

Unconstitutional Punishment Categories

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Two terms ago, the Supreme Court decided Jones v. Mississippi, in which it upheld but arguably narrowed its Eighth Amendment categorical bar on the imposition of mandatory juvenile life-without-parole (JLWOP) sentences. Specifically, the Court held that the Eighth Amendment did not require a fact-finding prerequisite to the imposition of JLWOP sentences. The opinion, however, did not speak to the question of whether other categories of JLWOP sentences might violate the Eighth Amendment.

Indeed, the Court has identified six categories of capital punishment that the Eighth Amendment proscribes: (1) mandatory death sentences; (2) executions of juveniles; (3) executions of intellectually disabled defendants; (4) executions for certain felony murder crimes; (5) executions for the crime of adult rape; and (6) executions for the crime of child rape. The Court has extended some of the categorical punishment bars to JLWOP, covering three of the unconstitutional capital punishment categories—mandatory JLWOP sentences, JLWOP sentences for adult rape, and JLWOP sentences for child rape.

The open question is whether the other three unconstitutional death penalty categories under the Eighth Amendment also apply to JLWOP sentences. This Article explores that doctrinal gap.

While the Court's decision in Jones v. Mississippi suggests that it is not eager to expand the scope of Eighth Amendment generally and the scope of JLWOP in particular, the Court has never explicitly concluded that JLWOP is fundamentally different from the death penalty for purposes of the Eighth Amendment. And if the death penalty and JLWOP are the same for Eighth Amendment purposes, applying the remaining unconstitutional death penalty categories to JLWOP would not be expanding the doctrine, but simply completing it. This Article

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argues that the Court should take that step if presented with the opportunity.

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I. INTRODUCTION

Two terms ago, the Supreme Court decided *Jones v. Mississippi*,¹ in which it upheld but arguably narrowed² its Eighth Amendment categorical bar on the imposition of mandatory juvenile life-without-parole³ (JLWOP) sentences.⁴

¹ *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). The facts of the case are unsettling. On August 9, 2004, Brett Jones killed his paternal grandfather, Bertis Jones, twenty-three days after the younger Jones's fifteenth birthday, during a fight about Jones's girlfriend, Michelle Austin. Brief for Petitioner at 3, *Jones*, 141 S. Ct. 1307 (No. 18-1259). Two months before, the younger Jones had moved to Shannon, Mississippi to stay with his grandparents to escape his mother and stepfather's violent household. Brief for Respondent at 2, 7, *Jones*, 141 S. Ct. 1307 (No. 18-1259). A few weeks later, Austin secretly joined Jones in Mississippi. Brief for Petitioner, *supra*, at 3. The altercation between Jones and his grandfather began when his grandfather discovered Austin in Jones's bedroom and angrily ordered her out of the house. *Id.* Later that day, while the younger Jones was making a sandwich, he and his grandfather began to argue. *Id.* After Jones "sass[ed]" his grandfather, his grandfather pushed him and Jones pushed him back. *Id.* When his grandfather then swung at him, Jones stabbed his grandfather using the steak knife in his hand from making the sandwich. *Id.* When his grandfather persisted, Jones switched knives and stabbed his grandfather eight times, killing him. *Id.* After the altercation, Jones and Austin began to head to Walmart in nearby Tupelo, Mississippi, where Jones's grandmother worked so that Jones could tell her what had happened. *Id.* at 4. Police arrested Jones and Austin at a gas station while they were trying to get a ride to Walmart. *Id.* Despite Jones being a child, Mississippi sentenced him to life without parole. *Jones*, 141 S. Ct. at 1312–13.

² The majority argued it was simply applying the Court's prior precedent. *Jones*, 141 S. Ct. at 1311. By contrast, the dissent argued that the majority was ignoring the rules of stare decisis. *Id.* at 1328 (Ginsburg, J., dissenting).

³ An LWOP sentence, sometimes called a "whole life" or "natural life" sentence, means that the sentence of the offender is to die in prison, with no possibility of release. See MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENT'G PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 4 (May 2004), <http://www.sentencingproject.org/doc/publications/inc-meaningoflife.pdf> [<https://perma.cc/7633-4SZB>]; DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 1 (2002); Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 598 (2007). "Death-in-prison" or "a civil death" is perhaps a more accurate way of characterizing LWOP sentences. See Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 5 (2010); Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 68–70 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012). For examples of efforts made to challenge JLWOP sentences, see BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 147–62 (2014) (describing cases involving juveniles sentenced to life without parole).

⁴ *Jones*, 141 S. Ct. at 1321; see *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (barring mandatory JLWOP sentences); *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (applying the Court's decision in *Miller* retroactively). Interestingly there has been a movement among state legislatures over the past decade to abolish JLWOP sentences. See Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), <https://www.sentencingproject.org/publications/jlwop-overview>.

Specifically, the Court held that the Eighth Amendment did not require a fact-finding prerequisite to the imposition of JLWOP sentences.⁵ The opinion, however, did not speak to the question of whether other categories of JLWOP sentences might violate the Eighth Amendment.⁶

Indeed, the Court has identified six categories of capital punishment that the Eighth Amendment proscribes: (1) mandatory death sentences;⁷ (2) executions of juveniles;⁸ (3) executions of intellectually disabled defendants;⁹ (4) executions

www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/H8K7-ZNX7].

⁵ *Jones*, 141 S. Ct. at 1311. The Court's prior decision in *Miller v. Alabama* had held that mandatory JLWOP sentences violated the Eighth Amendment. *Miller*, 567 U.S. at 465. Then, in *Montgomery v. Louisiana*, the Court held that the *Miller* rule applied retroactively because it was a substantive rule, not a procedural one. *Montgomery*, 136 S. Ct. at 732. Jones argued that the *Miller* decision meant that the Eighth Amendment contained a factual prerequisite to imposing a JLWOP sentence—a finding that the defendant was “permanently incorrigible.” *Jones*, 141 S. Ct. at 1311. If the Court had found that the Eighth Amendment did require some kind of factual finding prior to imposing a JLWOP sentence, the Sixth Amendment would require that fact be found by a jury. See Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 451 (2019); *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). The Court in *Jones* concluded that even though Jones's argument was what the Court might have meant in *Montgomery*, it was not what it said. *Jones*, 141 S. Ct. at 1317–18 (“In short, Jones's *Montgomery*-based argument for requiring a finding of permanent incorrigibility is unavailing because *Montgomery* explicitly stated that ‘*Miller* did not impose a formal factfinding requirement’ and that ‘a finding of fact regarding a child's incorrigibility . . . is not required.’” (quoting *Montgomery*, 136 S. Ct. at 211)).

⁶ The Court actually took the opposite tack, noting that Jones could have pursued an as-applied claim instead of a categorical one. See *Jones*, 141 S. Ct. at 1322, 1337 n.6. This suggestion has interesting implications of its own. See generally William W. Berry III, *The Evolving Standards, As Applied*, 74 FLA. L. REV. 775 (2022) (arguing for the adoption of heightened standards of Eighth Amendment review for individual as-applied proportionality challenges in capital and JLWOP cases).

⁷ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital statute); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital statute); see also *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (finding that the proscription against mandatory sentences also required individual sentencing discretion in capital cases); William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 22 (2019) (arguing for a broader application of the *Woodson-Lockett* principle).

⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (barring executions of defendants who were seventeen years old or younger at the time of their crimes). *Roper* reversed *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had allowed the execution of a seventeen-year-old, and expanded *Thompson v. Oklahoma*, 487 U.S. 815 (1988), which barred executions of defendants who were fifteen years old or younger at the time of their crimes. *Roper*, 543 U.S. at 574–75.

⁹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death sentences for intellectually disabled offenders unconstitutional); *Hall v. Florida*, 572 U.S. 701, 704 (2014)

for certain felony murder crimes;¹⁰ (5) executions for the crime of adult rape;¹¹ and (6) executions for the crime of child rape.¹² The Court has extended some of the categorical punishment bars to JLWOP, covering three of the unconstitutional capital punishment categories—mandatory JLWOP sentences,¹³ JLWOP sentences for adult rape,¹⁴ and JLWOP sentences for child rape.¹⁵

The open question is whether the other three unconstitutional death penalty categories under the Eighth Amendment also apply to JLWOP sentences. This Article explores that doctrinal gap.

While the Court's decision in *Jones v. Mississippi* suggests that it is not eager to expand the scope of Eighth Amendment generally and the scope of JLWOP in particular,¹⁶ the Court has never explicitly concluded that JLWOP is fundamentally different from the death penalty for purposes of the Eighth Amendment.¹⁷ The reasons that the Court barred the death penalty in the three

(requiring that the intellectual disability determination be more than just IQ); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (requiring that the intellectual disability determination apply modern definitional approaches); *see also* *Ford v. Wainwright*, 477 U.S. 399, 401 (1986) (holding death sentences for insane individuals unconstitutional).

¹⁰ *Enmund v. Florida*, 458 U.S. 782, 797, 801 (1982) (holding death sentences for some felony murders unconstitutional); *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (narrowing the holding from *Enmund*).

¹¹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding death sentences for adult rape unconstitutional).

¹² *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding death sentences for child rape unconstitutional).

¹³ *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (barring mandatory JLWOP sentences); *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (applying the Court's decision in *Miller* retroactively).

¹⁴ *Graham v. Florida*, 560 U.S. 48, 82 (2010) (barring JLWOP as a punishment for non-homicide crimes). *See generally* Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012) (exploring the practical consequences of the *Graham* decision).

¹⁵ *Graham*, 560 U.S. at 82 (barring JLWOP as a punishment for non-homicide crimes).

¹⁶ *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021). The Court's holding focused on the statement from *Miller* that no additional fact finding was required under the Eighth Amendment. *Id.* at 1318. The dissent essentially claimed that even though that was what the Court said, it was clearly not what it meant. *Id.* at 1335 (Sotomayor, J., dissenting). One consequence of *Jones* could be increased arbitrariness in JLWOP sentencing. *See* Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. 1319, 1346–47 (2022).

¹⁷ The Court has concluded that both the death penalty and juveniles are “different,” meaning that unconstitutional categories of capital sentences and JLWOP sentences exist. *Miller*, 567 U.S. at 481 (“So if (as *Harmelin* recognized) ‘death is different,’ children are different too.”). But it is not clear whether both kinds of sentences being “different” for purposes of the Eighth Amendment makes the death penalty the same, or well, different. *See* discussion *infra* Part IV. By contrast, non-capital, non-JLWOP cases almost never violate the Eighth Amendment. *See* 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, 1154, 1160 (2009) (describing the “two-track approach” to sentencing); *see also*

remaining categories also apply to JLWOP. And if the death penalty and JLWOP are the same for Eighth Amendment purposes, applying the remaining unconstitutional death penalty categories to JLWOP would not be expanding the doctrine, but simply completing it. This Article argues that the Court should take that step if presented with the opportunity.

Part II of the Article frames the constitutional question and explains what is at stake when the Court creates an unconstitutional punishment category. In Part III, the Article describes the punishment categories that are unconstitutional under the Eighth Amendment. Part IV explores the theoretical underpinnings of the determinations by the Court that the death penalty and JLWOP in some cases contravene the Eighth Amendment, as well as the theoretical relationship between the punishments. It then advances the central claim of the Article—that the Court should expand its unconstitutional death penalty categories to JLWOP to complete the doctrine. Finally, in Part V, the Article considers possible expansions of the Eighth Amendment to include new categories of unconstitutional punishments.

II. FRAMING THE EIGHTH AMENDMENT QUESTION

To understand the modern Eighth Amendment, it is instructive to frame the Court's approach in a larger context. The Eighth Amendment cases tell a story of judicial hesitancy, of an unfortunate deference to state punishment practices, and ultimately, of unconstitutional punishment categories.

A. Reasons to Constitutionalize Punishments

Constitutionalizing a category of cases strikes at the heart of our federal system.¹⁸ On the one hand, the historical role of the Court has been to protect individual's constitutional rights, particularly those enumerated in the Bill of

Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861, 872 (2008) (distinguishing between capital and non-capital sentencing systems); cases cited *infra* note 24.

¹⁸ See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 1–2 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1385–86 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1011 (2000); Barry Friedman, *The History of The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336 (1998). See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

Rights, against congressional and state legislative overreach.¹⁹ Protecting the constitutional rights of individuals against the majority will, particularly when according such rights might be unpopular, is part of the constitutional check the courts provide through judicial review.²⁰

On the other hand, excessive expansion of constitutional rights through overly expansive readings of the Constitution infringes upon the power of legislatures to regulate the behavior of citizens pursuant to the representative will of the majority.²¹ The pejorative “judicial activism” often accompanies decisions in which the perception is that the Court is unduly trammeling on the authority of legislatures, with unelected judges substituting their normative views for those of “the people.”²²

Part of the problem relates to the open-ended nature of constitutional language. The Eighth Amendment, which is the subject of this Article, provides an obvious example, proscribing cruel and unusual punishments.²³ It is not clear

¹⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Burch v. Louisiana*, 441 U.S. 130, 134 (1979); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Justia has compiled a list of almost a thousand such cases. See *State Laws Held Unconstitutional*, JUSTIA, <https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html> [<https://perma.cc/M2DP-VM5E>].

²⁰ See sources cited *supra* note 18.

²¹ See sources cited *supra* note 18.

²² See, e.g., *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting); *Coppage v. Kansas*, 236 U.S. 1, 38 (1915) (Day, J., dissenting); *Adkins v. Child.’s Hosp.*, 261 U.S. 525, 559–60 (1923). See generally BICKEL, *supra* note 18.

²³ U.S. CONST. amend. VIII. The Court has not addressed the meaning of “and,” although most but not all scholars have read it conjunctively. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14 (1980); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 116 (2012); Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734, 1778–79 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1199–200 (2006); Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 120 (1997); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997); David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 PUB. AFFS. Q. 77, 77 (2002); Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819, 831 (2006); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 614 (2010). But see Samuel L. Bray, *“Necessary and Proper” and “Cruel and Unusual”: Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695, 720 (2016); HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 96–97 (1987); KENT GREENAWALT, *INTERPRETING THE CONSTITUTION* 119 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 n.120 (2003); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 968–69 (2011); JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 180–81 (2012). For

what punishments cross the constitutional line; citizens with different normative views certainly might draw the line in different places. The punishment practices of the various states theoretically reflect one thought about what punishments are, and are not, appropriate based on the actions of state officials, whether in writing the laws or enforcing them.

The larger question, though, is the degree of deference courts should accord such practices.²⁴ In a vacuum, one might imagine a world where no American government imposed “cruel and unusual” punishments, such that an Eighth Amendment limit would be unnecessary or moot.²⁵

The practical reality, though, is that harsh punishment seems to be a part of human nature, or at least American culture.²⁶ The United States remains one of the few countries in the West to still allow the death penalty.²⁷ It is the only country in the world that allows the imposition of life-without-parole sentences

a discussion of the possible readings, see William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1207–08 (2020).

²⁴The degree of deference in non-capital, non-JLWOP cases is astounding, with almost no punishments being unconstitutional, despite being draconian in many cases. *See* Lockyer v. Andrade, 538 U.S. 63, 68, 70, 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, 17–19, 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 v. Michigan*, 501 U.S. 957, 961, 994, 996 (1991) (affirming sentence of life without parole 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, 285 (1980) (affirming life with parole sentence for felony theft of \$120.75 by false pretenses where defendant had two prior convictions). *But see* *Solem v. Helm*, 463 U.S. 277, 279–84 (1983) (reversing by a 5–4 vote a sentence of life without parole for presenting a no-account check for \$100, where defendant had six prior felony conviction is the one exception). The results are not any more promising at the state level under the Eighth Amendment or its state constitutional analogues. *See also* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1638–41 (2021) (summarizing the few state cases in which non-capital, non-JLWOP defendants have prevailed under state constitutional Eighth Amendment analogues).

²⁵This is certainly how the Supreme Court tends to view non-capital, non-JLWOP cases. *See* cases cited *supra* note 24; William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 317–18 (2018).

²⁶Scholars have theorized that American culture explains its retention of the death penalty. *See* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 6 (2003); FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 227–28 (2003); DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN THE AGE OF ABOLITION* 10 (2010).

²⁷*See* ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 503–08 (5th ed. 2015) (providing a comprehensive survey of retentionist and abolitionist countries).

on children.²⁸ It currently houses the largest prison population in the history of the world, and imprisons its citizens at a rate that far exceeds any other country in the world.²⁹

The volume and types of punishments only scratch the surface. The manner in which the United States administers criminal justice is broken,³⁰ particularly the death penalty.³¹ Two out of every three capital cases are reversed for error,³² almost two hundred innocent people have been sentenced to death before later being exonerated,³³ the average death row inmate spends almost two decades waiting for execution,³⁴ and lethal injection—the dominant method of execution—can inflict brutal, silent torture on inmates.³⁵ The use of solitary confinement,³⁶ the physical conditions of prisons,³⁷ the imposition of life without

²⁸ Rovner, *supra* note 4.

²⁹ See *Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/L5W3-EAK6>]; Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/VBQ8-CN3C>].

³⁰ See generally JOHN F. PFAFF, *LOCKED IN* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012); STEVENSON, *supra* note 3; MARC MAUER & THE SENT’G PROJECT, *RACE TO INCARCERATE* (1999); 13TH (Netflix 2016).

³¹ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2755–74 (2015) (Breyer, J., dissenting) (cataloging all of the many flaws with the modern death penalty in the United States, including arbitrariness).

³² See, e.g., Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 217 (2004); James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000). Racial disparity also persists. See, e.g., DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 1–4 (1990); *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987).

³³ From 1973 to 2022, 190 death row inmates have been exonerated. *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/L2L4-CSG3>].

³⁴ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/9XNY-YNM5>].

³⁵ *Glossip*, 135 S. Ct. at 2793 (Sotomayor, J., dissenting); *Baze v. Rees*, 553 U.S. 35, 42–43 (2008).

³⁶ See, e.g., ACLU, *ABUSE OF THE HUMAN RIGHTS OF PRISONERS IN THE UNITED STATES: SOLITARY CONFINEMENT*, <https://www.aclu.org/other/abuse-human-rights-prisoners-united-states-solitary-confinement> [<https://perma.cc/WAP5-9LTT>].

³⁷ See, e.g., *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/#:~:text=Millions%20of%20Americans%20are%20incarcerated,treatment%2C%20education%2C%20or%20rehabilitation.&text=Incarcerated%20people%20are%20beaten%2C%20stabbed,abuse%20their%20power%20with%20impunity> [<https://perma.cc/SK2V-ULJV>].

parole sentences,³⁸ and the culture of abuse within prisons also fail to satisfy basic elements of human rights.³⁹ And the post-incarceration consequences of parole, probation, and lengthy supervision do little to encourage reentry of individuals who have served their punishments.⁴⁰

In short, blind deference to state and federal punishment practices allows cruel and unusual punishments to persist.⁴¹ And yet, the story of the Court's Eighth Amendment cases has been one of historical deference to Congress and state legislatures.⁴²

B. *How the Court Has Categorically Applied the Eighth Amendment*

In applying the Eighth Amendment to cases, courts have two avenues of challenges to consider. First, a court can review an Eighth Amendment constitutional challenge “as-applied,”⁴³ meaning that it considers whether the punishment as applied to this person in this instance is a cruel and unusual

³⁸ See, e.g., THE SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <https://www.sentencingproject.org/app/uploads/2022/08/Life-Goes-On.pdf> [<https://perma.cc/TF7F-DN75>].

³⁹ See *Prison Conditions*, *supra* note 37.

⁴⁰ See, e.g., Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/#:~:text=Incarceration%20can%20trigger%20and%20worsen,someone%20leaves%20the%20prison%20gates.&text=The%20carceral%20environment%20can%20be,and%20purpose%20from%20their%20lives> [<https://perma.cc/VG3V-2TYW>]; *Collateral Consequences*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/collateral.html> [<https://perma.cc/36GK-KWZK>]. This is particularly troubling when one considers that ninety-five percent of inmates return to society. See NATHAN JAMES, CONG. RSCH. SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 1 (2015); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5–6 (2019). Collateral consequences also can dramatically affect even those convicted of misdemeanors. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2–3 (2019).

⁴¹ See Berry, *supra* note 25, at 329–31.

⁴² See *id.* at 320.

⁴³ The Court famously did this in *Furman v. Georgia*, holding the death penalty unconstitutional as applied under the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). The response was an overwhelming number of states passing new statutes in response, some which the Court upheld. See *Gregg v. Georgia*, 428 U.S. 153, 186–87, 207 (1976) (upholding Georgia's death penalty statute); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (upholding Florida's death penalty statute); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas's death penalty statute); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 47–48 (2007) (noting the immediate response of state legislatures to the *Furman* decision).

punishment.⁴⁴ Alternatively, the court can review an Eighth Amendment constitutional challenge “facially,” meaning that punishment is a cruel and unusual punishment for every case within a particular category.⁴⁵

The Court’s cases have found categories of capital punishments and JLWOP punishments unconstitutional under the Eighth Amendment. In doing so, the Court has developed the evolving-standards-of-decency doctrine,⁴⁶ in which the

⁴⁴ Since *Furman*, the Court has never upheld an Eighth Amendment challenge to a particular sentence on as-applied grounds, but two concurrences have arrived at such a view. See *Coker v. Georgia*, 433 U.S. 584, 601, 603–04 (1977) (Powell, J., concurring in part, dissenting in part); *Graham v. Florida*, 560 U.S. 48, 86–96 (2010) (Roberts, C.J., concurring). Nonetheless, the Court highlighted this approach in *Jones*. *Jones v. Mississippi*, 141 S. Ct. 1307, 1322 (2021); see also Berry, *supra* note 6, at 813–14 (exploring possible implications).

⁴⁵ See, e.g., *Coker*, 433 U.S. at 592 (holding death sentences for rape unconstitutional); *Enmund v. Florida*, 458 U.S. 782, 797, 801 (1982) (holding death sentences for some felony murders unconstitutional); *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (narrowing the holding from *Enmund*); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death sentences for intellectually disabled offenders unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding death sentences for juvenile offenders unconstitutional); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding death sentences for child rape unconstitutional); *Graham*, 560 U.S. at 82 (barring JLWOP as a punishment for non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (barring mandatory JLWOP sentences).

⁴⁶ The doctrinal concept dates from the Court’s decision in *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). The *Trop* Court explained, “the words of the [Eighth] Amendment are not precise, and . . . their scope is not static,” and as a result, the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* *Trop* relied on the Court’s prior decision in *Weems v. United States*. *Trop*, 356 U.S. at 100–01; *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.”).

meaning of the Eighth Amendment evolves over time.⁴⁷ And the doctrine applies only to “different” cases⁴⁸—capital cases⁴⁹ and JLWOP cases.⁵⁰

This evolving-standards-of-decency doctrine⁵¹ uses a two-part test to determine if a particular category of punishment violates the Eighth Amendment.⁵² The first inquiry is an objective one,⁵³ where the Court looks to state punishment practices⁵⁴ to determine whether a supermajority⁵⁵ of states

⁴⁷ *Trop*, 356 U.S. at 100–01. Interestingly, the original meaning of the Eighth Amendment supports a similar reading—the constitutional provision should evolve over time. See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1741–42 (2008) [hereinafter *Original Meaning of “Unusual”*]. Even so, that does not mean that punishments that were unconstitutional can now become constitutional. *Id.* at 1746 (highlighting the one-way ratchet of unusualness); John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 493–94, 498 (2017). Avoiding a static approach seems like a good idea, as “[e]ighteenth-century notions of acceptable punishment were sometimes much more ‘robust’ than those that prevail today.” *Original Meaning of “Unusual,” supra*, at 1742. In eighteenth-century England, for example, it was legally permissible to publicly disembowel or burn traitors alive. 4 WILLIAM BLACKSTONE, COMMENTARIES *92.

⁴⁸ The Court reviews non-capital and non-JLWOP cases under its gross disproportionality test, which is insurmountable in most cases. See cases cited *supra* note 24; see also Barkow, *supra* note 17, at 1156–57.

⁴⁹ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“There is no question that death as a punishment is unique in its severity and irrevocability.”); 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 and requesting additional procedural safeguards “when humans play at God”).

⁵⁰ See *supra* note 17 and accompanying text.

⁵¹ The Court’s first application of this test came in *Coker v. Georgia*. *Coker v. Georgia*, 433 U.S. 584, 598–600 (1977).

⁵² See cases cited *supra* note 45.

⁵³ See cases cited *supra* note 45.

⁵⁴ The Court has most often looked to state legislative action in counting the states that prohibit the punishment. See, e.g., *Coker*, 433 U.S. at 593–96; *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Tison v. Arizona*, 481 U.S. 137, 152–54 (1987); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002); *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 422–26 (2008). The Court has also looked to state sentencing outcomes, the direction of legislative change, and international practices. See, e.g., *Coker*, 433 U.S. at 596–97; *Enmund*, 458 U.S. at 794–96; *Thompson v. Oklahoma*, 487 U.S. 815, 831–33 (1988); *Graham v. Florida*, 560 U.S. 48, 62–67 (2010); *Atkins*, 536 U.S. at 315–17; *Roper*, 543 U.S. at 567, 575–78.

⁵⁵ The number of states has varied. See, e.g., *Coker*, 433 U.S. at 595–96 (forty-nine states); *Enmund*, 458 U.S. at 792–93 (forty-two states); *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) (thirty states); *Roper*, 543 U.S. at 564 (thirty states); *Kennedy*, 554 U.S. at 426 (forty-five states).

proscribes the punishment.⁵⁶ The second inquiry is a subjective one,⁵⁷ where the Court assesses whether the punishment is unconstitutionally disproportionate⁵⁸ by asking if it serves any of the purposes of punishment.⁵⁹ Interestingly, every category of punishment that the Court has assessed under this two-part test has satisfied both the objective and subjective prongs of the test.⁶⁰

⁵⁶ Nonetheless, this remains a flawed approach, because the Court is using a majoritarian standard—the practices of a majority of states—to determine the content of a counter-majoritarian right, the protection of individuals from cruel and unusual punishments imposed by governments. See William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 109–10 (2018) (exploring the majoritarian nature of the evolving standards of decency). Part of the Court’s hesitancy here in hiding behind a majoritarian approach may relate to the backlash of states in responding to its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), striking down the death penalty. Berry, *supra*, at 117; Lain, *supra* note 43, at 47–48 (noting the immediate response of state legislatures to the decision); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 3–18 (2009) (demonstrating the connection between the Court’s reading of the Constitution and popular opinion).

⁵⁷ *Coker*, 433 U.S. at 597 (“[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”).

⁵⁸ Proportionality in this sense could just refer to retribution. See Stinneford, *supra* note 23, at 961–68. However, a better approach would be to measure proportionality in light of all of the purposes of punishment. See William W. Berry III, Response, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 62 (2011); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005). A more developed normative framework could certainly help clarify the Court’s approach. See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 589–92 (2005).

⁵⁹ In capital cases, this inquiry only includes retribution and deterrence, as incapacitation and rehabilitation are not common goals of executions. William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 903 (2010) (arguing against dangerousness as a justification for the death penalty). But see Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1236–37 (2013) (arguing that rehabilitation is relevant to capital cases). Many scholars question whether the death penalty, at least as it is used in the United States, has any deterrent effect at all. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (“[E]xisting evidence for deterrence is surprisingly fragile”). See generally Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that the weight of the evidence shows that capital punishment does not deter murder). But see Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705, 750 (2005) (arguing that executions are morally required if they deter murders). Part of the explanation for this may be the long period of time between the conviction and the execution—typically more than a decade. See generally Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. L. REV. 1, 10, 25 (1995).

⁶⁰ See cases cited *supra* note 45.

III. UNCONSTITUTIONAL PUNISHMENT CATEGORIES

In its Eighth Amendment jurisprudence, the Supreme Court has delineated three groups of cases—capital cases, juvenile life-without-parole cases, and cases that fall outside those two groups. In the first two groups, death and JLWOP, the Court has carved out unconstitutional categories of cases by applying its evolving standards of decency doctrine.

A. *The Death Penalty*

The Court has found six⁶¹ categories of capital sentences to be unconstitutional under the Eighth Amendment.⁶² The Court has often explained that “death is different”⁶³ for two reasons—its severity and irrevocability.⁶⁴

First, the death penalty is unique in its severity.⁶⁵ Taking an individual’s life as punishment is the most serious punishment that the state can impose.⁶⁶

⁶¹ There is arguably a seventh category, insane individuals, but state statutes do not allow the practice in the first place. *Ford v. Wainwright*, 477 U.S. 399, 408 (1986). Nonetheless, the Court has found that the Eighth Amendment categorically bars executing insane offenders in holding that the defendant was entitled to a hearing in the case of *Ford v. Wainwright*. 477 U.S. at 401, 409–10, 418.

⁶² See *supra* notes 7–15 and accompanying text.

⁶³ See *supra* note 49.

⁶⁴ See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) (“[T]he death sentence is unique in its severity and in its irrevocability”); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“There is no question that death as a punishment is unique in its severity and irrevocability.”).

⁶⁵ One could argue that, in some senses, LWOP is more severe than the death penalty because the consequence is the same—death, but without a particular defined end point, and a much lower chance of success on appeal. See, e.g., CESARE BECCARIA, AN ESSAY OF CRIMES AND PUNISHMENT 99–100 (W. C. Little & Co. new ed. 1872) (1764) (arguing that LWOP sentences were harsher than the death penalty); John Stuart Mill, Speech in Favor of Capital Punishment (Apr. 21, 1868), <https://americanliterature.com/author/john-stuart-mill/essay/speech-in-favor-of-capital-punishment> [<https://perma.cc/V6N7-X2HF>] (“What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?”). The Court, however, generally views the death penalty as worse. See, e.g., *Graham v. Florida*, 560 U.S. 48, 89 (2010) (Roberts, C.J., concurring) (“A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment.”).

⁶⁶ See sources cited *supra* note 65.

Second, the death penalty is irrevocable once imposed, unlike other punishments.⁶⁷ The state can release a wrongly incarcerated person but cannot undo an execution.⁶⁸

The first unconstitutional category identified by the Court was mandatory death sentences. In *Woodson v. North Carolina*, the Court held that North Carolina's mandatory death penalty statute violated the Eighth Amendment.⁶⁹ The Court reasoned that because of the severity of a death sentence, each individual had an Eighth Amendment constitutional right⁷⁰ to an individualized sentencing determination.⁷¹

The next unconstitutional death penalty category identified by the Court came in *Coker v. Georgia*, where the Court categorically barred death sentences for the crime of rape.⁷² Informing the Court's application of the evolving standards of decency were both the lack of use of this punishment⁷³ and its finding

⁶⁷ See, e.g., *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (explaining as “death is not reversible,” DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Brennan, J., concurring) (noting that death differs from life imprisonment because of its “finality”).

⁶⁸ See cases cited *supra* note 67.

⁶⁹ *Woodson*, 428 U.S. at 301. The Court also struck down Louisiana's mandatory death penalty statute in a companion case, *Roberts v. Louisiana*. *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

⁷⁰ *Woodson*, 428 U.S. at 305. This decision was one of five decided on the same day reviewing state death penalty statutes passed in response to *Furman v. Georgia*. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (upholding Georgia's death penalty statute); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (upholding Florida's death penalty statute); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas's death penalty statute); *Woodson*, 428 U.S. at 305 (striking down North Carolina's death penalty statute); *Roberts*, 428 U.S. at 336 (striking down Louisiana's death penalty statute).

⁷¹ *Woodson*, 428 U.S. at 302–04. The Court developed this principle further in *Lockett v. Ohio*, barring statutory limits on mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); see also Berry, *supra* note 7, at 20–22 (arguing for an extension of this principle to non-capital, non-JLWOP crimes); William W. Berry III, *Individualized Executions*, 52 U.C. DAVIS L. REV. 1779, 1785 (2019) (arguing for an extension of this principle to execution methods).

⁷² *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁷³ With respect to the objective indicia, Georgia was the only state that permitted a death sentence for the crime of rape of an adult woman. *Id.* at 595–96. The Court also looked at jury verdicts in Georgia, finding that five of sixty-three adult rape cases received the death penalty, meaning that such sentences were unusual for the crime in question. *Id.* at 596–97. At the time that *Furman v. Georgia* was decided, sixteen states had allowed death sentences for rape. *Id.* at 594. Interestingly, Florida, Mississippi, and Tennessee authorized the death penalty for child rape at the time of *Coker*. *Id.* at 595.

that the death penalty was grossly disproportionate⁷⁴ to the crime of rape because the punishment resulted in death while the crime did not.⁷⁵

The Court next applied the evolving standards in assessing the categorical question of when death sentences for accessories to felony murder crimes might be excessive.⁷⁶ In *Enmund v. Florida*, the Court held that a death sentence for a felony murder accomplice violated the Eighth Amendment when the individual did not kill or intend to kill.⁷⁷ Looking at the objective indicia, the Court found that only eight states allowed death sentences for felony murder accomplices without proof of additional aggravating circumstances, and another nine states allowed death sentences for felony murder with proof of additional aggravating circumstances.⁷⁸ Finding that there were no aggravating circumstances in *Enmund*'s case, only eight out of thirty-two death penalty states allowed punishment for his category of felony murder.⁷⁹ As a result, the Court found that the legislative practice "weigh[ed] on the side of rejecting capital punishment for the crime at issue."⁸⁰ With respect to the subjective indicia,

⁷⁴Unlike in later cases, the Court did not specifically refer to the purposes of punishment, but implicitly referenced them in finding that the punishment was disproportionate. *Id.* at 597–99; *see also supra* note 58 (highlighting the connection between proportionality and purposes of punishment).

⁷⁵Chief Justice Burger's dissent, joined by Justice Rehnquist, rejected this idea. *Coker*, 433 U.S. at 611–12 (Burger, C.J., dissenting) ("A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. . . . Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that 'the death penalty . . . is an excessive penalty' for the perpetrator of this heinous offense."). Justice Powell's partial dissent echoed this sentiment. *Id.* at 603 (Powell, J., concurring in part, dissenting in part) ("[T]here is indeed 'extreme variation' in the crime of rape. Some victims are so grievously injured physically or psychologically that life is beyond repair.").

⁷⁶Several recent articles have suggested limiting capital felony murder further under the Eighth Amendment. *See* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1144 (2017) [hereinafter Binder, Fissell & Weisburg, *Capital Punishment*] (arguing for a *mens rea* standard of recklessness in capital felony murder cases); Guyora Binder, Brenner Fissell & Robert Weisberg, *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549, 552 (2018); William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY 605, 612 (2021).

⁷⁷*Enmund v. Florida*, 458 U.S. 782, 801 (1982). *Enmund* was the getaway driver for a home robbery and had no knowledge that his fellow participants would kill the residents. *Id.* at 783–86.

⁷⁸*Id.* at 789–91.

⁷⁹*Id.* at 789, 798.

⁸⁰*Id.* at 793.

the Court held that Enmund's criminal culpability did not rise to the level required by just deserts retribution⁸¹ to warrant a death sentence.⁸²

The Court, however, narrowed the scope of *Enmund* five years later in *Tison v. Arizona*.⁸³ Again considering the Eighth Amendment limits on death sentences for the crime of felony murder, the *Tison* Court assessed whether the death penalty was appropriate for the sons of Gary Tison,⁸⁴ an escaped convict who had brutally murdered a family after carjacking their car in the desert.⁸⁵ The sons participated both in helping Tison break out of prison and in the carjacking.⁸⁶ They were not present, however, when their father killed the family and were unaware that he intended to do so.⁸⁷

Under the evolving standards of decency, the Court examined the objective indicia of states that allowed the death penalty for felony murder.⁸⁸ The Court found that only eleven of the thirty-two capital states prohibited the death penalty in the category of cases of felony murder where the "defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."⁸⁹ This meant that the objective indicia did not contravene the Eighth Amendment.⁹⁰

Similarly, the Court subjectively found that the death sentences imposed on Tison's sons possessed the requisite culpability even though they did not intend to kill.⁹¹ Specifically, the Court modified the rule in *Enmund*, holding in *Tison* that death sentences for felony murders did not violate the Eighth Amendment where the defendant was a major participant in the crime and demonstrated reckless indifference to human life.⁹²

⁸¹ *Id.* at 798–99. Just deserts retribution requires that a punishment be proportionate to the offender's culpability and the harm caused. See ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 4 (2005).

⁸² *Enmund*, 458 U.S. at 801.

⁸³ *Tison v. Arizona*, 481 U.S. 137 (1987).

⁸⁴ For a chilling account of Gary Tison's escape from prison and subsequent crime spree, see generally JAMES W. CLARKE, *LAST RAMPAGE: THE ESCAPE OF GARY TISON* (1988).

⁸⁵ *Tison*, 481 U.S. at 139–41.

⁸⁶ *Id.* at 139–41.

⁸⁷ *Id.* at 140–41. Tison died of exposure in the desert after a police manhunt. *Id.* at 141. His death may have increased the public desire (or at least that of the prosecutor) to seek death sentences for his sons. See CLARKE, *supra* note 84, at 263–66.

⁸⁸ *Tison*, 481 U.S. at 152–55.

⁸⁹ *Id.* at 147, 154.

⁹⁰ *Id.* at 158.

⁹¹ *Id.* For alternative perspectives, see sources cited *supra* note 76.

⁹² *Tison*, 481 U.S. at 158.

In 2002, in *Atkins v. Virginia*, the Court barred the sentencing of the intellectually disabled⁹³ individuals to death.⁹⁴ Applying the objective indicia,⁹⁵ the Court found that thirty states prohibited the execution of intellectually disabled offenders.⁹⁶ With respect to the subjective indicia, the Court in *Atkins* determined that none of the purposes of punishment justified the execution of intellectually disabled offenders.⁹⁷

Three years later, the Court applied similar reasoning in *Roper v. Simmons*,⁹⁸ holding that the Eighth Amendment prohibited death sentences for juvenile offenders.⁹⁹ As in *Atkins*, the application of the majoritarian objective

⁹³ In *Atkins*, the Court used the now disfavored term “mentally retarded” to describe the intellectual disability at issue. *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002).

⁹⁴ *Id.* at 321. *Atkins* reversed *Penry v. Lynaugh*. *Id.*; *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Court unfortunately left the definition of intellectual disability up to the states. *Atkins*, 536 U.S. at 317. This has led to additional litigation, including two cases where the Court has further defined the scope of this category. In *Hall v. Florida*, the Court held that one’s IQ cannot be the only parameter used in assessing intellectual disability. *Hall v. Florida*, 572 U.S. 701, 723 (2014). And in *Moore v. Texas*, the Court held that modern standards had to be used to assess intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

⁹⁵ *Atkins*, 536 U.S. at 313–16. In addition, the Court looked objectively at “the consistency of the direction of change,” noting that sixteen of the states banning execution of intellectually disabled defendants had done so in the prior decade. *Id.* at 314–15. The Court also highlighted the absence of recent legislation allowing the execution of intellectually disabled offenders and the small number—five—of states which have executed intellectual disabled offenders since its decision in *Penry*. *Id.* at 314–16.

⁹⁶ *Id.* at 342–43 (Scalia, J., dissenting). Interestingly, eighteen of the thirty states prohibited the death penalty completely. *Id.* This meant that twenty capital states allowed the execution of intellectually disabled offenders, while eighteen prohibited it. *Id.* Justice Scalia took exception to counting the non-capital states in his dissent. *Id.*

⁹⁷ *Id.* at 318–20 (majority opinion). The purpose of retribution did not justify execution of intellectually disabled offenders, according to the Court, because such offenders by definition did not possess the required culpability. *Id.* at 319. The Court similarly found that exempting the intellectually disabled from the death penalty would have no effect on the ability of the death penalty to deter criminal offenders. *Id.* at 319–20. Interestingly, the Court in *Atkins* did not address the broader question of whether the holding applied to mental illness as well as intellectual disability. For an exploration of possible applications of *Atkins* to mentally ill offenders through the intersection of the Eighth and Fourteenth Amendments, see generally Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009).

⁹⁸ *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

⁹⁹ *Id.* at 578. Like *Atkins* with *Penry*, *Roper* reversed a recent Supreme Court decision, *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the execution of seventeen-year-old offenders did not violate the Eighth Amendment. *Roper*, 543 U.S. at 574–75. *Roper* also expanded the Court’s holding in *Thompson v. Oklahoma* which created a categorical Eighth Amendment rule against executing a fifteen-year-old offender, expanding it to age eighteen. *Id.* at 574; *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

indicia commenced with counting the state laws, and like *Atkins*, thirty states¹⁰⁰ prohibited the execution of juvenile offenders.¹⁰¹

Applying the subjective standards, the Court developed the idea that juveniles were offenders that, by definition, possessed a diminished level of culpability.¹⁰² Specifically, the Court cited the (1) lack of maturity and undeveloped sense of responsibility, (2) the susceptibility of juveniles to outside pressures and negative influences, and (3) the unformed nature of juveniles' character as compared to adults.¹⁰³ In light of the diminished level of culpability, the purposes of punishment, in the Court's view, failed to justify the imposition of juvenile death sentences.¹⁰⁴ Such death sentences failed to achieve the purpose of retribution in light of the diminished culpability.¹⁰⁵ Likewise, the Court concluded that execution of juveniles did not achieve a deterrent effect—offenders with diminished capacity will be unlikely to be susceptible to deterrence.¹⁰⁶ In addition, the Court found no evidence that a juvenile death sentence would add any deterrent value beyond that achieved by a life-without-parole sentence.¹⁰⁷

Three years later, the Court expanded its *Coker* holding in *Kennedy v. Louisiana*, striking down Louisiana's child rape statute under the Eighth Amendment.¹⁰⁸ In applying the majoritarian objective indicia, the Court determined that forty-four states did not allow capital punishment for child rape.¹⁰⁹ With respect to the subjective indicia, the *Kennedy* Court explained that the purposes of punishment did not support a death sentence for the offense of child rape.¹¹⁰

¹⁰⁰ *Roper*, 543 U.S. at 564–65. Justice Scalia's dissent again protested counting the non-capital cases. *Id.* at 609–11 (Scalia, J., dissenting).

¹⁰¹ *Id.* at 564–65 (majority opinion). The objective indicia included the direction of change like in *Atkins* as well as emphasizing the relevance of international standards and practices in determining the meaning of the evolving standards. *Id.* at 575–78 (noting that the United States was the only country in the world that allowed the juvenile death penalty). See generally David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) (exploring the appropriateness of using international law in determining constitutional meaning).

¹⁰² *Roper*, 543 U.S. at 571–73.

¹⁰³ *Id.* at 569–70.

¹⁰⁴ *Id.* at 571–74.

¹⁰⁵ *Id.* at 571.

¹⁰⁶ *Id.* at 571–72.

¹⁰⁷ *Id.* at 572.

¹⁰⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

¹⁰⁹ *Id.* at 423. This number exceeded the number of states in *Atkins* (thirty), *Roper* (thirty), and *Enmund* (forty-two). *Id.* at 425–26.

¹¹⁰ *Id.* at 441–46. Specifically, the Court held that retribution did not justify a penalty of death for a child rape because, as indicated in *Coker*, such a penalty was disproportionate—the sentence involved death while the crime did not. *Id.* at 420, 442–44. With respect to deterrence, the Court concluded that the crime of child rape is underreported, and allowing

B. JLWOP

Beyond the Court's categorical exemptions under the Eighth Amendment in capital cases, the Court has more recently identified three unconstitutional categories of JLWOP sentences. At the heart of these decisions is the understanding that "juveniles are different."¹¹¹

In *Graham v. Florida*, the Court held that JLWOP sentences as punishments for non-homicide crimes violate the Eighth Amendment.¹¹² With respect to the majoritarian objective indicia, the Court in *Graham* recognized that a majority of states permitted JLWOP sentences in non-homicide cases, particularly rape.¹¹³ The Court, however, found that the legislative analysis was less important than the actual sentencing practices with respect to JLWOP in non-homicide cases.¹¹⁴ Because only 109 offenders were serving JLWOP for non-homicide crimes, the Court found a national consensus against JLWOP.¹¹⁵ For the Court, the relationship between the numbers of such sentences as compared to the opportunity for their imposition provided the basis for its analysis.¹¹⁶

As to the subjective indicia, the Court expanded upon its discussion in the *Roper* case concerning the lessened culpability of juvenile offenders.¹¹⁷ In addition, the Court emphasized the diminished culpability of offenders that do not commit homicide.¹¹⁸ The "twice diminished moral culpability" combining the offender (juvenile) and the offense (non-homicide) made JLWOP, a kind of death sentence,¹¹⁹ a disproportionate punishment.¹²⁰ As a result, the Court found that the purpose of retribution does not justify JLWOP in non-homicide cases.¹²¹ Deterrence likewise did not justify JLWOP sentences in non-homicide cases because juveniles are less susceptible to deterrence.¹²² The purposes of

the death penalty as a punishment would only increase the incentive to hide the crime. *Id.* at 444–46.

¹¹¹ *Miller v. Alabama*, 567 U.S. 460, 501 (2012) (Roberts, J., dissenting).

¹¹² *Graham v. Florida*, 560 U.S. 48, 75 (2010). While broader than the unconstitutional death penalty categories of death for rape and child rape, the unconstitutional JLWOP category of non-homicide crimes encompasses both of the unconstitutional death categories.

¹¹³ *Id.* at 62.

¹¹⁴ *Id.* at 62–63.

¹¹⁵ *Id.*

¹¹⁶ *Id.* It is also worth noting that many of the statutes resulted from changes in transfer statutes and the abolition of parole, so that the JLWOP was not necessarily what was intended at the time the statutes were adopted. *Id.* at 66–67.

¹¹⁷ *Id.* at 67–68.

¹¹⁸ *Graham*, 560 U.S. at 69.

¹¹⁹ *Id.* at 69–70; see *supra* note 3 (explaining why LWOP sentences are a kind of death sentence).

¹²⁰ *Graham*, 560 U.S. at 71.

¹²¹ *Id.* at 71–72.

¹²² *Id.* at 72.

incapacitation and rehabilitation also did not justify JLWOP sentences in non-homicide cases.¹²³

Two years later, in *Miller v. Alabama*, the Court followed its approach in *Graham*, again applying an unconstitutional death penalty category to juvenile offenders.¹²⁴ The Court held in *Miller* that the Eighth Amendment prohibited the imposition of mandatory JLWOP sentences.¹²⁵

As to the majoritarian objective indicia of the evolving standards of decency, the Court determined that twenty-nine states allowed mandatory JLWOP sentences.¹²⁶ As in *Graham* (where thirty-seven states allowed the practice at issue), the Court in *Miller* de-emphasized the overall importance of state counting as the prime determinant of the objective inquiry.¹²⁷ Rather, in most cases, the mandatory JLWOP sentences resulted from a confluence of two statutes—one that provided for juveniles to be tried as adults in some situations, and one that imposed the mandatory JLWOP sentence.¹²⁸

Because states had not considered these together in one determination about the propriety of mandatory JLWOP, the state counting did not create dispositive proof of consensus.¹²⁹ In light of the Court's concerns related to the denial of individualized sentencing rights, the Court did not further address whether a consensus existed, but largely presumed its presence in its analysis.¹³⁰

With respect to its typical subjective inquiry, the Court recounted its application of the purposes of punishment in *Graham* and suggested that the same conclusions applied in *Miller*.¹³¹ Further, the Court focused on the *Woodson* precedent in emphasizing the need for individualized sentencing determinations.¹³²

C. Non-Capital, Non-JLWOP Crimes

In non-capital, non-JLWOP cases, the Court has not considered constitutional challenges categorically like it does under the evolving standards of decency.¹³³ Instead, the Court examines cases individually as as-applied challenges under a

¹²³ *Id.* at 72–74.

¹²⁴ *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

¹²⁵ *Id.*

¹²⁶ *Id.* at 483–84.

¹²⁷ *Id.* at 485–87.

¹²⁸ *Id.* at 485–87.

¹²⁹ *Id.* at 486–87.

¹³⁰ *See Miller*, 567 U.S. at 482–88.

¹³¹ *Id.* at 472–73.

¹³² *Id.* at 482–83.

¹³³ *See generally* Barkow, *supra* note 17 (describing the “two-track approach” to sentencing). *See also* Berman, *supra* note 17, at 861 (distinguishing between capital and non-capital sentencing systems).

gross disproportionality standard.¹³⁴ As explored below, the Court has rejected most of these challenges in the modern era.¹³⁵

In *Rummel v. Estelle*, the Court upheld a mandatory life-with-parole sentence under a Texas recidivist statute despite the defendant's crimes involving a total of \$230 stolen over three offenses.¹³⁶ The crime at issue involved false pretenses of \$120.75, but the Court found that the life sentence was not grossly disproportionate to the crime, noting that it was likely that the defendant would receive parole in twelve years.¹³⁷

Similarly, in *Hutto v. Davis*, the Court upheld a sentence of forty years and a \$20,000 fine under Virginia law for the possession with intent to distribute and the distribution of nine ounces of marijuana.¹³⁸ Relying on *Rummel*, the Court held that Hutto's sentence did not violate the Eighth Amendment and was not grossly disproportionate to his crime.¹³⁹

In *Solem v. Helm*, the Court attempted to broaden the narrow disproportionality inquiry under the Eighth Amendment in finding that a punishment of life without parole under South Dakota's recidivist statute for the crime of uttering a no-account check for \$100 was unconstitutional.¹⁴⁰ The Court's analysis began by emphasizing the importance of proportionality as a core principle of the Eighth Amendment.¹⁴¹ Consistent with the differentness principle, the Court nonetheless emphasized the deference to be accorded to states in non-capital sentencing.¹⁴²

¹³⁴ See, e.g., *Ewing v. California*, 538 U.S. 11, 21 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 962–63 (1991); *Solem v. Helm*, 463 U.S. 277, 283–84 (1983); *Hutto v. Davis*, 454 U.S. 370, 372–73 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

¹³⁵ See, e.g., *Ewing*, 538 U.S. at 30–31; *Lockyer*, 538 U.S. at 77; *Harmelin*, 501 U.S. at 996; *Hutto*, 454 U.S. at 374–75; *Rummel*, 445 U.S. at 285. But see *Solem*, 463 U.S. at 290, 303.

¹³⁶ *Rummel*, 445 U.S. at 265–66, 285.

¹³⁷ *Id.* at 269, 273, 285.

¹³⁸ *Hutto*, 454 U.S. at 370–72.

¹³⁹ *Id.* at 373–75. Justice Powell concurred in the judgment, despite finding Hutto's sentence to be disproportionate, because, in his view, *Rummel* controlled the outcome. *Id.* at 375 (Powell, J., concurring).

¹⁴⁰ *Solem*, 463 U.S. at 296–97, 302–03. The defendant had six prior felony convictions. *Id.* at 279–80.

¹⁴¹ *Id.* at 284–86, 290 (“In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”).

¹⁴² *Id.* at 290 (“Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.”).

Applying these concepts,¹⁴³ the Court held that Helm's sentence violated the Eighth Amendment because it was a far less severe crime than others for which the punishment—the most serious other than death—had been applied.¹⁴⁴ Even with the recidivist premium, the Court found that the punishment of life without parole for passing a bad check was grossly disproportionate.¹⁴⁵

Less than a decade later, however, the Court substantially narrowed its decision in *Solem*, moving back toward the trajectory of *Rummel*. In *Harmelin v. Michigan*, the Court upheld a mandatory LWOP sentence for a first time offense of possession of 672 grams of cocaine.¹⁴⁶ In a 5–4 decision, the Justices in the majority splintered on the reasoning for the decision.¹⁴⁷ In a clear attempt to narrow *Solem*, Justice Scalia, joined by Justice Rehnquist, held that the Eighth Amendment did not contain a proportionality guarantee, and therefore Harmelin's sentence could not be unconstitutionally disproportionate.¹⁴⁸ The controlling plurality—Justices Kennedy, Souter, and O'Connor—found that the Eighth Amendment had a proportionality guarantee, but that Harmelin's sentence was nonetheless proportionate in light of the deference accorded to states in non-capital sentencing.¹⁴⁹ Justice Kennedy determined that the *Solem* three-part analysis remained useful, but a reviewing court should consider the second and third factors—that is, the intra- and inter-jurisdictional analyses—only if “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”¹⁵⁰ The import of this framing has

¹⁴³ Specifically, the *Solem* Court articulated a three-part test to assess the proportionality of a punishment:

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 292.

¹⁴⁴ *Id.* at 296–303; *see supra* note 3.

¹⁴⁵ *Solem*, 463 U.S. at 296–303.

¹⁴⁶ *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991).

¹⁴⁷ *Id.* at 960.

¹⁴⁸ *Id.* at 960, 965, 996–96.

¹⁴⁹ *Id.* at 996–1001, 1008–09.

¹⁵⁰ *Id.* at 1005. As summarized in the Syllabus, the plurality described the tools for the *Solem* analysis as including the following ideas:

First, the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations. Second, there are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation, and the Eighth Amendment does not mandate adoption of any one such scheme. Third, marked divergences both in sentencing theories and the length

been a return to *Rummel*, where there is a strong presumption that non-capital punishments are constitutional, no matter how disproportionate.¹⁵¹

Two cases in 2003 underscored this presumption of constitutionality. In *Lockyer v. Andrade*, the Court affirmed two consecutive sentences of twenty-five years to life for stealing approximately \$150 of videotapes where the defendant had three prior felony convictions.¹⁵² Similarly, in *Ewing v. California*, the Court affirmed a sentence of twenty-five years to life for stealing approximately \$1,200 of golf clubs, where the defendant had four prior felony convictions.¹⁵³ The Court upheld these three strikes laws in finding that neither sentence was grossly disproportionate under the Eighth Amendment.¹⁵⁴

IV. THE CASE FOR COMPLETING THE CATEGORIES

In assessing whether it makes sense to extend the unconstitutional categories of death sentences to JLWOP, a comparison of the two punishments is instructive. Interestingly, the Court has not engaged in any such comparison other than to suggest that both are “different” punishments for purposes of the Eighth Amendment.¹⁵⁵

A. *The Relative Sameness of the Death Penalty and JLWOP*

While there are important differences between JLWOP and the death penalty, a close examination of those differences suggests that they are not constitutionally meaningful. In other words, JLWOP is different than death, but

of prescribed prison terms are the inevitable, often beneficial, result of the federal structure, and differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of terms for particular crimes. Fourth, proportionality review by federal courts should be informed by objective factors to the maximum extent possible, and the relative lack of objective standards concerning length, as opposed to type, of sentence has resulted in few successful proportionality challenges outside the capital punishment context. Finally, the Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime.

Id. at 959 (citing *id.* at 996–1001 (Kennedy, J., concurring)).

¹⁵¹ *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). For an argument that *Harmelin* was wrongly decided, see generally Berry, *supra* note 25.

¹⁵² *Lockyer v. Andrade*, 538 U.S. 63, 66–67, 77 (2003).

¹⁵³ *Ewing v. California*, 538 U.S. 11, 28, 30–31 (2003).

¹⁵⁴ *Id.* at 30–31; *Lockyer*, 538 U.S. at 77. Three strikes laws punish recidivists by imposing a life sentence for a third felony conviction. See *Ewing*, 538 U.S. at 14–17.

¹⁵⁵ *Miller v. Alabama*, 567 U.S. 460, 481 (2012) (“So if (as *Harmelin* recognized) ‘death is different,’ children are different too.”).

not so different that the same unconstitutional categories that apply to the death penalty should be different from those that apply to JLWOP.

1. *Why JLWOP is Different from Death*

What is “different”—the uniqueness that entitles a punishment to heightened review and an unconstitutional category—is actually different when considering the death penalty and JLWOP under the Eighth Amendment. With respect to the death penalty, it is the punishment that is constitutionally different. With respect to JLWOP, it is the kind of defendant—a juvenile—that is different.¹⁵⁶

The Court has ignored this difference in the kind of differentness (punishment as opposed to kind of defendant) in its JLWOP cases.¹⁵⁷ The decisions treat JLWOP functionally as similar to the death penalty.¹⁵⁸ JLWOP, like the death penalty, is a kind of punishment for which some categories of cases are unconstitutional, despite the defendant (and not the punishment) being the source of the constitutional differentness.¹⁵⁹

The differentness of death does suggest that it is distinguishable from JLWOP. The Court’s cases drew a bright line between death sentences and life sentences for several decades before its decision in *Graham* that made JLWOP sentences also different.¹⁶⁰

Unlike JLWOP, a death sentence is irrevocable. Killing an inmate is an irreversible act. A discovery of DNA evidence that exonerates a defendant is useful where the individual is serving a JLWOP sentence, but of no use in a capital case once the state has carried out an execution.

A death sentence is also more severe than a JLWOP sentence. A death sentence involves the state killing the inmate, while a JLWOP sentence does not involve killing. A JLWOP sentence also does not mandate the end date of one’s life like a death sentence does.

The differentness of juveniles is, well, different. The reason that JLWOP sentences give rise to unconstitutional categories relates to the diminished level of culpability that juveniles exhibit.¹⁶¹ The constitutional objection in proscribed categories of JLWOP reflects a view that children deserve less punishment than adults, that children are less likely to be deterred than adults,

¹⁵⁶ At the time, some read *Graham* as being more about LWOP than juveniles. See, e.g., William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1112–13 (2010).

¹⁵⁷ See discussion *supra* Part III.B.

¹⁵⁸ See discussion *supra* Part III.

¹⁵⁹ See discussion *supra* Part III.

¹⁶⁰ *Graham v. Florida*, 560 U.S. 48, 102–03 (2010) (Thomas, J., dissenting). See generally Barkow, *supra* note 17.

¹⁶¹ See discussion *supra* Part III.B.

that children are less dangerous than adults, and that children have more time to be rehabilitated than adults.¹⁶²

The seriousness of an LWOP sentence, to be sure, plays a part in the analysis. Dying in state custody is its own kind of death sentence. But the language of the Court in *Roper*, *Graham*, and *Miller* makes clear that it is the characteristics of the child that makes JLWOP cases “different.”¹⁶³

2. Why JLWOP Is Like Death

On the whole, these differences between JLWOP and the death penalty are differences of degree, not of category. While a JLWOP sentence is not irrevocable in the same way that an execution is, the consequence of serving a JLWOP sentence is irrevocable in its own way. Serving the first decade of a JLWOP sentence costs an inmate his youth, and the second decade wipes away young adulthood. Releasing a juvenile inmate after any significant amount of time in an adult prison does not allow him to regain the youth lost behind bars.

Brett Jones, who lost his Supreme Court case last term, provides an obvious example of this irrevocability.¹⁶⁴ Even if Jones, age thirty-one at the time of the Court’s decision, had prevailed in his case, he still has spent more of his life incarcerated than free, having committed his crime at age fifteen.¹⁶⁵ It is impossible to recapture what he has lost as a result of his incarceration. His juvenile status at the time of the punishment led to the irrevocability of his sentence.

The severity of punishment difference between death and JLWOP also remains a matter of degree, with the severity of JLWOP being far closer to death than other punishments. The severity operates in two directions for JLWOP inmates. The sentence is severe, as mentioned, because it causes the individual to lose his youth. But it also holds only the promise of dying in a cage with no real hope of release.¹⁶⁶ As such, while the death penalty is the most severe, JLWOP seems severe enough to warrant unconstitutional categories of punishment like the death penalty.

At a macro level, a decision to sentence a defendant to JLWOP is reaching the same kind of conclusion as a death sentence—the defendant deserves to die in the custody of the state and does not possess a redeemable quality that will permit him to ever return to society. The consequence of the crime is thus death.

¹⁶² See discussion *supra* Part III.B.

¹⁶³ See discussion *supra* Part III.

¹⁶⁴ *Jones v. Mississippi*, 141 S. Ct. 1307, 1311–12 (2021).

¹⁶⁵ See *id.* at 1341 (Sotomayor, J., dissenting).

¹⁶⁶ Despite Justice Kavanaugh’s suggestions in *Jones* to the contrary, both compassionate release and clemency remain remote possibilities for most inmates serving JLWOP sentences. See *id.* at 1323 (majority opinion); Rovner, *supra* note 4. Indeed, legislative reform may be a JLWOP inmate’s best hope. See Rovner, *supra* note 4.

The time and circumstances of death may not be the same, but the remainder of life will be spent in prison in both cases.

Practically, the outcome may be the same for those sentenced to death and those sentenced to JLWOP. The leading cause of death for death row inmates is old age and illness, not execution.¹⁶⁷

With respect to the differentness of children, the diminished culpability that gives rise to the heightened Eighth Amendment scrutiny is also a part of a number of the unconstitutional death penalty categories.¹⁶⁸ Certainly, the proscription against execution of juveniles and intellectually disabled individuals reflects the diminished culpability of those two categories of defendants.¹⁶⁹ And the limitations on the death penalty in rape cases similarly indicate a view that the level of culpability and the extent of harm caused do not deserve death.¹⁷⁰

3. *Why the Similarities Outweigh the Differences*

When the Court assesses whether to differentiate between death penalty cases and JLWOP cases in its application of the Eighth Amendment, it should note that the similarities between the punishments outweigh their differences. First, the irrevocable aspects of both punishments warrant the same kind of constitutional scrutiny. The punishments are equally devastating to the defendants that receive them, with the practical consequence—death in prison—being the same in most cases.

The same arguments also apply to the characteristic of severity. JLWOP sentences mirror the severity of death sentences, especially those where the state never executes the individual sentenced to death. The juvenile characteristics of the JLWOP sentence also make that sentence especially severe. The state imposition of a death-in-prison JLWOP sentence on a child adds a level of severe impact that is more pronounced than that of the same sentence imposed upon an adult.

Further, JLWOP is demonstrably different than any other punishment besides death. This is because, as with a death sentence, there is no return from state custody. All other punishments besides LWOP and the death penalty result in a return from incarceration to freedom.

The Court's decisions support this reading of JLWOP and the death penalty as similar punishments for purposes of developing categories of unconstitutional punishments. In *Graham*, the Court proscribed JLWOP sentences in non-homicide cases as a direct extension of its decisions in capital cases barring

¹⁶⁷ Adam Liptak, *Too Old to be Executed? Justices Consider an Aging Death Row*, N.Y. TIMES, Mar. 6, 2018, at A19, A19.

¹⁶⁸ See discussion *supra* Part III.

¹⁶⁹ See *Graham v. Florida*, 560 U.S. 48, 69 (2010); *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002).

¹⁷⁰ See *Graham*, 560 U.S. at 69.

death sentences in rape and child rape cases.¹⁷¹ The JLWOP unconstitutional category identified in *Graham* was, if anything, broader than the analogues from the death penalty, which left open the possibility for death sentences in some non-homicide cases as opposed to foreclosing JLWOP sentences in all non-homicide cases.¹⁷²

And while the Court's decision in *Jones* did not expand *Miller* to add a fact-finding requirement, it nonetheless did not narrow *Miller* either.¹⁷³ The scope of the unconstitutional category for JLWOP is the same as the unconstitutional category for the death penalty—the Eighth Amendment proscribes mandatory sentences in both cases.¹⁷⁴ The decision in *Miller* reflected this—indicating that the decision was a complete extension of the Court's decision in *Roper*, not a partial one.¹⁷⁵

The Court's description of JLWOP differentness also does not differentiate between the death penalty and JLWOP for constitutional purposes. As the Court explained, if death is different, juveniles are different too.¹⁷⁶ The lack of differentiation between JLWOP and the death penalty under the Eighth Amendment in the Court's cases suggests that the two sets of constitutional categories should be the same. The fact that they are not does not reflect a doctrinal differentiation; rather, it reflects an incomplete replication. The Court, then, presumably just needs cases from which it can complete the evolving standards doctrine by adding the missing unconstitutional punishment categories of JLWOP. The next section explains how that might work in practice.

B. *The Application of the Death Penalty Categories to JLWOP*

In applying the first part of the evolving-standards-of-decency doctrine to JLWOP, any new unconstitutional JLWOP category can arguably satisfy the objective indicia. This is because thirty-four states either bar JLWOP or have no one serving JLWOP sentences.¹⁷⁷ JLWOP thus has approached the threshold number of states that the Court accepted in *Atkins* and *Roper* in identifying unconstitutional categories of death sentences.¹⁷⁸ In other words, the objective indicia reflect a national consensus against the use of JLWOP generally.¹⁷⁹ The

¹⁷¹ *Id.* at 69–75.

¹⁷² *Kennedy v. Louisiana*, 554 U.S. 407, 442, 446–47 (2008); *Graham*, 560 U.S. at 79.

¹⁷³ *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021).

¹⁷⁴ *Miller v. Alabama*, 567 U.S. 460, 481 (2012).

¹⁷⁵ *Id.* at 483.

¹⁷⁶ *Id.* at 481.

¹⁷⁷ *Rovner*, *supra* note 4.

¹⁷⁸ *See* discussion *supra* Part III.

¹⁷⁹ The Court eschewed the state counting in *Miller*, in part because *Miller* lay at the interstices of the *Woodson* line of cases and the *Graham-Roper* line of cases. *Miller*, 567 U.S. at 483–87.

analysis of whether particular kinds of JLWOP sentences deserve their own unconstitutional categories under the evolving standards of decency will thus be a measure of the subjective indicia—whether the kind of JLWOP sentence in question satisfies one or more of the purposes of punishment.

As explained, there are six types of categorical limits to death sentences—no mandatory sentences, no juvenile offenders, no intellectually disabled offenders, no rape offenses, no child rape offenses, and no felony murders for non-major participants who did not demonstrate a reckless indifference to human life.¹⁸⁰ As JLWOP is its own kind of death sentence, it follows that all six types of capital categorical exceptions would also apply to JLWOP cases.

The Court has already created categorical exceptions for three of the categories—the Eighth Amendment bars non-homicide JLWOP cases (and thus rape and child rape cases) and mandatory JLWOP sentences.¹⁸¹ The three remaining categories are felony murder cases, intellectually disabled offenders, and juvenile offenders.

1. *Categorical Limits on JLWOP for Felony Murder*

Felony murder offers a clear application—the Court should create a categorical exception under the Eighth Amendment barring JLWOP sentences for felony murders where the juvenile offender is not a major participant in the crime and does not exhibit reckless indifference to human life.¹⁸² This would be a straightforward application of *Tison v. Arizona*.¹⁸³

The Court’s implicit reasoning in *Tison* and its predecessor *Enmund* relates to the absence of a *mens rea* requirement with respect to the homicide in felony murder cases.¹⁸⁴ Felony murder cases only require the intent to commit the

¹⁸⁰ See *supra* Part III.A. Technically, the proscription against execution of insane individuals is a seventh category, but juvenile defendants can use that defense without a constitutional categorical exemption. See, e.g., *M’Naghten’s Case* (1843) 8 Eng. Rep. 718 (HL) (establishing insanity as a defense to homicide).

¹⁸¹ *Graham v. Florida*, 560 U.S. 48, 69 (2010); *Miller*, 567 U.S. at 465.

¹⁸² Justice Breyer’s concurrence in *Miller* makes this point with respect to Kuntrell Jackson who received JLWOP for a felony murder in *Miller*’s companion case, *Jackson v. Hobbs*. See *Miller*, 567 U.S. at 489–91 (Breyer, J., concurring) (“Given *Graham*’s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim.”).

¹⁸³ *Tison* requires that an individual be a major participant in the crime and exhibit a reckless indifference to human life to comply with the Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). The problem, of course, is that the *Tison* standard is too broad—not many felony murder cases would fall in this category resulting in the case that would lead to the adoption of the categorical exemption. The possibilities would be more promising under the *Enmund* standard, which bars the execution of individuals that did not kill or intend to kill. *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Miller*, 567 U.S. at 489–91 (Breyer, J., concurring); see also sources cited *supra* note 76.

¹⁸⁴ *Tison*, 481 U.S. at 158; *Enmund*, 458 U.S. at 801.

felony related to the death, not the actual intent to commit homicide.¹⁸⁵ Because death is a “different” punishment, ordinary felony murders should not warrant the death penalty. Rather, only felony murders where the defendant plays a major role in the crime and exhibits reckless indifference to human life are eligible for death.¹⁸⁶

The logical extension of this unconstitutional death penalty category is to JLWOP. It would serve the similar purpose of differentiating high culpability felony murderers from lower culpability felony murderers before imposing a kind of death sentence on them.

Under the evolving standards of decency test, the subjective indicia would support an extension of *Tison*. The purpose of retribution would not be met by imposing JLWOP on a child who is not a major participant in a felony murder where the child does not exhibit a reckless indifference to human life. The purpose of deterrence would similarly not be served because having a secondary role without exhibiting reckless indifference would not chill similar behavior by other children because the behavior is not that culpable to begin with on the part of the child. Likewise, a child that was not a major participant is not particularly likely to be dangerous enough to warrant a LWOP sentence. And a child who is not a major participant in a felony murder likely does not possess the irreparable corruption that would make rehabilitation impossible.

Separating JLWOP felony murder cases on the basis of culpability by extending the *Tison* test would dovetail with the larger idea that the reason that JLWOP cases deserve unconstitutional categories is because they involve children. Children who commit felony murders that do not meet the *Tison* standard then have doubly diminished culpability. This would suggest that JLWOP felony murders that fail to satisfy the *Tison* standard deserve an unconstitutional carve out.

An even better approach would be to read *Tison* as an outlier and reinstate an *Enmund* standard in JLWOP felony murder cases.¹⁸⁷ This would create an unconstitutional category of felony murder cases proscribing JLWOP where the child did not kill or intend to kill.¹⁸⁸ Another possible approach that has been suggested in the capital context would be to require a reckless *mens rea* as a prerequisite to imposing JLWOP sentences in felony murder cases.¹⁸⁹

Both of these standards would further heighten the culpability requirement needed to impose a JLWOP sentence. This would make them logical extensions of the Court’s conception of juvenile differentness.

¹⁸⁵ *Tison*, 481 U.S. at 159 (Brennan, J., dissenting).

¹⁸⁶ *Id.* at 158.

¹⁸⁷ Berry, *supra* note 76, at 640.

¹⁸⁸ See discussion *supra* Part III.

¹⁸⁹ See Binder, Fissell & Weisburg, *Capital Punishment*, *supra* note 76, at 1206.

2. *Categorical Limits on JLWOP for Intellectually Disabled Defendants*

The Court should also expand the Eighth Amendment to proscribe LWOP sentences for intellectually disabled juveniles. The combined mitigation of age and intellectual disability should make such sentences unconstitutional.¹⁹⁰ In other words, the Court would apply *Atkins v. Virginia* to JLWOP cases.¹⁹¹

With respect to the subjective indicia of the evolving standards of decency, the purposes of punishment would not support imposing a JLWOP sentence on an intellectually disabled individual. Certainly, an intellectually disabled child who commits a homicide is unlikely to deserve JLWOP in the same way that an adult individual who has no intellectual disability arguably might.

Similarly, a JLWOP sentence is unlikely to deter an intellectually disabled child from committing a homicide, as the collective diminished culpability and lack of impulse control would not be influenced by other punishments. Intellectually disabled children also do not seem so dangerous that incarcerating them until death seems warranted or necessary. Finally, it is difficult to say that intellectually disabled children have no potential for rehabilitation such that JLWOP is a justified punishment.

What makes JLWOP so objectionable for intellectually disabled children is the doubly diminished level of culpability. The Court has been clear in its view, over several cases, that death sentences for intellectually disabled individuals are categorically unconstitutional because of the diminished culpability of such individuals.¹⁹² The Court has similarly emphasized, in multiple cases, the diminished culpability of juveniles.¹⁹³

Collectively, then, intellectually disabled children have two measures of lowered culpability. This means that categorically excluding them from JLWOP both makes sense and fits with the justifications for the Court's other unconstitutional categories.

3. *Categorical Limits on Juveniles to Eliminate JLWOP*

The final unconstitutional Eighth Amendment category of death sentences is the execution of juveniles. Applying the final category—juveniles—to JLWOP would mean abolishing JLWOP altogether.

¹⁹⁰ The problem here is the lack of clear definition of intellectual disability. *See* *Hall v. Florida*, 572 U.S. 701, 704 (2014) (requiring that the intellectual disability determination be more than just IQ); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (requiring that the intellectual disability determination apply modern definitional approaches).

¹⁹¹ *See* *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002).

¹⁹² *See id.* at 307; *Hall*, 572 U.S. at 709; *Ford v. Wainwright*, 477 U.S. 399, 417 (1986).

¹⁹³ *See* *Graham v. Florida*, 560 U.S. 48, 69 (2010); *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005).

This step might be more of a doctrinal extension than merely doctrinal completion, but a basic application of the evolving standards of decency suggests that the Court should strongly consider holding JLWOP as an unconstitutional punishment in all circumstances under the Eighth Amendment.¹⁹⁴

As discussed, the objective indicia have reached the same levels as in *Atkins* and *Roper*, with thirty states having either abolished JLWOP or having no one serving JLWOP sentences.¹⁹⁵ The direction of change also supports such an inference, with many of the thirty states banning JLWOP in the decade since the Court decided *Miller*.¹⁹⁶ And international opinion reflects a strong consensus against JLWOP—the United States is the only country in the world that allows the imposition of JLWOP sentences.¹⁹⁷

The subjective indicia also suggest that the purposes of punishment do not support JLWOP sentences. The long emphasized diminished culpability of children indicates that no children deserve JLWOP, and that it is an excessive punishment for children. The diminished culpability and lack of impulse control of juveniles makes deterrence an unlikely justification for JLWOP sentences. The diminished culpability of juveniles also makes dangerousness determinations suspect. It is impossible to determine prior to adulthood whether someone will be so dangerous to justify eliminating the possibility of release. And the youth of juveniles provides a greater opportunity for rehabilitation both in terms of time and capacity for individual development, such that a decision to forego rehabilitation by choosing JLWOP is not logical.

V. NEW COURT, NEW CATEGORIES?

Beyond the possible application of unconstitutional death penalty categories to JLWOP is the question of whether other possible unconstitutional punishment categories exist outside of JLWOP and the death penalty. It is worth noting that the likelihood of the Court adopting such categorical limitations in the near future is remote. The evolving standards decisions beginning with *Atkins* in 2002 were almost all 5–4 decisions.¹⁹⁸ With the replacement of Justice Kennedy

¹⁹⁴ There are certainly good reasons for getting rid of LWOP sentences altogether. See generally 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 (2015).

¹⁹⁵ *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) (eighteen states banned the death penalty for the mentally disabled); *Roper*, 543 U.S. at 564–65 (thirty states banned the death penalty for juveniles).

¹⁹⁶ *Roper*, 543 U.S. at 566.

¹⁹⁷ See Rovner, *supra* note 4; *Graham*, 560 U.S. at 80–81.

¹⁹⁸ Chief Justice Roberts joined the majority in *Graham* to make it 6–3. *Graham*, 560 U.S. at 86 (Roberts, C.J., concurring). In that case, though, Roberts's vote in *Graham* was not in favor of categorical expansion, but in favor of finding *Graham*'s JLWOP sentence unconstitutional as applied. *Id.*

with Justice Kavanaugh, and the replacement of Justice Ginsburg with Justice Barrett, there are likely only three votes (four with Roberts) on the Court in favor of categorical expansions of the Eighth Amendment beyond JLWOP and the death penalty. To the extent that *Jones v. Mississippi* provided a litmus test, the Court decided the case 6–3 against expanding the Eighth Amendment with respect to JLWOP cases.¹⁹⁹ So, for the time being, new categorical Eighth Amendment exceptions are probably not happening.²⁰⁰

Even so, a close examination of criminal sentences suggests that disproportionate sentences exist throughout the range of available punishments, not just with respect to JLWOP and the death penalty. Whether the Court chooses to use categorical exceptions as in the past or moves to individual as-applied challenges, the Court should be more open to striking down excessive punishments rather than blindly deferring to legislatures and state courts.

As explored previously, there are two categories of differentness in the Court’s jurisprudence—the death penalty and juveniles.²⁰¹ The first is a category of sentence; the second is a category of defendant. It follows that there might be other categories of different sentences and other categories of different defendants. This Article concludes by making the case that both exist, and there should be unconstitutional categories beyond the death penalty and JLWOP.

A. *Different Sentences*

Based on the Court’s Eighth Amendment jurisprudence, there exist two logical sentences for expansion of the concept of differentness—life-without-parole sentences and mandatory sentences. The Court’s JLWOP cases—*Graham*, *Miller*, *Montgomery*, and *Jones* all emphasize the severe nature of LWOP.²⁰² And the Court’s decisions in *Woodson*, *Roberts*, *Miller*, and *Montgomery* all emphasize the importance of individualized sentencing consideration.²⁰³

1. *LWOP*

LWOP sentences may not be as “different” as death sentences, but they are different in the same way—being unique in their severity and irrevocability.²⁰⁴ LWOP sentences are the most severe sentence other than the death penalty, and in many ways constitute their own kind of death sentence.²⁰⁵ The decision that

¹⁹⁹ *Jones v. Mississippi*, 141 S. Ct. 1307, 1310–11 (2021).

²⁰⁰ See generally THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020).

²⁰¹ See discussion *supra* notes 156–63.

²⁰² See discussion *supra* Part III.B.

²⁰³ See discussion *supra* Part III; sources cited *supra* note 71.

²⁰⁴ See Berry, *supra* note 156, at 1112.

²⁰⁵ See sources cited *supra* note 3.

an offender will never rejoin society and will die in prison is a serious determination with an inescapable consequence.

LWOP sentences are also irrevocable in that they offer no further review of the life sentence after a court imposes them. While capital cases seem to receive endless attention and renewed consideration, often up until the moment of execution, LWOP sentences rarely receive any significant review or scrutiny on appeal.²⁰⁶ While death sentences are overturned at an alarming rate,²⁰⁷ LWOP sentences are rarely overturned despite the possibility of similar errors.²⁰⁸

In addition to their severity and permanence, LWOP sentences also deserve unconstitutional categorization because, more than other sentences, they are likely to be disproportionate punishments. This penchant for disproportionality stems from three different sources—the abolition of parole, recidivist premiums, and capital cases.

As part of the penal populism movement²⁰⁹ of the 1970s, 1980s, and 1990s, many states and the federal government abolished parole.²¹⁰ The effect of this move towards “truth-in-sentencing” was a reshaping of the consequence of a life sentence.²¹¹ Prior to the abolition of parole, a life sentence resulted in fifteen years in prison with the possibility of parole, meaning that many of those serving life sentences were released in fifteen years.²¹² State legislatures adopted statutes with life sentences with the presumption that offenders would serve fifteen to twenty years in most cases.²¹³ The abolition of parole converted these sentences into LWOP sentences, injecting a more severe punishment into the sentencing calculus for the same crime.²¹⁴ The consequence thus has been individuals serving LWOP sentences for crimes never designed to impose that

²⁰⁶ Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1853 (2006). Some inmates prefer a death sentence to LWOP. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.143 (1998) (citing cases where inmates preferred death sentences to terms of life in prison); see also Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855–61 (1987); Berman, *supra* note 133, at 221.

²⁰⁷ This is unlike capital cases, where the reversal rate is almost seventy percent. See Gelman, Liebman, West & Kiss, *supra* note 32, at 260.

²⁰⁸ Note, *supra* note 206, at 1853.

²⁰⁹ For a thorough discussion of the move from penal welfarism to penal populism, see generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

²¹⁰ *Life Without Parole*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/sentencing-alternatives/life-without-parole> [<https://perma.cc/9FXU-HFBG>]; Berry, *supra* note 194, at 1052–56.

²¹¹ See Berry, *supra* note 194, at 1055–56.

²¹² See Note, *supra* note 206, at 1839; Berry, *supra* note 194, at 1055–56.

²¹³ Berry, *supra* note 194, at 1060.

²¹⁴ *Id.*

level of punishment.²¹⁵ This means that a significant number of individuals serving LWOP crimes are doing so for nonviolent crimes.²¹⁶

Similarly, the movement towards penal populist, tough-on-crime regimes led to the adoption of harsh recidivist punishment schemes,²¹⁷ imposing significant premiums on sentences for repeat offenders.²¹⁸ These schemes allowed states and the federal government to impose LWOP sentences on individuals based on the number of crimes committed, irrespective of their severity.²¹⁹ As such, many disproportionate punishments have been imposed.²²⁰

The now-advisory Federal Sentencing Guidelines impose a number of LWOP sentences, even for nonviolent offenders, based on prior convictions.²²¹ State crimes also impose life sentences for repeat offenders, with schemes like three strikes laws.²²² As indicated above, where states have abolished parole, these recidivist premiums can also result in LWOP sentences for individuals that have not committed serious homicides.²²³

Finally, the death penalty is responsible, at least partially, for the increase in LWOP sentences over the past three decades. Some of the states with the highest LWOP populations are abolitionist states that choose LWOP sentences as a substitute for the death penalty.²²⁴ As juries have become increasingly skeptical of the death penalty in the past two decades,²²⁵ LWOP cases have grown significantly, with over 60,000 people currently serving LWOP sentences.²²⁶

The practical consequence for sentencing juries in capital cases is that LWOP becomes the default alternative to a death sentence. Some jurisdictions make LWOP a mandatory alternative,²²⁷ but even where state statutes allow life with parole as a sentencing option, juries are likely to fixate on death versus no death as the sentencing decision.²²⁸ The jury is less likely to wrestle significantly

²¹⁵ *Id.*

²¹⁶ MAUER, KING & YOUNG, *supra* note 3, at 1–2.

²¹⁷ Many have questioned whether a recidivist premium amounts to double punishment; others have tried to find justifications for it. *See* RICHARD S. FRASE & JULIAN V. ROBERTS, PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS 19 (2019).

²¹⁸ MICHAEL TONRY, SENTENCING MATTERS 4 (1996).

²¹⁹ *Id.*

²²⁰ *See* FRASE & ROBERTS, *supra* note 217, at 2. Most of the Court's gross disproportionality cases fall in this category. *See* cases cited *supra* note 24.

²²¹ *See* Berry, *supra* note 194, at 1063–64.

²²² *See* Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 89–94 (2001); JENNIFER E. WALSH, THREE STRIKES LAWS, at xv (2007).

²²³ *See* MAUER, KING & YOUNG, *supra* note 3, at 1–2.

²²⁴ *See id.* at 5–6.

²²⁵ *See* Note, *supra* note 206, at 1846.

²²⁶ *See* MAUER, KING & YOUNG, *supra* note 3, at 3.

²²⁷ *See* Berry, *supra* note 194, at 1067.

²²⁸ *See* Note, *supra* note 206, at 1844–45.

over the decision between LWOP and life with parole because neither is a death sentence.²²⁹ This is particularly unfortunate because the consequence of a death sentence and an LWOP sentence will be identical in many jurisdiction—death by natural causes in prison.²³⁰

2. Mandatory Sentences

The Court's decisions in *Woodson* and *Miller* suggest that mandatory sentences might warrant additional unconstitutional categories.²³¹ While the Court's decisions cabin the analysis first to capital cases²³² and then to JLWOP cases,²³³ it seems arbitrary to draw the unconstitutional categorical line at those two punishments.²³⁴

Woodson and *Miller* both emphasized the value of individualized sentencing consideration.²³⁵ This meant that a sentencing court should engage in the “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition” of the death or JLWOP sentence.²³⁶ This allows consideration of “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”²³⁷ Such

²²⁹ See, e.g., William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L.J. 67, 90 (2015).

²³⁰ See sources cited *supra* note 3; see also Juan A. Lazano, *Longest Serving Death Row Inmate in US Resentenced to Life*, ASSOCIATED PRESS (June 9, 2021), <https://abcnews.go.com/US/wireStory/longest-serving-death-row-inmate-us-resentenced-life-78182097> [<https://perma.cc/U9XY-HTK8>].

²³¹ Dating back to *McGautha v. California*, the disfavoring of mandatory sentences related in part to a desire to avoid jury nullification in criminal trials. *McGautha v. California*, 402 U.S. 183, 199–200 (1971). Where mandatory sentences are severe, such as death sentences, juries might elect to find the defendant not guilty of a crime that they clearly committed to avoid imposing an unjust punishment. See, e.g., Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1102 & n.18 (1953).

²³² *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.”).

²³³ *Miller v. Alabama*, 567 U.S. 460, 475 (2012) (“That correspondence—*Graham's* ‘[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,’—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.” (alterations in original) (quoting *Graham v. Florida*, 560 U.S. 48, 89 (2010))).

²³⁴ See Berry, *supra* note 7, at 20–22.

²³⁵ *Woodson*, 428 U.S. at 303–05; *Miller*, 567 U.S. at 475–76.

²³⁶ *Woodson*, 428 U.S. at 303; see also *Miller*, 567 U.S. at 475–76.

²³⁷ *Woodson*, 428 U.S. at 304.

consideration is part of “fundamental respect for humanity underlying the Eighth Amendment.”²³⁸

Indeed, many mandatory sentences encapsulate the same problems that the Court highlighted in *Woodson* and *Miller*. Mandatory sentencing schemes prohibit the judge (or jury) from determining the sentence for the criminal offender.²³⁹ Instead, the court applies the sentence determined by the legislature for the crime.²⁴⁰

If all offenders were identical, such an approach would not be problematic, but they are not. There are important differences which suggest aggravating sentences in some cases and mitigating them in others. The purposes of punishment reflect as much. Just deserts retribution bases the applicable sentence on the culpability of the offender and the harm caused.²⁴¹ It is difficult, if not impossible, to define a crime in such a way as to only capture cases with comparable levels of culpability and harm.²⁴² The same thing is true for the utilitarian purposes of punishment. Legislative guesses that all individuals that commit a particular crime will have similar levels of dangerousness or similar need for rehabilitation and as such, should serve a sentence of a mandatory length.²⁴³

To the extent that the mandatory sentences in question are mandatory minimums, there is an argument that legislatures are better equipped to draw accurate lines, but those sentences again assume a similarity across cases that may or may not exist. Certainly, mandatory minimum sentences create significant opportunity for unjust outcomes because they foreclose consideration of the

²³⁸ *Id.*; *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *see also* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2131 (exploring the Court’s use of the concept of dignity under the Eighth Amendment).

²³⁹ *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1965 (1992).

²⁴⁰ John S. Martin, Jr., Speech, *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311, 311–12 (2004).

²⁴¹ *See* John J. Sloan III & J. Langly Miller, *Just Deserts, The Severity of Punishment and Judicial Sentencing Decisions*, 4 CRIM. JUST. POL’Y REV. 19, 22 (1990); Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 2–3 (1991) (“Seriousness of crime has two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability, to the factors of intent, motive, and circumstances that determine the extent to which the offender should be held accountable for the act.” (footnote omitted)).

²⁴² Controlled substance convictions are particularly egregious in this way. Equalizing the relative desert of two individuals based purely on the volume of drugs seems both inaccurate and short-sighted, designed for judicial efficiency not sentencing accuracy.

²⁴³ The argument for deterrence may be better here, but only if one assumes that the punishment will deter equally irrespective of the identity of the individual receiving the sentence.

specific details of the crime being punished and the relevant characteristics, particularly mitigating ones, of the offender.²⁴⁴

Giving mandatory sentences unconstitutional categorization beyond the death penalty and JLWOP would give a court the ability to assess whether the case falls within the goals of the legislature. For particular kinds of mandatory sentences, there should be a presumption against legislative accuracy in mandatory sentences because of the diminished likelihood of the sentence being proportionate.²⁴⁵ At the very least, courts should entertain individual as-applied challenges in cases imposing a mandatory sentence and not blindly defer to the potentially excessive sentence mandated by statute.

Finally, there is an institutional choice point worth considering. While mandatory sentences frame the sentencing decision as one where a judge or jury exercises deference toward a legislature,²⁴⁶ the practical consequence of a mandatory sentence is to delegate the sentencing decision to the prosecutor.²⁴⁷

²⁴⁴ Martin, *supra* note 240, at 313–14.

²⁴⁵ See *supra* note 242.

²⁴⁶ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 984–86 (1991).

²⁴⁷ See Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 243 (1992) (“[M]andatory penalty laws shift power from judges to prosecutors”); see also Scott & Stuntz, *supra* note 239, at 1965 (“[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining.”); Martin, *supra* note 240, at 314 (“Since the power to determine the charge of conviction rests exclusively with the prosecution for the eighty-five percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution.”); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 FED. PROB. 9, 9 (1993) (noting concerns about prosecutors interfering with “the judicial role of making individualized sentencing judgments” when mandatory minimums are involved); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993) (discussing how prosecutors use mandatory minimums to induce defendant cooperation); LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* 3 (1994) (describing an instance during the author’s time as a trial judge in which the prosecutor demanded a five-year sentence, the judge denied the harsh sentence for being unconstitutional, and the appellate court remanded to the judge to impose the sentence). There is extensive literature criticizing the use of mandatory sentences, including as part of the War on Drugs. See JONATHAN P. CAULKINS, C. PETER RYDELL, WILLIAM L. SCHWABE & JAMES CHIESA, *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS’ MONEY?* 124–29 (1997) (discussing the consequences and costs of applying mandatory minimums to drug dealers); Joan Petersilia & Peter W. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 J. CRIM. L. & CRIMINOLOGY 604, 615 (1978) (finding that mandatory minimum sentences can reduce crime, but they will also increase prison populations). For a discussion on public opinion and mandatory sentences, see generally Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

The possibility of prosecutors choosing disproportionate sentences is perhaps higher than a judge doing the same thing, suggesting a need for unconstitutional categorization of mandatory sentences.

3. *Mandatory LWOP Sentences*

If LWOP sentences possess characteristics suggesting that they are different sentences, and mandatory sentences also have elements that indicate they too are different, then mandatory LWOP sentences seem to be a category deserving of an unconstitutional category. The combination of these two categories is not just cumulative, it is exponential. The consequence of a sentence to die in prison becomes doubly problematic when it is imposed without any individualized consideration. The Court's reasoning in *Woodson* and *Miller* encapsulates why such sentences are clearly "different" and entitled to heightened scrutiny if not categorical exclusion.²⁴⁸

The Court, unfortunately, rejected a challenge to a mandatory LWOP sentence in *Harmelin v. Michigan*, finding that the volume of drugs justified a mandatory LWOP sentence for a first-time offender and did not violate the Eighth Amendment.²⁴⁹ Indeed, the Court in *Miller* noted the tension between the *Miller* decision and the Court's decision in *Harmelin*.²⁵⁰ Adopting an unconstitutional category barring the imposition of mandatory LWOP sentences would be a logical extension of the Court's cases, even if it required overruling *Harmelin*.

B. *Different Defendants*

While the death penalty is a kind of punishment that is different, juveniles are a category of defendant that is different.²⁵¹ To the extent that a category of offenders might, based on the identity of that group, deserve unconstitutional categorization, it opens the possibilities that other groups might also be "different" for purposes of the Eighth Amendment.

²⁴⁸ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Miller v. Alabama*, 567 U.S. 460, 472–76 (2012).

²⁴⁹ *Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991).

²⁵⁰ *Miller*, 567 U.S. at 480–81 (denying that *Miller* would effectively overrule *Harmelin*).

²⁵¹ See *supra* note 111.

1. Elderly

One place to start would be the corollary group to juveniles—elderly offenders.²⁵² Unlike juvenile offenders, elderly offenders do not possess diminished culpability.²⁵³ As life course criminology studies show, most individuals cease criminal behavior by age thirty, if not sooner.²⁵⁴

Where elderly offenders are different, though, is in the consequence of their sentences. A ten-year sentence for an elderly offender might effectively be a life sentence, while a ten-year sentence for a thirty-year-old offender is most likely not a life sentence. Given the proximity to death,²⁵⁵ the impact of the punishment is arguably more severe, particularly when the length of the sentence exceeds the offender's life expectancy.

In such cases, the proportionality calculus arguably shifts, with the impact of the punishment being decidedly different than merely a sentence of a particular length. A court should thus consider the sentence as applied to the elderly offender, and whether the likely life sentence is proportionate in terms of the retributive and utilitarian purposes of punishment.

Such an approach would not cap the length of punishment for elderly offenders; instead, it would treat a five- or ten-year sentence as much more serious given the life expectancy of the elderly offender. Considering elderly offenders as “different,” then would essentially put a thumb on the scale opposite sentence length.²⁵⁶

²⁵²For purposes of this proposal, assume that elderly means age sixty-five or older. To avoid any inequities created by such a bright line, the Court should give penumbral effects to such constitutional lines. See William W. Berry III, *Eighth Amendment Presumptive Penumbra (and Juvenile Offenders)*, 106 IOWA L. REV. 1, 6 (2020).

²⁵³Cases of dementia and loss of capacity might be an exception to this idea that elderly people are less impulsive and have matured.

²⁵⁴See generally JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003) (exploring the patterns of criminal offending and other behaviors over the life course of high-risk children); ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993).

²⁵⁵This presumes a life expectancy of around seventy-eight years. See ELIZABETH ARIAS, BETZAIDA TEJADA-VERA & FARIDA AHMAD, NAT'L VITAL STAT. SYS., DEP'T HEALTH & HUM. SERVS., *PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE, 2020* (Feb. 2021), <https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf> [<https://perma.cc/7A5Q-NCN6>]. The calculus would be altogether different if life expectancy increased to 125 years. See Ryan Morrison, *Better Get Your Pension Sorted! Humans Could Live to More Than 130 Years Old by the End of This Century, Study Claims*, DAILY MAIL (July 2, 2021), <https://www.dailymail.co.uk/sciencetech/article-9750517/Humans-live-130-years-old-end-century-study-claims.html> [<https://perma.cc/3H27-AMP6>].

²⁵⁶Indeed, this discussion underscores the importance of individualized sentencing consideration, and not using one-size-fits-all sentencing practices. This is particularly important when the consequence is dying in a prison cell. See generally Berry, *supra* note 7.

2. Young Adults

The bright-line of juvenile and adult drawn at the age of eighteen does not reflect the scientific understanding of the applicable brain science.²⁵⁷ Indeed, there is evidence that individuals at least up to age twenty-one may, at least in certain cases, possess diminished culpability such that unconstitutional categorization would be appropriate.²⁵⁸

All of the characteristics of juvenile offenders described by the Supreme Court would also be applicable, in theory, to individuals up to age twenty-one.²⁵⁹ There is certainly no magic to the bright-line of age eighteen, and individual characteristics of a particular offender might make their particular sentence disproportionate in light of their reduced individual culpability.

VI. CONCLUSION

This Article made the case for completing the unconstitutional punishment categories under the Eighth Amendment by including JLWOP analogues to all of the categories of proscribed capital punishments. Specifically, it filled a doctrinal gap by demonstrating why the Court should fill the missing JLWOP categories in light of the relationship between the death penalty and JLWOP. Finally, the Article highlighted some possible expansions of the Eighth

²⁵⁷ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (juveniles possess a “lack of maturity and an underdeveloped sense of responsibility” (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993))); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (quoting *Roper* and suggesting that these qualities lead to “recklessness, impulsivity, and heedless risk-taking”). The brain science supports this view, suggesting brains are not fully developed until one’s twenties. See, e.g., Ruben C. Gur, *Development of Brain Behavior Integration Systems Related to Criminal Culpability from Childhood to Young Adulthood: Does It Stop at 18 Years?*, 7 J. PEDIATRIC NEUROPSYCH. (forthcoming 2021) (manuscript at 6–7) (on file with the *Ohio State Law Journal*); see also John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper’s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEX. L. REV. 921, 923 (2020) (arguing for an expansion of the *Roper* categorical ban); Michael N. Tennison & Amanda C. Pustilnik, “And If Your Friends Jumped Off A Bridge, Would You Do It Too?”: How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents, 12 IND. HEALTH L. REV. 533, 535 (2015) (exploring implications of the neuroscience research for juvenile justice). See generally Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL’Y & L. 410 (2017).

²⁵⁸ The death penalty is arguably inappropriate for anyone twenty-one and under. See Blume, Freedman, Vann & Hritz, *supra* note 257, at 923–24 (arguing for an expansion of the *Roper* categorical ban to age twenty-one). There are a number of cases challenging LWOP sentences for eighteen- to twenty-year-olds. See Alanna Durkin Richer, *Cases Challenge No-Parole Terms for Young Adult Killers*, ASSOCIATED PRESS (June 25, 2021), <https://apnews.com/article/us-supreme-court-health-9ca18c91b603d9c1579b2553c6277897> [<https://perma.cc/ZHA9-YXDM>].

²⁵⁹ See sources cited *supra* note 258.

Amendment into new unconstitutional punishment categories. Some of these were punishment-based like the death penalty, and some were person-based like JLWOP.

To be sure, the central proposal of the Article is one that the current Supreme Court might consider. The latter expansion will likely have to wait until the composition of the Supreme Court changes, or alternatively, that the justices start to engage with the excessive nature of many punishments imposed by state and federal governments. The Eighth Amendment exists to impose limits on state and federal punishment practices. In an age of mass incarceration and over-punishment, its expansion is sorely needed.