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Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment

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TAKING DIGNITY SERIOUSLY: EXCAVATING THE BACKDROP OF THE EIGHTH AMENDMENT

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The U.S. punishment system is in turmoil. We have a historically unprecedented number of offenders in prison, and our prisoners are serving longer sentences than in any other country. States are surreptitiously experimenting with formulas for lethal injection cocktails, and some prisoners are suffering from botched executions. Despite this tumult, the Eighth Amendment of our Constitution does place limits on the punishments that may be imposed and how they may be implemented. The difficulty, though, is that the Supreme Court's Eighth Amendment jurisprudence is a bit of a mess. The Court has been consistent in stating that a focus on offender dignity is at the core of the Amendment's prohibition on cruel and unusual punishments, but there has been virtually no analysis of what this dignity requirement means. This Article takes the first foray into this unexplored landscape and finds that the Constitution demands that the individuality of offenders be considered in imposing and carrying out sentences. While this appears to be a simple concept, it raises significant concerns about several modern-day sentencing practices. Punishments rooted in pure utilitarianism, by neglecting the importance of the individual offender, run afoul of this dignity demand. This sheds doubt on the propriety of some judges' assertions that defendants' freestanding innocence claims cannot stand because policy considerations like finality are of paramount importance; an individual offender cannot be ignored purely for the sake of societal goals. For the same reason, the importance of individual dignity should lead us to question statutes supporting only utilitarian aims of punishment. While this raises questions about the constitutionality of pure deterrence, rehabilitation, and incapacitation,

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these purposes of punishment may be reconceptualized to account for the individual offender. For example, rehabilitation could be reformulated to consider not only the offender's effects on society when he is returned to the community, but also whether the offender's character has been reformed. Finally, the importance of Eighth Amendment dignity raises questions about the constitutionality of mandatorily imposed punishments, which overlook the importance of individualization in sentencing. If we take seriously the dignity core of the Eighth Amendment, then many of these practices must be reconsidered.

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I. INTRODUCTION

The punishment landscape in the United States is constantly changing and is currently in a state of turmoil. There is a historically unprecedented number of prisoners in U.S. prisons;[1] prisoners are serving longer

1. *See* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (2014). The number of people incarcerated in the United States has declined slightly in recent years, however. *See* Ted Gest, *U.S. Overall Prison Population Declines Slightly*, CRIME REP. (Sept. 17, 2015), http://www.thecrimereport.org/news/inside-criminal-justice/2015-09-us-prison-population-declines-slightly.

sentences here than anywhere else in the world;[2] some jurisdictions are chemically castrating sex offenders;[3] a shortage of lethal injection drugs has led states to experiment with lethal injection cocktails;[4] and one state has decided to carry out executions with firing squads.[5] All of these approaches to punishment raise the question of what qualifies as acceptable punishment in our nation.

The acceptability of punishment is more than a policy decision. The Constitution's Eighth Amendment Punishments Clause places limitations on the sentences jurisdictions may impose and the ways in which they may implement punishments.[6] For example, the Supreme Court has held that, pursuant to the Eighth Amendment, jurisdictions may not execute juvenile offenders or "insane" persons.[7] Further, prisons must provide adequate medical care to their inmates and may not use unnecessary force against them.[8] Despite these fairly clear guidelines, there is a lot of gray area under the Eighth Amendment. In particular, it is difficult to assess when a punishment is too harsh and when legitimate punishment has crossed over the line into the area of prohibited torture. As a result of uncertainty about what punishments are appropriate and the various twists and tangles of the Court's cases in this area, scholars have described the Court's Punishments Clause jurisprudence as simply a mess.[9] However, the Court has remained predictable in one sense: its Eighth Amendment cases consistently invoke the concept of dignity. As a plurality of the Court famously stated in *Trop v. Dulles*,[10] "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of

2. *See* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION ET AL., *supra* note 1, at 24–25, 34, 52–58 (examining the long prison sentences in U.S. prisons); *see also* Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012, at 72 (stating that "huge numbers of [American prisoners] are serving sentences much longer than those given for similar crimes anywhere else in the civilized world.").

3. *See* Madison Park, *Using Chemical Castration to Punish Child Sex Crimes*, CNN (Sept. 5, 2012, 4:30 AM), http://www.cnn.com/2012/09/05/health/chemical-castration-science/.

4. *See* Matt Ford, *How to Execute People in the 21st Century*, ATLANTIC (Mar. 13, 2015), http://www.theatlantic.com/politics/archive/2015/03/gas-chambers-electric-chairs-and-firing-squads/387706/. *See generally* Deborah W. Denno, *Lethal Injection Chaos Post-*Baze, 102 GEO. L.J. 1331 (2014) (detailing jurisdictions' difficulties in obtaining certain lethal injection drugs and the chaos that has ensued in the wake of the Court's *Baze v. Rees* decision).

5. *See* Mark Berman, *Utah's Governor Has Not Decided Whether to Sign Firing Squad Bill*, WASH. POST (Mar. 11, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/03/11/utahs-governor-has-not-decided-whether-to-sign-firing-squad-bill/; NPR Staff, *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (Apr. 5, 2015), http://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-wtineses-recall-the-last-one.

6. *See* U.S. CONST. amend. VIII.

7. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005); Ford v. Wainwright, 477 U.S. 399, 401 (1986).

8. *See* Hudson v. McMillian, 503 U.S. 1, 5–6 (1992); Estelle v. Gamble, 429 U.S. 97, 104 (1976).

9. *See, e.g.*, John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 75 (2010) ("It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess."); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 476 (2005) ("The Court's jurisprudence under the Eighth Amendment's Cruel and Unusual Punishment Clause stands in disarray.").

10. 356 U.S. 86 (1958) (plurality opinion).

man."[11] The difficulty is that the Court's understanding of Eighth Amendment dignity has thus far remained unexamined.

This Article traverses this unsettled terrain and explores the boundaries of the dignity conception that animates the Court's Eighth Amendment Punishments Clause jurisprudence. It takes an in-depth look at the Court's cases explicitly invoking the concept of dignity and surveys the Court's Eighth Amendment cases more broadly for a better understanding of this principle that serves as the backdrop of the Amendment. The Article finds that Eighth Amendment dignity means the individuality of an offender must be respected and punishment of an offender cannot be used simply to achieve some other end, even if it is societally beneficial. Although this seems like an elementary concept, it has some significant implications. If this dignity demand is to be taken seriously, then several modern-day punishment practices are constitutionally questionable.

To provide broader background on the concept of dignity, Part II of this Article traces the history of the use of dignity in law and politics from its early meanings related to an individual's status to its more modern meanings in the wake of the Holocaust.[12] After World War II, reliance on the concept of dignity gained significant traction, and, today, references to dignity can be found in national constitutions and international treaties across the globe.

Part III of this Article explains that the Supreme Court has also woven dignity into its constitutional analyses—especially in the context of the Eighth Amendment.[13] It consistently invokes dignity in assessing the constitutionality of punishments, and its reliance on dignity in these decisions is on an upward trajectory. Given the importance of this Eighth Amendment notion of dignity, Part III notes how surprising it is that the meaning of dignity in this context has remained largely unexplored.[14]

Part IV takes an in-depth look at the Court's Eighth Amendment dignity jurisprudence.[15] It first examines the cases in which the Court has explicitly invoked Eighth Amendment dignity and finds that dignity refers to the individuality of the offender. This study reveals that the Court excavates dignity through examining the proportionality and humanness[16] of the punishment. Individuals differ in their assessments of proportionality, so settling on proportionality is a difficult task. Accordingly, the Court sometimes examines the motivation or purpose behind the punishment to determine whether it constitutes legitimate proportional punishment, or whether it is being imposed for revenge or another illegitimate reason. The Court reflects on the humanness of a punishment

11. *Id.* at 100.
12. *See infra* Part II.
13. *See infra* Part III.
14. *See infra* Part III.
15. *See infra* Part IV.
16. I generally use the term "humanness" rather than "humanity" throughout this piece to avoid confusion, as the latter term has several varying definitions.

because some punishments are so extreme that no one, not even the worst of offenders, should be subjected to them in this nation. After engaging in this micro-examination of Eighth Amendment dignity, Part IV employs a macro-examination of the concept. It considers the Court's analyses across the entire spectrum of Eighth Amendment cases and finds that the cases similarly focus on these two facets of individualism—proportionality and humanness—in sentencing. To aid in this analysis, Part IV divides the Court's Eighth Amendment cases into five classes: procedural, type-of-offense, class-of-offender, method-of-punishment, and prison-condition cases.[17] While the Court addresses each of these classes in a slightly different manner, each of the Court's analyses focus on the importance of individualization in sentencing. The concept of dignity could certainly be broader, but the core of the Eighth Amendment dignity demand is that the individual offender must be considered in imposing and implementing punishment.

Part V of this Article explains how this individuality core of the Eighth Amendment can have tremendous consequences for how we view punishment.[18] Historically, we have bounced back and forth between retribution-based punishments and utility-based ones. For example, the utility-based goal of rehabilitation motivated most punishment practices during about the first half of the twentieth century.[19] This quickly changed, though, once decision-makers determined that rehabilitation does not work. Retributive punishment then swooped in and has been dominating our punishment system since the late 1970s. More recently, however, retributive punishment has fallen into disfavor, and there are movements to utilitarianize current punishment practices.[20] While there may be many benefits to utility-based punishment, the individuality core of the Eighth Amendment suggests that *purely* utilitarian punishment is unconstitutional because it focuses on the benefits to society rather than on the individual. It thus fails to comport with the individualism requirement of the Eighth Amendment dignity demand. While punishment may legitimately have utilitarian components, it cannot completely neglect the importance of the individual offender.

Finally, Part VI provides some examples of punishment practices that become constitutionally questionable under the Eighth Amendment focus on individualism.[21] First, the implication that purely utilitarian punishment is unconstitutional lays the groundwork for challenging certain approaches to actual innocence claims. Some judges have suggested that freestanding claims of actual innocence are incognizable in certain circumstances because procedural considerations indicate that the time for

17. *See infra* Part IV.B.
18. *See infra* Part V.
19. *See infra* Part VI.B.
20. *See infra* Part VI.B.
21. *See infra* Part V.

innocence challenges may have passed.[22] The Eighth Amendment dignity demand, though, suggests that the individual offender must be considered whenever punishment is at issue. Thus, ignoring the guilt or innocence of an offender is certainly problematic. This may seem obvious, but, troublingly, it is often overlooked once enough time and procedural opportunities have passed. A second concern raised by the requirement of observing Eighth Amendment dignity relates to jurisdictions' statutes specifying the relevant aims of punishment. Statutes specifying only utilitarian aims of punishment are constitutionally suspect, as they neglect the importance and individuality of the offender in sentencing. They thus neglect the dignity demand required by the Eighth Amendment. This leads to a related issue raised by the constitutional requirement of dignity. Some utilitarian purposes of punishment can perhaps be reconceptualized to accommodate the dignity demand. For example, rehabilitation, which is traditionally viewed as purely utilitarian in nature, could be reformulated to account for the individuality of offenders, thus circumventing the otherwise constitutional landmine of dignity.[23] Sentencers could take into account both the societal effects of the offender's reintegration into the community and the individual offender's character reform in settling on an appropriate punishment. Finally, the Eighth Amendment dignity demand suggests that mandatorily imposed punishments are problematic, as they neglect the individual circumstances of the offender. Each offender is an individual and must be treated as an end in himself rather than as a means to achieve some other end. Neglecting the constitutional requirement of dignity that lies at the core of the Eighth Amendment, these modern-day punishment practices are ripe for successful constitutional challenges.

This Article takes the important step of delving into the meaning of the constitutional requirement of dignity under the Eighth Amendment. This constitutional demand focuses on the importance of individuality in sentencing and examines individuality through the lenses of proportionality and humanness. Taking this dignity requirement seriously leads us to some seemingly simple conclusions, but these conclusions have significant implications for modern-day sentencing practices. We must reassess the propriety of these practices in light of this new understanding of Eighth Amendment dignity.

II. THE CONCEPT OF DIGNITY

The concept of dignity has been around since antiquity. In Roman times, "dignity" often referred to an individual's, institution's, or state's status.[24] There was also a thread of dignity relating to a human being's

22. *See infra* Part VI.A.

23. *See infra* Part VI.B.

24. *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656 (2008).

unique worth apart from his or her status.[25] The Stoics tethered dignity to a man's rationality.[26] This understanding of dignity grew with time, and this understanding of a human being's specialness was often tied to humans being created in the image of God.[27]

Despite these ancient roots of dignity, most scholars agree that modern conceptions of dignity can be traced back to the eighteenth century when Immanuel Kant expounded on the idea. While not the first scholar to discuss the concept, Kant is considered by many to be the father of modern understandings of dignity.[28] Kant suggested that dignity is intrinsic in all rational human beings:[29]

> Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being . . . but must also be used at the same time as an end. It is just in this that his dignity . . . consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.[30]

This non-instrumentalization principle—that individuals should not be used merely as means to achieve other ends—is a central theme of Kant's conception of dignity.[31] Adoption of this principle constituted a shift away from dignity's religious roots and anchored dignity to man's rationality rather than his creation in the image of God.[32]

Although dignity has long been a matter of philosophical discussion, reliance on dignity in law, philosophy, and politics has become increasing-

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25. *See id.* at 657.

26. *See* CHARLES FOSTER, HUMAN DIGNITY IN BIOETHICS AND LAW 27 (2011).

27. *See id.* at 28–31; McCrudden, *supra* note 24, at 657–59.

28. Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, *in* 37 SCIENCE AND TECHNIQUE OF DEMOCRACY: EUROPEAN AND U.S. CONSTITUTIONALISM 75, 79 (Georg Nolte ed., 2005) ("[T]he father of the modern concept of human dignity is considered to be Kant . . . ."); *see also* Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 309 (2013) ("Kant is considered by many scholars to be the founder of the modern concept of human dignity.").

29. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary J. Gregor trans. & ed., Cambridge University Press 1996) (1797). It has been suggested that Kant's view of dignity is essentially the Stoic view. *See* FOSTER, *supra* note 26, at 37.

30. KANT, *supra* note 29, at 209 (emphasis omitted)

31. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 45, 46–47 (Allen W. Wood, ed., 2002) ("Now I say that the human being, and in general every rational being, *exists* as end in itself, *not merely as means* to the discretionary use of this or that will . . . . The practical imperative will thus be the following: *Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means.*"); *see also* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 24 (2012) (noting that Kant has much to say about human dignity); Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1271–72 (2013) (citing scholarship by Luis Roberto Barroso, John D. Castiglione, Izhak Englard, Rex D. Glensy, Maxine D. Goodman, Oscar Schachter, and, of course, Immanuel Kant). It is also important to recognize that Kant tied dignity to individual autonomy. *See* KANT, *supra*, at 54 ("*Autonomy* is thus the ground of the dignity of the human and of every rational nature.").

32. *See* McCrudden, *supra* note 24, at 659. One concern with adopting this Kantian view wholesale is that some children, intellectually disabled persons, and mentally ill individuals might be considered not rational and thus not possessing human dignity. Today, most people would likely disagree with excluding these individuals in this way.

ly popular in the wake of World War II.[33] As a reaction to atrocities perpetrated by the Nazis, a number of nations have recognized the importance of working to safeguard individuals' rights and dignities, and to prevent another Holocaust from taking place.[34] This led to the creation of the United Nations[35] and its adoption of the Universal Declaration of Human Rights ("UDHR") in 1948, which is premised on "recogni[zing] . . . the inherent dignity . . . of all members of the human family."[36] Also rising from the ashes of defeat in World War II, West Germany, Japan, and Italy all incorporated the concept of dignity into their respective constitutions.[37] Israel's Declaration of Independence in 1948 similarly espoused the Israelis' "right to a life of dignity."[38] And several other nations have also incorporated the concept of dignity into their national constitutions. For example, India's Constitution provides that the nation "resolve[s] . . . to secure to all its citizens . . . fraternity assuring the dignity of the individual and the unity and integrity of the Nation."[39] Similarly, South Africa's Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."[40]

The concept of dignity is also pervasive in international legal documents. For example, the Geneva Conventions each provide that "outrages upon personal dignity, in particular, humiliating and degrading treat-

33. *See id.* at 662–64.

34. *See* UNITED NATIONS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: HISTORY OF THE DOCUMENT, http://www.un.org/en/sections/universal-declaration/history-document/ (last visited Sept. 9, 2016).

35. The Preamble to the United Nations Charter provides that "the peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." U.N. Charter Pmbl.

36. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). "Dignity" is referenced five times in the Declaration. *See id.* Although the drafters came to the table with unique understandings of dignity based upon their religious and philosophical differences, they agreed on the basic principle that man should not be used merely as a means to achieve some other end; instead, man is an end in himself. *See* Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 360 (2008) (suggesting that the drafters "could agree on the idea that the human being is an end and not merely a means, and their account of human rights embodied a practical political agreement deriving from this shared intuitive idea, which different religions would then interpret further in different ways.") (citing JACQUES MARITAIN, MAN AND THE STATE (1951)).

37. *See* McCrudden, *supra* note 24, at 664–65; *see also* GRUNDGESETZ FÜR DIE BUDESREPUBLIK DEUTSCHLAND [CONSTITUTION] May 23, 1949, art. 1 (Ger.) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."); COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION] Dec. 27, 1947, arts. 3 & tit. I, art. 27 (It.) (providing that "[a]ll citizens have equal social dignity and are equal before the law," and that "[p]unishment cannot consist in treatment contrary to human dignity and must aim at rehabilitating the condemned"); NIHON KOKU KENPŌ [CONSTITUTION] May 3, 1947, ch. 3, art. 24 (1946) (Japan) ("With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.").

38. THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (1948); *see also generally* Basic Law: Human Dignity and Liberty, 1992, SH no. 1391 (Isr.) (providing legal protection for human dignity).

39. INDIA CONST. Pmbl.

40. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA May 8, 1996.

ment," shall not be employed against "[p]ersons taking no active part in hostilities."[41] Similarly, the Convention on Human Rights and Biomedicine states that "[p]arties to th[e] Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine."[42]

Dignity is also important in U.S. domestic law. The U.S. Supreme Court Justices referred to the concept of dignity as early as 1793,[43] and the Court and its Justices continue to employ the concept today.[44] Early on, references to dignity focused on dignity as an institutional status, but, consistent with the rest of the world, the Court's focus on dignity shifted to highlight individual dignity following World War II.[45] The concept of dignity is sprinkled throughout the Supreme Court's constitutional decisions, and the Court's use of the term "dignity" has steadily increased throughout the years.[46] The Court has employed the concept in a wide array of constitutional matters, ranging from First Amendment rights, to search and seizure law, to equal protection analysis.[47] Justice William J. Brennan, Jr. has even argued that human dignity is the animating principle behind the entire Constitution.[48]

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41. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 973; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 972; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 971; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 970.

42. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine , Apr. 4, 1997, C.E.T.S. No. 164.

43. *See* Chisholm v. Georgia, 2 U.S. 419, 471 (1793) (Jay, C.J.) (explaining that "the people . . . declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.'"); *id.* at 451 (Blair, J.) (referring to the "dignity of a state"); *id.* at 455 (Wilson, J.) ("Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.").

44. *See infra* Part III.A.

45. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 203 (2011).

46. *See id.* at 179–80 & Fig. 3. Professor Henry has explained that the Court's use of the term in majority opinions has increased "at a statistically significant rate (two-tailed p-value = 0.004)." *Id.* at 180. She noted that "[t]here is a statistically significant, positive relationship between Court Term and the percentage of majority opinions that use dignity ($r = 0.35$, $p = 0.004$)." *Id.* at 180 n.48.

47. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages."); Hudson v. Michigan, 547 U.S. 586, 594 (2006) (stating in its Fourth Amendment analysis that "the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance."); Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

48. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438–45 (1986) (stating that "the Constitution is a sublime oration on the dignity of man" and that "[t]he vision of human dignity [is] embodied within the Constitution"; that the document's "text [as augmented by the Bill of Rights and the Civil War amendments] is a sparkling vision of

Having been relied on in a variety of settings and by an array of nations, as well as in international law, the concept of dignity has been described in a number of different ways. Scholars have described dignity as "a basic value accepted in a broad sense by all peoples"[49] and as "perhaps the premier value underlying the last two centuries of moral and political thought."[50] As used today, the concept of dignity is pervasive and multifaceted. There are many different conceptions of dignity, ranging from the heightened status of certain individuals or entities, to the autonomy of individuals, to acting in accordance with societal expectations. For example, Professor Louis Henkin has explained that "human dignity requires that in any society every person count, that he (she) be considered worthy as an individual, not merely as part of the collectivity."[51] His understanding of dignity obligates us to respect an individual's "autonomy and freedom," "physical and psychic integrity," and "'personhood' before the law."[52] Moreover, these elements of dignity should not "be lightly sacrificed, even for the welfare of the majority or for the common good."[53] Professor Leon Kass has articulated a conception of dignity that focuses not just on personhood, but also on the importance of human life.[54] He has suggested that "respect for a being created in God's image means respecting *everything* about him, not just his freedom or his reason but also his blood."[55] Thus, Kass explained, dignity requires something more than respecting autonomy, and individual autonomy may even be sacrificed to protect human life, such as in prohibiting euthanasia.[56] He has developed "an ethical account of human flourishing based on a biological account of human life as lived, not just physically, but psychically, socially and spiritually."[57] Professor Nick Bostrom has considered "[d]ignity as moral status" as "the inalienable right to be treated with a basic level of respect."[58] He has viewed the level of dignity that each individual possesses—the

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the supremacy of the human dignity of every individual"; and that the document is designed to secure "the freedom, the dignity, and the rights of all persons within our borders."); Ryan, *supra* note 31, at 1271 n.246 (noting that Justice Brennan suggested "that the concept of human dignity is the animating principle behind the entire Constitution.").

49. Oscar Schachter, *Editorial Comment: Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848 (1983).

50. Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & William A. Parent eds., 1992).

51. Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210, 210 (Michael J. Meyer & William A. Parent eds., 1992).

52. *Id.* Henkin stated that, "[s]ometimes[,] human dignity is seen as requiring more—the full development of the individual's personality, respect by society and by one's neighbors, security for one's 'honor' and self-esteem." *Id.* at 211.

53. *Id.* at 211.

54. *See* LEON R. KASS, LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE OF BIOETHICS 17–18 (2002).

55. *Id.* at 21.

56. *See id.* at 17–18, 240–56.

57. *Id.* at 21.

58. Nick Bostrom, *In Defense of Posthuman Dignity*, 19 BIOETHICS 202, 209 (2005).

"moral worthiness" of an individual—as changeable, though, based upon the individual's particular characteristics.[59] Professor Martha Nussbaum has expressed a broader understanding of dignity. She has adopted the non-instrumentalization aspect of Kant's dignity conception,[60] but additionally has found that ten individual capabilities must be observed in accordance with properly respecting human dignity: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) relationships with other species; (9) play; (10) and control over one's environment (both political and material).[61] Even more broadly, Professor Erin Daly has argued that the rights surrounding dignity "include interests associated with equality, expression, due process, privacy, health, family, work, and virtually every other sphere of life."[62]

Perhaps frustratingly, there seems to be no clear consensus on the exact meaning of dignity across disciplines, or even within disciplines.[63] This has led some scholars to label dignity as "a useless concept."[64] Professor Ruth Macklin, for example, has argued that "dignity" is meaningless—"that appeals to dignity are either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding of the topic."[65] Similarly, responding to the lack of consensus on the meaning of dignity, Professor Steven Pinker has said that "the concept of dignity remains a mess"—"a phenomenon of human perception."[66] And Professor Helga Kuhse has asserted that the concept is "nothing more than a short-hand expression for people's moral intuitions and feelings."[67]

Despite the widely varying conceptions of dignity, there seems to be a core understanding of dignity to which most courts, constitution and treaty drafters, and scholars subscribe. Professor Christopher McCrudden

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59. *Id.* at 209–10. Bostrom distinguished between this type of dignity, and the "human dignity" that refers to "[d]ignity as moral status." *Id.* at 209.

60. *See* Nussbaum, *supra* note 36, at 353 ("Indeed, one good general way of thinking about the intuitive idea of dignity is that it is the idea of being an end rather than merely a means.").

61. *See id.* at 351, 377–78.

62. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 5–6 (2013).

63. *See* FOSTER, *supra* note 26, at 43–57 (laying out several different conceptions of dignity in the context of bioethics). For a useful discussion of human dignity, see generally UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013) (discussing the history of the concept, current debates on the topic, and various conceptions of human dignity).

64. Ruth Macklin, *Dignity is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003).

65. *Id.* Macklin has suggested that, in the bioethics context, "dignity seems to be nothing other than respect for autonomy." *Id.* It is "a useless concept"—at least in the context of "medical ethics." *Id.* Professor John Witte, Jr. has said that "the concept of human dignity has become ubiquitous to the point of cliché—a moral trump frayed by heavy use, a general principle harried by constant invocation." John Witte, Jr., *Between Sanctity and Depravity: Human Dignity in Protestant Perspective*, *in* IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES 119, 121 (Robert P. Kraynak & Glenn Tinder eds., 2003).

66. Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), https://newrepublic.com/article/64674/the-stupidity-dignity.

67. Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, *in* 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds., 2000).

has explained that this "minimum core" of human dignity includes three principles:[68] First, there is general agreement that "every human being possesses an intrinsic worth."[69] Second, others should recognize and respect this intrinsic worth.[70] And finally, recognizing every individual's intrinsic worth "requires that the state should be seen to exist for the sake of the individual human being, and not vice versa."[71] This last core element of dignity—that the state exists for the individual—is akin to Kant's command that an individual is an end in himself and not a means to achieve some other end.[72] And it is the same core concept on which the drafters of the UDHR agreed after World War II.[73] This core principle of the non-instrumentalization of human beings thus seems to be well accepted.

III. EIGHTH AMENDMENT DIGNITY

The U.S. Supreme Court has increasingly relied on dignity in its constitutional decision-making. One of the primary areas in which the Supreme Court regularly relies on dignity is in the Eighth Amendment context of cruel and unusual punishments. The Court has said that dignity is the touchstone of the Amendment's prohibition, yet the Court has not clearly defined the concept, and few scholars have delved into the cases to determine what Eighth Amendment dignity really means. To the extent that scholars have examined the Court's Eighth Amendment dignity jurisprudence, they have done so in the context of larger projects, thus not giving this breed of dignity the attention that it really deserves.

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68. McCrudden, *supra* note 24, at 679. Henry has argued that "McCrudden's 'minimum core' suffers from [drawing the concept of dignity too broadly]." *See* Henry, *supra* note 46, at 185–86. She stated that, under his view, dignity "could conceivably encompass all of the cases," or almost all of the cases, that she set out. *See id.* Of course that is what I interpret McCrudden as trying to do in defining this "minimum core" of dignity.

69. McCrudden, *supra* note 24, at 679. McCrudden referred to this as the "ontological" claim. *Id.* He suggested that everyone possesses this intrinsic worth "merely by being human," but there is some disagreement as to why human beings possess dignity and also whether human beings are the only creatures that possess such dignity. Kant would perhaps object to this first point, because he tied dignity to an individual's rationality. *See* KANT, *supra* note 31, at 54 (suggesting that that only rational beings possess dignity); Ryan, *supra* note 31, at 1271–72 (noting that "Kant[] determin[ed] that dignity is intrinsic in all rational human beings."); R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 461 (1994) ("Immanuel Kant is well known for his linkage of the capacity for rational decisionmaking and dignity or moral value.").

70. *See* McCrudden, *supra* note 24, at 679. McCrudden refered to this claim as the "relational" claim. *Id.*

71. *Id.* McCrudden refered to this claim as the "limited-state claim." *Id.*

72. *Compare id.* (explaining the "limited-state claim" of the dignity core), *with* KANT, *supra* note 29, at 209; *cf. supra* text accompanying notes 29–31 (summarizing Kant's understanding of dignity).

73. *See supra* note 35 and accompanying text.

A. Backdrop of the Eighth Amendment

Since 1958, the Supreme Court has emphasized that the Eighth Amendment's prohibition on cruel and unusual punishments is focused on preserving the dignity of man. In that year, the Court decided *Trop v. Dulles*[74]—a case in which the Court confronted the constitutionality of denationalization as a punishment for wartime desertion.[75] In the case, the Court sought to excavate the meaning of the prohibition:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court, but the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.[76]

There is no indication that the explicit focus on human dignity was drawn from the historical pedigree of the prohibition on cruel and unusual punishments,[77] and the Court, in subsequent cases, has not expanded much on the scope of this Eighth Amendment dignity principle. Instead, the Court generally bases its Eighth Amendment decisions on both the popularity of the punishment among the states and the Court's own "independent judgment" about the propriety of the punishment practice.[78] The Court's reference to dignity, though, seems to be more than just a rhetorical flourish. It is dignity, not these other two areas of examination, that the Court has said is at the heart of the Eighth Amendment.

Despite the uncertainty of the source of this dignity principle as it relates to cruel and unusual punishments, the Court has remained con-

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74. 356 U.S. 86 (1958) (plurality opinion).

75. *See id.* at 87.

76. *Id.* at 99–100.

77. *See id.*; *see also* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 573–80 (2010) (examining the historical roots of the prohibition on cruel and unusual punishments). Eighth Amendment dignity, then, does not seem to be rooted in the text or the history of the Eighth Amendment prohibition. However, some principles that are bound up in the concept of Eighth Amendment dignity may be rooted in the history of the prohibition. *See, e.g.*, John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 959–61 (2011) ("The Supreme Court's decision to engage in proportionality review under the Cruel and Unusual Punishments Clause is well-founded as a textual and historical matter.").

78. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564–75 (2005) (examining the "national consensus against the death penalty for juveniles" and applying the Court's own "independent judgment" to the question of the punishment's constitutionality); Atkins v. Virginia, 536 U.S. 304, 311–21 (2002) (assessing the popularity of the punishment and applying the Court's own independent judgment in assessing whether the punishment was unconstitutionally cruel and unusual); *see also* Ryan, *supra* note 77, at 586–91 (summarizing the Court's general approach to examining Eighth Amendment questions). The dignity analysis may be rolled into the Court's application of its own judgment.

sistent in invoking the concept.[79] For example, in its 2002 case of *Atkins v. Virginia*,[80] the Court quoted *Trop*, repeating that "'[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'"[81] Again in its 2002 *Hope v. Pelzer*[82] opinion the Court quoted this same language.[83] In 2005, the Court stated that, "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[84] In 2008, the Court explained that the "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[85] In 2011, the Court stated that "[r]espect for [human] dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."[86] And in one of the Court's most recent Eighth Amendment opinions—*Hall v. Florida*[87]—it emphasized the importance of dignity, referencing the government's duty "to respect the dignity of all persons" and "the Eighth Amendment's protection of human dignity."[88] Overall, the Court has remained quite consistent in tying the Eighth Amendment to this concept of dignity.

B. Little Scholarly Attention

Despite this importance of dignity in the Eighth Amendment context, very little attention has been paid to what Eighth Amendment "dignity" really means. The few scholars who have looked into this have either determined with little analysis that it is a Kantian conception of dignity or, with a bit more analysis, that it is really the dignity of society—not of individual human beings—that is at issue here.

Considering that many scholars view Kant as the father of the modern concept of dignity,[89] it is not surprising that most scholars looking at the meaning of dignity under the Constitution have relied on Kant for

79. It is worth noting that Justices Kennedy and Stevens are responsible for most of these Eighth Amendment opinions relying on the concept of dignity. *See* Hall v. Florida, 134 S. Ct. 1986 (2014); Brown v. Plata, 563 U.S. 493 (2011); Kennedy v. Louisiana, 554 U.S. 407 (2008); *Roper*, 543 U.S. 551; Hope v. Pelzer, 536 U.S. 730 (2002); *Atkins*, 536 U.S. 304; Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion). In each of these opinions, though, a majority of the Court signed on to the dignity language.

80. 536 U.S. 304.

81. *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

82. 536 U.S. 730.

83. *See id.* at 738 (quoting *Trop*, 356 U.S. at 100).

84. *Roper*, 543 U.S. at 560.

85. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

86. *Brown*, 563 U.S. at 510.

87. 134 S. Ct. 1986 (2014).

88. *Id.* at 1992 (quoting *Roper*, 543 U.S. at 560); *see also id.* at 1999 ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court' decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.").

89. *See supra* text accompanying note 27.

their understandings of the concept.[90] For example, one scholar has asserted that "it is the Kantian vision of dignity that seemingly animates" the Court's interpretation of constitutional provisions such as the Punishments Clause.[91] In support of this, he pointed to the Court's opinion in *Hope*, which focused on the degrading and humiliating nature of punishing an inmate by hitching him to a post for an extended period of time in intense heat without water or restroom privileges.[92] The scholar then concluded that the Court's reasoning in this case supports the view that "people must not be treated as objects."[93] Another scholar has broadly described the Court's understanding of dignity as relying on Kant's formulation and then has examined the Court's adherence to, and departure from, this dignity standard through employing this particular conception of dignity.[94] Scholars such as these, who point to a Kantian view of dignity, including Eighth Amendment dignity, seem to have shied away from looking at the relevant Eighth Amendment cases in much depth. Eighth Amendment dignity is important, though, and it deserves more concentrated attention.

Other scholars have looked at dignity in a bit more depth and suggested that Eighth Amendment dignity is concerned about society rather than the individual. For example, Professor Leslie Meltzer Henry has argued that the Eighth Amendment focuses on "collective virtue as dignity"—that the Court's jurisprudence in this area concentrates on creating a society that is decent.[95] In buttressing this conclusion, Henry pointed to the Court's language in five select Eighth Amendment opinions: *Ford v. Wainwright*,[96] *Atkins v. Virginia*,[97] *Hope v. Pelzer*,[98] *Roper v. Simmons*,[99] and *Brown v. Plata*.[100] Like Henry, Professor Michal Buchhandler-Raphael has concluded that Eighth Amendment dignity reflects "com-

90. *See* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 86 (2011) (stating that "it is the Kantian vision of dignity that seemingly animates [the Supreme Court Justices]" when they discuss the concept of dignity in constitutional cases); *see also* Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 358 (2012) ("Many of [Kant's] reflections are directly connected with the idea of human dignity, and it is not surprising that he is one of the most frequently cited authors in works on the subject."); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 748 (2006) ("Immanuel Kant is generally thought responsible for our understanding of human dignity." (citing Bedau, *supra* note 50, at 152)); *cf.* Glensy, *supra*, at 75–76 (stating "Immanuel Kant [is] regarded as the father of the modern concept of dignity," but noting that "[w]hile Kant was certainly fundamental to the shaping of European legal precepts and modern international law, it is arguable that [Kant's] influence on the United States was less potent.").

91. Glensy, *supra* note 90, at 86.

92. *See id.* at 88; Hope v. Pelzer, 536 U.S. 730, 734–35 (2002); *infra* text accompanying notes 156–59.

93. Glensy, *supra* note 90, at 88.

94. *See* Goodman, *supra* note 90, at 748–53, 757, 772–78 (2006) (tying the Court's conception of dignity—including in the Eighth Amendment context—to Kant's conception).

95. Henry, *supra* note 45, at 222–24.

96. 477 U.S. 399 (1986).

97. 536 U.S. 304 (2002).

98. 536 U.S. 730 (2002

99. 543 U.S. 551 (2005).

100. 563 U.S. 493 (2011); *see* Henry, *supra* note 54, at 225.

munitarian virtue," meaning that this conception of dignity focuses on society—on what society has deemed "civilized, decent, and virtuous."[101] Pointing to some of the same cases, she too placed less importance on the individual offender in the Eighth Amendment context. Both Henry and Buchhandler-Raphael addressed Eighth Amendment dignity in the context of larger projects dealing with constitutional dignity more broadly, though. As a result, their examinations of *Eighth Amendment* dignity are not as nuanced as they could be. Eighth Amendment dignity—and the unique ways in which the Court addresses it—deserves greater attention.

IV. PUNISHMENTS CLAUSE CASES, DIGNITY, AND THE IMPORTANCE OF THE INDIVIDUAL

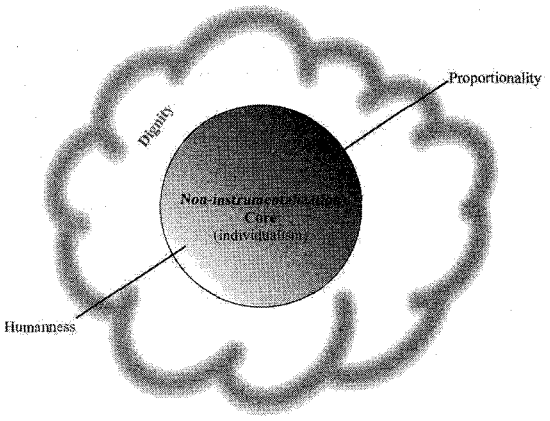
Examining the meaning of dignity under the Eighth Amendment really requires an in-depth exploration of the case law in this area. The Court began putting dignity to use in its landmark Eighth Amendment case of *Trop v. Dulles*.[102] Since then, the Court has continued to cite the concept of dignity in its Punishments Clause cases. Like the core of most definitions of dignity in other areas, the Court's explicit use of dignity in these cases highlights the importance of viewing individuals as ends rather than merely as means. In doing this, the Court emphasizes the importance of the offender as an individual human being. In some ways, this is akin to the Kantian approach to dignity. This concept of individualism is not only suggested by the Court's clear invocation of dignity, but also the general thrust of the Court's cases under the Eighth Amendment prohibition on cruel and unusual punishments is that we must respect the importance of individuals in this regard.

A. The Court's Invocation of Dignity in Eighth Amendment Cases

In a handful of its Eighth Amendment cases, the Court has provided more detail on what it means when it refers to dignity in relation to the constitutional prohibition on cruel and unusual punishments. This conception of dignity is focused on human beings as individuals. One facet of this concentration on the individual is that the offender should not receive greater punishment than he deserves. Punishment for some other reason—such as to further society in some way—loses sight of the individual. The other facet of the focus on the individual is emphasizing the fact that the individual is a *human being*. There are some punishments that are so inhumane, so uncivilized, that no one should be punished in that manner—not even humans who have committed the vilest of offenses.

101. Buchhandler-Raphael, *supra* note 28, at 317.
102. 356 U.S. 86, 100 (1958) (plurality opinion).

FIGURE 1



The first facet of the Court's focus on individualism in discussing Eighth Amendment dignity is proportionality, which relates to agreement between the offender's desert resulting from his culpability and the heinousness of his offense, and the punishment imposed.[103] Such proportionality is sometimes difficult to determine, however. While people often have a rough sense of which criminal offense is more or less heinous than another offense, people often disagree about exactly what punishment is proportionate to a particular offense.[104] Because of this indeterminacy, the Court has found another question relevant in determining proportionality—whether the punishment has been imposed for some reason other than a traditional purpose of punishment.[105] If punishment is im-

103. This proportionality is most often thought of in terms of retribution. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 575 (2005) ("Anglo-American courts and scholars have usually (but as will be shown, not universally) applied the concept of proportionality only when discussing retributive sentencing principles."). Although the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), appeared to adopt a harm-based approach to retribution—one that measures desert based only on an offender's culpable state of mind and the harms the offender caused by his crime—many scholars prefer an intent-based approach to retribution that measures desert based only on the offender's culpable state of mind. *See* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1063 (2012). Beyond retribution, Professor Richard Frase has outlined other conceptions of proportionality, such as ends- and means-proportionality. *See* Frase, *supra*, at 592–97. *But see* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution. 'It becomes difficult even to speak intelligently of proportionality, once deterrence and rehabilitation are given significant weight.'" (internal quotations and citations omitted)); Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (Scalia, J.) ("[I]t becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law.").

104. *See* Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121, 140 (2014); Ryan, *supra* note 103, at 1064.

105. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 6–7 (1992) (finding that the use of excessive force amounts to an Eighth Amendment violation even when the inmate does not suffer a serious injury because, "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated").

posed for some other reason, such as for vengeance or as a result of the sadistic desires of a prison guard, it is unjustified and unconstitutional.[106]

The second facet of the Court's focus on individualism is humanness—recognizing that the offender is a *human being* and that certain punishments, like torture, are therefore prohibited no matter what crime the offender committed. Such punishments are simply too horrendous to impose on any offender. The Court first forayed into this area of per se unconstitutional punishments when it initially invoked the concept of dignity under the Eighth Amendment in *Trop*.[107] There, the Court examined whether the punishment of denationalization violated the Eighth Amendment.[108] The question arose when a defendant was so punished for his conviction of wartime desertion, but the controlling plurality of the Court did not seem to limit its analysis to this particular context. Instead, it broadly stated that it was determining "whether denationalization is a cruel and unusual punishment."[109] Addressing the first facet of individualism, the plurality explained that the punishment could not be found disproportionate to the offense of conviction, because death—perhaps the most extreme punishment under American law—was another authorized punishment for the crime.[110] Turning to the humanness facet, the plurality framed the question as one of "whether th[e] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[111] The plurality said that denationalization was even "more primitive than torture."[112] It destroys a part of the individual, "strip[ping] him of his status in the national and international political community" and of his "right to have rights."[113] The plurality concluded that no one should be subject to such a punishment.[114] In reaching this conclusion, the plurality demonstrated that this concern for the individual is at the heart of the Court's understanding of dignity: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[115]

106. *See id.* ("[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."); *infra* text accompanying notes 122–23, 263–65.

107. 356 U.S. at 99.

108. *See id.* at 87.

109. *Id.* at 99.

110. *See id* ("Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.").

111. *Id.*

112. *Id.* at 101.

113. *Id.* at 101–02.

114. *Id.* at 104 (concluding that the punishment of denationalization is unconstitutional).

115. *Id.* at 100.

Having expounded primarily on the humanness facet of dignity in *Trop*, the Justices elaborated on the proportionality aspect of Eighth Amendment dignity in the famous 1976 case of *Gregg v. Georgia*[116]—in which the Court approved a state capital sentencing scheme after it had previously struck down as unconstitutional capital punishment as it had earlier been practiced by the states.[117] There, a plurality of the Court suggested that the concept of dignity means, at a minimum, that the punishment must not be "excessive."[118] Measuring excessiveness, the plurality explained, means looking first at whether "the punishment . . . involve[s] the unnecessary and wanton infliction of pain," and, second, at whether "the punishment [is] grossly out of proportion to the severity of the crime."[119] While perfect proportionality would be desirable, the plurality acknowledged that proportionality is a matter of judgment and that state legislatures and juries may disagree with individual Justices as to what the perfect level of proportionality might be in any given case.[120] Accordingly, the plurality conceded that it could not strike down a punishment as failing to comport with the dignity requirement just because a majority of the Court disagreed with the severity of the punishment necessary to achieve penological ends.[121] Thus, review was for only *gross* disproportionality.[122] The plurality, however, explained that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."[123] If the Court finds that the punishment is imposed for some reason other than an acceptable purpose of punishment—that it is "unnecessar[ily]" imposed or constitutes the "wanton" infliction of pain—then the punishment will run afoul of the Eighth Amendment.[124] Ultimately, the *Gregg* Court found that Georgia's capital sentencing scheme provided sufficient guidance to sentencers such that they could adequately take into account the offender's crime and

116. 428 U.S. 153 (1976) (plurality opinion).

117. *See id.* at 206–07.

118. *Id.* at 173.

119. *Id.*

120. *See id.* at 174–75.

121. *See id.* at 183–84.

122. *See id.* at 173. In more recent years, the Court's Eighth Amendment jurisprudence in capital cases has migrated from examining gross disproportionality to just disproproportionality. *Compare, e.g.*, *id.* (stating that a "punishment must not be grossly out of proportion to the severity of the crime."), *with* Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (concluding that "the death penalty is not a proportional punishment for the rape of a child" and is therefore unconstitutional under the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 575 (2005) (concluding that "the death penalty is disproportionate punishment for offenders under 18" and is thus unconstitutional under the Eighth Amendment). The Court has also recently extended this more easily met disproportionality standard beyond the capital context. *See, e.g.*, Montgomery v. Louisiana, 136 S. Ct. 718, 732–33 (2016) (stating in a non-capital case that "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence.").

123. *Gregg*, 428 U.S. at 182–83. The Court said that capital punishment "serve[s] two principal social purposes: retribution and deterrence[.]" *Id.* at 183. The Court noted, though, that incapacitation is "[a]nother purpose that has been discussed" in the capital context. *Id.* at 183n.28.

124. *Id.* at 173.

individual circumstances to determine whether death was actually deserved.[125] Accordingly, the statutory scheme met the proportionality requirements of the Eighth Amendment.[126]

The Court applied both facets of individualism in its Eighth Amendment dignity analysis in the 1976 case of *Estelle v. Gamble*.[127] In this case, the Court explained that, since at least *Trop*, it had expanded its view of unconstitutionally cruel and unusual punishments.[128] The Punishments Clause no longer proscribes only "physically barbarous punishments"; it now "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures."[129] In expounding on this broader prohibition, the Court explained that punishments inconsistent with the "evolving standards of decency that mark the progress of a maturing society" are unconstitutional,[130] and, as in *Gregg*, the Court explained that punishments that "involve the unnecessary and wanton infliction of pain" are prohibited,[131] as are those that are "grossly disproportionate to the severity of the crime."[132] Based upon these principles, the Court found that the government was constitutionally required to provide prisoners with appropriate medical care.[133] "In [the] less serious cases," the Court explained, "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."[134] If not serving such a legitimate purpose, it would be pain imposed for some improper purpose and constitute excessive punishment. The Court also expressed concern about the humanness of the punishment in some circumstances. "In the worst cases," it explained, a failure to provide such medical care "may actually produce physical 'torture or a lingering death . . . .'"[135] Allowing an individual to suffer what could amount to such torturous conditions is simply inhumane, and no individual should be subjected to that.

The Court reaffirmed these individualism principles of proportionality and humanness—although without much analysis—in *Hutto v. Finney*.[136] There, the Court reiterated that the Eighth Amendment "prohibits

125. *Id.* at 206–07.

126. *See id.* at 207.

127. 429 U.S. 97 (1976).

128. *See id.* at 102 ("Our more recent cases . . . have held that the Amendment proscribes more than physically barbarous punishments." (citing *Gregg*, 428 U.S. at 171; Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion); and Weems v. United States, 217 U.S. 349, 373 (1910)).

129. *Estelle*, 429 U.S. at 102 (internal citations omitted).

130. *Id.* (quoting *Trop*, 356 U.S. at 101). The Court first invoked this "evolving standards of decency" formulation in *Trop v. Dulles*. *See Trop*, 356 U.S. at 101.

131. *Estelle*, 429 U.S. at 102–03 (quoting *Gregg*, 428 U.S. at 173).

132. *Id.* at 103 n.7. The Court also noted that the prohibition "imposes substantive limits on what can be made criminal and punished." *Id.*; *see also* Robinson v. California, 370 U.S. 660, 665–67 (1962) (setting forth this principle in striking down a law that allowed a defendant to be punished for being "addicted to the use of narcotics").

133. *See Estelle*, 429 U.S. at 103.

134. *Id.*

135. *Id.*

136. 437 U.S. 678 (1978).

penalties that are grossly disproportionate to the offense, . . . as well as those that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[137] Under these standards, the Court assumed that the conditions in the state prison's "punitive isolation cells" violated the Eighth Amendment.[138]

In its 1986 case of *Ford v. Wainwright*,[139] the Court muddied its dignity analysis somewhat. In that case, the Court struck down as unconstitutional a state practice of executing "insane" persons because it failed to meet the Eighth Amendment's demand of preserving human dignity.[140] As in previous cases, the Court examined the popularity of the punishment and applied its own independent judgment to the case, assessing whether the "punishment comport[ed] with the fundamental human dignity that the Amendment protects."[141] The Court explained that very few states had authorized executing insane persons, perhaps "to protect the dignity of society itself from the barbarity of exacting mindless vengeance," or because the practice "simply offends humanity."[142] Accordingly, it concluded that executing insane persons is indeed unconstitutional.[143] The Court's language here hints at a different thread of dignity—the dignity of society that some scholars have found controlling.[144] But, as in the Court's earlier Eighth Amendment decisions, the conception of dignity discussed in *Ford* is broader than that. It is more about the proportionality and humanness of the punishment at issue.

The *Ford* Court suggested that executing insane persons generally does not meet the proportionality requirement of Eighth Amendment dignity. Alongside its concern for society, the Court referred to avoiding the imposition of "mindless vengeance."[145] Vengeance is often contrasted with retribution, which the Court has consistently held to be a legitimate penological purpose.[146] Unlike the passionless and community-based

137. *Id.* at 685 (internal quotations and citations omitted).

138. *See id.* at 681–85 (stating that there was ample evidence to support the conclusion that the conditions in Arkansas's prisons—even outside of the punitive isolation cells—were cruel and unusual).

139. 477 U.S. 399 (1986).

140. *Id.* at 401, 406, 410.

141. *Id.* at 406 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)) (plurality opinion)); *see also supra* text accompanying note 74 (explaining that the Court often examines the popularity of a punishment and then applies its own independent judgment in determining whether a punishment violates the Eighth Amendment).

142. *Id.* at 409–10.

143. *See id.* at 401.

144. *See supra* text accompanying notes 93–99.

145. *Ford*, 477 U.S. at 410.

146. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) ("[C]apital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."); Spaziano v. Florida, 468 U.S. 447, 477–78 (1984) (overruled on other grounds) ("In general, punishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution."); Austin Sarat, *When Memory Speaks: Remembrance and Revenge in Unforgiven*, 77 IND. L.J. 307, 309 (2002) ("Retribution, with its advertised virtues of

characteristics of retributivism, though, vengeance is generally passionate in nature and is based on personal, rather than community, judgments.[147] Not endorsed by the community, punishment based on vengeance is imposed for a reason inconsistent with the legitimate purposes of punishment and thus runs afoul of the proportionality requirement articulated in *Gregg* that "the punishment must not involve the unnecessary and wanton infliction of pain."[148]

Perhaps more importantly, the *Ford* Court focused on the humanness of the punishment. According to the Court, even persons who were sane at the time of conviction and sentencing, but who became insane on death row—like Ford himself—should be protected from execution.[149] This Eighth Amendment protection, then, is not premised on culpability. In fact, in some cases, the punishment of death could arguably be a proportionate response for even an insane perpetrator due to the heinousness of the offense at issue. Instead, the Court suggested that care ought to be taken to ensure that the offender understands what is happening to him and why.[150] To ignore this would be to neglect the fact that the offender, no matter how heinous his crime, is human and ought to be treated as such. Instead of wading into assessing culpability issues, the Court determined that it is simply inhumane to execute these individuals who lack ordinary capacity.

In *McCleskey v. Kemp*,[151] a case decided in 1987, the Court addressed individualism more directly. In this case, the defendant alleged racism in the criminal justice system and presented the Court with a study suggesting that an offender who murdered a white victim is more likely to be sentenced to death than an offender who murdered a black victim.[152] In addressing the defendant's Eighth Amendment claim, the Court first acknowledged that the Amendment is rooted in "the dignity of man" and that the Amendment continues to evolve in meaning.[153] It then went on to

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measured proportionality, cool detachment, and consistency is contrasted with vengeance—the voice of the other, the primitive, the savage call of unreason, a 'wildness' inside the house of law which, by nature, will not succumb to rational forms of justice.").

147. *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 367 (1981) ("Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done."); Stephanos Bibas, *Criminal (In)justice and Democracy in America*, 126 HARV. L. REV. F. 134, 141 (2013) ("[Retribution] is a reflective, impartial, proportional moral judgment, while [revenge] is a hot, unchecked passion."); Ryan, *supra* note 103, at 1053–56 (distinguishing retributivism and vengeance); *see also* Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 173 (2015) ("A sentencing decision inflamed by passion could be more akin to one made out of vengeance than one rooted in retributivism, which is based on passionless and community-based notions of desert.").

148. Gregg v. Georgia, 428 U.S. at 1153, 173 (1976) (plurality opinion).

149. *See Ford*, 477 U.S. at 401–03.

150. *See id.* at 410, 417; *see also* Panetti v. Quarterman, 551 U.S. 930, 957 (2007) (detailing the Justices' opinions in *Ford* and suggesting that the competency standard under the decision is something along the lines of comprehending the reasons for the execution or determining whether the offender is aware of why he is to be executed).

151. 481 U.S. 279 (1987).

152. *See id.* at 286.

153. *See id.* at 300 (quoting Trop v. Dulles, 256 U.S. 86, 99 (1958) (plurality opinion)).

discuss the importance of attaining proportionality through individualized sentencing.[154] In particular, the Court suggested that a punishment imposed pursuant to procedures that focus sentencers' discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant" comports with Eighth Amendment demands.[155] Because the sentencing procedures at issue required consideration of the individual offender and his offense, and the defendant's sentence was not disproportionate, there was no Eighth Amendment violation here.[156]

In 1988, a plurality of the Court again referred to the proportionality facet of individualism in *Thompson v. Oklahoma*.[157] In that case, the plurality used the concept in its discussion of the purposes of punishment, finding that neither retribution nor deterrence—the purposes justifying capital punishment—could support executing fifteen-year-old offenders.[158] In analyzing retribution, the plurality quoted its language from *Gregg* that retribution is "not 'inconsistent with our respect for the dignity of men.'"[159] When dealing with such young offenders, however, the plurality suggested that retribution cannot justify capital punishment;[160] a fifteen-year-old's ability to grow and change suggests that he is less culpable than traditional offenders committing capital crimes and simply cannot be culpable enough such that imposing the death penalty would be a proportionate response.[161] In this way, the plurality examined proportionality by assessing the particular characteristics of the class of offenders of which the defendant was a part. Although the plurality was not focusing specifically on Mr. Thompson, the plurality, by creating a more expansive holding—that no one under sixteen years of age could be executed—was protecting an even broader swath of individual offenders. This prophylactic rule better protects against disproportionality that would be in violation of the Eighth Amendment dignity demand.

The 1992 *Hudson v. McMillian* Court focused primarily on proportionality in determining the constitutionality of a prison guard's use of force against an inmate.[162] The guard's culpability was essential in this inquiry, the Court explained, because, if the prison guard was employing excessive physical force, then it could amount to imposing undeserved punishment, which would be disproportionate and thus violate the Eighth Amendment.[163] Despite this focus on proportionality, though, the Court

154. *See id.* at 301–19.

155. *See id.* at 308; *see also id.* at 311–12 (stating that "[t]he capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant" and that the concept of "individualized justice is 'firmly entrenched in American law.'").

156. *See id.* at 306–12.

157. 487 U.S. 815 (1988).

158. *See id.* at 836–37.

159. *Id.* at 836 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion)).

160. *See id.* at 836–37.

161. *See id.* at 834–36.

162. *See* Hudson v. McMillian, 503 U.S. 1, 5–7 (1992).

163. *See id.*

also spoke more broadly, reiterating that the "concepts of dignity, civilized standards, humanity, and decency . . . animate the Eighth Amendment."[164] The Court, then, was true to not only the proportionality aspect of the individualism dignity concept, but it also embraced the perhaps more nebulous humanness component of the concept.

Elaborating on the themes of individualism, including both proportionality and humanness, the *Hope v. Pelzer*[165] Court found that hitching an inmate to a post for a seven-hour period in intense heat, and without allowing the prisoner to drink water or use the restroom, was unconstitutional because it did not serve a legitimate penological purpose.[166] Although the offender deserved his sentence of imprisonment, this hitching-post practice employed by the prison guards constituted "gratuitous infliction of 'wanton and unnecessary' pain."[167] It was "painful, . . . degrading and dangerous,"[168] and this additional punishment was undeserved. It was thus disproportionate and, even though the Court did not explicitly say so, could be said to be inhumane and uncivilized as well.

The Court similarly has continued to invoke dignity in its more recent *Atkins v. Virginia*,[169] *Roper v. Simmons*,[170] and *Kennedy v. Louisiana*[171] decisions, and thus the Court has continued to discuss the importance of individualism under the Eighth Amendment. In *Atkins*, the Court considered dignity in conjunction with examining "the evolving standards of decency that mark the progress of a maturing society."[172] It then moved on to "[p]roportionality review" and its survey of legislatively authorized punishments among the states.[173] In *Roper*, the Court explained thatthe Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons."[174] Again, this is focusing on offenders as human beings. The Court declared this directly after explaining the requirement to avoid excessive punishment—a command that flows from the "basic precept of justice that punishment for crime should be graduated and proportioned to the offense."[175] Next, in *Kennedy*, the Court again referred to the importance of "express[ing] respect for the

164. *Id.* at 11 (internal quotations omitted).
165. 536 U.S. 730 (2002).
166. *See id.* at 733–35, 737.
167. *Id.* at 738.
168. *Id.* at 745; *see also id.* at 738 (stating that the practice subjected the inmate "to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.").
169. 536 U.S. 304 (2002).
170. 543 U.S. 551 (2005).
171. 554 U.S. 407 (2008).
172. *Atkins*, 536 U.S. at 311–12 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (internal citations and quotations omitted)).
173. *Id.* at 312; *see supra* text accompanying note 73.
174. *Roper*, 543 U.S. at 560.
175. *See id.* (quoting *Atkins*, 536 U.S. at 311) (internal quotations omitted).

dignity of the person."[176] And, consistent with the other cases, the Court discussed this alongside its review of proportionality and the various purposes of punishment.[177] The Court stated that "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."[178] It explained that retribution is the most problematic of these justifying purposes, as it "often can contradict the law's own ends."[179] The Court noted that "[t]his is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[180] As in *Ford*, the Court may be alluding to the importance of protecting society from imposing brutal punishments,[181] but it remains the dignity of the person, the individual, that is paramount in these cases.

In its 2011 case of *Brown v. Plata*,[182] the Court went further to highlight the humanness component of dignity.[183] There, the Court examined the constitutionality of the overcrowded prison conditions in California.[184] It emphasized that, although prisoners "may be deprived of rights that are fundamental to liberty," they "retain the essence of human dignity inherent in all persons."[185] The Court thus focused on the fact that prisoners are humans and must be treated in a way that respects this. It explained that the government must provide prisoners with sustenance—such as food, water, and medical care—because failure to do so could result in torture or a lingering death—circumstances prohibited by the Eighth Amendment's prohibition on excessiveness.[186] This, the Court explained, would be entirely "incompatible with the concept of human dignity and has no place in civilized society."[187]

Most recently, the Court relied on the concept of dignity in its 2014 *Hall v. Florida*[188] case, which tightened state procedural requirements for determining when an offender is intellectually disabled such that he may not be executed.[189] Highlighting the humanness facet of individualism, the

176. *Kennedy*, 554 U.S. at 420.
177. *See id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *See supra* text accompanying notes 145–48.
182. 563 U.S. 493 (2011).
183. *See id.* at 510.
184. *See generally id.* at 499–510 (describing the issues involved, and the procedural posture, in the case).
185. *Id.* at 510.
186. *See id.*
187. *Id.* at 511.
188. 134 S. Ct. 1986 (2014).
189. *See generally id.* (reversing the Florida Supreme Court decision). In *Hall v. Florida*, 134 S. Ct. 1986, (2014), the Court reviewed what procedural requirements were necessary in determining that an offender was intellectually disabled such that, pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), he could not be executed. Florida law determined that an individual was intellectually disabled if he had an IQ test score of 70 or below. *See Hall*, 134 S. Ct. at 1990, 1994. Florida interpreted this to mean that

Court stated that the Eighth Amendment protects "the dignity of all persons"—"even those convicted of heinous crimes"—and that the government is obliged to respect their dignity.[190] Moreover, our understanding of an individual offender's dignity is not stagnant based on the principles of our nation's Founders.[191] Instead, our protection of individual dignity changes and grows as society evolves.[192] The *Hall* Court implemented this understanding of dignity by taking a more nuanced approach to the categorical rule in *Atkins* that "mentally retarded" offenders cannot constitutionally be executed.[193] The *Hall* Court delved into how intellectual disability should be assessed at the individual level and suggested that these determinations should be based on a broader swath of individual offender evidence than just IQ score.[194] In sum, the Court again determined that concern for the individual offender is paramount in these Eighth Amendment analyses.

These cases in which the Court has explicitly invoked the concept of dignity focus on themes of individualism and, often more specifically, proportionality and the humanness of the offender. In assessing proportionality, the Court has looked at possible purposes of the punishment as in *Gregg*.[195] It has also examined prison officials' explicit motivations for punishment as in *Hudson*.[196] Both of these assessments are aimed at determining why a punishment is being imposed. If an offender is being punished for a reason unrelated to his offense, it suggests that the punishment is unjustified. The Court has also highlighted that punishment must respect the humanness of the offender. As it stated in *Brown*, punishment must "retain the essence of human dignity inherent in all persons."[197] In examining this relationship between the offender and his punishment, the Court has emphasized the importance of looking closely at the particular offense at issue and the individual offender's unique characteristics and circumstances. This careful concern for the individual offender in the Court's invocation of Eighth Amendment dignity is consistent with the minimum core of dignity—that the individual offender should be treated as an end rather than merely as a means to achieve

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a defendant was required to present an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability. *See id.* at 1992. The Supreme Court found that this approach violated the Eighth Amendment because it does not take into account the applicable standard of error in assessing IQ scores. *See id.* at 1994.

190. *Hall*, 134 S. Ct. at 1992.

191. *See id.*

192. *See id.*

193. *See id.* at 1990, 1993; *Atkins*, 536 U.S. at 321.

194. *See Hall*, 134 S. Ct. at 1999–2001.

195. *See* Gregg v. Georgia, 428 U.S. 153, 183–84 (1976) (plurality opinion); *see also supra* text accompanying notes 116–26.

196. Hudson v. McMillan, 503 U.S. 1, 6–7 (1992) ("[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."); *see also supra* notes 163–65 and accompanying text.

197. Brown v. Plata, 563 U.S. 493, 510 (2011).

some other end.[198] Eighth Amendment dignity is concerned with the individual offender; the individual offender cannot be ignored in imposing punishment.

There is also a thread of societal concern incorporated into the Court's Eighth Amendment dignity cases. For example, in *Ford*, the Court referenced "protect[ing] the dignity of society itself."[199] Indeed, it is this strain of Eighth Amendment dignity that Henry and Buchhandler-Raphael extracted when attempting to define dignity.[200] But this is only a small piece of the Court's conception of Eighth Amendment dignity. At the heart of the Court's conception is the importance of focusing on the individual offender rather than on societal concerns. In this sense, Henry's and Buchhandler-Raphael's understandings of the Court's Eighth Amendment dignity conception are askew. Henry cited just five cases supporting her societally focused view of Eighth Amendment dignity.[201] In three of these cases, the language Henry cited—that the punishment violates the "dignity of man,"[202] that the Eighth Amendment prohibition "secure[s] individual freedom and preserve[s] human dignity,"[203] and that the punishment is "antithetical to human dignity"[204]—does not seem to support this societally based view of dignity over any other view. In one of the five cases—*Ford v. Wainwright*—she highlighted the Court's language that, in prohibiting the execution of "insane" individuals, the Court sought "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[205] This does seem to tie Eighth Amendment dignity to societal concerns. The last of the five cases that Henry quoted, though, arguably takes the opposite position. Henry highlighted the language in the Court's 2011 *Brown v. Plata* case, in which the Court emphasized that prisoners, despite being convicted, "retain the essence of human dignity inherent in all persons."[206] In this case, the Court seemed to focus on the individual rather than society, thus raising questions about this "collective virtue" version of dignity that Henry argued is at the heart of the Court's Eighth Amendment dignity jurisprudence. Buchhandler-Raphael similarly invoked the Court's language in support of her own societally focused view of Eighth Amendment dignity.[207] She quoted the

198. *See supra* text accompanying notes 29–30.
199. Ford v. Wainwright, 477 U.S. 399, 410 (1986).
200. *See supra* text accompanying notes 95–101.
201. *See* Henry, *supra* note 45, at 222–26.
202. Henry, *supra* note 45, at 223–24 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)).
203. *Id.* at 224 (quoting Roper v. Simmons, 543 U.S. 551, 578 (2005)).
204. *Id.* at 319 (quoting Hope v. Pelzer, 536 U.S. 730, 745 (2002)).
205. *Id.* at 223 (quoting Ford v. Wainwright, 477 U.S. 399, 410 (1986)).
206. *Id.* at 225 (quoting Brown v. Plata, 563 U.S. 493, 510 (2011)).
207. *See* Buchhandler-Raphael, *supra* note 28, at 317–19 (quoting *Hope*, 536 U.S. at 745). More specifically, Professor Buchhandler-Raphael explained that the cases she cited, "[t]aken together, . . . suggest that there are some fundamental standards of decency that command the government's protection of the dignity of individuals, and they are best captured in the notion of communitarian virtue." E-mail from Michal Buchhandler-Raphael, Visiting Assistant Professor of Law, Washington and Lee University School of Law, to author (June 17, 2016) (on file with author).

Court's language in *Hope v. Pelzer* that the punishment at issue was "antithetical to human dignity"[208] and its language in *Brown* that prisoners "retain the essence of human dignity inherent in all persons."[209] She also pointed to the Court's language in *Roper v. Simmons*,[210] in which the Court stated that constitutional "doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity,"[211] as well as to Justice Brennan's concurrence in *Furman v. Georgia* that the Eighth Amendment "prohibits the infliction of uncivilized and inhuman punishments."[212] None of these passages, though, supports the societal view of dignity under the Eighth Amendment. The Court's language in *Hope* refers only generally to dignity. The *Brown* Court's reference to dignity of the individual. The Court's language in *Roper* is referring to the importance and relevance of constitutional protections since the founding of this nation. And Justice Brennan's language in *Furman* suggests only that the Eighth Amendment prohibits uncivilized and inhumane punishments; it does not suggest whether this is for the purpose of protecting the individual offender or society. Moreover, this was not language embraced by a majority of the Court in *Furman*.

Eighth Amendment dignity focuses primarily on the importance of the individual offender as a human being, but Eighth Amendment dignity may certainly be broader than this minimum core. Just because a punishment accounts for the individual offender does not mean that the punishment is constitutional. But if a punishment is imposed with disregard for the individual offender, it runs afoul of the Eighth Amendment dignity demand.

B. The Individuality Core of the Eighth Amendment

The Court's invocation of dignity in its Eighth Amendment cases and those cases' focus on individualism is indicative of much of the Court's overall Eighth Amendment jurisprudence. In some respects, the Court's Eighth Amendment jurisprudence is a bit of a mess.[213] Despite the Court's general method of state-counting and applying its own inde-

208. Buchandler-Raphael, *supra* note 28, at 319 (quoting Hope v. Pelzer, 536 U.S. 730, 745 (2002)).

209. *Id.* (quoting *Brown*, 563 U.S. at 510).

210. 543 U.S. 551 (2005).

211. Buchhandler-Raphael, *supra* note 28, at 318 (quoting Roper v. Simmons, 543 U.S. 551, 578 (2005)).

212. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring)).

213. Castiglione, *supra* note 9, at 75 ("It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess."); Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 558–59 (2012) (stating that the Court's inconsistency in the factors it relies on in its Punishments Clause cases "has led scholars to throw up their hands in exasperation and has created an unpredictable Eighth Amendment jurisprudence."); Stacy, *supra* note 9, at 476 ("The Court's jurisprudence under the Eighth Amendment's Cruel and Unusual Punishment Clause stands in disarray.").

pendent judgment,[214] the ways in which the Court applies these techniques in any given case can sometimes be perplexing. While the Court's jurisprudence is no beacon of clarity, dividing the Court's Eighth Amendment cases into five different classes—procedural cases, type-of-offense cases, class-of-offender cases, method-of-punishment cases, and prison-condition cases—can provide greater clarity to the Court's jurisprudence in the area. In each these classes, the Court is concerned about individualism and viewing the offender as an end rather than as a means.

1. Procedural Cases

The Eighth Amendment procedural cases examine how a sentence is imposed and assess whether this comports with the Eighth Amendment. These cases are generally death penalty cases, and they stress the importance of individualization in sentencing. In *Woodson v. North Carolina*,[215] for example, a plurality of the Court determined that a mandatory imposition of capital punishment for offenders who were convicted of first-degree murder is unconstitutional because it does not allow consideration of the details of the offense committed or the particular characteristics of the individual committing the offense.[216] The Eighth Amendment requires more: it requires sentencers to look into the facts of the crime and the characteristics of the perpetrator to determine whether death is really appropriate in the capital case. The *Woodson* plurality explained that the mandatory death penalty at issue unconstitutionally "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[217] Such a process, the plurality explained, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[218] Quoting precedent, the plurality stated that, "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[219] It explained that individualization of sentencing is "progressive and humanizing," and that:

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214. The Court's traditional approach to questions of cruel and unusual punishment is to first survey the number of states adopting or prohibiting the punishment practice at issue, and then to apply the Court's own independent judgment to determine whether the practice is unconstitutionally cruel and unusual. *See* Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 85–88 (2010); Ryan, *supra* note 77, at 586–91; *supra* note 78.

215. 428 U.S. 280 (1976) (plurality opinion).

216. *See generally id.* (finding the petitioners' mandatory death sentences unconstitutional).

217. *Id.* at 303.

218. *Id.* at 304.

219. *Id.* (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

> [w]hile the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative . . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[220]

Despite the *Woodson* plurality's suggestion that individualization in sentencing is a constitutional demand only in capital cases, in recent years the Court has expanded this individualization requirement to non-capital sentences in some circumstances. For example, in *Miller v. Alabama*,[221] the Court also stressed the importance of individualization in sentencing under the Eighth Amendment when it struck down a mandatory sentence of life without the possibility of parole for juveniles who commit nonhomicide offenses.[222] Although the Court partially relied on the special status of juveniles—their characteristics as impulsive, neurocognitively undeveloped, and capable of rehabilitation—in reaching its decision, the Court stressed the importance of individualization in sentencing under the Eighth Amendment.[223] Similarly, in its 2011 case of *Pepper v. United States*,[224] the Court highlighted the importance of considering a defendant's individual post-sentencing rehabilitation in formulating a new non-capital sentence at resentencing.[225] Like the Court's reasoning in the capital and life-without-parole contexts, the *Pepper* Court explained that it has been a tradition in this country for courts to consider defendants as individuals and that a punishment should fit not only the crime but also the individual offender.[226] The *Pepper* Court did not root its decision in Eighth Amendment dignity, but the tradition on which the *Pepper* Court relied—the tradition that the offender be treated as an individual—seems to be rooted in our general sense of human dignity.[227]

Further, the individualization demand articulated in *Woodson* is spreading beyond just the capital context as the Supreme Court continues to whittle away at its "death is different" jurisprudence.[228] The Court's

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220. *Id.* (citations omitted).

221. 132 S. Ct. 2455 (2012).

222. *See id.* at 2463–64, 2469.

223. *See id.* at 2463–69 (stating that individualized sentencing is required when such a serious punishment is to be imposed on juveniles).

224. 562 U.S. 476 (2011).

225. *See id.* at 492–93.

226. *See id.* at 487–88. The *Pepper* Court stated:

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime.

Id. (internal quotations and citations omitted).

227. *See id.*

228. *See* Graham v. Florida, 560 U.S. 48, 103 (2010) (Thomas, J., dissenting) ("'Death is different' no longer."); Ryan, *supra* note 31, at 1233–34 (explaining that in recent cases the Court has "upended

holding in *Miller* was based on prior cases in which the Court had explained why capital cases should not always stand alone in being treated by the Court with greater scrutiny.[229] In *Graham v. Florida*,[230] for example, the Court suggested that its Eighth Amendment approach is based on the type of Eighth Amendment argument being made rather than on whether capital punishment is at issue in the case.[231] The Court thus afforded less deference to the state in determining that the punishment of life without parole was unconstitutional as applied to a nonhomicide offender.[232] After *Graham* and *Miller*, then, death no longer seems to be so different such that alternative rules should apply in the capital context.

Finally, if Eighth Amendment dignity demands that capital offenders be treated as individual human beings, it only makes sense to treat less serious offenders as equally human. One might still argue that death remains different in some respects—arguments that may no longer hold water[233]—but one of the reasons society looks askance at offenders is because of the horrendous crimes they have committed. Indeed, some offenders have been likened to animals.[234] If we must respect the dignity of even the worst offenders by treating them as individual human beings, then consistency would suggest that we must similarly respect the dignity

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its long-held conclusion that different rules apply in the capital context than in non-capital cases[,] . . . cutting back on its 'death is different' jurisprudence"). For a summary of the Court's traditional "death is different" jurisprudence, see Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 859–61 (2007).

229. *See* Miller v. Alabama, 132 S. Ct. 2455, 2463, 2466–67 (2012).

230. 560 U.S. 48.

231. *See id.* at 59–62.

232. *See id.* at 61–62.

233. Death has been said to be different because of its severity and finality. *See* Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring). But the Supreme Court has indicated that other punishments, such as life without the possibility of parole, are likewise incredibly severe, *see Graham*, 560 U.S. at 69, and the Court has struck down other punishments like denationalization, *see* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), while upholding the practice of capital punishment, *see* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion). Justice Stewart found death to be different in kind rather than degree. *See Furman*, 408 U.S. at 306 (Stewart, J., concurring). He found the punishment to be "unique in its total irrevocability" and "in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." *Id.* While we are unable to raise the dead, however, we are similarly unable to give back years spent in prison, making terms of imprisonment irrevocable as well. Further, although it is commonly thought that death cannot serve rehabilitative goals, imposition of the death penalty was originally used in this country to do just that. *See* Ryan, *supra* note 31, at 1246–49. Further, remnants of the rehabilitative effects of a death sentence can be seen in anecdotes of death row inmates like Karla Faye Tucker being transformed as she awaited execution and also in legal doctrines such as the dying declaration, which is premised on those facing death to be truthful because they would not want to die with a lie on their lips. *See id.* at 1249–57. Finally, some Justices have suggested that death is different because it "is uniquely degrading to human dignity." *Furman*, 408 U.S. at 290–91 (Brennan, J., concurring); *see also id.* at 306 (Stewart, J., concurring) (stating that capital punishment is unique "in its absolute renunciation of all that is embodied in our concept of humanity."). Failing to be concerned about the individual offender, however—in any context—is a failure to respect his dignity.

234. *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 178–83 (1986) (finding on *habeas* review that the prosecutor's reference to the defendant as an animal at trial "did not deprive petitioner of a fair trial"); People v. Garcia, 258 P.3d 751, 787–88 (Cal. 2011) (noting that the prosecutor repeatedly referred to the defendant as an animal during the sentencing phase of a capital trial and finding this unproblematic).

of offenders outside of the capital realm. Individualism remains important in all of these cases.

2. *Type-of-Offense Cases*

Type-of-offense cases deal with whether a particular punishment is appropriate for a certain offense or class of offenses. For example, does it violate the Eighth Amendment to execute someone for raping a child?[235] Does the Eighth Amendment bar a sentence of life imprisonment without the possibility of parole for the crime of uttering a $100 "no account" check when the offender has previously been convicted of six other nonviolent felonies?[236] These cases often focus on whether the punishment is proportionate to the offense committed. In assessing proportionality, the Court has, in some of these cases, waded deeply into the facts to examine the offender's previous offenses. In *Ewing v. California*,[237] for example, the Court looked at the twenty-five-years-to-life sentence imposed for Mr. Ewing's crime of felony grand theft.[238] While this punishment may seem extreme, the Justices explained that the offender had previously committed at least two serious or violent felonies.[239] Accounting for the legitimate "public-safety interest in incapacitating and deterring recidivist felons," a plurality of the Court determined that Mr. Ewing's offense was not grossly disproportionate to the long sentence.[240] Moreover, a majority of the Justices found proportionality exceptionally important in these type-of-offense cases.[241] As in the Court's cases that explicitly invoke dignity, these type-of-offense cases' focus on proportionality generally requires the Court to look closely at the individual and the offense(s) he committed, thus requiring an individualization in sentencing akin to that seen in the Court's Eighth Amendment procedural cases.

In some type-of-offense cases, the Court has looked at only the offense committed and not at the offender at the center of the case when assessing proportionality. For example, when the Court concluded that it is unconstitutional to execute someone for the crime of child rape, the Court created a bright-line rule based on the offense committed.[242] In no case, then, would capital punishment be appropriate for raping a child. No characteristic possessed by an offender—whether he had raped a dozen children or worshipped Satan—could render him eligible for the death penalty as punishment for this offense. While these cases do not wade into the facts, they determine that the punishment could never be propor-

235. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court held that, yes, it is unconstitutional to execute someone for having committed this offense. *See id.* at 413.

236. *See* Solem v. Helm, 463 U.S. 277, 296, 303 (1983).

237. 538 U.S. 11 (2003) (plurality opinion).

238. *See id.* at 20.

239. *See id.* at 28.

240. *Id.* at 29–31.

241. *See id.* at 30–31; *id.* at 36–37 (Breyer, J., dissenting).

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

tionate to the offense at issue. They provide prophylactic rules to protect the individual offenders, regardless of who those individual offenders are.

3. *Class-of-Offender Cases*

Class-of-offender cases focus on whether a certain category of offender is eligible to be sentenced to a particular punishment. For example, the Supreme Court has held that several different types of offenders—"insane" persons, intellectually disabled persons, and juvenile offenders—cannot constitutionally be executed.[243] Like the type-of-offense cases, these cases focus on proportionality, but here they hone in on the offender's probable culpability and capacity—taking into account the class of offender's decision-making abilities and comprehension, neurological development, impulsivity, and the like—rather than concentrate on the seriousness of the offense. For example, in finding it unconstitutional to execute intellectually disabled persons, the *Atkins v. Virginia* Court relied on these offenders' "cognitive and behavioral impairments"—such as their "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses"—which lessen their culpabilities.[244] Similarly, in *Roper v. Simmons*[245] the Court relied on juvenile offenders' "lack of maturity and . . . underdeveloped sense of responsibility"; "vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure"; and generally unformed characters in determining that they could not constitutionally be executed.[246] These punishments again focus on proportionality between the offender's desert and the punishment imposed. In a sense, the inquiry is even more offender-based than in type-of-offense cases because it looks at the very human qualities of the offenders at issue. Like some of the type-of-offense cases, though, class-of-offender cases are generally prophylactic in nature. In this way they focus less on the individual offender in the particular case but instead concentrate on a broad class of offenders to provide even greater protection to individual dignity.

4. *Method-of-Punishment Cases*

Method-of-punishment cases focus less on the proportionality of the punishment in a particular case and instead on whether the punishment, or the particular procedures involved in any punishment, should ever be an available sentencing option under our Constitution. These cases examine whether the particular punishment method and its procedures are un-

243. Ford v. Wainwright, 477 U.S. 399, 401 (1986); *see* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014); Roper v. Simmons, 543 U.S. 551, 578 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

244. *Atkins*, 536 U.S. at 319–20. These "cognitive and behavioral impairments" also lessen the deterrence value of the punishment. *Id.*

245. 543 U.S. 551.

246. *Id.* at 568–75.

constitutional.[247] Most of these cases are focused on the death penalty: Is electrocution a cruel and unusual method of implementing capital punishment?[248] Is the three-drug cocktail that has traditionally been used to carry out lethal injection unconstitutionally cruel and unusual?[249] Are the more recent techniques that states have employed to carry out lethal injection constitutional?[250] While the Court has never found any method of capital punishment to violate the Eighth Amendment,[251] it has emphasized in its method-of-punishment cases that torturous punishments, or those to which "terror, pain, or disgrace were . . . superadded," are unconstitutional.[252] In more recent method-of-punishment cases, the Court has focused more specifically on the degree of risk of suffering pain, the magnitude of that pain, and available alternatives to carry out the punishment.[253] This attention to inflicting terror, pain, and disgrace for a purpose not necessary to put the defendant to death is in accord with the Court's general proportionality analysis.[254] Although the Court has issued

247. This class of cases includes both methods of punishment—such as lethal injection broadly—and the procedures, or "techniques" employed in that method—such as a particular cocktail used to carry out lethal injection. The "prison condition cases" also relate to the procedures or techniques used in carrying out a term of imprisonment. *See infra* Part III.B.5.

248. *See generally* Francis v. Resweber, 329 U.S. 459 (1947) (plurality opinion) (examining whether a criminal offender could be put to death by electrocution when the first attempt to execute him by electrocution failed); *In re* Kemmler, 136 U.S. 436 (1890) (upholding the practice of electrocution).

249. *See generally* Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion) (upholding a common three-drug lethal injection protocol).

250. *See generally* Glossip v. Gross, 135 S. Ct. 2726 (2015) (upholding Oklahoma's three-drug lethal injection cocktail of midazolam, a paralytic (vecuronium bromide, pancuronium bromide, or rocuronium bromide), and potassium chloride).

251. *See id.* at 2732 ("While methods of execution have changed over the years, this Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." (internal quotations, alterations, and citations omitted)). But in *Trop v. Dulles*, the Court struck down the punishment of denationalization. *See* 356 U.S. 86, 101 (1958) (plurality opinion).

252. Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878); *see also Baze*, 553 U.S. at 48 ("What each of the forbidden punishments [in the Court's previous cases] had in common was the deliberate infliction of pain for the sake of pain—'superadding' pain to the death sentence through torture and the like." (internal alterations omitted)).

253. *See Glossip*, 135 S. Ct. at 2738 ("Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution."); *Baze*, 553 U.S. at 61 (stating that a defendant "must show that the risk is substantial when compared to the known and available alternatives."); *Baze*, 553 U.S. at 107 (Breyer, J., concurring) (concluding that "the relevant question [is] whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering."). In *Baze v. Rees*, for example, seven of the Justices determined that courts should consider the degree of risk of suffering pain, the magnitude of that pain, and available alternatives to carry out the punishment. *See* 553 U.S. at 51 (Roberts, J.) (indicating that a defendant may succeed on an Eighth Amendment challenge if he can establish that alternative procedures "effectively address a substantial risk of serious harm"); *id.* at 87 (Stevens, J., concurring) ("Under [the Court's] precedents, whether as interpreted by THE CHIEF JUSTICE or Justice GINSBURG, I am persuaded that the evidence adduced by petitioners fails to prove that Kentucky's lethal injection protocol violates the Eighth Amendment."); *id.* at 107–08 (Breyer J., concurring) ("I agree that the relevant factors—the 'degree of risk,' the 'magnitude of pain,' and 'availability of alternatives'—are interrelated and each must be considered."); *id.* at 116 (Ginsburg, J., dissenting) ("I agree with . . . the plurality that the degree of risk, magnitude of pain, and availability of alternatives must be considered. I part ways with the plurality, however, to the extent its 'substantial risk' test sets a fixed threshold for the first factor.").

254. *See supra* text accompanying notes 103–06.

broad prophylactic holdings in these cases as well, the Court is still attuned to the reason the punishment was imposed because, again, punishment added for a reason not associated with the basic purposes of punishment results in disproportionality and thus runs afoul of the Eighth Amendment dignity demand. Thus, while a severe punishment like death is constitutional, and while this punishment "inherent[ly]" involves "[s]ome risk of pain,"[255] at some point that risk of pain can become so great that the method of execution is unconstitutional.[256] Although it is acceptable to impose death,[257] it is unacceptable to wantonly inflict pain because this amounts to disproportionality.[258] These prophylactic rules also touch on the humanness facet of the Court's dignity requirement. In no cases are these torturous punishments available under the Constitution.

5. *Prison-Condition Cases*

Finally, prison-condition cases focus almost exclusively on how the practice of punishment is carried out. These cases are unique in that they ordinarily arise in a slightly different procedural context than the other classes of Eighth Amendment cases. Instead of arising in post-conviction proceedings, prison-condition cases usually arise in civil 42 U.S.C. § 1983 cases instead.[259] These are also the cases in which the Court most consistently invokes the concept of Eighth Amendment dignity.[260]

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255. *See Baze*, 533 U.S. at 47.

256. *See generally id.* (upholding the traditional three-drug method of lethal injection and setting forth a constitutional standard that a punishment is unconstitutional when there is "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm,'" at least when compared to available alternatives); *see also id.* at 116–17 (Ginsburg, J., dissenting) (setting forth a lower threshold for unconstitutionality); *id.* at 87 (Stevens, J., concurring) (accepting either the plurality's standard or that set forth by Justice Ginsburg in dissent); *id.* at 107–08 (Breyer, J., concurring) (adopting the standard set forth by Justice Ginsburg).

257. Facts are accumulating, however, such that there might soon be a determination that capital punishment has become unconstitutional under the Eighth Amendment. *See* Meghan J. Ryan, *On the Road to Abolition: The Uncertain Future of Capital Punishment in the United States*, JURIST (Feb. 24, 2016), http://www.jurist.org/forum/2016/02/meghan-ryan-capital-punishment.php.

258. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) (stating that "[a] penalty . . . must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment'" and that "[t]his means, at least, that the punishment not be 'excessive'"—that it "not involve the unnecessary and wanton infliction of pain" and that it "not be grossly out of proportion to the severity of the crime" (internal citations omitted)); *supra* text accompanying notes 103–06.

259. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 735 (2002) (noting that the plaintiff "filed suit under . . . 42 U.S.C. § 1983 . . . against three guards . . . , one of whom also handcuffed him to the hitching post."); Hudson v. McMillian, 503 U.S. 1, 4 (1992) ("Hudson sued the three corrections officers in Federal District Court under . . . 42 U.S.C. § 1983, alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishments and seeking compensatory damages.").

260. The Court explicitly invoked Eighth Amendment dignity in the prison condition cases of Estelle v. Gamble, 429 U.S. 97 (1976), Hutto v. Finney, 437 U.S.678 (1978), *Hudson*, 503 U.S. 1, *Hope*, 536 U.S. 730, and Brown v. Plata, 563 U.S. 493 (2011). It also explicitly invoked Eighth Amendment dignity in the procedural cases of *Gregg*, 428 U.S. 153, and McCleskey v. Kemp, 481 U.S. 279 (1987); the type-of-offense case of Kennedy v. Louisiana, 554 U.S. 407 (2008); the class-of-offender cases of Ford v. Wainwright, 477 U.S. 399 (1986), Thompson v. Oklahoma, 487 U.S. 815 (1988), Atkins

Perhaps recognizing the uniqueness of these cases, the Court applies a different analytical framework to prison-condition cases. Instead of relying on state- or jurisdiction-counting and applying its own independent judgment like the Court does in many of its other Eighth Amendment cases,[261] here the Court has sorted prison condition into two groups and then applied unique analyses in each of these types of cases. In the first category—the medical-care cases—the Court has determined that prison authorities' "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment in violation of the Eighth Amendment.[262] In the second category—the excessive-force cases—the Court has found it unconstitutional for prison authorities to "maliciously and sadistically use force to cause harm" to prisoners.[263] These are ad hoc analyses in which the examining courts look at the individual facts of each case to determine the constitutionality of the government action (or inaction).

Even within this unique group of cases, though, we see the Court again referencing the importance of individualism in relation to Eighth Amendment dignity. In both the medical-care cases and the excessive-force cases, the Court is concerned about the prison officials' purposes behind their actions: Were they *deliberately indifferent* toward the inmate's basic needs?[264] Or were they *maliciously and sadistically* employing force against the inmate?[265] As in *Gregg* and other Eighth Amendment cases explicitly invoking the dignity demand, this purpose is integrally related to proportionality.[266] If the officers were acting maliciously or sadistically, they were imposing pain independently rather than as part of legally sanctioned punishment. If the government was deliberately indifferent to an inmate's medical needs, it was, in effect, imposing punitive treatment similarly outside the bounds of legal punishment. These prison-condition cases go beyond just the concern for proportionality, though; they focus on whether the prisoner has been treated humanely. In *Estelle v. Gamble*, for example, the Court explained that deliberately acting indifferent toward an inmate's serious medical need is "simply in-

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v. Virginia, 536 U.S. 304 (2002), Roper v. Simmons, 543 U.S. 551 (2005), and Hall v. Florida, 134 S. Ct. 1986 (2014); and the method-of-punishment case of Trop v. Dulles, 356 U.S. 86 (1958).

261. *See supra* text accompanying notes 78, 214.

262. *Estelle*, 429 U.S. at 104.

263. *Hudson*, 503 U.S. at 6–7.

264. *See Estelle*, 429 U.S. at 104. In some medical care cases, the Court has been unclear in its Eighth Amendment analysis. In *Brown v. Plata*, for example, the Court concluded that the results of overcrowded prisons in California amounted to "ongoing violations of the Cruel and Unusual Punishments Clause," and, although the Court set forth the shocking and disturbing conditions of the prisons at issue, it did not clearly engage in straightforward constitutional analysis to explain how it reached this conclusion. 563 U.S. at 499. It is possible that the Court broadened its test for determining whether there is an Eighth Amendment violation in these cases, though, as the Court expansively stated that there is an Eighth Amendment violation when "[a] prison . . . deprives prisoners of basic sustenance, including adequate medical care, [because it] is incompatible with the concept of human dignity and has no place in civilized society." *Id.* at 510.

265. *See Hudson*, 503 U.S. at 7.

266. *See supra* Part III.A.

humane" and can, in the worst cases, amount to torture.[267] In *Hope v. Pelzer*, the Court explained that tying the inmate to the hitching post under those circumstances was "obvious[ly] cruel" and "antithetical to human dignity."[268] In both proportionality and the concern for human beings, then, the prison-condition cases again emphasize the importance of the individual offender. Like the other Punishments Clause cases, these cases suggest that it is unconstitutional to neglect the importance of the individual offender in punishing.

V. THE UNCONSTITUTIONALITY OF PURELY UTILITARIAN PUNISHMENT

The minimum non-instrumentalization core of constitutional dignity that the Court seems to have adopted has significant consequences for when and how offenders may be constitutionally punished. The Court's focus on the individual offender and command that offenders must be viewed as ends in themselves rather than as means to achieve other ends places limitations on the types of punishments that may be constitutionally imposed. Purely utilitarian punishment, it seems, is impermissible. By "purely utilitarian punishment," I mean the variety of utilitarianism to which legal scholars ordinarily refer when they reference utilitarianism.[269] It is the type described by Jeremy Bentham—"universalistic hedonistic act utilitarian[ism]"[270]—which is ordinarily described as creating the greatest happiness for the greatest number of people.[271] For example, say

267. *Estelle*, 429 U.S. at 103; *see supra* text accompanying notes 133–35.

268. Hope v. Pelzer, 536 U.S. 730, 745 (2002); *see supra* text accompanying notes 157–160.

269. *See, e.g.*, Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1116 (2007) ("Utilitarianism justifies the punishment of criminals only if such punishment serves the overall greater good of increasing societal happiness."); H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 829–30 (1979) ("In the perspective of classical maximising utilitarianism separate individuals are of no intrinsic importance but only important as the points at which fragments of what *is* important, *i.e.* the total aggregate of pleasure or happiness, are located."); David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1227 (1979) (referencing "utilitarian calculations of the greatest happiness of the greatest number.").

270. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (1907) ("By utility is meant that property in any object, whereby it tends to produce . . . happiness or . . . unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual."); 9 ENCYCLOPEDIA OF PHILOSOPHY 605 (Donald M. Borchert ed., 2d ed. 2006); Jeremy Bentham, *A Fragment on Government*, *in* BENTHAM'S FRAGMENT ON GOVERNMENT 93 (F.C. Montague ed., 1891) ("[I]t is the greatest happiness of the greatest number that is the measure of right and wrong . . . .").

271. *See* BENTHAM, *supra* note 270, at 2–4; *supra* note 269. Bentham noted that "utility" is often described as "the *greatest happiness* or *greatest felicity* principle." BENTHAM, *supra* note 270, at 2. He said that this label was for brevity and in substitution for stating that it is a principle providing that "the greatest happiness of all those whose interests is in question as being the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of Government." *Id.*

that a crazed man has taken ten individuals hostage and is threatening to kill them. He says that he will trade their lives (and freedom) in exchange for the authorities handing over his ex-wife, whom he will kill instead. Should the authorities sacrifice one individual woman's life to save the ten hostages? Pure utilitarianism says yes (assuming all other factors are equal). It suggests that individuals may be used to achieve greater societal happiness.[272] Focusing on the happiness of the greatest number of people, or societal happiness, in this way loses sight of the individual. In this sense, pure utilitarianism is at odds with the non-instrumentalization principle of dignity that the Court seems to have adopted as an Eighth Amendment constitutional limitation on punishment. Thus, if the Court has adopted this non-instrumentalization principle, then it has rejected the purely utilitarian approach to punishment.[273]

Perhaps it should not be surprising that purely utilitarian punishment is unconstitutional. After all, purely utilitarian punishment has been criticized for years. One of the primary criticisms of utilitarian punishment is that it justifies punishing innocent individuals. As H.J. McCloskey explained, "[i]t appears to be useful to do lots of things which are unjust and undesirable . . . . We may sometimes best deter others by punishing, by framing, an innocent man who is generally believed to be guilty . . . ."[274] Why it is unpalatable to punish the innocent is ordinarily assumed rather than discussed, but perhaps intuitive notions of human dignity are why most people can agree upon this conclusion.[275] Indeed, most legal scholars seem to have concluded that ignoring the individual—

272. *But see* P.J. KELLY, UTILITARIANISM AND DISTRIBUTIVE JUSTICE: JEREMY BENTHAM AND THE CIVIL LAW 81 (1990) (explaining that, under Bentham's theory, "[l]aw provides the basic framework of social interaction by delimiting spheres of personal inviolability within which individuals can form and pursue their own conceptions of well-being.").

273. *Cf.* Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1335 (1993) ("Kant's ethical principle, the categorical imperative, disregards consequences in determining moral judgments, a concept diametrically opposed to utilitarianism."); Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1867–68 (2000) ("Whether understood as 'love of neighbor as oneself,' the golden rule, or Kant's categorical imperative, the supreme principle of morality in natural law theory, in both its conception of human good and its conception of the equality of persons, stands in direct opposition to the supreme principle of morality in utilitarianism, which was given its most explicit expression by Jeremy Bentham.").

274. H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249, 253 (1965); *see also* E.F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947) (suggesting "it might be highly expedient [in some circumstances] to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty."). *But see* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118–19 (2001) (arguing that "the charge of framing the innocent rests on a misunderstanding of utilitarian penology as an application of an 'act-utilitarian' ethic governing individual behavior" and that utilitarianism actually "began as a normative theory of law and legal process aiming not just at happiness in general, but also at security in particular, and that this theory was methodologically committed to publicity, regularity and representativeness of legal decisionmaking.").

275. Other explanations for why we should be concerned about punishing innocent persons include basic unfairness and allowing the true offender to go free. *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 596 (2005).

and his particular desert in any case—is unacceptable.[276] At the extreme, it seems unjust to punish an innocent person just because it would increase society's overall happiness (such that it outweighs the innocent person's decrease in happiness).[277] Instead of adopting a purely utilitarian view of punishment, most courts and legal scholars have adopted a theory of limiting retributivism, under which the offender's desert sets the bounds of how much, and how little, an offender should be punished.[278] Within this range of acceptable punishment, utilitarian theories of punishment—such as deterrence, incapacitation, and rehabilitation—may be employed to determine the exact punishment that should be imposed.[279] Because such a theory takes into account the offender as an individual, it is not purely utilitarian punishment even though utilitarian considerations play a role in determining the appropriate punishment. Accordingly, punishing under the theory of limiting retributivism does not pose the same constitutional dignity concerns that purely utilitarian punishment does. *Purely* utilitarian punishment is not only disfavored, but it is also unconstitutional under the Court's interpretation of Eighth Amendment dignity.[280]

VI. TAKING EIGHTH AMENDMENT DIGNITY SERIOUSLY

If we take the Eighth Amendment dignity demand seriously and recognize the constitutional importance of the individual offender, some of our common criminal justice practices become questionable. Many of these practices ignore the offender as an individual human being. For example, overlooking individual innocence for the sake of utilitarian goals like finality raises an Eighth Amendment dignity concern. Similarly, statutes authorizing punishments based only on utilitarian goals are problematic. And practices like imposing mandatory sentences also lose sight

276. *See supra* text accompanying note 262.

277. Note that legal scholars often seem not to concern themselves with the nuances of differing types of utilitarianism, or even consequentialism, so this classical understanding of utilitarianism is usually what legal scholars are referring to when they speak of utilitarianism.

278. *See* Ryan, *supra* note 103, at 1062 (noting that "perhaps the permutation of . . . retributivism that has gained the most traction among courts and scholars is 'limiting retributivism,' which uses the tenets of ordinary retributivism to determine the appropriate endpoints on an acceptable range of punishment and uses consequentialist theories to determine the particular punishment within that range."); *cf.* MODEL PENAL CODE: SENTENCING § 1.02(2), cmt. b(3) (Tentative Draft No. 1, 2007) (commenting that the purpose of punishment provision of the most recent draft of the *Model Penal Code: Sentencing* relies on Norval Morris's theory of limiting retributivism); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76, 78 (2005) ("[A]lmost every system has adopted some form of what Norval Morris called 'limiting retributivism' (also known as modified just deserts).").

279. *See* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 161 (1982) (explaining that, "[t]o the limiting retributivist, desert sets the outer limits, upper and lower, of punishment" but that one's sense of what a criminal deserves "is not finely tuned"); Norval Morris & Marc Miller, *Predictions of Dangerousness*, *in* 6 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 37 (Michael Tonry & Norval Morris eds., 1985) ("The upper and lower limits of 'deserved' punishment set the range within which utilitarian values, including values of mercy and human understanding, may properly fix the punishment to be imposed.").

280. *See supra* Part IV.

of the individual, raising Eighth Amendment concerns. While the constitutional requirements of dignity may be more robust than the basic non-instrumentalization of individual offenders, this is the core of the Eighth Amendment dignity demand. If dignity is really the backdrop of the Eighth Amendment, then we need to look more carefully at these criminal justice practices.

A. A Ban on Punishing the Innocent

Recognizing the dignity limitation on punishment under the Eighth Amendment sheds new light on freestanding claims of actual innocence. In recent decades, there has been much debate about whether criminal convictions should be overturned based only upon evidence of convicted individuals' factual innocence. For example, in 2008, the federal district court for the Eastern District of Michigan denied Mr. Jash Lardie's petition for a *writ of habeas corpus*, which was based on his claim of actual innocence.[281] Lardie had been sentenced to six to fifteen years' imprisonment based on his convictions for three counts of operating a vehicle under the influence of liquor, causing death.[282] He had apparently imbibed alcohol, smoked marijuana, driven several passengers in his vehicle, and gotten into a car accident that killed three of his passengers.[283] In his *habeas* petition, Lardie claimed that he was innocent and that newly discovered evidence raised doubt about his guilt.[284] In his petition for *writ of habeas corpus*, though, Lardie pointed to a 2003 police report and a written statement from an individual alleging that another occupant of the car had admitted that he could have been the driver.[285] Despite this, the court denied Lardie's petition because "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal *habeas* relief absent an independent constitutional violation oc-

281. *See* Lardie v. Birkett, No. 05-CV-74766-DT, 2008 WL 474072, at *1 (E.D. Mich. Feb. 19, 2008).

282. *See id.* ("Petitioner Jash E. Lardie, has filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his 1996 convictions for three counts of OUIL causing death which were imposed following a jury trial in the Grand Traverse County Circuit Court.").

283. *See id.* As the court explained, "the Michigan Supreme Court summarized" the events:

> On May 22, 1993, defendant Lardie drank alcohol and smoked marijuana at a party at his parents' home. Defendant was seventeen years old. He left his home at approximately 1:50 a.m. to give several people from the party a ride to one of their cars. From the physical evidence, defendant apparently drove the car off the paved road and traveled about 130 feet on the shoulder. The car hit a small tree and then, traveling another sixty or seventy feet, struck a larger one, killing the three passengers in the back seat, Jason Stutesman, Kendra Tiernan, and Erinn Tompkins. Lardie had an estimated blood-alcohol level of 0.12 percent or greater at the time of the accident and tested positive for marijuana use. The medical expert testified that taking these two substances together creates a "synergistic type impairment," multiplying the impairment rather than just adding to what each would cause alone.

Id. (quoting People v. Lardie, 551 N.W.2d 656, 658 (Mich. 1996)).

284. *See id.* at *1, *3.

285. *See id.* at *3 ("The evidence at issue is a 2003 police report and written statement from Shawn Priest stating that the passenger of the car, Christopher Timms, told him in 1993 that he (Timms) may have been the driver of the car.").

curring in the underlying state criminal proceeding";[286] instead, "[f]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[287]

Like other courts reaching similar conclusions, the *Lardie* court based its decision on what is perhaps the Supreme Court's most notable actual innocence case: *Herrera v. Collins*.[288] In 1982, Mr. Herrera was convicted of capital murder in Texas.[289] He appealed his conviction and lost, and then he filed habeas corpus petitions in both state and federal court, on which he was also unsuccessful.[290] Nearly a decade later, though, Herrera filed another habeas petition in state court claiming, based on newly discovered evidence, that he was actually innocent.[291] He lost once again but then filed a similar petition in federal court, which made its way up to the U.S. Supreme Court.[292] In deciding the case, there was a sharp divide among the Justices as to whether it is unconstitutional to execute an innocent person.[293] The Court ultimately decided the case on the ground that, regardless of whether executing an innocent person would pose a constitutional problem, Herrera had not made a sufficient showing of innocence.[294] Thus, Herrera lost his case in a 6-3 decision and was executed at 4:49 a.m. on April 12, 1993, in Huntsville, TX.[295] In his final moments, Herrera said: "I am innocent, innocent, innocent.... Make no mistake about this. I owe society nothing.... I am an innocent man and something very wrong is taking place tonight."[296] The *Herrera* case has received significant attention, and Herrera's name is just one of many names at the center of earnest discussions about innocent people being punished.

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286. *Id.* (quoting Herrera v. Collins, 506 U.S. 390, 400 (1993)).

287. *Id.* (quoting *Herrera*, 506 U.S. at 400). The court further stated that even "federal courts which have suggested that habeas relief could conceivably be granted upon newly-discovered evidence have set an extraordinary showing of a petitioner's innocence before relief could be granted," and "Petitioner has not met this standard." *Id.* at *3–*4.

288. 506 U.S. 390 (1993).

289. *See id.* at 393.

290. *See id.* at 393, 395–96.

291. *See id.* at 396.

292. *See id.* at 396, 398.

293. *Compare id.* at 419 (O'Connor, J., concurring) (stating that it is a "fundamental legal principle that executing the innocent is inconsistent with the Constitution."), *id.* at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."), *and id.* at 430 (Blackmun, J., dissenting) ("Nothing could be more contrary to contemporary standards of decency . . . or more shocking to the conscience . . . than to execute a person who is actually innocent."), *with id.* at 427–28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

294. *See id.* at 417.

295. *Man in Case on Curbing New Evidence Is Executed*, N.Y. TIMES, May 13, 1993, *available at* http://www.nytimes.com/1993/05/13/us/man-in-case-on-curbing-new-evidence-is-executed.html.

296. *Id.*

Considering our general intuitions that are perhaps rooted in dignity,[297] it may seem obvious that offenders' convictions should be overturned when evidence of their actual innocence arises. But there are other considerations to take into account. Reexamining a conviction after appellate review has been completed, and certainly after a round of habeas has come to an end, undermines the doctrine of finality. Finality has been deemed to be important, although its sacrosanct position has been criticized in recent years.[298] Finality is said to further several vital interests, such as the government's "punitive interests," deterrence, rehabilitation, closure for the victims, and federalism and comity.[299] Accounting for this finality doctrine, the traditional writ of habeas corpus limits the grounds on which an offender can challenge his conviction once it has become final.[300] And federal law—through the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—further restricts offenders' opportunities to collaterally attack their convictions.[301] These statutory limitations, several courts like *Lardie* have held, trump claims of actual innocence.[302]

Placing these other interests above an offender's innocence, though, ignores the Eighth Amendment dignity demand. Pursuant to the Court's non-instrumentalist approach to dignity, an offender cannot be used as a means to achieve other ends; an offender cannot be punished despite his innocence to further broader interests of finality or procedure.[303] Accordingly, if there is indeed a case in which the convicted offender is innocent,

297. *See supra* text accompanying note 258.

298. *See* Ryan, *supra* note 104, at 127–28 ("The finality doctrine, and the interests finality is said to serve, has been questioned in recent years . . . . Much of this questioning stems from flagging confidence in the certainty of convictions that is fostered by cases like *Herrera*.").

299. *See* Kuhlmann v. Wilson, 477 U.S. 436, 452–53 (1986) (Powell, J.); Ryan, *supra* note 104, at 125–27.

300. *See* FED. JUDICIARY CTR., *Habeas Corpus Jurisdiction in the Federal Courts*, HISTORY OF THE FEDERAL JUDICIARY, http://www.fjc.gov/history/home.nsf/page/jurisdiction_habeas.html (last visited June 4, 2016). *See generally* Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748 (1987) (summarizing the history of *habeas corpus* in the United States).

301. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

302. *See, e.g.*, Graves v. Cockrell, 351 F.3d 143, 151 (5th Cir. 2003) (rejecting the petitioner's claim of actual innocence because the court rejected the notion that "a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief," and holding "that claims of actual innocence are not cognizable on federal habeas review."); Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) ("Because federal habeas relief exists to correct constitutional defects, not factual errors, 'claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" (internal alterations omitted) (quoting Herrera v. Collins, 506 U.S. 390, 400 (1993))); Milone v. Camp, 22 F.3d 693, 700, 705–06 (7th Cir. 1994) (sympathizing with the petitioner because he could be innocent of the crime for which he was convicted, but concluding that the court could not grant petitioner relief because Supreme Court precedent "strongly suggests that actual innocence is not itself a ground for granting habeas relief in anything other than a capital case" and "a contrary rule would gravely undermine legitimate concerns for federalism and finality by arrogating to federal courts, under the guise of a constitutional claim to substantive due process, the fact-finding function that is generally reserved for state processes.").

303. *See supra* Part IV & V.

it would violate the Eighth Amendment dignity demand to punish that individual.[304]

It is difficult to imagine that the Court would allow a person to be punished if it were clear that the individual was actually innocent. Indeed, six of the nine Justices in *Herrera* concluded that it would be unconstitutional to punish an innocent person.[305] Justices Blackmun, Stevens, and Souter explained that "[n]othing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent."[306] Justice White stated that he "assume[d] that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of" an individual.[307] And Justices O'Connor and Kennedy said that they could not "disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[308] But still, in his majority opinion, Justice Rehnquist clearly stated that:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceedin[g] .... This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.[309]

Moreover, Justices Scalia and Thomas argued that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[310] The membership of the Court has changed over the years, and today's Court may have varying views on these matters from the *Herrera*

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304. There seem to be other constitutional reasons as to why punishing an innocent person should be considered as unacceptable. Under the Court's proportionality analyses in both capital and noncapital cases, it would seem that punishing an innocent person would not only be disproportionate, but it would also be grossly disproportionate.

305. Justices O'Connor, White, and Blackmun expressed this sentiment in their concurrences and dissents, which were variously joined by Justices Kennedy, Stevens, and Souter. *See* Herrera, 506 U.S. at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *id.* at 429 (White, J., concurring) ("In voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.* at 430 (Blackmun, J., dissenting) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." (internal citations omitted)).

306. *Id.* at 430 (Blackmun, J., dissenting).

307. *Id.* at 429 (White, J., concurring).

308. *Id.* at 419 (O'Connor, J., concurring).

309. *Id.* at 400. Justices O'Connor, Kennedy, Scalia, and Thomas joined in the majority opinion, although they also authored or joined in concurring opinions.

310. *See id.* at 427–28.

Court,[311] but it is still difficult to imagine the Supreme Court finding it constitutional to punish someone who is clearly innocent. The Eighth Amendment dignity limitation, though, may be a useful tool in setting this outer boundary on permissible punishment.

It seems unlikely that the constitutionality of punishing, and especially executing, a factually innocent individual will be tested. If the innocence of an individual were undeniable, political pressure would likely trigger some other form of relief, such as executive clemency.[312] Instead, in practical terms, this really comes down to a question of how clear proof of innocence must be in order to override the societal interests of maintaining a judgment of conviction and sentencing. The Eighth Amendment requirement of preserving an individual's dignity does not clearly answer this question. Taking the strong position that we cannot punish individuals if there is any risk that they might be innocent seems unworkable. It would conflict with the Court's *In re Winship*[313] decision setting the applicable standard of proof at beyond a reasonable doubt.[314] This other constitutional standard cannot be reconciled with a total commitment to ensuring that each individual convicted is actually guilty.[315] And this concern that complete focus on the individual is unworkable is the same concern that arises when adopting a purely retributive theory of punishment.[316] The *In re Winship* standard of requiring only proof beyond a reasonable doubt that an individual is guilty before punishment may be imposed suggests that we tolerate that some innocent individuals will be punished.[317] This is in conflict with the theory of retributivism that an individual should be punished only to the extent that he deserves it. Under *In re Winship*, then, the focus on the individual is in some sense sacrificed for the sake of a working criminal justice system. Just as under the theory of limiting retributivism,[318] utilitarianism may be used to fill these uncertainty gaps, and utility may often be a useful consideration in determining the

311. In its recent case of *McQuiggin v. Perkins*, the Court explained that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." 133 S. Ct. 1924, 1931 (2013).

312. Even though grants of clemency "can be politically motivated and capricious," it still seems that clemency would be likely in the case of an undeniably innocent person. *See* Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1118 (2015).

313. 397 U.S. 358, 364 (1970).

314. *See id.* ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

315. And, factually, it may be impossible to determine with 100% certainty that any individual is actually guilty.

316. *See* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632 (1992) ("[S]ince any actual criminal justice system is inherently fallible, any such system will inevitably inflict punishment on some people who are actually innocent and thus do not deserve it.").

317. *See id.*

318. *See supra* text accompanying notes 277–78.

appropriateness of punishment. *Pure* utilitarianism, though, which disregards individual consideration of the offender, is problematic.[319]

While recognizing the importance of Eighth Amendment dignity does not resolve the evidentiary question, it does provide courts and litigants with another avenue by which to attack the position that freestanding claims of actual innocence should not be considered due to other concerns, such as the interest in finality or the procedural requirements imposed by statute. Clear-cut cases of actual innocence may not be the cases in which these actual-innocence battles are fought, but Eighth Amendment dignity may also push the balance toward the convicted offender even in cases in which innocence is probable but not absolutely clear.

B. Purely Utilitarian Punishment Statutes

Taking the Eighth Amendment dignity demand seriously also requires thinking more carefully about individual jurisdictions' statutes and constitutional provisions specifying the proper purposes of punishment. Throughout our history, punishment theories have waxed and waned in popularity and acceptance.[320] Retributivism has deep roots in our society, but around the middle of the last century, utilitarian purposes of punishment surpassed retributivism as the primary purposes of punishment in the United States.[321] During this period of time, reformers sought to firmly establish these utilitarian purposes of punishment within our legal culture by pushing for their codification in state constitutions and penal codes.[322] This followed on the heels of the American Law Institute's publication of the Model Penal Code ("MPC") (including its circulation of early drafts of the MPC), which emphasized the paramount importance of crime prevention in sentencing criminal offenders.[323] Indeed, Herbert

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319. *See supra* Part V.

320. *See* Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 269–85, 289–90 (2015).

321. *See* Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 85–87 (2012); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314–17 (2000); Ryan, *supra* note 103, at 1053–57; Ryan, *supra* note 320, at 269–74.

322. *See* Cotton, *supra* note 321, at 1313–14.

323. *See* MODEL PENAL CODE § 1.02, explanatory note (explaining that the provision governing "the general purposes of . . . the sentencing and treatment of offenders . . . [should be viewed within] the general framework of a preventative scheme."); *see also id.* § 1.02 cmt. 2(a) (stating § 1.02 "affirms and articulates the dominant preventative purpose of the penal law."); Cotton, *supra* note 321, at 1320 (asserting the Model Penal Code's "statement of purposes omitted retribution and articulated only utilitarian purposes: prevention (deterrence and incapacitation) and rehabilitation."); Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns*, 19 RUTGERS L.J. 811, 813–15 nn.7&12 (1988). *But see* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 414 (1992) ("Criminal sentences are the product primarily of necessity—of process and politics—but not enough the product of principle."); Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 253 (1997) (stating that the MPC's "list of purposes includes all four of the traditional purposes of criminal liability and punishment: to rehabilitate the offender to reduce the likelihood of a future offense, to deter the offender and other potential offenders from com-

Wechsler, the Chief Reporter for the MPC, affirmed that "[d]eterrence (both general and special), incapacitation, and correction" are the purposes of punishment underlying the MPC.[324] Soon thereafter, several states adopted utilitarian purpose-of-punishment provisions modeled after the MPC.[325] However, many courts and legislatures later infused retribution back into local purpose-of-punishment provisions as the popularity of utilitarian theories of punishment declined. According to Professor Michele Cotton, they found that nonutilitarian retribution was so important that they engaged in "judicial activism"; "abandon[ed] . . . the usual rules of statutory construction"; neglected principles of "federalism," "separation of powers," and constitutional supremacy"; and generally thwarted the "rule of law" to preserve this nonutilitarian purpose of punishment.[326] Still today, though, there are statutes on the books suggesting that some states' accepted purposes of punishment are entirely utilitarian in nature. Florida law, for example, provides that "[t]he general purposes of . . . the [criminal] code are . . . [t]o proscribe conduct that improperly causes or threatens substantial harm to individual or public interest" and "[t]o ensure the public safety by deterring the commission of offenses and providing for the opportunity for rehabilitation of those convicted and for their confinement when required in the interests of public protection."[327] The law does not explicitly contemplate considering

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mitting future offenses, to incapacitate the offender if necessary to prevent a future offense, and to impose the just punishment deserved for the offense.").

324. Herbert Wechsler, *Sentencing, Corrections, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1962); *see also* Cotton, *supra* note 321, at 1320–21 (discussing Herbert Wechsler's and an Associate Reporter's views on the MPC).

325. *See* Cotton, *supra* note 321, at 1324–36. It bears noting that several of the statutes that Michele Cotton cites as eschewing retributivism and being entirely utilitarian in nature include provisions that could arguably be characterized as retributive in nature. For example, Cotton cites the 1963 Minnesota statute as straightforwardly utilitarian. *See id.* at 1324, 1326–27. The statute provides that the state's purposes of punishment are "to protect the public safety and welfare by preventing the commission of crime through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires." MINN. STAT. § 609.01(1) (1963). Cotton quotes this language of the statute, *see* Cotton, *supra* note 321, at 1325–26, but she neglects to mention the remainder of the statutory language, which provides that "protect[ing] the individual against the misuse of the criminal law by fairly defining the acts and omissions prohibited, authorizing sentences reasonably related to the conduct and character of the convicted person, and prescribing fair and reasonable postconviction procedures" are also included within the state's accepted purposes of punishment, MINN. STAT. § 609.01(2) (1963).

326. Cotton, *supra* note 321, at 1314–15.

327. FLA. STAT. § 775.012 (2015); *see also* Cotton, *supra* note 321, at 1331 n.81 (explaining that "Florida adopted a utilitarian, nonretributive statement of purposes in 1974."). The statute includes four additional purposes—"[t]o give fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction," "[t]o define clearly the material elements constituting an offense and the accompanying state of mind or criminal intent required for that offense," "[t]o differentiate on reasonable grounds between serious and minor offenses and to establish appropriate disposition for each," and "[t]o safeguard conduct that is without fault or legitimate state interest from being condemned as criminal." FLA. STAT. § 775.012. The statute, which was passed in 1974, was undermined by the Florida Sentencing Guidelines Commission's promulgation of a guideline stating that "[t]he primary purpose of sentencing is to punish the offender." FLA. STAT. § 921.002(1)(b) (noting that "[r]ehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."); FLA. STAT. § 921.001(4)(a)(2) (repealed) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a de-

the individual in sentencing, thus making it constitutionally suspect under the Eighth Amendment dignity demand.[328] Iowa law is similarly utilitarian in nature. It provides that "[t]he court shall determine . . . which [sentencing options] or which combination of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others."[329] And Kentucky law, in much the same fashion, provides that "[i]t is the sentencing policy of the Commonwealth . . . that . . . [t]he primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced."[330] This statute perhaps leaves room for, and acknowledges the importance of, the individual offender, but to the extent that this is neglected, this statute, too, is constitutionally suspect.[331]

The cycling between retribution- and utility-driven punishment is important to recognize, as utilitarian goals are once again coming to the forefront of criminal punishment.[332] Just as utilitarianism was ushered in as the progressive and enlightened view of punishment in the 1900s, the popularity of retributivism is retreating, and renewed emphasis on utilitarian purposes, such as deterrence and rehabilitation, are now making a comeback.[333] This could lead to greater statutory focus on the purposes of punishment rooted in utilitarianism and neglecting the importance of the individual offender. Accordingly, offenders' dignities are at stake.

One way of accommodating the return to utilitarian purposes of punishment is to reconceptualize some of these purposes to account for individual offenders. Again, only *purely* utilitarian punishment is imper-

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sired goal of the criminal justice system but is subordinate to the goal of punishment."); *cf.* Cotton, *supra* note 321, at 1331 n.81 (describing the shift from a "utilitarian, nonretributive statement of purposes in 1974" to "an explicit retributive statement of purposes" in 1983). Still, this purely utilitarian statute remains law in Florida, even if only on its face. The statute has not been repealed or overruled.

328. *See supra* Part III. Although the statute does not clearly allow for consideration of the individual, some might interpret its goal of rehabilitation as providing for the individual offender. Most modern understandings of rehabilitation, though, are purely utilitarian. *See infra* text accompanying note 326. Rehabilitating the offender is for the benefit of society not the individual offender. To the extent that the statute does provide for consideration of the offender, it would not suffer from the same Eighth Amendment dignity difficulty. *See infra* text accompanying note 326.

329. IOWA CODE § 901.5 (2015).

330. KY. REV. STAT. ANN. § 532.007 (West 2016).

331. *See supra* Part V.

332. *See, e.g.*, Ryan, *supra* note 320, at 289–304 (discussing the return of rehabilitation).

333. *See generally id.* (discussing the cycling between retributive and utilitarian purposes in American punishment theory). The recent rise of evidence-based sentencing—a practice focused on deterrence—is one example of this renewed focus on utilitarian purposes of punishment. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014) ("'Evidence-based sentencing' . . . refers to the use of actuarial risk prediction instruments to guide a judge's sentencing decision. The instruments are designed to assist judges in their pursuit of several traditional utilitarian sentencing objectives—incapacitation, specific deterrence, and rehabilitation—each of which centers on the reduction of the defendant's future crime risk.").

missible under the Eighth Amendment dignity demand.[334] This means that so long as utilitarian purposes of punishment accommodate recognition of, and consideration for, the individual offender, there would likely not be an Eighth Amendment dignity violation. Many modern views of punishment theory indeed accommodate both utilitarian and retributive purposes. Limiting retributivism, for example, finds room for both approaches to punishment but employs retributivism to set the endpoints for the permissible punishment range and then uses utilitarian purposes to find the appropriate punishment within that range.[335] This is the approach adopted by the draft *Model Penal Code: Sentencing*.[336]

One could make similar modifications to classically utilitarian purposes of punishment. For example, the theory of rehabilitation could be reworked to accommodate the individual offender.[337] Modern understandings of rehabilitation are ordinarily regarded as purely utilitarian in nature.[338] In the capital context, for instance, most scholars consider rehabilitation to be entirely irrelevant because, after all, "[h]ow [could] an offender be rehabilitated if he is being put to death?"[339] He does not have the chance to reintegrate back into society.[340] This view that an offender must reintegrate back into society to achieve rehabilitation focuses on the societal effects of the offender rather than on the offender himself, such as by looking at his character.[341] Earlier conceptions of rehabilitation, in contrast, focused on the offender—on his repentance and reform.[342] Reintegrating this earlier conception of rehabilitation into modern understandings of the punishment purpose could avoid a clash with the Eighth Amendment dignity requirement.

Recognizing the relevance of Eighth Amendment dignity here suggests that we ought to reject purely utilitarian purposes of punishment. One way to do this is to reconceptualize classically utilitarian punishment purposes such as rehabilitation. This could remedy these purposes' clashes with the Eighth Amendment dignity demand.

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334. *See supra* Part IV.

335. *See* MORRIS, *supra* note 279, at 161 ("To the limiting retributivist, desert sets the outer limits, upper and lower, of punishment. It is the reflection of society's official view of what the criminal deserves . . . ."); *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 58–80 (1974) (providing an earlier description of limiting retributivism); *supra* text accompanying notes 280–81. (summarizing the tenets of limiting retributivism).

336. *See* MODEL PENAL CODE: SENTENCING § 1.02(2), cmt. b & Reporter's Note b(3) (Tentative Draft No. 1, 2007) (explaining that the Model Penal Code: Sentencing "borrows" its approach to punishment from Norval Morris's theory of "limiting retributivism").

337. Legal scholars have generally lumped together the concepts of rehabilitation, reform, and repentance. *See* Ryan, *supra* note 32, at 1246 n.102.

338. *See* Ryan, *supra* note 320, at 327–28.

339. Ryan, *supra* note 31, at 1243–45.

340. *See id.* at 1264.

341. *See id.* at 1264–65.

342. *See id.* at 1246–48.

C. *Mandatory Punishments*

Mandatorily imposed punishments—made popular in the early half of the twentieth century—are also concerning if we take the Eighth Amendment dignity demand seriously.[343] The Court has already struck down as unconstitutional mandatorily imposed capital punishment and mandatorily imposed life-without-parole sentences for juvenile offenders.[344] In these cases, the Court emphasized how either capital punishment, or juveniles, are different, thus the mandatorily imposed punishment was inappropriate in those circumstances.[345] Further, the Court has emphasized the importance of individualization in sentencing.[346] But this importance of individualization is not localized to cases invoking the death penalty or juveniles. Focusing on the individual is at the core of Eighth Amendment dignity, which is the backdrop of the Eighth Amendment.[347] This importance of individualism in sentencing raises questions about thousands of criminal sentences imposed each year.[348] For example, mandatorily imposed life-without-parole sentences for adults are questionable. If the punishments are automatically imposed,

343. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 67–69 (1993). Professor Lowenthal, who has explained that "[t]he principal rationales of mandatory sentencing laws are utilitarian," has briefly outlined the history of mandatory punishments:

> The concept of mandatory punishment is not new. Colonial legislatures established fixed penalties for most criminal offenses and allowed courts little or no flexibility when imposing punishment in individual cases. By the early years of the nineteenth century, however, mandatory fixed sentences had become increasingly rare. Most states, reacting to the rigidity of colonial sentencing schemes, revised their criminal laws to give trial courts greater sentencing discretion. Mandatory punishment resurfaced a century later, when the New York Legislature enacted a statute in 1926 requiring a life sentence if a person convicted of a felony offense had two prior felony convictions. In the years preceding World War II, most states enacted similar measures aimed at habitual offenders, typically requiring courts to impose life sentences for a third or fourth felony conviction. However, apart from these early recidivist laws and a few provisions enacted in the 1950s, most of the current mandatory enhancement laws did not appear until the 1970s.

Id. at 67–69 (internal citations omitted).

344. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (striking down mandatorily imposed life-without-parole sentences for juveniles); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion) (striking down mandatorily imposed capital punishment).

345. *See Miller*, 132 S. Ct. at 2464, 2469, 2470; *Woodson*, 428 U.S. at 303–05; *see also*, @MeghanJRyan, TWITTER (June 26, 2012, 8:33 AM), https://twitter.com/MeghanJRyan/status/217611454331883520 ("#Miller opinion largely piggybacks on #Graham. Ct seems to be moving from 'death is different' to 'kids are different.'").

346. *See Miller*, 132 S. Ct. at 2460 ("Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (internal omitted)); *Woodson*, 428 U.S. at 303–04.

347. *See supra* Part III.A.

348. *See, e.g.*, Ed Pilkington, *Over 3,000 US Prisoners Serving Life Without Parole for Non-Violent Crimes*, GUARDIAN, Nov. 13, 2013, http://www.theguardian.com/world/2013/nov/13/us-prisoners-sentences-life-non-violent-crimes (explaining that, in 2013, 3,281 individuals are serving life-without-parole sentences for non-violent crimes and that an "overwhelming proportion" of these sentences were mandatorily imposed); *see also* THE SENTENCING PROJECT, STATE OF SENTENCING 2013: DEVELOPMENTS IN POLICY AND PRACTICE 1 (2013) ("[T]here continues to be a great need to address the nation's high rate of incarceration . . . . Most states continue to authorize life without parole as a sentencing option, implement a range of mandatory sentencing laws, and enact practices that extend the length of time persons spend in prison.").

the sentencers lack the opportunity to consider the offender's individual circumstances or the details of his offense in determining the appropriate sentence. Mandatory minimum sentences are also questionable if we take the dignity demand seriously. Here, sentencers cannot act on individual circumstances suggesting that a sentence more lenient than the mandatory minimum is appropriate. By not examining each individual offender's particular crime and circumstances, courts imposing mandatory sentences—even though they are statutorily required to do so—courts imposing mandatory sentences are failing to take the Eighth Amendment dignity demand seriously.

VII. CONCLUSION

The core of the Eighth Amendment focuses on the dignity of the offender. This translates into recognizing and safeguarding the individual in punishing. Ensuring consideration of the offender means that purely utilitarian punishment is off the table. Purely utilitarian punishment focuses on societal benefits rather than on the offender, himself. Accordingly, this style of punishment runs afoul of the non-instrumentalization requirement associated with Eighth Amendment dignity. The unconstitutionality of purely utilitarian punishment does not mean that partially utilitarian punishments are similarly problematic. In fact, punishments that are traditionally viewed as utilitarian may be reconceptualized to account for the individual offender and thus Eighth Amendment dignity. This new understanding of the Eighth Amendment that individual offenders must be taken into account in sentencing, though, requires us to look more carefully at modern punishment practices, like setting aside freestanding claims of actual innocence in the name of finality and imposing mandatory sentences. Armed with greater appreciation for the core dignity requirement of the Eighth Amendment, judges and legislatures may now in a position to make more informed decisions about the proper sentencing procedures and punishments that should, constitutionally, be employed.