Florida Law Review

Volume 70 | Issue 2 Article 3

Unusual Deference

William W. Berry III

UNUSUAL DEFERENCE

William W. Berry III[*]

Abstract

Three Eighth Amendment decisions—*Harmelin v. Michigan*, *Pulley v. Harris*, and *McCleskey v. Kemp*—have had enduring, and ultimately, cruel and unusual consequences on the administration of criminal justice in the United States. What links these cases is the same fundamental analytical misstep—the decision to ignore core constitutional principles and instead defer to state punishment practices. The confusion arises from the text of the Eighth Amendment where the Supreme Court has read the "cruel and unusual" punishment proscription to rest in part on majoritarian practices. This is a classical analytical mistake—while the Amendment might prohibit rare punishments, it does not make the corollary true—that all commonly used punishments must be constitutional.

The "unusual deference" to state punishment practices in light of this misconstruction of the text has opened the door to a proliferation of punishments that are disproportionate, arbitrary, and discriminatory. As such, this Article argues for a restoration of the Eighth Amendment from its present impotence by reframing the concept of unusualness in accordance with the Court's stated Eighth Amendment values and unlinking it from its deferential subservience to state legislative schemes.

Part I of this Article explains the genesis of the Court's unusual deference. Part II of this Article explores the manifestations of unusual deference, examining the flaws in the evolving standards of decency, differentness deference, and the three most far-reaching examples of unusual deference—*Harmelin*, *Pulley*, and *McCleskey*. Finally, this Article concludes in Part III by reimagining an Eighth Amendment free from the error of unusual deference and demonstrating how such an approach could begin to remedy the problem of mass incarceration.

* Associate Professor of Law and Frank Montague, Jr. Professor of Legal Studies and Professionalism, University of Mississippi. The author would like to thank Jack Wade Nowlin, Christopher Green, Michele Alexandre, Rick Bierschbach, Corinna Lain, Meghan Ryan, and Brendan Plant for their insights concerning preliminary discussions of this Article. The author would also like to thank Allison Bruff for her excellent research assistance.

All men make mistakes, but a good man yields when he knows his course is wrong, and repairs the evil. The only crime is pride.

— Sophocles, *Antigone*

INTRODUCTION

The criminal justice system in the United States remains broken.[1] Two central problems encapsulate the flawed system: (1) the conviction and punishment of innocent individuals,[2] and (2) the excessive and arbitrary punishment of offenders that has resulted in a mass incarceration epidemic.[3] This Article explores the latter problem from the perspective of a neglected safeguard—the Eighth Amendment to the United States Constitution.

While there are certainly many causes of the excessive imprisonment of criminal offenders in the United States, the absence of any serious constitutional limitation on such practices certainly constitutes, at the very least, an important enabling factor.[4] Indeed, the U.S. Supreme Court bears significant responsibility for the current epidemic by failing to apply the Eighth Amendment to excessive, arbitrary, and discriminatory criminal punishments.

Three Eighth Amendment decisions—*Harmelin v. Michigan*,[5] *Pulley v. Harris*,[6] and *McCleskey v. Kemp*[7]—have had enduring, and ultimately cruel and unusual consequences on the administration of criminal justice in the United States.[8] *Harmelin* has allowed the proliferation of disproportionate non-capital sentences, including draconian mandatory

1. *See generally* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, iii (2015) (noting that while many suggest the American criminal justice system benefits defendants, very few are acquitted).

2. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 222 (2011) (explaining that one fourth of all DNA exonerations involve cases as early as the 1990s); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 598, 611–12 (2005).

3. *See* CONNIE DE LA VEGA ET AL., U.S.F. CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 17–18 (2012), https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf.

4. *See, e.g.*, William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 69–70 (2015) [hereinafter Berry, *Eighth Amendment Presumptions*]; William W. Berry III, *Implementing* Just Mercy, 94 TEX. L. REV. 332, 340–41 (2015) [hereinafter Berry, *Implementing* Just Mercy] (explaining that a major factor in excessive sentencing is the rise of the penal-populism movement).

5. 501 U.S. 957 (1991).

6. 465 U.S. 37 (1984).

7. 481 U.S. 279 (1987).

8. *Id.* at 289; *Harmelin*, 501 U.S. at 965; *Pulley*, 465 U.S. at 43–44.

sentences and excessive sentences for non-violent offenders.[9] *Pulley* has allowed state supreme courts to abandon their responsibility for preventing the arbitrary imposition of the death penalty[10] as promised in *Gregg v. Georgia*.[11] Finally, *McCleskey* has allowed racial discrimination to persist for over twenty-five years in capital cases, and has provided a doctrinal basis for the Court's unfortunate lethal injection jurisprudence.[12]

What links these cases is the same fundamental analytical misstep—the decision to conflate core constitutional principles with state punishment practices. The confusion arises from the text of the Eighth Amendment where the Court has read the "cruel and unusual" punishment proscription to rest in part on majoritarian practices. This is a classical analytical mistake—while the Amendment might prohibit rare punishments, it does not make the corollary true—that all commonly used punishments must be constitutional.[13] Seizing upon this idea, the Court has exercised wide deference toward state punishment practices.[14]

The "unusual deference" to state punishment practices in light of this misconstruction of the text has opened the door to a proliferation of punishments that are disproportionate, arbitrary, and discriminatory. As such, this Article argues for a restoration of the Eighth Amendment from its present impotence by reframing the concept of unusualness in accordance with the Court's stated Eighth Amendment values and unlinking it from its deferential subservience to state legislative schemes.

If the Court were to reverse the decisions of *Harmelin*, *Pulley*, and *McCleskey*, it would be taking a significant step in this remediation effort. Further, this Article shows how reversing these decisions would begin to remedy the problems of excessive, arbitrary, and discriminatory sentences. Ultimately, this Article demonstrates how the Eighth Amendment could serve as a powerful tool to fix a broken criminal justice system.

Part I of this Article explains the genesis of the Court's unusual deference. Part II of this Article explores the manifestations of unusual

---

9. *Harmelin*, 501 U.S. at 961, 994, 996 (affirming LWOP sentence for first offense of possessing 672 grams of cocaine).

10. *Pulley*, 465 U.S. at 43–46, 54 (holding that the Eighth Amendment requirement of relative proportionality does not require any particular scheme of review).

11. 428 U.S. 153 (1976).

12. *McCleskey*, 481 U.S. at 292–93 (holding that the death sentence did not violate the Eighth or Fourteenth Amendments because petitioner failed to produce evidence of racial discrimination in his particular case).

13. As explained below, just because all states chose to adopt a brutal form of punishment—like drawing and quartering murderers—such a punishment would not be constitutionally acceptable. *See infra* Part I.

14. Furman v. Georgia, 408 U.S. 238, 359 (1972).

deference, examining the flaws in the evolving standards of decency, differentness deference, and the three most far-reaching examples of unusual deference—*Harmelin*, *Pulley*, and *McCleskey*. Finally, this Article concludes in Part III by reimagining an Eighth Amendment free from the error of unusual deference and demonstrating how such an approach could begin to remedy the problem of mass incarceration.

I. THE GENESIS OF UNUSUAL DEFERENCE

To understand the Court's embrace of unusual deference under the Eighth Amendment, it is instructive to examine its origins through the selective incorporation of the Bill of Rights and the backlash to the Court's decision in *Furman v. Georgia*.[15] These two beginnings set the stage for the manifestations of unusual deference detailed in Part II.

A. *Selective Incorporation and State Deference*

Even before the adoption of the Constitution, a fundamental question existed as to the proper relationship between state and federal governments.[16] The initial experiment—the Articles of Confederation—rested on a decentralized model with state power trumping federal power in most circumstances.[17] The adoption of the Constitution and the Bill of Rights started to move the needle in the direction of federal power, establishing the supremacy of the federal government.[18] Over time, the Court made clear that the Bill of Rights incorporated limits on state power, not just federal power, albeit in a piecemeal fashion.[19] Indeed, the Supreme Court has found that the Fourteenth Amendment incorporates almost all of the Bill of Rights such that it applies to the states, but has

15. 408 U.S. 238 (1972).

16. *See* James Madison, *Vices of Political System 8*, *in* 9 PAPERS OF JAMES MADISON, 1780-1781, at 345–46, 348–52 (William T. Hutchinson & William M.E. Rachel eds., 1962) (discussing issues of early American federalism).

17. *See* Calvin H. Johnson, *States Rights? What States' Rights?: Implying Limitations on the Federal Government from the Overall Design*, 57 BUFF. L. REV. 225, 231 (2009).

18. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding."); Johnson, *supra* note 17, at 248 ("Under the Articles, the state governments had been supreme over the Congress . . . but when the ratification of the Constitution was completed, by the People, the state governments were made subject to the supremacy of the federal government.").

19. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 746–47 (1965).

done so one provision at a time.[20] For instance, the Court did not hold that the Eighth Amendment applied to the states until its 1962 decision in *Robinson v. California*.[21]

Since the beginning, the Constitution and the Congress largely left the administration of criminal law to the states.[22] Now, even after a century of proliferation of federal crimes in the areas of drugs, guns, and corporate crime, the states still impose a significant majority of criminal sentences in the United States.[23]

The combination of the Court's selective interventions and the broad state oversight of criminal justice led some Justices to resolve that, where possible, the Court ought to defer to the states rather than rigorously applying the Constitution to its practices.[24] Perhaps the most obvious example of this is Justice Harry Blackmun's dissenting opinion[25] in *Furman v. Georgia*.[26] In his dissent, Justice Blackmun indicated that he was against the death penalty and would vote against it if he were a legislator.[27] Nonetheless, he dissented from the Court's decision to find the death penalty unconstitutional as applied, and explained that the Court should not interfere with the decisions of states concerning punishment of their criminal offenders.[28]

B. *The* Furman *Backlash*

The *Furman* case, as well as its aftermath, provides further insight into the Court's deference to state legislatures in its application of the Eighth Amendment. At the time, public opinion polls showed that just under

---

20. Adamson v. California, 332 U.S. 46, 48, 59 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964); Gitlow v. New York, 268 U.S. 652, 664, 666 (1925); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 5 (1986).

21. 370 U.S. 660, 667 (1962) (holding that punishing an individual for being an addict violated the Eighth Amendment).

22. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (explaining how criminal law arose from a common law structure).

23. Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 522 (2011).

24. Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 252 (1958); Barkow, *supra* note 23, at 527.

25. Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting).

26. 408 U.S. 238.

27. *Id.* at 405, 406.

28. In *Furman*, Justice Blackmun was unwilling to apply the language of the Eighth Amendment to assess whether death was a cruel and unusual punishment. *Id.* at 410. Justice Blackmun's view is particularly ironic given he wrote *Roe v. Wade* a year after *Furman*, having no issue with the Court interpreting the meaning of the Constitution to find a substantive due process right to abortion, *without* any clear language as an anchor for doing so. Roe v. Wade, 410 U.S. 113, 116, 154 (1973); *see* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 920 (1973).

one-half of Americans supported the death penalty, and there had not been an execution in almost a decade.[29] After the Court held in *Furman* that the death penalty violated the Eighth Amendment as applied, the public backlash was significant, both in terms of opinion and legislative response.[30] Thirty-five states passed new death penalty statutes within the four years following *Furman*, with commentators and the general public alike widely criticizing the Court for perceived overreaching.[31]

A mere four years later, the Court reinstated the death penalty when it upheld the capital statutes of Georgia, Texas, and Florida in 1976, based on safeguards adopted by the states to limit arbitrariness in capital sentencing.[32] Nonetheless, over the next twenty years, the Court slowly but surely allowed states to water down and, in some instances, even completely ignore these safeguards.[33]

One reading of the Court's jurisprudence over this time views the Court as following the will of the people in its cases.[34] The Court's decision to adopt a deference-based doctrinal approach to the Eighth Amendment fits within this narrative, with the Court choosing to follow

---

29. *See Gallup Poll: Support for Death Penalty at Lowest Level Since 1972*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/6589. There had not been an execution for five years prior to *Furman*. *See 1967: Luis Monge, America's Last Pre*-Furman *Execution*, EXECUTEDTODAY (June 2, 2012), http://www.executedtoday.com/2012/06/02/1967-luis-monge-americas-last-pre-furman-execution/.

30. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 65 (2016).

31. *Id.* at 219; *see also* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–49 (2007) (describing the strong response of states in opposition to the *Furman* decision).

32. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 260 (1976).

33. *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 515 (1995); Tuilaepa v. California, 512 U.S. 967, 980 (1994); Romano v. Oklahoma, 512 U.S. 1, 13–14 (1994); Johnson v. Texas, 509 U.S. 350, 373 (1993); Arave v. Creech, 507 U.S. 463, 478 (1993); Payne v. Tennessee, 501 U.S. 808, 827 (1991); Walton v. Arizona, 497 U.S. 639, 655 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002); Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Franklin v. Lynaugh, 487 U.S. 164, 183 (1988); Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); McCleskey v. Kemp, 481 U.S. 279, 319 (1987); Lockhart v. McCree, 476 U.S. 162, 165 (1986); Baldwin v. Alabama, 472 U.S. 372, 389 (1985); Spaziano v. Florida, 468 U.S. 447, 466 (1984), *overruled by* Hurst v. Florida, 136 S. Ct. 1616 (2016); Pulley v. Harris, 465 U.S. 37, 50–51 (1984); Wainwright v. Goode, 464 U.S. 78, 86 (1983); Barclay v. Florida, 463 U.S. 939, 958 (1983); Barefoot v. Estelle, 463 U.S. 880, 904 (1983), *superseded by statute*, the Antiterrorism and Effective Death Penalty Act of 1996, *as recognized in* Slack v. Daniel, 529 U.S. 473 (2000); California v. Ramos, 463 U.S. 992, 1013 (1983); Zant v. Stephens, 462 U.S. 862, 890 (1983).

34. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 287 (2009); STEIKER & STEIKER, *supra* note 30, at 218; James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 28 (2007).

the lead of state legislatures rather than impose limits upon them.[35] Certainly, the Court has displayed a general hesitancy in this area uncommon with other areas of the Bill of Rights. Perhaps the consequence of *Furman* was a shell-shocked and cautious Court, at least in terms of placing limits on cruel and unusual punishments.

II. THE MANIFESTATIONS OF UNUSUAL DEFERENCE

Without a doubt, the costs of the Court's unusual deference have been significant for individual offenders. They have permitted a proliferation of disproportionate punishments, allowed continued arbitrariness in the imposition of the death penalty, and allowed discrimination to pervade state criminal justice systems.

A. *Adopting the Wrong Evolving Standards*

After *Furman*, the Court articulated its guiding framework for applying the Eighth Amendment in *Coker v. Georgia*,[36] which considered whether the death penalty was a constitutional punishment for the offense of rape.[37] Unlike other constitutional provisions in which the Court interpreted the applicable language as a limitation on the ability of the majority to place restrictions on the power of the minority, the Court looked to the majority practice as the basis for its decision.[38]

Relying on language from its decisions in *Weems v. United States*[39] and *Trop v. Dulles*,[40] the Court explained that the Eighth Amendment's ban against cruel and unusual punishments was not static, but evolved over time.[41] As such, the Court was to apply the "evolving standards of decency" as marked by the progress of a maturing society.[42]

---

35. William W. Berry III, *Evolved Standards, Evolving Justices*, 96 WASH. U. L. REV. (forthcoming 2018).

36. 433 U.S. 584 (1977).

37. *Id.* at 586, 592. The background to this case is important. At the time, Georgia was one of the only states executing criminal offenders for rape, and almost all of those who received the death penalty for rape in Georgia were African-American men accused of raping white women. *Id.* at 595–96; Marvin E. Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658, 667 (1975); Berry, *supra* note 35.

38. *Coker*, 433 U.S. at 597. In cases involving the First, Second, Fourth, and Fourteenth Amendments, the Court balances the imposition of the government against the rights of the minority accorded under the Bill of Rights.

39. 217 U.S. 349 (1910).

40. 356 U.S. 86 (1958).

41. *Coker*, 433 U.S. at 592, 596 n.10.

42. *Trop*, 356 U.S. at 101. Despite Justice Antonin Scalia's view to the contrary, there is clear evidence supporting the idea that the originalist understanding of the Eighth Amendment is that it was to evolve over time. *See* John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1815 (2008).

1. Proportionality and Dignity—The Ignored Standards

The question, though, was what would provide the content of this constitutional standard. As the Bill of Rights offers a protection of the rights of individuals against legislative overreach, one might begin with an investigation into such rights in the context of the Eighth Amendment. Here, the Eighth Amendment should protect individual criminal offenders against the imposition of cruel and unusual punishments by state and federal governments.

The content of this protection, at the time of *Coker*, could have stemmed from the Court's decisions in *Weems* and *Trop*. In *Weems*, the Court found that the punishment of *cadena temporal* for fifteen years, stemming from the falsification of documents, was unconstitutional under the Eighth Amendment; the Court explained that the Eighth Amendment prohibited disproportionate punishments—punishments excessive for the crime committed.[43] Indeed, it found that the constitutional infirmity of the punishment at issue was that it was more severe than punishments imposed for much more serious crimes.[44]

In *Trop*, the Court further articulated some core Eighth Amendment principles. It explained that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[45] In addition, the Court stated that "[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[46] While opaque, this concept of dignity prohibited the use of torture, at a minimum.[47]

At the very least, the Court's reading of the Eighth Amendment could consist of two basic principles: (1) the punishment itself was proportionate to the crime committed, and (2) the punishment did not infringe on the dignity of the offender, particularly in the sense it imposed torture or other similar degrading punishments on the offender.

---

43. The disproportionate nature of the punishment could be with reference to any of the four purposes of punishment—retribution, deterrence, incapacitation, or rehabilitation. *See* William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. BRIEF 61, 66–67 (2011). *But see* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 908 (2011).

44. Stinneford, *supra* note 43, at 971.

45. Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2141; *see also* William W. Berry III & Meghan J. Ryan, *Cruel Techniques*, *Unusual Secrets*, 78 OHIO ST. L.J. 403, 432 (2017) (discussing the Eighth Amendment dignity demand).

46. *Trop*, 356 U.S. at 100.

47. Ryan, *supra* note 45, at 2146. The Court had also previously indicated "[p]unishments are cruel when they involve torture or a lingering death" in upholding a death sentence. *In re* Kemmler, 136 U.S. 436, 447 (1890).

2. The Majoritarian Misstep

In *Coker*, however, the Court only relied on *Trop* for the principle that the Eighth Amendment evolved over time. The substantive doctrine it created had two parts: an objective inquiry and a subjective inquiry.[48]

The objective inquiry examines the majority punishment practices with respect to the punishment in question.[49] In other words, to determine the meaning of the Constitutional protection of individuals against tyrannical, majoritarian state legislative overreaching, the Court looks to the practices of the states themselves. Specifically, the Court engages in state-counting to determine whether a majority of jurisdictions use such a punishment.[50] If most states do not, the Court will hold that the punishment violates the objective part of the evolving-standards-of-decency test.[51] By adopting this approach, the Court has thus infused the content of a counter-majoritarian standard with the majoritarian practice.

By definition, the first part of the evolving-standards-of-decency test defers to state legislatures. To understand why such an approach eviscerates the power of the Eighth Amendment, imagine that every state adopted the penalty of life without parole (LWOP) for failing to pay one's taxes in a timely manner. Despite the clearly cruel and unusual nature of this punishment, it would satisfy the objective inquiry of the evolving-standards-of-decency test because all states use the punishment.

One rationale for adopting this test lies in the language of the Constitution. The Court has seized on this majoritarian approach through its application of the word "unusual." The Court has defined "unusual" to mean "rare," which means an approach not commonly used. Through the lens of this rationale, it seems to make sense for the Court to look to the majority practice to inform its definition of "unusual."[52]

The corollary to that rationale also shows why this is a poor standard. If a few states offer a particular punishment that is actually more effective and humane than the majority of other states, it would not make that punishment unconstitutional.

Popularity cannot be the appropriate measure of disproportionality or excessiveness. The content of unusualness, if linked to majority practice, entirely undermines the idea of cruelty. The provision—cruel and

48. Coker v. Georgia, 433 U.S. 584, 592 (1977).

49. *Id.*

50. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 422 (2008); Roper v. Simmons, 543 U.S. 551, 564 (2005); Atkins v. Virginia, 536 U.S. 304, 315–16 (2002); Berry, *supra* note 35, at 19–20.

51. *Id.*

52. Solitary confinement is a current example of this. The Editors, *Solitary Confinement Is Cruel and Ineffective*, SCI. AM. (Aug. 1, 2013), https://www.scientificamerican.com/article/solitary-confinement-cruel-ineffective-unusual/.

unusual—cannot mean that cruelty is acceptable as long as it is widespread and common.[53]

There are three possible readings of the "and" in the phrase "cruel and unusual." First, it could require punishments to be both cruel AND unusual.[54] Second, it could mean that it prohibits cruel punishments and unusual punishments, meaning the "and" has a meaning of "or."[55] Finally, the phrase could be a hendiadys, where cruel and unusual are a unitary concept.[56] In that reading, cruel and unusual constitutes one idea—cruel punishments are unusual in nature (assuming the Court is enforcing the Eighth Amendment), and unusual punishments are certainly cruel.[57] The hendiadys understanding is the best reading of the conjunction in the Eighth Amendment.

To support the objective aspect of the Court's inquiry, and the proposition that it is improper to link the word "unusual" to majoritarian standards, the Court also drew on the concept of the evolving standards defined in *Trop*. Indeed, the idea of an evolving standard necessitates some test for determining the content of a changing standard. Given the Court's hesitancy to impute normative content into the Eighth Amendment, the Court naturally chose to look to majority practice to assess societal standards.

3. Subjective Shortcomings

The second part of the evolving-standards-of-decency test could, in theory, serve to partially remedy the Court's analytical misstep of looking to majority trends as the basis for defining minority rights. In this part of the test, the Court articulates its own subjective judgment, "[bringing] to bear" its own views.[58] The adopted method of the Court in this vein is to inquire whether any aspect of the punishment satisfies any of the purposes of punishment—retribution, deterrence, incapacitation, or rehabilitation. If the punishment does not satisfy any of the purposes, then the subjective judgment of the Court is that the sentence is unconstitutional.

The problem with this application is that the subjective and objective judgments of the Court have never been different. In every case where

53. *But see* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 569 (2010) (arguing punishments must be both cruel and unusual).

54. *See id.* at 605.

55. *See id.*

56. Samuel L. Bray, *"Necessary AND Proper" and "Cruel AND Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 690 (2016). *But see* John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 468 n.167 (2017) (taking issue with Bray's reading of cruel and unusual).

57. Ryan, *supra* note 53, at 605.

58. *Id.* at 597.

the Court has concluded a majority of jurisdictions disfavor the application of a particular punishment in light of offender or offense characteristics, the Court has found that the punishment also lacks subjective justification.

Similarly, the Court has never found a punishment that has the objective support of a majority of jurisdictions subjectively unconstitutional. It is unclear what would happen if the objective and subjective indicia diverted. What seems to be clear is that the majoritarian-based objective requirement must be met in order for the Court to deem a punishment (or really the application of a punishment) cruel and unusual. Perhaps the subjective indicia exist only as a check on the overreach of the majority punishment practices, but in reality, it has never served as such.

Thus, the evolving-standards-of-decency paradigm adopted by members of the Court demonstrated a collective hesitancy to make normative determinations concerning the meaning of the cruel and unusual punishment proscription of the Eighth Amendment.

B. *Differentness Deference*

Another doctrinal manifestation of the deference the Court adopted at the time of *Furman* is worth noting—the concept of differentness. In *Furman*, Justice William Brennan first articulated the idea that "death is different," meaning that the death penalty's uniqueness entitles it to a higher degree of constitutional scrutiny in light of its severity and finality as a punishment.[59]

In later cases, however, this principle served to diminish the scrutiny of non-capital punishments under the Eighth Amendment, rather than to increase the constitutional scrutiny of capital cases.[60] This principle has essentially meant that the uniqueness of the death penalty limits consideration of other punishments because they are not as "unusual."[61]

---

59. Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence).

60. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009); William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1064 (2013); Berry, *Eighth Amendment Presumptions*, *supra* note 4, at 77.

61. Barkow, *supra* note 60; *see also* Harmelin v. Michigan, 501 U.S. 957, 995 (1991).

Indeed, the Court has elected not to apply the evolving standards of decency in non-capital cases.[62]

Because death is different, the Court provides almost complete deference to states in punishing non-capital offenses, with the Eighth Amendment barring only punishments that are grossly disproportionate.[63] There has only been one case that has ever met this standard, and even then, the Court subsequently narrowed that decision.[64]

In recent years, the Court has discovered another kind of differentness under the Eighth Amendment—juveniles.[65] As a result, the Court has applied the Eighth Amendment to restrict the imposition of juvenile life-without-parole (JLWOP) sentences for non-homicide crimes and the imposition of mandatory LWOP sentences.[66] Again, the instinct of the Court tracks majoritarian tendencies. The United States is the only country in the world that allows JLWOP sentences.[67]

The Court's Eighth Amendment jurisprudence has used the concept of unusualness as a basis for hiding from its traditional role of interpreting the Constitution. Instead, the Court has demonstrated a preference for allowing the counter-majoritarian constitutional provision to track the

62. The recent exception to this is juvenile LWOP cases. Miller v. Alabama, 567 U.S. 460, 489 (2012) (banning mandatory juvenile LWOP sentences); Graham v. Florida, 560 U.S. 48, 74 (2010) (banning LWOP sentences for juvenile offenders in non-homicide crimes); William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 340 (2014).

63. The Court has historically refused to extend the doctrine to non-capital cases, even where the sentence seems particularly excessive. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); *Harmelin*, 501 U.S. at 961, 996 (affirming sentence of LWOP for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming a LWOP sentence for felony theft of $120.75 by false pretenses where defendant had three prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279–84 (1983) (reversing sentence of LWOP for presenting a no account check for $100, where defendant had six prior felony convictions).

64. *Compare Solem*, 463 U.S. at 284, *with Harmelin*, 501 U.S. at 996.

65. *See Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 74; *see also* Berry, *supra* note 62, at 339, 345 (discussing the application of LWOP to juveniles).

66. *See, e.g.*, *Miller*, 567 U.S. at 465 (banning mandatory JLWOP sentences); *Graham*, 560 U.S. at 74 (banning LWOP sentences for juvenile offenders in non-homicide crimes); *see also* Berry, *supra* note 62, at 328 (discussing the series of Supreme Court cases that have affected LWOP sentences); Berry, *supra* note 60, at 1068–69 (2013) (discussing the Supreme Court's decision banning mandatory LWOP in juvenile sentences).

67. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008); *see also* DE LA VEGA ET AL., *supra* note 3, at 9.

majoritarian trends in state legislatures. This unusual deference has not been without consequences. Three cases in particular demonstrate how the Court's abdication of its role in protecting individual rights under the Eighth Amendment has resulted in widespread abuse and over-punishment by state legislatures and criminal justice systems.

C. *The Problem of Disproportionate Sentences (*Harmelin*)*

The first of these cases, *Harmelin v. Michigan*, imposed a cruel and unusual punishment on a first-time drug offender. Even worse, it closed the door on the examination of many similar cases under the Eighth Amendment.

1. *Harmelin v. Michigan*

In *Harmelin*, the Supreme Court considered whether the mandatory LWOP sentence imposed on Ronald Allen Harmelin, for possessing more than 650 grams of cocaine, violated the Eighth Amendment.[68] As this conviction was his first criminal offense, Harmelin argued on appeal that the sentence was disproportionate to the offense, rendering it a cruel and unusual punishment.[69]

The Court rejected Harmelin's argument based on two broad principles: (1) death is different[70] and (2) deference to state legislatures.[71] The majority split between the opinion of Justice Scalia, joined by Chief Justice William Rehnquist, and the plurality opinion of Justice Anthony Kennedy, joined by Justice Sandra Day O'Connor and Justice David Souter.[72] In his opinion, Justice Scalia applied an originalist analysis and found that the Eighth Amendment did not include a proportionality guarantee.[73] The plurality (and the dissenters) found otherwise, concluding that the Eighth Amendment did include a proportionality guarantee.[74]

Justice Kennedy's plurality opinion, in comparison, emphasized the narrowness of this principle.[75] Specifically, the opinion cited to the need to defer to state penological judgment, granting substantial deference to

68. *Harmelin*, 501 U.S. at 961.

69. *Id.* at 994.

70. *Id.* at 995.

71. *Id.* at 998–99 (Kennedy, J., concurring).

72. *Id.* at 960 (Scalia, J., concurring).

73. *Id.* at 965–85.

74. *Id.* at 1009 (White, J., dissenting). The Court had reached this conclusion on multiple prior occasions. *See* Solem v. Helm, 463 U.S. 277, 290 (1983); Hutto v. Davis, 454 U.S. 370, 374 n.3 (1982) (per curiam); Rummel v. Estelle, 445 U.S. 263, 271–74, 274 n.11 (1980); Weems v. United States, 217 U.S. 349, 371 (1910).

75. *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring).

legislative determinations.[76] The opinion referenced the wide variety of state punishment practices, both in terms of purposes of punishment and sentencing practices, as a basis for the Court not intervening.[77] The opinion also discussed the absence of objective factors by which to assess proportionality as a basis for deferring to states.[78] The opinion ultimately settled on an approach of limiting the application of the Eighth Amendment to situations where the punishment is grossly disproportionate to the crime.[79]

All five Justices then held that the mandatory nature of the sentence in this case did not violate Harmelin's rights.[80] Despite the Court's adoption of individualized sentencing principles in *Woodson v. North Carolina*[81] and *Lockett v. Ohio*,[82] the Court limited these principles to capital cases, relying on its "death is different" concept.[83]

The Court's errors here lie in according too much deference to state legislatures and courts. Indeed, the incorporation of the Eighth Amendment into the Fourteenth exists for the purpose of defending criminal defendants against legislative overreach. Here, the Court seems inclined to defer to the states because there are many ways of administering criminal justice. That may be true, but the Court's role is to distinguish the constitutional from the unconstitutional based on the concept of cruel and unusual punishments, which, at the very least, encompasses some notion of disproportionality.[84]

An additional basis for the Court's deference was its view that there is no objective standard for determining proportionality.[85] Ironically, the Court has used the purposes of punishment in exactly this way in a series of cases that assess whether certain kinds of capital sentences are disproportionate.[86]

---

76. *Id.* at 998–99.

77. *Id.* at 999–1000.

78. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 582 (2005).

79. *Id.*

80. *Id.* at 581.

81. 428 U.S. 280 (1976).

82. 438 U.S. 586 (1978).

83. Frase, *supra* note 78, at 582.

84. *See* Weems v. United States, 217 U.S. 349, 377–79 (1910); *see also* discussion *supra* Part I.

85. Harmelin v. Michigan, 501 U.S. 957, 1000–01 (1991) (Kennedy, J., concurring).

86. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (discussing the existence of objective indicia of societal standards contributed to disproportionality analysis); Roper v. Simmons, 543 U.S. 551, 564, 568 (2005) (discussing how objective indicia of national consensus guided the conclusion that sentences of death for juveniles violated the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (using state legislation as evidence of objective standards for proportionality review); *see also* Berry, *supra* note 35, at 19–20.

The Court likewise misreads the "death is different" concept as a basis for lowering scrutiny for non-capital sentences, a far cry from the purpose indicated at the genesis of the concept. By limiting Eighth Amendment claims in effect to capital cases, the Court has abdicated its role as preventer of excessive punishment at a state level and instead opened the door to mass incarceration.[87] This decision has essentially led to two tracks of criminal justice—capital and non-capital.[88] This arbitrary approach allows the court to further defer to states in non-capital cases by allowing mandatory sentences and denying offenders the ability to offer mitigating evidence at sentencing. Given the stakes of the *Harmelin* case itself, it seems particularly cruel to deny Harmelin the ability to plead for his life, as the state is effectively imposing a death sentence.[89]

2. The Consequences of *Harmelin*

At the heart of America's mass incarceration problem remains the imposition of excessive punishments.[90] The length of prison sentence awarded for many crimes in American jurisdictions, in many cases, far exceeds the sentence imposed in other Western countries for committing a similar crime.[91] Furthermore, most American jurisdictions, particularly the federal government, impose a severe sentence increase for second and third time offenders.[92] This recidivist premium often has an exponential dimension, drastically increasing the sentence, and becoming significantly larger with each increase in criminal history category.[93]

Similarly, mandatory minimum sentences often result in a higher sentence than a court might otherwise impose.[94] The volume of mandatory sentences, and the amount of incarceration mandated by each sentence, has contributed significantly to the growth of the carceral state in America over the past three decades.[95]

---

87. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL (2001) (discussing mass incarceration and reasons for its rise); MARC MAUER, THE RACE TO INCARCERATE (1999) (discussing the rise in incarceration rates starting in the 1970s).

88. *See generally* Barkow, *supra* note 60 (discussing the Court's two approaches to substantive sentencing law involving capital and non-capital cases).

89. *See* William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1065 (2015); Berry, *supra* note 62, at 338–40.

90. *See* DE LA VEGA ET AL., *supra* note 3, at 15.

91. *See id.* at 25–26.

92. Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. OF CRIM. L. & CRIMINOLOGY 614, 620 (1987).

93. *Id.*; *see also* Berry, *Eighth Amendment Presumptions*, *supra* note 4, at 78 (discussing various sources that contribute to the rise in incarceration).

94. *See* DE LA VEGA ET AL., *supra* note 3, at 8.

95. MAUER, *supra* note 87, at 32.

One clear problem with mandatory sentences is that they shift sentencing discretion from the Court to the prosecutor. If the Court lacks the discretion to determine the sentence, the prosecutor effectively chooses the sentence by deciding what level of crime to charge in a given case. And research has demonstrated that the increasingly punitive exercise of prosecutorial discretion at the local and state level has been one of the major drivers of the mass incarceration epidemic.[96]

In the capital context, the Court has placed restrictions on mandatory death sentences.[97] Specifically, the Court has emphasized the importance of considering mitigating evidence and making individualized sentencing determinations.[98] In addition, the Court has extended this right to juvenile offenders facing LWOP sentences.[99]

As I have argued elsewhere, the Court ought to extend the right to mitigation and individualized sentencing determinations to LWOP sentences, at a minimum, as well as to other lengthy sentences.[100] The Court's decision in *Harmelin*, however, currently forecloses such an application of the Eighth Amendment.[101] The consequences of *Harmelin* are severe for criminal defendants, and ultimately free states to punish non-capital offenders without oversight or limit. Such an application of this decision serves to block constitutional review of disproportionate punishments in non-capital cases, rendering the Eighth Amendment a dead letter in these non-capital contexts.

This decision also allows for the imposition of mandatory sentences without restriction, reallocating sentencing discretion from judges to prosecutors. In doing so, *Harmelin* has denied many offenders the right to plead for mercy, and in many cases, for their life, at sentencing.[102] *Harmelin* has removed the most obvious potential impediment to mass incarceration. It also facilitated the proliferation of LWOP sentences in the United States (41,000 and counting), unforeseen in the history of the world.[103]

---

96. *See* John Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1567 (2015); Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV 1343, 1357–58 (2016).

97. *E.g.*, Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976).

98. Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982); Lockett v. Ohio, 438 U.S. 586, 605–06 (1978).

99. Miller v. Alabama, 567 U.S. 460, 489 (2012).

100. Berry, *supra* note 62, at 345–46; Berry, *supra* note 60, at 1085.

101. Although, as *Miller* demonstrates, the strength of stare decisis on this point is dubious at best as a barrier to remedying this doctrinal error. *See generally* Berry, *supra* note 62 (discussing the effects of *Miller* on LWOP jurisprudence).

102. *Id.* at 335.

103. *See* John Tierney, *Life Without Parole: Four Inmates' Stories*, N.Y. TIMES (Dec. 12,

A final corollary consequence of *Harmelin* has been with respect to the potential application of the Eighth Amendment to federal drug sentences. In establishing that the Eighth Amendment does not place any real restriction on non-capital sentences, excessive federal drug sentences (many of which were mandatory) continued to persist after *Harmelin*.[104]

3. Considerations of Stare Decisis

The Court's approach in *Harmelin* itself lowered the bar for stare decisis in Eighth Amendment cases by reversing the Court's prior approach from eight years before in *Solem v. Helm*.[105] The Court explained, "[w]e have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents, and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions."[106]

Recent history suggests that *Harmelin* ought to be hoisted on its own petard and overruled by the Court. Recent development of the principles of (1) proportionality, (2) differentness, and (3) individualized sentencing suggest that this decision is "in apparent tension with other decisions."[107] Beginning in 2002, the Supreme Court has repeatedly held that the Eighth Amendment contains a proportionality guarantee that prohibits the imposition of certain death and JLWOP sentences.[108] These cases apply the principle of the purposes of punishment to help determine excessiveness.

With respect to differentness, the Court has recognized a second kind of differentness—juvenile offenders. The Court has thus started to chip away at the differentness bright-line by applying the Eighth Amendment to restrict state punishment practices in non-capital cases.[109]

Finally, in one of the JLWOP cases, *Miller v. Alabama*,[110] the Court reinvigorated its principle from *Woodson* and *Lockett* that offenders deserve individualized sentencing consideration.[111] This decision casts some doubt on the efficacy of the mandatory sentencing part of *Harmelin.*

2012), http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html.

104. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 89 (2010).

105. 463 U.S. 277, 279–84 (1983) (reversing sentence of LWOP for presenting a no account check for $100, where defendant had six prior felony convictions).

106. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (citations omitted).

107. *Id.*; Miller v. Alabama, 567 U.S. 460, 469–70, 475 (2012).

108. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Roper v. Simmons, 543 U.S. 551, 574 (2005); Atkins v. Virginia, 536 U.S. 304, 311 (2002).

109. *See* Berry, *supra* note 62, at 347.

110. 567 U.S. 460.

111. *Id.* at 475 (banning mandatory JLWOP sentences).

D. *The Problem of Arbitrary Death Sentences (*Pulley*)*

While the problem of *Harmelin* is the absence of review of non-capital sentences, the problem of *Pulley v. Harris* is the absence of review of jury imposition of death sentences. As explained below, the failure to examine such decisions results in a series of arbitrary capital sentencing outcomes.

1. *Pulley v. Harris*

In *Pulley*, the petitioner appealed his death sentence on the ground that the California Supreme Court did not engage in comparative proportionality review of his sentence.[112] The California scheme at the time required appellate review of death sentences but did not compare those sentences to other cases.[113] The Court held that California's system did not violate the Eighth Amendment, highlighting its prior decision in *Jurek v. Texas*,[114] where it had affirmed Texas's capital sentencing scheme that, likewise, did not mandate comparative proportionality review.[115] The Court explained that the Constitution did not require comparative proportionality review.[116] Rather, the Constitution merely demands meaningful appellate review such that the sentencing outcome is not arbitrary.[117]

2. The Consequences of *Pulley*

In addition to preventing the regulation of disproportionate and mandatory punishments, the Court's unusual deference approach also enables states to impose arbitrary punishments, particularly in capital cases. The Court's holding in *Furman* struck down the death penalty in large part because of the randomness of the outcomes in jury sentencing. Justice Potter Stewart famously likened the imposition of the death penalty at that time to being "struck by lightning."[118]

---

112. Pulley v. Harris, 465 U.S. 37, 39–40 (1984).

113. *Id.* at 53 (recognizing that "[t]he [California] statute does not require comparative proportionality review").

114. 428 U.S. 262 (1976).

115. *Pulley*, 465 U.S. at 50–51. Part of the Court's reaction to the *Furman* backlash described above, *Jurek* also is of questionable merit, particularly because it allows for death sentences based upon future dangerousness. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 915–16 (2010). I do not discuss it separately here because its shortcomings are cabined to Texas.

116. *Pulley*, 465 U.S. at 53.

117. *Id.* at 59 (Stevens, J., concurring in part and concurring in judgment) (noting that "meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid").

118. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

A quick look at the modern death penalty suggests little has changed. Annually, there are over 15,000 murders in the United States,[119] and the number of executions has been fewer than fifty-five per year for the last decade.[120] The individuals executed are often not the worst offenders.[121] Rather, a number of inappropriate variables—geography,[122] prosecutors,[123] lawyering,[124] and race[125]—seem to have a determinative effect on who receives the death penalty.

Jury sentencing remains one source of the wide disparity in capital sentencing outcomes.[126] Jurors historically lacked any guidance in sentencing capital cases, making for wide variations in sentencing results.[127] After *Furman*, states adopted aggravating and mitigating

119. KENNETH D. KOCHANEK, ET AL., NAT'L CTR. FOR HEALTH STATISTICS, DEATHS: FINAL DATA FOR 2014, at 44 (2016), https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf (detailing 15,872 total deaths in 2014 by homicide).

120. *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (last updated Sept. 13, 2017).

121. *See* William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L.J. 67, 92 (2015) (commenting that a large percentage of Ohio capital cases since 1996 did not warrant the death penalty).

122. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–09 (2010) (commenting that capital punishment is often sought only by a handful of counties).

123. *See* FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 3 (2016), http://www.fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

124. *See* Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Joseph L. Rauh Lecture (Apr. 9, 2001), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a ("I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial."); Charles Lane, *O'Connor Expresses Death Penalty Doubt*, WASH. POST (July 4, 2001), https://www.washingtonpost.com/archive/politics/2001/07/04/oconnor-expresses-death-penalty-doubt/bcafbc53-43d0-4af5-9f5f-b124c6c66cd5/?utm_term=.c592da5d8246 ("'Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used,' O'Connor said.").

125. *See generally* David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (commenting that African-American defendants are sentenced to death more often when the victim is Caucasian, as opposed to any other defendant/victim combination).

126. Prosecutorial discretion also plays a major role here, but to date the Court has not applied the Constitution to restrict such discretion.

127. *See* McGautha v. California, 402 U.S. 183, 207 (1971) (holding that the broad discretion afforded to juries did not violate the petitioners' due process rights under the Fourteenth Amendment), *reh'g granted and vacated on other grounds by* Crampton v. Ohio, 408 U.S. 941 (1972).

circumstances or similar guideposts to guide juries.[128] Even so, studies since *Furman* demonstrate wide variances in sentencing outcomes.[129]

The Supreme Court in *Gregg*, which reinstated the death penalty after *Furman*,[130] allowed its reintroduction based not only upon the adoption of the aggravating and mitigating circumstances to frame jury discretion, but also appellate review by the state supreme court with respect to the proportionality of the sentence imposed.[131] Specifically, this comparative proportionality review sought to identify outliers in outcomes to mandate some level of consistency in outcomes.[132]

The tension between individualized sentencing determinations in capital cases and consistency in results remains.[133] While the outcomes do not have to be identical, they certainly cannot be random or arbitrary given the consequences of the sentence (death).[134] Comparative proportionality review by a state supreme court can reduce and even

128. *See, e.g.*, Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 58 (2007) (noting that, after *Furman*, Georgia amended its death penalty statute to include aggravating circumstances).

129. For more on the general regression toward a pre-*Furman* era death penalty jurisprudence, see John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre*-Furman *Era*, 4 CHARLESTON L. REV. 479, 483 (2010) (arguing that South Carolina's system has returned to its pre-*Furman* status); Bill Rankin et al., *From 2007: A Matter of Life and Death: Death Still Arbitrary*, ATLANTA J. CONST. (Sept. 23, 2007), http://www.myajc.com/news/state--regional/from-2007-matter-life-and-death-death-still-arbitrary/uQMik03eSLJ7VlI4wvUZnN/ (reporting that "56 percent of all murders in the decade studied [in Georgia] were . . . eligible for death, including hundreds of moderately aggravated cases"); John Seigenthaler, *Deeper Look Shows Even More Cases of Unequal Justice*, TENNESSEAN (Jan. 10, 2010), http://gaile-owens.blogspot.com/2010/01/deeper-look-shows-even-more-cases-of.html (reporting on the striking differences in sentences that state judges and juries gave women convicted of killing their abusive husbands in Tennessee).

130. Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion).

131. *Id.* at 196–98.

132. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 96–97 (2011) (describing the proportionality analysis model as a question of absolute and relative proportionality followed by appellate review).

133. *See* Walton v. Arizona, 497 U.S. 639, 656, 664–65 (1990) (Scalia, J., concurring in part and concurring in judgment) (noting that "our jurisprudence and logic have long since parted ways" because "[t]he latter requirement [(individualized factual determinations)] quite obviously destroys whatever rationality and predictability the former requirement [(limitations on jury discretion)] was designed to achieve"), *overruled by* Ring v. Arizona, 536 U.S. 584, 589 (2002); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); *Gregg*, 428 U.S. at 206; *see also* William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 690 (2012) (explaining that "the consideration of individualized, mitigating facts necessary for absolute proportionality review eviscerates the consistency achieved by relative proportionality parameters"); Berry, *supra* note 132, at 71 (noting the balance courts must strike between case-by-case analysis and consistent results).

134. *See* Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

eliminate randomness in cases by comparing the case on appeal to similar cases and assessing the outcome in such cases.[135]

Nonetheless, this safeguard constituted a central reason why the Supreme Court in *Gregg* upheld Georgia's revised capital scheme, as it provided protection against the random and arbitrary outcomes condemned in the opinions in *Furman*.[136] To be clear, the central concern in *Furman* was the random and arbitrary administration of the death penalty, of which juries were a primary cause.[137] As explained below, *Pulley* undermined this safeguard by removing it from the purview of the Eighth Amendment.[138]

Pulley's consequences are twofold. First, petitioners cannot raise a constitutional challenge based on the lack of comparative proportionality imposed by states at sentencing.[139] With this no longer being part of the Eighth Amendment, the Court has undermined a significant part of the safeguards it upheld in *Gregg* as the basis for satisfying the concerns identified in *Furman*.[140] The appellate court merely has to pay lip service to the sentence by saying it was not arbitrary, as there is no required point of comparison to address the wild variances that arise from jury sentencing.[141] Second, states that still utilize proportionality review merely violate state statutes by failing to apply it rigorously, leaving them free to administer it in a cavalier manner.[142] Furthermore, there is a strong likelihood that pro-death penalty legislatures will eliminate comparative proportionality review if the courts use it to reverse death sentences.[143]

Indeed, the manner in which states apply proportionality review, for the most part, guarantees that no case will ever be disproportionate.[144] Most state supreme courts that use this method compare the case on

135. *See* Berry, *supra* note 121, at 96–97.

136. *Gregg*, 428 U.S. at 206 ("The provision for appellate review . . . serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.").

137. *See Furman*, 408 U.S. at 253 (Douglas, J., concurring).

138. *See infra* text accompanying notes 140–49.

139. Pulley v. Harris, 465 U.S. 37, 43–44 (1984).

140. *See* Berry, *supra* note 121, at 74–75; Berry, *supra* note 133, at 697.

141. *See* Berry, *supra* note 121, at 75; Berry, *supra* note 133, at 707.

142. *See* Berry, *supra* note 133, at 697.

143. *See id.* at 696; Berry, *supra* note 121, at 74–75.

144. *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 668–69 (1983) [hereinafter Baldus et al., *Comparative Review of Death Sentences*]. *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (describing proportionality review in different state courts); RAYMOND PATERNOSTER ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT (2008) (explaining the appellate review process undertaken by state supreme courts).

appeal to one or more similar *death* cases that involved the same statutory aggravating circumstance.[145] Not only do the courts refuse to examine cases with similar fact patterns where the defendant received a life sentence, but they also use aggravating factors—concepts that can encompass a wide range of dissimilar factual situations—as the basis for identifying similar cases.[146] In *Walker v. Georgia*,[147] Justice John Paul Stevens's dissent to the denial of certiorari made this point.[148] Serving as one member who wrote the plurality opinion in *Gregg*, he chastised the Georgia Supreme Court for the cursory manner in which it conducted comparative proportionality review in capital cases. Justice Stevens explained:

> Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. . . .
>
> . . . .
>
> Particularly troubling is that the shortcomings of the Georgia Supreme Court's review are not unique to this case. . . .
>
> . . . And the likely result . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.[149]

The reality, then, is that state supreme courts provide no check against disparities in jury sentencing—the problem identified in *Furman*—thus allowing arbitrariness to persist.

3. Considerations of Stare Decisis

Without comparative proportionality review, the *Furman* problem of arbitrary and random capital sentencing outcomes persist. *Pulley* is perhaps the most significant in a line of cases that largely undermines the protections affirmed in *Gregg*. As such, the Court could easily reverse *Pulley* on the grounds that it is inconsistent with *Furman* and allows the persistence of arbitrary death sentences.

145. *See* Berry, *supra* note 121, at 77; Berry, *supra* note 133, at 708.
146. *See* Berry, *supra* note 133, at 708.
147. 555 U.S. 979 (2008).
148. *Id.* at 982–83 (Stevens, J., dissenting).
149. *Id.* at 982–84.

In addition, the Court has a long history of reversing its Eighth Amendment cases.[150] For instance, it reversed *Penry v. Lynaugh*[151] and *Stanford v. Kentucky*[152] in its decisions in *Atkins v. Virginia*[153] and *Roper v. Simmons*.[154] Certainly, stare decisis should not preclude a careful re-examination of *Pulley* and arbitrariness in jury sentencing outcomes.

E. *The Problem of Discriminatory Death Sentences (*McCleskey*)*

In addition to deferring to the states on the question of mandatory sentences, absolute proportionality, and comparative proportionality, the Supreme Court has ultimately deferred to states on the most fundamental question of fairness—racial discrimination.

1. *McCleskey v. Kemp*

In *McCleskey v. Kemp*, Warren McCleskey challenged Georgia's capital punishment system on the grounds that systemic race discrimination resulted in an arbitrary death penalty in violation of the Eighth and Fourteenth Amendments.[155] To support his claim, McCleskey introduced two studies performed by David Baldus and his colleagues.[156] These studies demonstrated clear evidence of racial discrimination in Georgia's death penalty system.[157]

Specifically, the Baldus studies showed that offenders who killed white victims were four times more likely to receive the death penalty than those who killed African-American victims.[158] In addition to demonstrating the significant role race played in jury outcomes, the studies also showed how race influenced the decisions of prosecutors.[159] Illustratively, cases in which an African-American killer murdered a

150. *See generally* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847 (2007) (explaining that Eighth Amendment law is constantly changing).

151. 492 U.S. 302 (1989).

152. 492 U.S. 361 (1989).

153. 536 U.S. 304 (2002).

154. 543 U.S. 551 (2005).

155. 481 U.S. 279, 286 (1987). For more on the story behind the case, see JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY (2015).

156. *McCleskey*, 481 U.S. at 286–87; *see* Baldus et al., *Comparative Review of Death Sentences*, *supra* note 144, at 731.

157. *See* Baldus et al., *Comparative Review of Death Sentences*, *supra* note 144, at 731 ("Finally, our analyses suggest that Georgia's death-sentencing system is tainted by the influence of arbitrary and capricious factors, notably the victim's race . . . ."); *see also* William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 459 n.91 (2011).

158. *See* Baldus et al., *Comparative Review of Death Sentences*, *supra* note 144, at 709.

159. *Id.*

white victim were substantially more likely to garner capital prosecutions than cases where a white killer murdered an African-American victim.[160]

The Supreme Court did not challenge the results of Baldus's studies and assumed, for purposes of the case, that the results were accurate.[161] Nonetheless, the Court denied McCleskey's claims in a narrow 5–4 decision.[162] At the heart of the Court's reasoning rested two central conclusions. First, in order to demonstrate prejudice warranting relief under the Eighth and Fourteenth Amendments, the Court held that McCleskey must have shown more than just systemic racial discrimination.[163] The Court concluded that to prevail, he must have shown that racial discrimination affected the outcome of *his particular case*.[164] The Court majority thus ignored the systemic discrimination because McCleskey lacked proof of individualized discrimination, despite both (1) the difficulty in proving such discrimination and (2) that his conviction and sentence occurred within a discriminatory system.[165]

Second, the Court opined that ruling in McCleskey's favor would open Pandora's box to claims it did not want to pursue. For example, if the Court found that Baldus's evidence regarding Georgia's systematic racial discrimination in capital cases warranted relief for McCleskey, then, in theory, it would open the door for habeas corpus claims from all of Georgia's death row.[166] Further, if similar evidence indicated that the systemic racial discrimination went beyond just capital sentencing, petitioners could challenge the entire criminal justice system in Georgia and have grounds for relitigating their convictions.[167] This slippery slope articulated by the Court served in part to justify its decision to ignore the Baldus evidence's possible application to McCleskey and instead require proof of such discrimination on an individual level.[168]

Again, deference to the states echoes through this decision. By deferring to states, even when states act maliciously, the Court prefers the majority practice to constitutional restriction.

160. *Id.* at 709 n.131.
161. *See McCleskey*, 481 U.S. at 291 n.7.
162. *Id.* at 319.
163. *Id.* at 292.
164. *Id.*
165. *Id.* at 292–93.
166. *Id.* at 315.
167. *Id.*
168. *Id.* at 314.

2. The Consequences of *McCleskey*

From the time of *Furman*, the Court has been aware of the influence of race in capital cases.[169] For example, several of the concurring opinions in *Furman* highlighted the racial disparity in the administration of the death penalty.[170] Over time, a number of studies have explored this issue. As explained below, such studies have consistently demonstrated that the race of the victim is predictive of death sentences, with homicides of white victims being more likely to result in death sentences than homicides of African-American victims.

There remains significant evidence that racial discrimination persists in the criminal justice system.[171] This persistence becomes particularly troubling in capital cases, when the stakes are so high. The idea that race plays a significant role in determining which offenders receive the death penalty undermines the legitimacy of the criminal justice system as a whole.

The most obvious consequence of *McCleskey* rests in the persistence of race discrimination in capital cases, not only in Georgia, but also throughout the United States.[172] Indeed, evidence continues to show that race plays a significant role in the administration of the death penalty in the United States, usually arising out of prosecutorial discretion and sentencing determinations.[173]

This decision also discourages broader challenges to discrimination in state and federal sentencing practices. With the Court requiring proof of discrimination on an individualized level, it made attacks on discrimination in capital cases substantially more difficult.[174] Perhaps more importantly, the *McCleskey* decision closed the door to systemic challenges to race discrimination.[175] As a result, states lack any incentive, at least constitutionally driven ones, to engage in reform to cure race-based capital sentencing. Finally, the *McCleskey* decision invited the Court in later opinions to mandate that individual proof, and not systemic

169. *See* Furman v. Georgia, 408 U.S. 238, 250 n.15 (1972).

170. *Id.* at 249–51 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 364 (Marshall, J., concurring).

171. *See generally* ALEXANDER, *supra* note 104 (highlighting racial disparity in the justice system); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (further highlighting racial inequality in sentencing); 13TH (Netflix 2016) (documentary examining the history of racial inequality in the prison system).

172. *See Race and the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/race-and-death-penalty (last visited Nov. 11, 2017).

173. *See* Baldus & Woodworth, *supra* note 125, at 214–15 (2003).

174. *See* McCleskey v. Kemp, 481 U.S. 279, 292, 311 (1987).

175. *See id.* at 292–97.

error, had to serve as a basis for relief for potentially afflicted offenders.[176]

The best example of this arises in execution cases when the Court requires that an offender demonstrate that a particular execution procedure creates a substantial risk of severe pain for him, and not generally.[177] With a procedure like lethal injection that hides the effects of its drugs by using a paralytic, the petitioner cannot know what will happen to him with respect to pain.[178] The design of the procedure is such that no one watching can know whether the potassium chloride caused pain, because the paralytic makes it impossible for the petitioner to have any visible reaction.[179] And yet, the Court relied on the same reasoning as *McCleskey* in affirming two different versions of the lethal injection procedures. By requiring proof of individualized prejudice where such prejudice remains hidden, the Court essentially foreclosed legitimate challenges to systemic risks of constitutional violations, whether based on race discrimination or cruel and unusual infliction of torturous pain.

3. Considerations of Stare Decisis

The author of the majority opinion, Justice Lewis F. Powell, had second thoughts concerning the *McCleskey* decision.[180] When asked by his former law clerk whether he would change his vote in a prior case, Justice Powell responded, "Yes, *McCleskey v. Kemp*."[181]

With one member of its 5–4 majority later recanting his opinion, *McCleskey* is ripe for re-examination. This is particularly true because of the volume of additional social science evidence that supports Baldus's Georgia studies. The overwhelming evidence demonstrates that race unfairly influences the imposition of the death penalty. Such a reality remains intolerable in a criminal justice system that purports to be just and fair.

In addition, the Pandora's box argument from the Court remains overstated. Where there is compelling evidence of systemic discrimination in a state over a period of time, one easy solution would be to commute the death sentences during that time to LWOP. The practical difference might be insignificant, as states are slow to execute

176. *See id.* at 292.

177. *See* Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015); Baze v. Rees, 553 U.S. 35, 51–52 (2008).

178. *See* Berry & Ryan, *supra* note 45, at 425.

179. *Id.* at 406.

180. *See* Berry, *supra* note 157, at 442–43.

181. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (quoting a conversation between Justice Powell and his former law clerk, John Jeffries, which was recorded for a biography of Justice Powell that Jeffries wrote).

their offenders anyway, often taking over a decade to impose the sentence.[182] Likewise, almost two-thirds of capital cases contain error that causes appellate courts to reverse them.[183] Reversing a few more to remedy race discrimination does not seem so far-fetched.

Finally, the Court could use its death-is-different principle as a basis for only re-examining capital cases, rather than other examples of discrimination in criminal justice. To be sure, states should really make every effort to eliminate race discrimination in the present and future, as well as remedy instances of such injustice occurring in the past. The overwhelming nature of that project should not chill the Court from starting with capital cases to remedy the most serious of injustices.

III. REMEDYING UNUSUAL DEFERENCE

Part I of this Article demonstrated the genesis of the Court's unusual deference to states in sentencing criminal offenders. In Part II, it demonstrated how the core absolute proportionality doctrine remains limited in its application because it relies on majoritarian concepts as the normative foundation for the counter-majoritarian constitutional proscription against cruel and unusual punishments.

Part II then examined three of the most egregious examples of how this cancer spread to accord states deference with respect to absolute proportionality, mandatory sentences, comparative proportionality, and discrimination. This Part concludes this Article by articulating a first principles approach to the Eighth Amendment that robustly defends individual rights and does not blindly defer to states.

A. *The Basic Framework*

Contrary to the Court's decisions, it is possible to create a framework to apply the Eighth Amendment more broadly to undercut mass incarceration. At the very least, the individual rights of criminal offenders warrant doctrinal reconsideration.

1. Three Aspects: Type, Method, and Technique

The Eighth Amendment applies to three separate aspects of punishing criminal offenders: the type of punishment, the method of punishment, and the technique of punishment.[184] In a lethal injection, for instance, the type of punishment is death, the method is lethal injection, and the

182. *See* Krista MacKay, Note, *The Rise of Systematic Pre-Execution Delay: Proposing a Solution to Decades on Death Row*, 68 FLA. L. REV. 1163, 1181 (2016).

183. *See* Howard Mintz, *Death Sentence Reversals Cast Doubt on* System, DEATH PENALTY INFO. CTR. (Apr. 13, 2002), https://deathpenaltyinfo.org/node/534.

184. Berry & Ryan, *supra* note 45, at 409.

technique is the three-drug protocol. All three should be subject to the same inquiry under the Eighth Amendment.

Before exploring each, it is worth recalling that the Court's cases and the originalist interpretations of the Eighth Amendment both envision a constitutional provision that evolves over time. Also, for purposes of this analysis, the concepts of "cruel and unusual" are applied as a unitary concept.[185] In addition, each of these three aspects of punishment—the type, the method, and the technique—cannot be cruel and unusual in an individual sense or a systemic sense.[186] The individual inquiry into whether the Constitution proscribes an aspect of punishment has two components: (1) core normative values and (2) absolute proportionality. The systemic inquiry likewise has two parts: (1) comparative proportionality and (2) systemic fairness.

2. Individual Inquiry (Core Values and Absolute Proportionality)

The first individual inquiry applies the core normative values of the Eighth Amendment—the dignity of man and the right to be free from torture. This concept, which needs further development by the Court, mirrors the Court's decision in *Trop v. Dulles*, where it held that denationalization was an unconstitutional type of punishment.[187] Other punishment types, methods, or techniques that compromise the dignity of an offender or are otherwise particularly brutal might fall under this proscription as well.

Further, the Court should require individualized sentencing determinations in all cases with serious punishments. At the very least, the Court should eliminate mandatory LWOP sentences in the same way it has eliminated mandatory JLWOP sentences and mandatory death sentences. As the Court's capital cases show, the dignity of the offender requires individualized sentencing consideration in cases involving the punishment of death.[188] This principle should apply irrespective of whether the death is in a prison cell or in an execution chamber.

The second individual inquiry, absolute proportionality, explores whether the punishment type, method, or technique is excessive in light of the crime committed.[189] This assessment requires application of the purposes of punishment[190] to make such a determination, as the Court has done in the application of its subjective view under the evolving-standards-of-decency doctrine. As in *Weems*, the Court should proscribe excessive punishments that are disproportionate. Unlike its current

185. *See* Bray, *supra* note 56.
186. Berry & Ryan, *supra* note 45, at 409–10.
187. *See* 356 U.S. 86, 103 (1958).
188. *See* McCleskey v. Kemp, 481 U.S. 279, 300 (1987).
189. *See* Berry, *supra* note 132, at 96.
190. *See* Berry, *supra* note 43. *But see* Stinneford, *supra* note 43, at 962.

practice, the Court should apply this absolute proportionality inquiry to all cases, not just capital and JLWOP ones, as punishments not approaching death can still be both wildly disproportionate and constitute cruel and unusual punishments.

3. Systemic Inquiry (Comparative Proportionality and Fairness)

The Eighth Amendment's systemic inquiry exists to make sure that arbitrariness does not persist in the administration of punishment types, methods, or techniques.[191] Comparative proportionality review in capital cases exists to remedy inconsistencies in jury verdicts.[192] While this is less of a concern with lower level punishments, death sentences require some modicum of consistency or, at the very least, something more than complete arbitrariness. The Eighth Amendment should thus require appellate review of jury sentencing outcomes in capital cases by state supreme courts. Otherwise, the Court's decision in *Furman* has no meaning.

The second systemic inquiry should read the Eighth Amendment to prohibit any pervasive influence of non-acceptable indicia, particularly race. Where the Court finds race discrimination or other systemic error, the Court cannot simply pretend as if it does not exist or otherwise wish it away as it did in *McCleskey*.

The Court can order remedies to address these problems, much like it has done in other contexts like affirmative action.[193] While the cost of re-litigating cases is expensive, the cost of injustice is much higher, particularly in the context of the death penalty. While finality perhaps can trump justice in some contexts, the death penalty should not be one of them.[194]

B. *Some Applications of the Basic Principles*

In addition to addressing the erroneous decisions in *Harmelin*, *Pulley*, and *McCleskey*, there are a number of obvious applications of the Eighth Amendment that rest on core values and not majoritarian pandering. The use of LWOP sentences is an obvious place to begin, with some regulation necessary to eliminate the arbitrariness inherent in death-in-prison sentences.

Further, the Court should abolish JLWOP under the Eighth Amendment. Doing so is possible even if the Court continues to use the

191. *See* Berry & Ryan, *supra* note 45, at 410.

192. *See* Berry, *supra* note 132, at 80.

193. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

194. *See* William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 490 (2016).

broken evolving-standards-of-decency doctrine, with a number of states outlawing JLWOP and the United States remaining as the only country currently using JLWOP.[195]

Mandatory sentences, particularly ones with long sentences, deserve significant scrutiny. As discussed above, such sentences deny analysis of proportionality and individualized consideration of offenders. More generally, the Court should consider claims of disproportionality in sentencing under the Eighth Amendment. In the current regime, excessive sentences are common, and contribute significantly to the mass incarceration epidemic.

To the extent that the death penalty survives under a more robust Eighth Amendment, the safeguards approved in *Gregg*, including comparative proportionality review, serve as minimum requirements. Revisiting the Court's execution-technique jurisprudence would also be advisable.

Finally, the Court should use the Eighth Amendment as a tool by which to eradicate racism in the criminal justice system, particularly in capital cases. At the very least, the Court should put the burden on the states to change their practices and combat race discrimination.

CONCLUSION

This Article has demonstrated that the Supreme Court's Eighth Amendment jurisprudence rests on a faulty premise—that state punishment practices are entitled to broad deference by the Court. In particular, this Article explained how the misreading of "unusual" drives the missteps of the evolving-standards-of-decency cases. In addition, this Article showed how three decisions adhering to this principle—*Harmelin*, *Pulley*, and *McCleskey*—prevent the Court from applying core Eighth Amendment principles to limit disproportionate sentences, mandatory sentences, comparatively disproportionate sentences, and discriminatory sentences.

Having demonstrated the Court's errors, this Article then articulated a holistic model of the Eighth Amendment that cures these errors. This Article ended by briefly suggesting some of the many applications of this improved jurisprudential model.

195. *See* Brief for Constance de la Vega et al. as Amici Curiae Supporting Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).