SOME REFLECTIONS ON CONSERVATIVE POLITICS AND THE LIMITS OF THE CRIMINAL SANCTION

Richard Broughton
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By J. Richard Broughton*

I. INTRODUCTION

Alex DeLarge surely deserved the moral condemnation of the political community. The protagonist in A Clockwork Orange, the youthful Alex found a natural pleasure in raping, and robbing, and killing; simply, as he put it, engaging in a “bit of the old ultraviolence.” Alex freely chose the old ultraviolence, and he freely chose his leadership role among his equally violent compatriots. But after his voluntary participation in aversion therapy while incarcerated (sentenced to fourteen years for killing the Cat Lady with a giant phallus sculpture), he lacked the capacity to enjoy violence, and Beethoven’s Ninth Symphony.2

The lessons for criminal punishment to be found in A Clockwork Orange are many. It considers man’s nature and whether it is desirable to compel the habits of goodness and to destroy the human choice to be bad.3 It considers the weaknesses of rehabilitation. But—and this may be among its least acknowledged virtue—it also compels our consideration of the role of the state in inflicting punishment and of the proper reach and limits of the criminal sanction, and therefore of the state, in protecting the governed from one another. To put it in Madisionian

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* Assistant Professor of Law, University of Detroit Mercy. I am grateful to the Charleston Law Review for inviting me to participate in the Symposium on Crime and Punishment. And I am continually grateful to Wendy and Blair, and to Bryce, who joined us during the writing of this Article.

1 A CLOCKWORK ORANGE (Warner Brothers Pictures 1972). Although I confess I am partial to the film, Stanley Kubrick’s cinematic version is based on the novel by Anthony Burgess. See ANTHONY BURGESS, A CLOCKWORK ORANGE (1962).

2 Id.

3 Id.
terms, how can the government control both the people and itself?[^4] Do public law and policy better serve the interests of the state when people are free to do evil, and how should we punish them once they do so? *A Clockwork Orange* reminds us that there are some people who deserve the sanctions, even harsh ones, of the criminal law, but also that there are limits to what the criminal sanction can accomplish, particularly where political action is merely a reaction to public passion and outrage.

The lesson ought not to be lost on American conservatives, the champions of order but also of limited government. The conservative seeks equilibrium in the state, a tension between liberty and authority; he adheres to a stubborn reliance on custom and habit, acknowledging the necessity of change but seeking it within the framework of existing orders and institutions; he advocates a check on both individual and state appetite and aggrandizement through formal institutional arrangements and restraints; and while he recognizes that ours is a government based on consent, he knows the fragility of popular governments and of the human condition, and thus seeks a healthy distance between the people and their governors, suspicious of popular appeals to the masses.[^5] Matters of crime and punishment lend themselves naturally to the

[^4]: *See The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).*

[^5]: The conservatism on which I rely is drawn chiefly from the work of Russell Kirk, among others, and particularly from Kirk’s writings on the intellectual heritage of American constitutional government. *See Russell Kirk, The Conservative Mind: From Burke to Eliot* (7th Rev. Ed. 1999); *Russell Kirk, The Roots of American Order* (3rd ed. 1991); *see also Edmund Burke, Reflections on the Revolution in France* (1790) (explaining Burke’s disdain for abstract rights and warning of the dangers in abandoning fixed institutions in the name of political reordering). Of course, it is in the nature of conservatism to defy precise definitions and dogma, so I do not claim to supply the only plausible account of conservative politics, or to fully capture its full range of possibilities. I seek to describe only its essence as I understand it, and I believe the conservative inclinations that I describe here and throughout this Article are common to most, if not all, faithful descriptions of American conservatism. I also hope that my Libertarian friends will forgive the overlap with their doctrine, though I am persuaded by Kirk’s account of the important distinctions between Libertarianism and conservatism, even as they find common ground with one another on a variety of political and legal questions.

conservative inclination toward social order, yet also to the conservative impulse to resist totalism in the state.\(^6\) An omnipotent prosecutorial and incarcerative regime is no better than an omnipotent revenue collecting agency, an omnipotent legislature, or an omnipotent judiciary. Yet in contemporary American politics, criminal justice issues, particularly at the national level, have faded in significance. With the possible exception of issues concerning the death penalty and terrorism, questions about crime and punishment—including what kind of conduct the government can and should criminalize, and what should be the appropriate punishment, if any, for conduct that can be made criminal—have, as the 2008 presidential campaigns made clear, generally been neglected, or at best, have failed to produce robust debate in political campaigns and legislative discourse.\(^7\) Moreover, when criminal justice issues do arise, they ordinarily induce electoral platitudes, facile distinctions between those “soft on crime” and “tough on crime,” and otherwise do not spark much interesting debate about the proper scope and limits of criminal law and punishment. Perhaps few politicians feel it is in their professional interest to campaign on limiting the powers of the state to define and prosecute crimes, and perhaps they are correct if their sense is that the electorate cares little about that debate, too. Even when conservatives have engaged in discourse on crime and punishment, it often involves (and often

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quite sensibly) the elevation of the community’s interests in safety and civil order, and the diminution of liberty interests.

Recently, however, some on the political right have perhaps inadvertently reinvigorated a debate about the proper scope and function of the criminal law more broadly. One way they have done so publicly is by expressing criticism of the Obama Administration’s original desire (though one that apparently no longer exists) to prosecute terrorists in federal criminal courts, rather than hold them as prisoners of war and subject them to military tribunals. The argument is that the Constitution permits the President to exercise the executive power, and his power as Commander-in-Chief more specifically, to treat this particular category of persons—those whose actions are taken as part of a larger effort to wage war on the United States—differently from other persons who violate federal criminal law but who do so for reasons unrelated to waging war. The criminal justice system, the argument further goes, is not a proper forum for this particular class of evil-doers because it is riddled with complex rules and protections for the accused that will make it more difficult to maintain national security and intelligence secrets and to obtain useful intelligence from the offenders; it will result, at best, in incarceration in a civilian correctional facility, when the offenders are best treated by military officials, and it will give the

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offenders a public, civil forum for anti-American sentiment. Although these arguments come from figures across the political spectrum and are subject to debate even among conservatives, they at least represent a defensible position as to the appropriate treatment of a certain category of terrorists and terror suspects. The premise of this entire line of argument, though, is that there are limits to what the criminal law can and should do.

So if the criminal justice system is limited as to what it can accomplish in the arena of international terrorist activity, must there not also be other limits on the use and effectiveness of the criminal justice system? Conservatives would do well to consider, and give effect to, the notion of limits on criminal law and punishment beyond the preference for a war powers-based terrorism policy. Conservatives should be asking, and seeking intellectually honest and coherent answers to, a number of questions about criminal justice policy in America: in light of our understanding of human nature and the frailties of human beings, what are the purposes of punishment, and which offenders and offenses truly deserve incarceration or other especially harsh sanctions? In a democratic republic with a written Constitution of limited and enumerated powers, what can we do about a federal criminal law, and federal law enforcement and prosecutorial regime, so vast as that which currently exist? What can be done to make the judiciary’s constitutional regulation of punishment more coherent so that it respects the moral judgments of the political community while not reducing constitutional limits to meaningless words? The conventional “law and order” label has its greatest appeal when the crimes at issue are especially heinous, violent, or socially harmful, but the matter becomes more complicated


when one considers the vast number of crimes punishable by incarceration that involve far less harmful conduct. Perhaps some, even many, conservative political actors ultimately believe that the answers to these questions depend upon public sentiment and other factors that could affect electoral outcomes. But these actors, qua conservatives, ought to recall the frailties of democracy, which inhere in the frailties of man, and muster the courage to judge independently the merits of a limited criminal justice regime and enforce restraints on government’s coercive power through forms and institutions.

This Article represents a modest, albeit unusual, contribution to the ongoing dialogue about the role of popular forces in criminal justice by advocating a conservative program for criminal justice reforms grounded in the notions of balance among political forces, the value of formal institutional arrangements, and limits on the power of the state. I argue that while structural considerations limit the judiciary’s authority to undermine popular decision-making as to criminal punishment, particularly under the Cruel and Unusual Punishments Clause of the Eighth Amendment, those same structural considerations necessarily make popular forces the chief definers—and chief enforcers of limits on—the criminal sanction. They obligate political actors to more carefully weigh questions about crime and punishment by serving as filters for, not tools of, public passions. Conservatives can lead criminal justice politics at the national level by not only adhering to their impulse for preserving an orderly political community and controlling the governed through a criminal sanction focused on harmful conduct, but also by using constitutional forms to grapple with the dangers of a politically unaccountable prosecutorial and penal regime. This could include a comprehensive review of the federal criminal code in each congressional chamber, as well as more robust congressional oversight of federal criminal prosecution and punishment practices. Conservatives should take care to ground
federal criminal justice reforms in formal institutional arrangements, though, and not in popular appeals or sentiment. This Article therefore endorses a popular and constitutionalist, but not a populist, approach to maintaining a limited and responsible regime of crime and punishment in America.

II. CONSERVATIVES, JUDICIAL REVIEW, AND THE EIGHTH AMENDMENT MESS

It is no secret that conservatives generally have shown disdain towards a judiciary that aggressively undermines popularly enacted criminal laws and punishments, or that interprets a procedural right so broadly that it becomes unhinged from constitutional text and tradition and compromises the ability of law enforcement to effectively investigate, detect, and control socially harmful behavior. So it seems natural that any criminal justice program for conservatives would focus on the judiciary, and the United States Supreme Court, in particular. Yet conservatives who follow the Court closely find that the criminal defendants have allies among the Court’s conservative ranks in some cases, particularly under the Sixth Amendment, which is wholly devoted to the rights of the criminally accused. The more conservative Justices have found that the Sixth Amendment right to a trial by jury requires that every fact that increases a sentence beyond the statutory maximum must be tried to a jury and proven beyond a reasonable doubt; that the Confrontation Clause requires in-court confrontation and forbids the use of testimonial hearsay; and that a defendant has a constitutional right to waive counsel and


proceed without a lawyer at trial.\textsuperscript{15} In addition, many (though not all) conservatives embraced the Rehnquist Court’s judicially-enforced federalism,\textsuperscript{16} which invalidated one substantive federal crime\textsuperscript{17} and, if maintained, could potentially reach a significant portion of the federal criminal code.\textsuperscript{18} And the Court’s conservatives led the effort to invalidate the District of Columbia’s handgun ban, which provided for criminal penalties, pursuant to the Second Amendment in \textit{District of Columbia v. Heller}.\textsuperscript{19} So it is difficult to generalize conservatives as always opposing judicial intervention, or always disfavoring criminal defendants, in criminal cases. Still, conservatives have consistently opposed aggressive judicial review under the Eighth Amendment’s Cruel and Unusual Punishments Clause, though it is not clear that they must do so. It is this category of cases that represents perhaps the greatest frustration for devotees of ordered liberty and limited, but not impotent, government characterized by formal institutional arrangements.

One of the most important elements of modern Eighth Amendment jurisprudence has been the significance of popular decision-making—the expression of citizen or majoritarian preferences in legislation and jury decisions—in criminal law and punishment. Even in a regime

\begin{itemize}
\item \textsuperscript{15} See Indiana v. Edwards, 554 U.S. ___, 128 S. Ct. 2379 (2008) (Scalia, J., dissenting, joined by Thomas, J.) (defending the constitutional right to waive counsel and represent oneself pro se).
\item \textsuperscript{17} See United States v. Lopez, 514 U.S. 549 (1995) (holding the Gun Free School Zones Act of 1990 exceeded Congress’s authority under the Commerce Clause).
\item \textsuperscript{18} After Gonzales v. Raich, 545 U.S. 1 (2005), it is not clear whether the Court’s federalism-based limits on the Commerce Clause have reached their outer limits. But \textit{Raich} suggests that federal criminal-law making authority under the Commerce and Necessary and proper Clauses remains strong.
\item \textsuperscript{19} 555 U.S. ___, 128 S. Ct. 2783 (2008) (Scalia, J.).
\end{itemize}
of constitutional regulation that follows one track for capital cases and another for non-capital cases, the Court has at least invoked the importance of these popular forces when assessing punishments on both tracks. Yet ultimately, the Supreme Court's approach to validating popular decision-making as to criminal punishments has been schizophrenic, embracing it and offering it tremendous deference in non-capital cases but conveying less trust in capital cases. Recent scholarship has considered the difficulties and consequences of the Court's dual-track approach to proportionality in criminal sentencing. What follows is a modest addition to that valuable literature.

Starting from the Court’s pronouncement that the Eighth Amendment’s bar on “excessive” punishments forbids those punishments that are at odds with evolving standards of decency or that are grossly disproportionate to the severity of the offense, it is worth beginning with the observation that the Court’s capital proportionality methodology is marked by a “two”-step analysis that is weighted heavily toward the “independent judgment” of the Justices. First, the Court conducts an objective proportionality analysis, in which it surveys the objective indicia of societal attitudes about a particular death penalty practice (how many states do it, jury decisions, charging decisions). In Kennedy v. Louisiana, for example, the Court said the objective indicia did not favor the death penalty for child rape—only six jurisdictions permitted

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20 See infra this Part.


it, no one had been executed for it since 1964, and the only two people on death row for child rape at that time were Kennedy and another Louisiana inmate. Second, the Court conducted a subjective proportionality analysis, in which the Court held that regardless of the objective indicia, “in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty.” This second prong originated with the Court’s decision in Coker v. Georgia, but it is not clear from where Coker derived this authority or why, even if it is an accurate statement of judicial power, it is unique to capital punishment review. The Court said in Kennedy that, in its view, even the rape of a child, no matter how brutal or aggravated, does not compare with murder in terms of the harm done to the individual. Here, the Court relied heavily on Coker’s language distinguishing rape from murder. Effectively, the Court constitutionalized the notion that a death must occur in order to impose capital punishment for a crime against the person.

My chief concern, and one that I have articulated on multiple occasions, is with this “two-step” capital proportionality approach. If the objective indicia of societal attitudes about a particular death penalty practice do not support a consensus for the perpetuation of that practice,

25    Id. at 2643-44.

26    Roper, 543 U.S. at 563 (quoting Atkins, 536 U.S. at 312).


28    Kennedy, 128 S. Ct. at 2659-60.

29    Id.

30    The Court expressly exempted from its holding crimes against the state. Id. at 2659. Therefore, it is unclear whether the Court would require a death to occur before capital punishment could be imposed for treason, espionage, terrorism, or drug kingpin activity.

then it should not matter what the Court believes in its own “independent judgment.”\textsuperscript{32} Similarly, if the Court’s independent moral judgment is what matters (and the Court has said this in its capital proportionality cases\textsuperscript{33}), then the objective indicia become meaningless.\textsuperscript{34} There is little need to confirm societal attitudes if the Court’s judgment trumps that of the political community.\textsuperscript{35} So, on these terms among others, it is difficult to take the objective analysis seriously as an independently meaningful assessment of constitutionality.

And this analysis, too, hardly looks neutral. When the Court tells us in \textit{Kennedy} that rape does not compare to murder, the Court fails to tell us why \textit{this} particular measurement of harm is the one the Eighth Amendment requires.

For example, let us turn it up to eleven.\textsuperscript{36} Imagine that the legislature punishes based upon a sliding scale of serious crimes (say, from one to eleven). Now try to proportion punishment upward (that is, more harshly) along the scale. Let us say in this hypothetical penal scheme that intentional or premeditated murder is an eleven, unintentional killings are a ten, and

\begin{itemize}
\item \textsuperscript{32} See Broughton, \textit{Kennedy}, supra note 31, at 603-04.
\item \textsuperscript{33} See Kennedy, 128 S. Ct. at 2658 (citing \textit{Coker}, 433 U.S. at 597); \textit{Roper}, 543 U.S. at 563-64; \textit{Atkins}, 536 U.S. at 312-13. In \textit{Kennedy}, for example, a counter-trend had begun throughout the country on child rape and many jurisdictions had other laws providing capital punishment for a variety of serious non-homicide crimes. See Broughton, \textit{Kennedy}, supra note 31, at 604 (noting that about 40 percent of death penalty jurisdictions imposed capital punishment for a serious non-homicide crime). And in cases like \textit{Atkins} and \textit{Roper}, the objective indicia of public attitudes did not clearly demonstrate that Americans had formed a consensus against the practice, but the Court found a national consensus against executing the mentally retarded and those who committed their crimes before age eighteen because the “trend,” the most recent public enactments, was the most important factor and the trend was moving away from those practices. See \textit{Atkins}, 536 U.S. at 315; \textit{Roper}, 543 U.S. at 566.
\item \textsuperscript{34} See Broughton, \textit{Kennedy}, supra note 31, at 603-04.
\item \textsuperscript{35} See Broughton, \textit{Second Death}, supra note 31, at 651.
\item \textsuperscript{36} For those unfamiliar with the reference, see \textit{THIS IS SPINAL TAP} (Spinal Tap Prods. 1984). Spinal Tap’s lead guitarist Nigel, during an interview with documentary filmmaker Marty DeBergi, boasts that the band’s amplifiers use “11,” rather than “10,” as their most powerful level. “It’s one louder, isn’t it?,” Nigel declares. Nigel is then puzzled when Marty asks why the band does not simply make 10 louder and use 10 as the highest level. “These go to eleven,” Nigel responds.
\end{itemize}
non-death-resulting aggravated child rape is a nine. The *Kennedy* Court is saying that in its own judgment the death penalty can only be used when the harm is at least ten (death-resulting, or criminal homicide). But, constitutionally speaking, the Court fails to explain why the Eighth Amendment does not allow the level of nine to be the line of demarcation for imposing the death penalty. Why does it have to be eleven? The Court does not tell us, or at least tells us only in a profoundly question-begging way. A reasonable legislature could conclude that the combination of harm done to the child, along with the attendant social harm caused by the offense and additional factors in aggravation, could cause a given child rape to rise to a sufficient level of moral culpability and personal and social harm to warrant capital punishment. But the Court forecloses this, no matter how aggravated or brutal the child rape may be. Can it really be true, as Justice Alito asks in his *Kennedy* dissent, that every homicide is necessarily more serious, more depraved, or more brutal than some rapes? 37 That seems implausible. More troubling still, and more to the constitutional point, the Court does not explain why the Eighth Amendment values the Court’s judgment more than the legislature in this hypothetical.38

So there is some reason to question whether the Court’s independent judgment is really a judgment about what the Eighth Amendment permits or prohibits, or whether it is about the moral or political acceptability of a particular use of the death penalty in the minds of the Justices only. After all, as the Court says explicitly in *Atkins*, “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.”39 To be fair, Justice Kennedy’s majority opinion is full of sensible political

38 See Broughton, Kennedy, supra note 31, at 607.
arguments against using the death penalty for child rape, which he tries to explain as undermining any legitimate penological goals. But, as Justice Alito complains, Justice Kennedy fails to explain why those political arguments are ones that the Constitution specifically contemplates.\(^{40}\)

Also, of course, *Kennedy* is distinct from *Atkins* and *Roper* in the sense that it applies the proportionality analysis to questions about the nature of the crime, rather than the personal characteristics of the defendant. But in each subcategory of cases the Court has decidedly rejected the capacity of the legislature *and* of the criminal jury—the popular forces at work in criminal law decision-making—to distinguish among various offenders who may be less culpable. This is an inherent contradiction in the Court’s approach. On the one hand, in assessing the objective factors, the Court looks at jury decisions and thus sees the jury as perfectly capable of not imposing the death penalty for a less culpable offender, using those decisions to justify a finding that society has set its face against a particular death penalty practice because “[t]he jury . . . is a significant and reliable objective index of contemporary values.”\(^{41}\) On the other hand, in its “independent judgment,” the Court says in *Kennedy* that we cannot trust a jury to apply reduced culpability as a mitigating factor because the nature of these crimes would “overwhelm a decent person’s judgment.”\(^{42}\) These two views of the jury are hard to reconcile. In addition, this confused approach to the role of the capital jury undermines the

\(^{40}\) *Kennedy*, 128 S. Ct. at 2673-74 (Alito, J., dissenting).

\(^{41}\) *Coker* v. Georgia, 433 U.S. 584, 596, (1977). In *Kennedy* and *Coker* the Court noted that juries were not sentencing rapists to death. *See Kennedy*, 128 S. Ct. at 2657-58; *Coker*, 433 U.S. at 596-97. And in *Enmund v. Florida*, which held that it was excessive to impose the death penalty upon a defendant who did not kill, intend to kill, or attempt to kill, the Court explained that juries were not sentencing non-triggerman accomplices to death. *Enmund v. Florida*, 458 U.S. 782, 794-95 (1982).

\(^{42}\) *Kennedy*, 128 S. Ct. at 2661.
Court’s Eighth Amendment mitigation jurisprudence, which is based on the premise that juries are capable of giving effect to mitigating factors. Why require the jury to consider mitigating factors regarding reduced culpability, and a vehicle for the jury to give them effect, if the jury cannot be trusted to impose the death penalty in a manner that is not purely arbitrary, or a mere emotional response to the crime? Perhaps the Court is simply concerned that juries will not give enough weight to the reduced culpability mitigators to justify a decision against capital punishment in these cases. But, even in its most aggressive regulation of the capital jury’s decision-making, the Court has never held that juries must give any particular degree of weight to a mitigating factor.\textsuperscript{43}

So another reason to be wary of the existing capital proportionality construct is that the Court’s subjective analysis supplants not only legislative judgments about culpability but also those of capital juries which, in other contexts, have played so significant a role in the Court’s Eighth Amendment regulation of the death penalty.\textsuperscript{44}

Yet despite the absence of any textual distinction between capital and non-capital cases, the construct does not exist in the non-capital proportionality arena. In the Court’s non-capital proportionality cases, the Court has been far more deferential to the legislature than in its capital cases. This, of course, is based on the rationale that the Eighth Amendment applies “with special force” to the death penalty—the so-called “death is different” notion.\textsuperscript{45} Rather, in the non-capital cases, the Court has acknowledged only a “narrow proportionality principle,” and applied an

\textsuperscript{43} See Woods v. Cockrell, 307 F.3d 353, 358-60 (5th Cir. 2002).

\textsuperscript{44} See, e.g., Penry v. Johnson, 532 U.S. 782 (2001) (holding that jury must have an adequate vehicle to consider and give effect to mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that capital jury cannot be precluded from considering mitigating evidence).

\textsuperscript{45} See Roper v. Simmons, 543 U.S. 551, 568 (2005).
approach that emphasizes the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system, and guidance by objective factors, all of which inform the ultimate principle that the Eighth Amendment does not require strict proportionality between crime and sentence.\textsuperscript{46} The Court has explained that “our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory,’” and that “selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”\textsuperscript{47} This language looks much different from the capital proportionality review scheme and is the kind of deferential review that applies even to the most severe of punishments in jurisdictions that do not have a death penalty.\textsuperscript{48} Indeed, \textit{Kennedy} seems to express the view that the Eighth Amendment \textit{does} require strict proportionality between crime and sentence, at least with respect to crimes against the person. Consequently, the Court has ultimately credited almost every proportionality claim in the capital arena to have been brought before the Court: in \textit{Coker, Enmund, Thompson, Atkins, Roper}, and \textit{Kennedy}, leaving \textit{Tison} as the only modern capital proportionality case on certiorari review to result in a decision favorable to the state that remains good law.\textsuperscript{49} Yet the Court has consistently \textit{rejected} challenges to non-capital sentences using its traditional deferential approach.\textsuperscript{50}

\textsuperscript{47} \textit{Id.} at 25.
\textsuperscript{49} True, the Court rejected proportionality claims in \textit{Penry v. Lynaugh}, 492 U.S. 302 (1989) (mental retardation) and the companion cases of \textit{Stanford v. Kentucky} and \textit{Wilkins v. Missouri}, 492 U.S. 361 (1989) (youth), but those cases are, of course, no longer good law.
\textsuperscript{50} These cases include such sentences as a prison term of twenty-five years to life for felony grand theft by a recidivist, \textit{Ewing}, 538 U.S. at 30; life without parole for a first-time offender convicted of possessing more than 650 grams of cocaine, \textit{Harmelin}, 501 U.S. at 996; and life with parole for a recidivist offender convicted of non-violent felony theft. \textit{Rummell v. Estelle}, 445 U.S. 263 (1980). \textit{Solem v. Helm}, 463 U.S. 277 (1983), stands as the only modern term-of-incarceration case to result in a holding that the sentence was unconstitutionally disproportionate,
But if the Court truly believes that the Constitution contemplates that the Court’s “independent judgment” will be brought to bear in assessing the acceptability of capital punishment practices, why does the Constitution not require the same independent judgment with regard to non-capital sentences? Or, to put it more precisely, why is the Court’s “judgment” constitutionally worth more (that is, why does it possess greater Eighth Amendment value) in capital cases than in non-capital cases? It is one thing to enact sensible policies that treat capital and non-capital cases differently because of the stakes and complexity of procedures involved; it is quite another to say that the Constitution specifically gives the Court power to impose its own moral and political sensibilities in one category of cases under the Cruel and Unusual Punishment Clause, but not in the other.

The *Graham* and *Sullivan* cases demonstrate how confounding the existing dual-track approach can be. There, the Court must decide whether the Cruel and Unusual Punishments Clause categorically forbids imposition of a life sentence without the possibility of parole for a juvenile offender convicted of a non-homicide crime. The Court must further determine which framework applies: the traditional deferential non-capital proportionality approach, or an approach that incorporates the holding of *Roper*, a capital case. Unlike the prior non-capital proportionality cases, *Graham* and *Sullivan* are not cases about whether the punishment imposed is proportional to the crime. Rather, like *Roper* and *Atkins*, they focus upon whether the personal

The Court also has also invalidated a punishment under the Excessive Fines Clause. United States v. Bajakajian, 524 U.S. 321, 324 (1998).

characteristics of the defendant (here, youth) sufficiently reduce his moral culpability at the time of the offense to render a life sentence without parole excessive.

If the Court does not apply *Roper* and instead affirms the sentences under existing non-capital case law, then the Court will simply reinforce the prevailing conventional wisdom that the Eighth Amendment is an ineffectual limitation on non-capital sentencing—even where a juvenile defendant receives the harshest punishment available for a non-homicide offense. Yet if the Court applies *Roper*, this could arguably undermine the Court’s contention that the Eighth Amendment applies with “special force” in the death penalty context; after all, not only was *Roper* a capital case, but even the *Roper* Court cited noted that its decision would not leave the states without an adequate punishment scheme for serious juvenile offenses, specifically citing the availability of life without parole. The *Roper* Court may also have been expressing the view that “seventeen is different;” but, again, if it said this, it said this in the context of a case in which it conceded that the Eighth Amendment has “special force.” And if *Roper* is imported into the non-capital context, there is no principled way to limit the importation of capital jurisprudence simply to juvenile life without parole. Moreover, other state courts have consistently rejected these types of Eighth Amendment challenges and have specifically refused to apply *Roper*’s reasoning to invalidate a juvenile’s sentence of life without parole. Courts also rejected these Eighth Amendment claims prior to *Roper*.

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53 *Id.* at 572.

54 *Id.* at 568.

A final possibility, and one that captured some of the more conservative Justices during oral argument, is that the Court could refuse to grant a *Roper*-based categorical exemption but allow an as-applied challenge based on reduced culpability. This would have the virtue of logical consistency in the sense that *Roper’s* science is not limited to youthful offenders who commit capital crimes. The science would still be useful in the non-capital arena for purposes of the as-applied challenge. But again, it would be difficult to limit this kind of challenge to youth only. And it could potentially result, over time, in requiring the same kinds of procedures for admitting and reviewing constitutional mitigation evidence that currently exists in capital jurisprudence—after all, a capital defendant who fails to meet the standard for the *Atkins* bar may still demand consideration of his mental deficiency evidence from the jury, and a capital defendant who fails to satisfy the *Roper* bar may still have the jury consider his youth. *Graham* and *Sullivan* therefore have the potential to create additional uncertainty, or unneeded havoc, in an Eighth Amendment jurisprudence defined by the dual-track approach.

Rachel Barkow has thoughtfully addressed the problems of the dual-track approach—notably that the Constitution makes no distinction between capital and non-capital crimes and that other constitutional rights are not evaluated differently in capital and non-capital cases—and has argued that the Court should abandon the dual-track approach and adopt a unified approach.

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56 *See, e.g.*, Commonwealth v. Carter, 855 A.2d 885 (Pa. Super. Ct. 2004) (juvenile convicted of felony murder); Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) (15-year-old convicted of murder); *but see, e.g.*, Naovarath v. State, 779 P.2d 944 (Nev. 1989) (holding that life without parole for 13-year-old murderer violated state constitution and Eighth Amendment); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968) (life without parole for juvenile offender convicted of forcible rape was unconstitutionally disproportionate).

57 *See* Transcript of Oral Argument at 12-13, Graham v. Florida, No. 08-7412.
to reviewing criminal sentences. 58 So one idea (a good one, based on Professor Barkow’s research) is to abandon the dual-track approach.

But perhaps another option exists. That is, does the Court have it all backwards? The Court could maintain something like a dual-track approach, but reverse the tracks. This would make the Court more deferential to the government when a harsh sentence is imposed for a very serious crime, but less deferential when a facially harsh sentence is imposed for a less serious crime, particularly one that does not involve violence against the person, where there is no direct nexus to violent crime, or where the personal and social harm are minimal. Ultimately, this reverse-dual-track approach is grounded in the sensible notion that a punishment is less likely to offend the moral sensibilities of the political community where it is imposed for a serious crime that causes great personal and social harm, but is more likely to offend those sensibilities when the government imposes a harsh punishment for a non-serious or non-violent crime that causes little or no meaningful personal or social harm. Aggressive, or less deferential, judicial review makes more sense for the latter than for the former. This approach would not just have the virtue of abandoning the capital/non-capital distinction, which has no foundation in the constitutional text, but also the virtue of leaving the Eighth Amendment with some teeth, giving less serious offenders at least a potential avenue of relief that does not exist under the current construct and thereby encouraging legislative reconsideration of punishment schemes that result in mass incarceration for many who do not belong in prison. So, for example, a challenge to capital punishment for the aggravated rape of a child, or for non-death-resulting treason or espionage, would likely be unsuccessful because reasonable people in the political community could find that those crimes involve such substantial personal and social harms and moral culpability that

58 Barkow, Life and Death, supra note 21, at 1186-1205.
they meet the threshold of harm for justifying capital punishment. But some room could remain for a challenge to a harsh prison sentence for certain sex or obscenity crimes, or for public corruption crimes like bribery, committed by a defendant with no criminal history and no evidence of future dangerousness to the community.\textsuperscript{59} Perhaps the Court should change the dual-track approach, and seek the uniformity that Professor Barkow persuasively urges, or maybe it should at least change the way it describes the tracks.

Conservatives understandably might find such a revised approach still unpalatable. First, it would require the Court to find some threshold of severity in the sentence before proceeding to determine whether it was excessive in relation to a less serious crime. The Court uses a similar approach now in non-capital cases. It would also require the Court to engage in some line-drawing that could be delegitimized on subjectivity grounds, such as drawing lines between violent and non-violent offenses (leaving drug offenses in a unique position somewhere in the zone of twilight between the two), or finding a sensible method for evaluating offense gravity, resulting harms, and culpability.

Donna Lee has proposed a detailed, thoughtful model for the Court to follow in accomplishing the task of meaningfully reviewing non-capital sentences, identifying offense gravity factors such as harm, culpability, violence, and magnitude; and sentence severity factors such as what she terms the offender’s “real sentence” and likely age and life opportunities upon release.\textsuperscript{60} Yet regardless of whether one follows Professor Lee’s model or some other one, the


\textsuperscript{60} See Donna H. Lee, \textit{Resuscitating Proportionality in Noncapital Criminal Sentencing}, 40 ARIZ. ST. L.J. 527, 557-79 (2008). While I find much to commend in Professor Lee’s work here, I differ from her in at least one
approach would remain subject to the criticisms that political actors are better positioned to discern the moral sensibilities of the community, and that textually and structurally the Constitution does not favor the Court’s determination of offense gravity or sentence severity more than those of popular actors. In a sense, this revised dual-track approach could simply reintroduce the same concerns about aggressively reviewing non-capital sentences that currently exist with regard to capital sentences. True, conservatives must find their way past the unhelpful “judicial activism/judicial restraint” labels, and also acknowledge that if the Cruel and Unusual Punishments Clause contains a proportionality guarantee, there must be some outer limit to criminal punishment that courts can enforce despite popular preferences. After all, conservatives have invalidated popular preferences in other types of individual rights cases. Still, conservatives might also contend that, unlike other constitutional provisions that do not enforce moral norms, the Cruel and Unusual Punishments Clause gives special protection to popular preferences, for it is these preferences that help us in the first instance to discern the moral content of the words “cruel” and “unusual,” in the sense that those preferences indicate what modes of punishment, and what distribution of punishment, is consistent with the moral sensibilities of the political community as a whole.

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62 See Broughton, Kennedy, supra note 31, at 619.


Conservatives might well balk, then, at any approach that appears to displace the political community’s judgments about how best to punish criminality that would undermine the decision-making processes in the political branches and invest the Court with essentially political powers to devise a system of punishment based on its own moral preferences. Ultimately, although conservatives have found room for judicial review in protecting certain other rights of criminal defendants or in safeguarding the constitutional structure from legislative overreaching, they are unlikely to embrace any aggressive role for courts in enforcing the Eighth Amendment’s limits on the criminal sanction, capital or otherwise.

III. CONCLUDING THOUGHTS ON CONSERVATIVES AND THE USES OF POLITICS

What I have articulated thus far may sound like the standard conservative critique: courts should use judicial review sparingly as a limit on the state’s criminal justice powers. I have attempted to show why that critique may actually be somewhat more nuanced. But even if conservatism leaves room for the occasional judicial invalidation of a criminal law or punishment in order to serve the interests of a specific textual command or to safeguard the Constitution’s institutional design, the conventional critique still retains some general force. Conservatives should rightfully worry about the expansion of judicial power at the expense of institutional arrangements and the consequences for a republican political system that come from judicial ubiquity. But there are natural political consequences—or, more accurately, obligations—if conservatives adhere to this critique. If conservatives insist on a judiciary that is as deferential to political actors as the one I have described, thereby leaving the Eighth Amendment and judicial review as ineffectual constraints on criminal punishment, then they

65 See Broughton, Second Death, supra note 31, at 662-63.
must be prepared to advocate political action that will chain the American criminal justice Leviathan.

A substantial amount of literature addresses the problems of overbreadth in criminal law and punishment, and I need not recount it fully here.\(^{66}\) Suffice it to say, though, the problem is related to some simple premises. Not everything that *can* be made a crime *should* be made a crime, and not everything that *can* be punished with incarceration *should* be punished with incarceration. That is, everything that is socially or morally undesirable need not be the subject of the criminal law, and every socially or morally undesirable act that *is* subject to the criminal sanction need not be punished with incarceration. Even among the universe of acts that *should* be subject to the criminal sanction, only a small category of those acts need be (and constitutionally can be) the business of the national government. Again, these appear to be simple premises—undeniable ones, perhaps—but the steady growth of the criminal sanction and the state of mass incarceration in America\(^{67}\) suggest that criminal law-making and prosecuting authorities have either forgotten or ignored them in favor of other interests: overresponsiveness to public attitudes or to recent incidents of crime, institutional cooperation between legislators and law enforcement entities with no meaningful system of accountability, or pressure to create a


public appearance of aggressiveness rather than weakness toward crime, among others. But conservatives must acknowledge these premises and dispose of any inclinations toward a populist criminal law regime before they can champion meaningful political limits on crime and punishment in America, while still championing an effective and responsible criminal sanction that will best serve public interests.

Accordingly, I can here only cursorily suggest a couple of very general and perhaps oversimplified ways in which political actors (and conservatives, in particular) can achieve a limited, responsible, yet effective political system of crime and punishment regulation. I focus upon national politics and the federal criminal law-making apparatus, though my suggestions could apply with equal force to the states, even as some recent research indicates that perhaps the states are more thoroughly engaged in limiting the scope of the criminal sanction than is the federal government.

Moreover, my suggestions have admittedly been the subject of some important literature, though mine are directed particularly toward conservatives and, moreover, are grounded in the observation that federal criminal justice reform should take its cue from institutional prerogatives, formal limits, and competition.

First, I add my voice to the many others who have lamented the gluttony of federal criminal law, and suggest that Congress address the sheer size and scope of federal criminal law through a comprehensive, deliberate, and systematic process of review and repeal. While the states still define, investigate, and prosecute the vast majority of crimes, the growth of the federal crime code remains a subject of concern, especially for conservatives. Other scholars have

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adequately addressed overcriminalization more generally (and quite frequently), and the “federalization” of criminal law, more specifically. 70 Again, I could not, and need not, recount those conclusions here. But a few facts are in order, which should be of special concern to conservatives (at least to their Republican allies) who had a substantial hand in creating the current bloated regime. Armed with a body of Commerce Clause jurisprudence that enabled Congress to justify vast new uses of criminal law-making power, 71 Congress has consistently enlarged the scope of the federal criminal code. 72 And even after Republicans won sweeping victories in the 1994 mid-term elections, promising to make Washington more sensitive to federalism and reduce the size of federal power, 73 the trend continued unabated. As one recent study led by John Baker shows, Congress enacted 452 new federal crimes between 2000 and 2007, which roughly tracks the rate of growth during the 1980s and 1990s. 74 By 2007, the total


72 See TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter ABA TASK FORCE].

73 See, e.g., 141 CONG. REC. H3352 (1995) (statement of Rep. Archer) (explaining “the third principle which forms the foundation for [the Personal Responsibility Act of 1995] is our commitment to shrink the Federal Government by returning power and flexibility to the States and communities where the needy can be helped the most.”); 141 CONG. REC. H2077-78 (1995) (statement of Rep. Solomon) (stating that “[the Republican Party] promised, in our Contract With America, less federal government, less spending, less taxes and a return of power, responsibility and decisionmaking to the people and the State and local governments closest to them.”); 141 CONG. REC. H979 (1995) (statement of Rep. Jones) (stating, “Republicans are committed to moving our Contract With America forward until it is completed. . . . We are moving on to a future of a smaller, less costly, more efficient government.”).

number of federal crimes reached about 4,450.\textsuperscript{75} This study shows the same kind of growth identified in the American Bar Association’s 1998 study on federalization of the criminal law.\textsuperscript{76} In addition, as this study shows, the problem is not merely one of numbers: federal prosecutors use the expansion of the criminal code to expand theories of liability and jurisdiction, and a substantial number of new federal criminal statutes in the period reported did not identify a \textit{mens rea} element.\textsuperscript{77} Moreover, another recent study demonstrates that while state prison populations have decreased over the past year (2009), the federal prison population has steadily and rapidly risen, and to twice what it was in 1995.\textsuperscript{78} These studies suggest that the federal government is more deeply involved in the business of criminal punishment than ever before. And while it is true that federal prosecutions and prison populations seem small in comparison to that of the States, the proper scope of federal criminal law ought not to be measured against the scope of State criminal action; rather, it should be measured chiefly against the scope and limits provided by the constitutional text.

In light of these concerns, the Judiciary Committees in both congressional chambers should undertake a comprehensive review of the federal criminal code.\textsuperscript{79} Members on both

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} ABA TASK FORCE, \textit{supra} note 72.

\textsuperscript{77} Baker, \textit{supra} note 74, at 6-7.

\textsuperscript{78} See PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS, ISSUE BRIEF (March 2010).

\textsuperscript{79} There are hopeful signs of something at least close to my proposal coming to fruition. In the summer of 2009, the House Judiciary Committee conducted a hearing on overcriminalization. \textit{See Overcriminalization of Conduct/Overfederalization of Criminal Law, Hearing Before the House Comm. on the Judiciary, 111\textsuperscript{th} Cong.} (2009). It is unclear at this point, however, whether the information gathered during the hearing will result in legislative action.

In addition, the Senate Judiciary Committee recently approved the National Criminal Justice Commission Act, which would create a commission to review the federal criminal justice system. \textit{See S. 714, 112\textsuperscript{th} Cong.} This proposal would serve as a useful alternative to my proposal, and would eliminate the need for additional Committee
committees should be prepared to identify duplicative, unnecessary, or contradictory federal crimes, and to advocate their repeal. The same review should include a consideration of existing mens rea requirements and ensure that statutes without adequate mens rea elements are amended to include them. 80 And, despite Congress’s delegation of extensive authority over sentencing to the courts through the now-discretionary Federal Sentencing Guidelines, congressional review should reconsider current statutory punishments for federal crimes and the penal justifications for those punishments. Even if Donna Lee’s proposed model for evaluating gravity and severity seems ill-suited for judicial review, perhaps it is in this kind of legislative review that her thoughtful model could be especially valuable. 81 To make this kind of legislative project effective, members of Congress must acknowledge and take seriously their own institutional responsibility to engage in constitutional deliberation and interpretation. 82 In addition to enforcing its own view of the Eighth Amendment and proportionality, and rather than waiting for judicial challenges or for a change in the Supreme Court’s approach to the Commerce and 

staff and resources. Those same staff and resources, however, would go to the Commission under S.714. The Commission also would have a broader mandate than the one I propose, including review of the prison system. Another hopeful sign: Pennsylvania recently conducted a successful criminal code review, though the research was performed by University of Pennsylvania law students under the direction of Paul Robinson. Robinson’s research shows that state lawmakers were consistently enacting harsh punishments in response to public outrage over local incidents of crime, and that “the natural effect is to exaggerate the penalty;” according to Robinson. See Daniel Rubin, Pa. Punishments Often Go Beyond the Crime, PHILLY.COM, Jan. 18, 2010, http://www.philly.com/inquirer/columnists/20100118_Daniel_Rubin_Pa_punishments_often_go_beyond_the_crime.html. For the report, see Paul H. Robison & University of Pennsylvania Criminal Law Research Group, Report on Offense Grading in Pennsylvania (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527149.

80 Baker’s study summarizes why this reform is important: mens rea requirements strengthen the normative force of the criminal law and help us to distinguish those who are truly deserving of community condemnation. See Baker, supra note 74, at 6-7.

81 See Lee, supra note 60, at 568-82.

Necessary and Proper Clauses, Congress should be prepared to repeal existing criminal laws and defeat proposals for new criminal laws that, in Congress’s own view, exceed its Article I powers. Even though conservatives have supported judicial-enforcement of limits on the Commerce and Necessary and Proper Clauses, conservatives should not wait for more such challenges to succeed in limiting the scope of federal criminal law; after Gonzales v. Raich, that wait may be lengthy). The responsibility rests in the first instance with the Congress, and conservatives can lead this effort in constitutional deliberation outside of the courts. Of course, this is not to say that all federal criminal laws are constitutionally or normatively problematic or that a conservative criminal justice program should oppose federal criminal-law making generally. Indeed, some of the new criminal laws enacted between 2000 and 2007 related directly to terrorism and national security, which are legitimate constitutional objects of federal concern.\textsuperscript{83} So the federal government ought not to be seen by conservatives as an inherent evil. It, too, is an institution of order, marked by formalities that restrain people and insulate institutions from public passion. But it is also one constrained by written and structural limits.

Second, and somewhat related to the unlikelihood of the first suggestion coming to fruition, Congress should make better use of its oversight and investigative powers to review and limit both the substantive criminal law and the federal prosecutorial regime.\textsuperscript{84} Not only could Congress use the committee structure to study and reform the criminal code, it could engage in more robust oversight of the Justice Department. Even if the effort to convince legislators to


more meaningfully limit the scope of the federal criminal code is a fool’s errand, perhaps some of the ultimate ends—such as a more limited and responsible federal prosecutorial regime—could be achieved if federal prosecutors understood that their decisions (decisions that can often amount to substantive criminal law-making and that have led scholars like Stuntz to describe prosecutors as the real lawmakers in the criminal justice system\textsuperscript{85}) would be subjected to rigorous scrutiny and public accounting before Congress. As Dan Richman has explained, oversight hearings allow Congress to “shine the spotlight on executive activities” and thus “challenge[] the virtual monopoly that enforcers, by invoking investigative secrecy and privacy, usually can maintain over information concerning their activities.”\textsuperscript{86} This is not a suggestion that Congress interfere with the exercise of prosecutorial discretion in any case, nor is it a suggestion that Congress compel prosecutors to disclose decision-making information that would otherwise be protected (such as through the deliberative process privilege);\textsuperscript{87} nor is it a suggestion that Congress take any action that would deprive the executive branch of its exclusive authority under Article II of the Constitution. Nor do I suggest that line attorneys at the Justice Department be subjected to congressional interrogation; political appointees who oversee the Department’s divisions are the best objects of congressional questioning. Moreover, it is usually true that “the solicitude that enforcers show to legislators is often limited to the duration of the hearing itself.”\textsuperscript{88} But although scholars have historically treated congressional oversight as a weak, or at

\textsuperscript{85} See Stuntz, supra note 68, at 506.

\textsuperscript{86} Richman, supra note 70, at 791.

\textsuperscript{87} See In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).

\textsuperscript{88} Richman, supra note 70, at 791.
least limited, control, this need not be the case. The point of Congress’s oversight and investigative powers, after all, is to aid Congress in the fulfillment of its constitutional legislative role, which could include not just statutory, but also constitutional reform as well. To the extent that Justice Department oversight can assist Congress in learning about the ways in which federal prosecutors are attempting to expand the reach of federal criminal law beyond what Congress desires, or seeking sentences that appear poorly proportioned to the offense, or charging offenses that are either best left to State prosecution or better left unprosecuted at all, then a more robust congressional oversight role that results in real confrontations over the scope of federal law and its enforcement could prove valuable in forcing the Justice Department, and Congress, to take the limits on the federal criminal law more seriously. Again, rather than serve as a mere tool for giving federal prosecutors everything they wish for, Congress has institutional prerogatives of its own that are worthy of assertion. Inter-branch conflict, after all, is no vice.

89 See, e.g., id. at 791-93.

90 Of course, this is not to ignore the role of the President, who should be more closely involved in criminal justice decision-making. The President, too, has an obligation to reflect upon and enforce his own understanding of constitutional limits. To this end, the President must aggressively use his veto upon any criminal legislation that he believes to exceed Congress’s powers, rather than allowing courts to later perform the necessary act of invalidating the law. See J. Richard Broughton, Rethinking the Presidential Veto, 42 HARV. J. LEGIS. 91 (2005). Presidents could also, where appropriate, take a more active role in overseeing and constraining the federal prosecutorial regime. This is not an uncontroversial proposition, for some have argued that the cause of justice and the unique role of the public prosecutor require that prosecutorial agencies have a special obligation to remain politically independent and do not in fact exercise executive functions. See Harold Krent, Executive Control Over Criminal Law Enforcement: Some Lessons from History, 38 AM. U. L. REV. 275 (1989). There are, of course, historical precedents that have contributed to the fear of presidential involvement in prosecutions. But other historical precedents, and some recent scholarship, cast some doubt upon the legitimacy of absolute prosecutorial independence, as a constitutional matter. See Saikrishna Prakash, The Chief Prosecutor, 73 GEO. WASH. L. REV. 521 (2005). My purpose here obviously is not to fully explore this controversy, but only to suggest that there is a plausible constitutional argument, derived from an understanding of the Constitution that emphasizes its formal arrangements, for a presidency that is more closely connected to prosecutorial decision-making. See id. I more fully explore some of these questions in an upcoming project tentatively entitled, The Criminal Justice Presidency. As for my remarks on congressional oversight, those are also treated more comprehensively in a forthcoming project on congressional oversight and the federal criminal law.
A limited, responsible, and competent criminal justice regime is difficult to achieve, however, when crime and punishment policy is merely a product of, reaction to, and appeasement of, public sentiment. Conservatives must beware the lure of a disenchanted electorate. And they must forego the temptation to allow the party affiliation of the president to determine the size and scope of federal criminal enforcement. When criminal law and punishment is merely a reaction to a recent incident of crime that has citizens clamoring for action to satisfy their sense of protection, or when political actors attempt to ride a wave of public opposition to the governing party or administration, or when criminal legislation is proposed and enacted to simply fulfill campaign promises to be “tough on crime,” then the criminal law lacks the benefit of the distance that ought to come between the people and their governing institutions. That distance allows political actors to serve as responsible filters of public voices and to engage in sober reflection about serious matters that implicate the tension between liberty and order, rather than merely give effect to those voices that speak loudest. Perhaps as much as any other area of legislation, the criminal law needs that space that our constitutional forms provide. In a government based on consent, popular sensibilities matter. But a constitutionalist approach to criminal law making places them in their best posture, subject to the cool deliberation of elected representatives acting in the public interest.91 My suggestions here thus are not intended to make federal criminal law weak, but rather to strengthen constitutional arrangements and to highlight the differences between populism and the popular character of American criminal law.92

91 See The Federalist No. 63, at 384 (James Madison).

92 See Kirk, Prudence, supra note 6, at 143-44 (explaining why conservatives should not embrace Populism).
American conservatives, then, have an opportunity to demonstrate meaningful political leadership on matters of crime and punishment at a time when that leadership matters a great deal. But they must locate their principles in constitutionalism, not in populist messages. Conservatives can advocate a more coherent model of judicial review of criminal sentences, champion a diminution in federal criminal statutes, and focus on crimes that involve national interests and that cause, or seek to cause, a meaningful degree of personal and social harm. They can still stand firm against Alex’s “old ultraviolence” and other real threats to domestic security and civil order without sweeping as broadly as the existing system. That kind of program, however, must be rooted in the conservative understanding of limited (but not impotent) government; of government in which public passions are not simply ratified by popular mass appeals, but instead pass through the filter of political institutions coolly contemplating the public good, cognizant of the importance of consent but comfortably distant from the masses. A populist criminal justice regime may win a few elections for conservatives, but over time, it is unlikely to result in a better system of criminal law and damages the formal arrangements of a political system designed to first control the people and then their government. Conflict between the political branches, and their healthy distance from the people, are not undesirable attributes in our system of government. They are, in fact, political and constitutional goods, and ones that conservatives ought to embrace for a better regime of crime and punishment.