of pain can be very difficult to determine. The evolving standards of decency baseline is fatally flawed, and the independent judgment baseline amounts to little more than the unconstrained exercise of judicial will.[279] It is not surprising that the Supreme Court ultimately resorted to a system of categorical presumptions to resolve excessiveness claims under the Cruel and Unusual Punishments Clause. Nor is it surprising, given the Court's general reluctance to interfere with legislative prerogative, that these presumptions are vastly underprotective.

The Eighth Amendment's prohibition of excessive punishments would have been much easier to implement had the Court started by interpreting the word "unusual."[280] In the context of the Eighth Amendment, the word "unusual" means "contrary to long usage."[281] Under the common law ideology that underlays the Eighth Amendment, a governmental practice that enjoys long usage is considered presumptively just, whereas a governmental practice that is contrary to long usage—an "unusual" practice—is considered presumptively unjust.[282] The fact that the Cruel and Unusual Punishments Clause focuses on punishments that are "cruel and new" implies that the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis.[283] In these situations, the Cruel and Unusual Punishments Clause is supposed to serve as a check on the impulse to ratchet up punishments to a new degree of harshness.[284]

A prohibition of punishments that are "cruel and new" is easier to implement than a bare prohibition of cruel punishments, and will extend the protection of the Cruel and Unusual Punishments Clause to a far broader group of cases. Recall *Rummel* and *Helm*: the *Helm* Court took the position that courts could sort out questions of ordinal proportionality by looking at traditional culpability factors such as intent, harm, and offender's character, and could use comparisons to current intrastate and interstate practice to decide

279. *See id.*
280. *See* Stinneford, *supra* note 28, at 1770–71.
281. *Id.* at 1817.
282. *See id.* at 1815–17. The broader relationship between the U.S. Constitution and the customary English Constitution has been explored by a number of scholars. For a particularly provocative exploration of this relationship, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2004).
283. Stinneford, *supra* note 268, at 909, 969–70.
284. *See id.*

questions of cardinal proportionality.[285] The *Rummel* Court, by contrast, argued that questions of ordinal and cardinal proportionality are inherently subjective, and that any effort to enforce a prohibition of excessive punishments would force state and federal punishment practices toward complete uniformity—a result that seems inconsistent with the premises of federalism.[286]

The *Rummel* Court's objections largely disappear once the focus shifts from "cruel punishments" to "cruel and new" punishments. With respect to ordinal proportionality, the question is not how culpable (relative to other offenders) the Court judges this offender to be, but rather how culpable (relative to other offenders) an offender like this has traditionally been judged. With respect to cardinal proportionality, the question is not whether the punishment of this offender for this particular crime is harsher than the rest of society permits right now, but rather whether the punishment of this offender for this particular crime is harsher than society has permitted *up to now*.

This approach avoids the total subjectivity associated with the "independent judgment" baseline because it asks the Court to compare the challenged punishment to prior practice rather than relying solely on the Court's own moral and practical intuitions. This approach also avoids the enforced uniformity implied by *Helm*'s interstate and intrastate analysis. Because prior practice involves a range of permissible punishments, any punishment that falls within that range would not be considered excessive.[287] But if the punishment is new, unprecedented, or outside the range permitted by prior practice, it may fairly be characterized as unusual.[288] If the punishment is harsher than prior practice would permit, it is cruel and unusual.[289]

Finally, the focus on "cruel and new" punishments would not require the Court to approve long-dead punishment practices that were once part of our tradition, such as flogging and mutilation. Under the common law ideology that formed the basis for the Cruel and Unusual Punishments Clause, practices that fall out of usage for a significant period of time lose their place in the tradition and become "unusual."[290] If a legislature seeks to

285. *See supra* Part III.B.
286. *See supra* Part III.B.
287. Stinneford, *supra* note 268, at 972.
288. *See id.*
289. *See id.*
290. *See, e.g.*, James v. Commonwealth, 12 Serg. & Rawle 220, 228 (Pa. 1825) ("The long disuetude of any law amounts to its repeal."); EDWARD COKE, THE COMPLEAT

reintroduce them, they will be treated with the same skepticism as any other "new" punishment.[291]

The insight provided by interpretation of the word "unusual" is important because we live in a world of "unusual" punishments. We have experienced crime panic after crime panic during the past forty years,[292] and as a result, we treat drug offenders,[293] sex offenders,[294] juvenile offenders,[295] and recidivists[296] (to name a few) with a degree of harshness unprecedented in recent history. For example, several states currently impose a form of castration on sex offenders, a punishment that was eliminated from the common law tradition in the thirteenth century.[297]

A focus on "cruel and new" punishments would support the Supreme Court's decision to limit both the death penalty and harsh sentences for juvenile offenders.[298] Such a focus would also permit the Court to engage in robust review of terms of imprisonment,[299] thus protecting the vast majority of offenders who are currently unprotected by the Eighth Amendment.[300]

CONCLUSION

The substitution of implementation rules for interpretation has several pernicious effects on constitutional adjudication. Because such rules are not based on interpretation of the Constitution, they

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COPYHOLDER § 33 (1630) ("Custome . . . lose[s its] being, if usage faile."), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 563, 564 (Steve Sheppard ed., 2003); Stinneford, *supra* note 28, at 1813.

291. *See* Stinneford, *supra* note 28, at 1817.

292. Stinneford, *supra* note 268, at 970; *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) ([A] moral panic [is a situation] in which media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat. The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community." (footnote omitted)).

293. *See* Michael M. O'Hear, *Perpetual Panic*, 21 FED. SENT'G REP. 69, 73 (2008).

294. *See id.* at 69; *see also* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 ST. THOMAS L. REV. 559, 561 (2006) (describing the recent trend toward imposing chemical castration as a punishment for sex offenders).

295. *See* Scott & Steinberg, *supra* note 292, at 807–11 (describing contemporary juvenile justice policy as the product of a moral panic).

296. Stinneford, *supra* note 268, at 923–24, 975–76 (describing the unprecedented nature of the punishments upheld by the Supreme Court in *Harmelin* and *Ewing*).

297. Stinneford, *supra* note 294, at 563, 595.

298. Stinneford, *supra* note 268, at 973–77.

299. *See id.* at 973–78.

300. *See generally id.* at 903–10.

create an appearance of judicial legislation. This appearance often provokes political and legislative backlash, resulting in judicial adoption of implementation rules that are largely underprotective. The Supreme Court's current Eighth Amendment excessiveness cases are a perfect example of this phenomenon: the Court has replaced interpretation with implementation rules that overprotect one one-thousandth of one percent of all felony offenders and vastly underprotect the rest. The best way to right this imbalance is to return to the traditional judicial practice of interpretation prior to implementation.