2020

Eighth Amendment Values

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

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As with many constitutional provisions, the language of the Eighth Amendment is open-ended and vague in its proscription of excessive bail, excessive fines, and cruel and unusual punishments. Because the language of the Constitution does not provide any additional descriptive information concerning what might make bail or fines excessive, or punishments cruel and unusual, courts must look beyond the text itself to ascertain the meaning of the Eighth Amendment. With respect to the prohibition on cruel and unusual punishments, the U.S. Supreme Court has, over the course of several decades, articulated a number of relevant underlying values that offer some guidance in interpreting this Eighth Amendment provision. These values are also helpful in assessing the excessiveness of bail and fines.[1]

This Chapter explores several of these core Eighth Amendment values, providing an overview of their origin and indicating how such values might apply in interpreting the Eighth Amendment in the future. Specifically, this Chapter discusses the principles of dignity, individualized sentencing, proportionality—both absolute and comparative, humanness, non-arbitrariness, and differentness. The Court has explicitly or implicitly invoked each of these values in its Eighth Amendment cases and detailed the scope and importance of these values to varying degrees. For the most part, though, the Court has remained opaque about how much each of these values influences, and should influence, its Eighth Amendment decisions.

While the scope and reach of the various Eighth Amendment values remain uncertain, the Court has made it clear that the meaning of the Amendment—*e.g.*, which punishments are unconstitutionally cruel and unusual—changes over time.[2] In *Weems v. United States*, the Court explained that, for "a principle[] to be vital, [it] must be capable of wider application than the mischief which gave it birth" and that "[t]his is peculiarly true of constitutions."[3] As such, the Court emphasized that the Eighth Amendment is

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[1] *See* chapters 10 and 11.

[2] *Cf.* Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 566 (2012) (explaining that the Court's Punishments Clause analysis is "atypical in that [it is] more securely tethered to a particular method of constitutional interpretation": "[b]y focusing on . . . "evolving standards" . . . , the Court's primary standard[] for constitutionality in th[is] context[] seem[s] to be tied to a notion of living constitutionalism rather than rooted in history as many originalists would prefer").

[3] Weems v. United States, 217 U.S. 349, 373 (1910).

progressive and may acquire broader meaning over time.[4] The Court cemented this principle in its 1958 landmark opinion of *Trop v. Dulles*,[5] indicating that "the words of the [Eighth] Amendment are not precise, and that their scope is not static." Accordingly, when determining whether a punishment is unconstitutionally cruel and unusual, courts must interpret the prohibition in light of "the evolving standards of decency that mark the progress of a maturing society."[6]

To capture these changing values, the Court has adopted a two-part test to assess whether a particular punishment violates the evolving standards of decency, at least in capital cases. The first step, an objective inquiry, generally consists of state-counting—surveying primarily legislatures' determinations, as well as decisions by sentencing juries, about whether the particular jurisdiction has rejected the punishment at issue, at least in the relevant circumstances.[7] In the second step, the Court "brings its own independent judgment to bear"[8] in assessing whether a punishment has become unconstitutionally cruel and unusual in light of the purposes of punishment.[9]

Viewing the Eighth Amendment's meaning as evolving over time reflects the changing nature of punishments over the course of generations and also the changing views and values of Americans and even other citizens of the world. The various Eighth Amendment values should be understood in light of this gradual movement toward greater enlightenment.

Dignity

An important Eighth Amendment value woven into the Eighth Amendment case law is that of dignity. In fact, the Court has been more explicit about this Eighth Amendment value than others. In 1958, the Court first articulated the requirement that punishments respect human dignity in its case of *Trop v. Dulles*.[10] There, a plurality of the Court explained:

> 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. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the

[4] *Id.*
[5] Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).
[6] *Id.*
[7] *See* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 855 (2007). For a discussion concerning filling the content of a counter-majoritarian constitutional provision with a majoritarian assessment, see Ch. 6.
[8] Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).
[9] *See* Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 90–95 (2010).
[10] 356 U.S. 86 (1958) (plurality opinion).

bounds of these traditional penalties is constitutionally suspect.[11]

This focus on dignity has been a touchstone for the Court in its Eighth Amendment cases. In case after case, the Court has stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[12]

Despite the Court's emphasis that dignity is the backdrop of the Eighth Amendment, the Court has never clearly explained what dignity means in this context. As a philosophical concept, and even as a legal one, dignity has a complicated history. Although the concept "has been around since antiquity," dignity really blossomed in the aftermath of World War II.[13] Reacting to Nazi atrocities, various nations established the United Nations (UN), the UN adopted the Universal Declaration of Human Rights, and countries around the world have created constitutions protective of human dignity. Yet, at both the international and national levels, there has been disagreement—among various nations, among various Supreme Court Justices, and even among commentators—about what dignity actually means and how it should apply to particular situations.

Although the Court has neglected to explicitly define Eighth Amendment dignity, and although there are various conceptions of dignity among legislators, courts, scholars, and commentators, there seems to be at least a common kernel of dignity that persists in the Eighth Amendment case law. Some thinkers have more robust notions of dignity, but, at the heart of the concept is a respect for individuals as individuals. As Emmanuel Kant put it, "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."[14] Examining the many Eighth Amendment cases in which the Court explicitly invoked the concept of dignity, one sees a focus on individualism—viewing individuals as ends rather than merely as means.

Preserving this minimum non-instrumentalization core of dignity has at least two facets—imposing only proportionate punishments on criminal offenders and treating offenders as human beings.[15] For example, in the famous case of *Gregg v. Georgia*,[16] a plurality of the Court suggested that respecting dignity prohibits excessive punishments. And in *Brown v. Plata*,[17] the Court explained that, "[a]s a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty" but that "the law and the Constitution demand [that] . . . [p]risoners retain the essence of human dignity inherent

[11] *Id.* at 100.
[12] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting *Trop*, 356 U.S. at 100–01); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (same).
[13] Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 ILL. L. REV. 2129, 2135–36 (2016); *see also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 662–64 (2008).
[14] IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary J. Gregor trans. & ed., Cambridge University Press 1996) (1797).
[15] *See* Ryan, *supra* note 13.
[16] 428 U.S. 153 (1976) (plurality opinion).
[17] 563 U.S. 493 (2011).

in all persons." In fact, in examining all of the Court's Eighth Amendment cases—the procedural, type-of-offense, class-of-offender, method-of-punishment, and prison-condition cases—it seems that the Court has been consistent in adopting an individualism-directed notion of dignity, which incorporates both proportionality and humanness principles.[18]

To be sure, this basic conception of Eighth Amendment dignity is still vague and, in many ways, cannot unambiguously police the constitutionality of punishments under the Amendment. At the same time, many commentators would argue that this conception of dignity is too narrow and does not go far enough in proscribing suspect methods, durations, and conditions of many punishments. While the Court seems to be cutting back on the breadth of Eighth Amendment protection against cruel and unusual punishments,[19] this non-instrumentalization core of dignity does not necessarily define the outer bounds of what this backdrop of the Eighth Amendment proscribes. Rather, it is the kernel of protection that the Court has consistently determined is essential to guarding against unconstitutionally cruel and unusual punishments.[20]

Taken seriously, this minimum non-instrumentalization core of dignity would limit punishment in significant ways—ways not necessarily yet captured in court opinions. Staying true to this conception of dignity would mean that purely utilitarian punishment is unconstitutional.[21] Punishments may certainly be partially instrumentalist, such as under the popular theory of limiting retributivism, where retribution sets the outer boundaries of punishment and instrumentalist approaches like deterrence determine the exact punishment within those endpoints. But punishments that treat individuals as means rather than ends in themselves would be impermissible. This suggests that punishing innocent persons is unconstitutional.[22] While this may not seem shocking, there are numerous court opinions suggesting that, if a convicted offender is later found innocent, he has no constitutional right to avoid punishment if he received a fair trial, because federal habeas courts review for constitutional violations rather than factual errors.[23]

The minimum non-instrumentalization core of dignity, and thus of the Eighth Amendment, also suggests that mandatorily imposed punishments are constitutionally

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[18] *See* Ryan, *supra* note 13, at 2156–65.

[19] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (rejecting the petitioner's Eighth Amendment challenge because he failed to sufficiently establish that he had identified a feasible alternative execution method that would "significantly reduce a substantial risk of severe pain"). *But see* Timbs v. Indiana, 139 S. Ct. 682 (2019) (incorporating—finally—the Excessive Fines Clause such that it applies to the states). Note that recent changes to the Supreme Court—the appointment of Justices Gorsuch and Kavanaugh and the retirement of Justice Kennedy—will likely have a limiting impact on the breadth of Eighth Amendment protections in future years.

[20] *See* Ryan, *supra* note 13, at 2156–65.

[21] *See id.*

[22] *See id.* at 2168–73.

[23] *See id.*

impermissible.[24] The Supreme Court has already struck down the mandatory imposition of capital punishment and the mandatory imposition of life without the possibility of parole (LWOP) for juvenile offenders,[25] but mandatory sentences are very common in other areas, and taking the Eighth Amendment dignity requirement seriously would mean finding these practices unconstitutional.

Individualized Sentencing

The Court's focus on individualism logically translates to the more specific value of individualized sentencing. Under the Court's decisions, individualized sentencing means that the sentencing court, at least in capital cases, must examine the individual characteristics of the offender and the offense prior to making a sentencing determination.

This idea germinates from the Court's decision in *McGautha v. California*,[26] in which the Court rejected Fourteenth Amendment due process challenges to the capital jury sentencing procedures of California and Ohio. In that case, the Court discussed the troubling consequences of jury nullification in response to mandatory death statutes. Without the ability to decide whether death was an appropriate sentence for the individual offender in question, juries often chose to find the offender not guilty instead of entering a guilty verdict that mandated death. In reaffirming the importance of juror sentencing discretion in capital cases, even when unguided, the Court explained that juries are critical to "maintain a link between contemporary community values and the penal system."[27]

The Court constitutionalized this idea in *Woodson v. North Carolina*,[28] holding that the Eighth Amendment bars mandatory death sentences. Specifically, the Court held that the Eighth Amendment requires "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."[29]

The Court reaffirmed this value of individualized sentencing determinations in *Lockett v. Ohio*, [30] where it struck down an Ohio statute that limited the mitigating evidence available to capital defendants at sentencing to enumerated statutory factors. A plurality of the Court made clear that the sentencing judge or jury must consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the

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[24] *See id.* at 2177–78.
[25] *See* Miller v. Alabama, 567 U.S. 460 (2012) (striking down the mandatory imposition of life-without-parole sentences for juvenile offenders); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).
[26] 402 U.S. 183 (1971).
[27] *Id.*
[28] 428 U.S. 153 (1976) (plurality opinion). The Court applied the same rule in another case decided the same day, *Roberts v. Louisiana*, 428 U.S. 325 (1976), in which it struck down Louisiana's mandatory death statute.
[29] *Woodson*, 428 U.S. at 303.
[30] 438 U.S. 586 (1976).

offense that the defendant proffers as a basis for a sentence less than death."[31]

While the Court has primarily focused on this concept of individualized sentencing in capital cases, the Court expanded the concept to juvenile life-without-parole (JLWOP) sentences in *Miller v. Alabama*,[32] finding that mandatory JLWOP sentences violate the Eighth Amendment. In that case, the Court relied on the same individualized sentencing concept, emphasizing the unique nature of cases and the need to consider the particularized circumstances and conduct of the offender in determining whether a death-in-prison sentence is appropriate.

While LWOP sentences are still permissible for adult offenders, a logical expansion of the individualized sentencing concept would be to prohibit mandatory LWOP sentences even for adults.[33] This extension would result from the Court acknowledging that these death-in-prison sentences share many similarities with death sentences, something the Court has already done in *Miller*. A further expansion, though perhaps less likely, would be to ban all mandatory sentences.[34]

Absolute Proportionality

In debating the bounds of the Eighth Amendment proscription on cruel and unusual punishments, various U.S. Supreme Court Justices have considered whether the Clause prohibits only certain torturous methods of punishment, or, alternatively, whether the Clause offers broader protection to criminal offenders. Several Justices would require, and indeed several cases indicate, that such broader protection demands that imposed sentences are proportionate to the crimes committed, accounting for both the characteristics of the particular offender and the details of the offense. Although Justices Scalia, Thomas, and Rehnquist have famously argued that proportionality has no place in the application of the Eighth Amendment,[35] a majority of the Court has embraced the value of proportionality.[36]

Beginning with the Court's decision in *Coker v. Georgia*,[37] the Supreme Court has used the concept of proportionality to hold that, in certain types of cases, death sentences constitute cruel and unusual punishments. To date, the Supreme Court has proscribed the

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[31] *Id.* at 604 (opinion of Burger, J.).
[32] 567 U.S. 460 (2012).
[33] *See* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L. J. 1109 (2010) (arguing for expansion of *Miller* to adult life without parole).
[34] *See* William W. Berry III, *Individualized Executions*, 52 U.C. DAVIS L. REV. 1779 (2019) (arguing for an application of individualized sentencing to methods of execution); William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019) (arguing for an expansion of individualized sentencing to all felony offenses).
[35] *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (Thomas, J., dissenting); Harmelin v. Michigan, 501 U.S. 957 (1991) (opinion of Scalia, J.).
[36] Ewing v. California, 538 U.S. 11 (2003) (plurality opinion).
[37] 433 U.S. 584 (1977).

death penalty for rape,[38] child rape,[39] certain felony murders,[40] juvenile offenders,[41] "insane" persons,[42] and intellectually disabled offenders.[43] The concept of proportionality embedded in these decisions—"absolute" proportionality—relates to the excessiveness of the death penalty in light of the underlying crime or the characteristics of the offender.

The Court's analysis in these capital cases begins with the objective assessment of jurisdictions' legislation and jury sentences to determine whether society has generally condemned the punishment.[44] The second prong of the analysis considers the question of whether one or both of the relevant purposes of punishment—retribution and deterrence—justify the imposition of death.[45] The idea championed by the Court is that, when capital punishment does not achieve the purpose of retribution or deterrence, that punishment is disproportionate and thus violates the Eighth Amendment. For example, in *Atkins v. Virginia*, the Court expressed concern that certain types of defendants, such as those with intellectual disabilities, are at a special risk of wrongful execution.[46]

In non-capital cases, the Court has fashioned the concept of proportionality in a different manner, electing not to apply its more robust test used in capital cases and instead using a narrow gross disproportionality standard. Ordinarily, the Court has held that non-capital sentences are generally proportionate punishments regardless of the offenses at issue. This deferential standard has, in essence, created two tracks of Eighth Amendment application.[47]

In more recent years, though, the Court has carved out a significant exception to applying the narrow gross disproportionality standard in non-capital cases: JLWOP sentences. In these cases, the Court has used the same two-part test it uses in capital cases instead of the gross proportionality test. In *Graham v. Florida*,[48] for example, the Court

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[38] *Id.*
[39] Kennedy v. Louisiana, 554 U.S. 407 (2008).
[40] *See* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).
[41] Roper v. Simmons, 543 U.S. 551 (2005).
[42] Panetti v. Quarterman, 551 U.S. 930 (2007); Ford v. Wainwright, 477 U.S. 399 (1986).
[43] Moore v. Texas, 137 S. Ct. 1039 (2017); Hall v. Florida, 572 U.S. 701 (2014); Atkins v. Virginia, 536 U.S. 304 (2002).
[44] One of us has argued that proportionality extends beyond *just deserts* retribution conceptions of proportionality. *See* William W. Berry III, *Separating Retribution from Proportionality*, 97 VA. L. REV. IN BRIEF 61 (2011); *see also* Ch. 7.
[45] The other two purposes of punishment—incapacitation and rehabilitation—have generally not been part of the Court's analysis. Incapacitation seems inappropriate, *see* William W. Berry III, *Ending Death by Dangerousness*, 52 ARIZ. L. REV. 889 (2010), but rehabilitation may surprisingly be more relevant than the Court has perceived, *see* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231 (2013).
[46] *See Atkins*, 536 U.S. at 321 (expressing concern that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution").
[47] *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009).
[48] 560 U.S. 48 (2010).

held that the Eighth Amendment bars LWOP sentences for juveniles who committed non-homicide offenses. In *Miller*, the Court barred mandatory JLWOP sentences.[49]

One of the most logical extensions of the value of absolute proportionality would be to prohibit capital punishment for additional categories of defendants like those suffering from various types of brain injuries. Another extension of the proportionality principle would be to prohibit JLWOP sentences for particular classes of defendants or even prohibit these sentences altogether.[50] Further, the Court could take the additional step of entirely dismantling the bright line between capital and non-capital cases, applying the Eighth Amendment's capital case approach to additional kinds of non-capital sentences.

Comparative Proportionality

A corollary to the concept of absolute proportionality that has inhabited the Court's Eighth Amendment cases is the concept of "relative" or "comparative" proportionality. While absolute proportionality assesses whether a particular kind of sentence is excessive under certain circumstances, comparative proportionality assesses whether a sentence is disproportionate in light of sentencing decisions in other cases.

In *Gregg v. Georgia*,[51] part of the state's solution to the problem of sentencing disparities arising from jury sentencing decisions was its adoption of comparative proportionality review. Under this approach, the state supreme court reviewed jury verdicts in capital cases to assess whether a death sentence was consistent with prior jury decisions in capital cases. After the Court affirmed this approach in *Gregg*, a number of states have employed similar approaches in their capital sentencing procedures.

The idea behind comparative proportionality is to eliminate outlier sentencing decisions by juries. While such an approach cannot guarantee complete consistency, it can, at the very least, minimize sentencing outcomes that fall outside of mainstream sentencing decisions. This is particularly important because states employ a wide variety of aggravating factors in capital sentencing, meaning that cases with widely differing levels of offender culpability within a jurisdiction can nonetheless be subject to capital sentencing determinations. Comparative proportionality review allows state supreme courts to strike down capital sentences that are excessive by comparison to previous cases in which the state imposed the death penalty.

Although many jurisdictions have adopted this comparative proportionality approach, they have mostly conducted the analysis in a cursory, toothless manner. State supreme courts have reversed a negligible number of sentences based on comparative proportionality review. Most states limit this review to prior capital cases, meaning the court never considers the cases in which juries imposed a life sentence. In addition, the

[49] 567 U.S. 460 (2012).
[50] *See* William W. Berry III, *Evolved Standards, Evolving Justices*, 96 WASH. U. L. REV. 105 (2018).
[51] 428 U.S. 153 (1976) (plurality opinion).

proportionality review in most states consists simply of identifying other cases relying on the same aggravating factor and, based upon that factor alone, declaring the sentence proportionate.[52]

Nonetheless, in *Pulley v. Harris*,[53] the Supreme Court made clear that the Eighth Amendment does not require a comparative proportionality analysis at all. The Eighth Amendment simply requires meaningful appellate review of jury-imposed death sentences. While comparative proportionality review can be one way to satisfy the Eighth Amendment concern of arbitrary and capricious imposition of punishment, the Constitution does not mandate such an approach.

While remaining a constitutionally approved but not required approach in the death penalty context, comparative proportionality review has also played a role in the assessment of non-capital sentences, but it is similarly ordinarily not constitutionally required. In *Solem v. Helm*, the Court used comparative proportionality concepts in assessing gross disproportionality, including the sentences imposed on other criminals in the same jurisdiction, and in other jurisdictions.[54] While the contours of the Court's gross disproportionality jurisprudence remain hazy, the Court made clear in *Harmelin v. Michigan* that such comparisons, while useful, were not constitutionally required in most cases.[55]

Humanness

In addition to focusing on proportionality in sentencing, the Court's Eighth Amendment analysis has highlighted the importance of ensuring that punishments acknowledge the humanness of even the worst convicted criminal offenders.[56] There are some punishments, such as torture, that are simply too horrendous to impose regardless of the offense committed. In *Trop*, for example, the Court found that the punishment of denationalization "subject[ed] the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[57] In fact, the Court found the punishment even "more primitive than torture."[58] In addressing the unconstitutionality of insufficient prison medical care under the Eighth Amendment, the Court was similarly concerned about

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[52] *See, e.g.*, William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012).
[53] 465 U.S. 37 (1984).
[54] Solem v. Helm, 463 U.S. 277 (1983).
[55] *See* Harmelin v. Michigan, 501 U.S. 957, 1004–05 (2003) (Kennedy, J., concurring) ("*Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. . . . [I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").
[56] See Ryan, *supra* note 13.
[57] *Trop*, 386 U.S. at 100.
[58] *Id.*

how such medical neglect could "actually produce physical 'torture or a lingering death,'" which would amount to cruel and unusual punishment.[59] And in striking down the practice of executing "insane" offenders, the Court emphasized the sheer inhumanity of the practice.[60]

The Supreme Court's command that punishments must reflect the humanness of individuals is important in this modern era of mass incarceration where thousands of individuals are convicted each year.[61] To many prosecutors, judges, and citizens, these offenders must seem to be faceless numbers—the causes of victims' pain and suffering and in part the source of staggering criminal justice expenses. But the Eighth Amendment requires that we remember the humanity of even the worst offenders. Although some prosecutors have been known to label these offenders as "animals,"[62] we cannot treat them like that under the Constitution. Depending on how far one takes this principle, it could raise significant questions about a number of current punishment practices, such as LWOP, solitary confinement, certain techniques used to carry out execution, and even the death penalty itself.

Non-arbitrariness

The Court has also adopted an Eighth Amendment value of non-arbitrariness. In 1972, the Court struck down the death penalty as applied throughout the United States in the landmark opinion of *Furman v. Georgia*.[63] The Justices were unable to reach a consensus about whether the death penalty was unconstitutional in its entirety or just as it was applied in this (and other) case(s), but there was significant agreement that, to the extent the punishment was unconstitutional, it was unconstitutional because of its unusualness. Some of the Justices noted the racially discriminatory way in which judges and juries had imposed the death penalty. But even more Justices focused on the arbitrary way in which capital punishment was imposed and carried out. For example, Justice White explained that, as applied, "the penalty [was] so infrequently imposed that the threat of execution [was] too attenuated to be of substantial service to criminal justice."[64] Justice Brennan pointed to the "steady decline in the infliction of the punishment in every decade since the 1930's," the increase in the number of capital crimes committed, and the resulting "rarity of the infliction of th[e] punishment."[65] He explained that, "[w]hen the punishment of death is inflicted in a trivial number of cases in which it is legally available, the

[59] *See* Estelle v. Gamble, 429 U.S. 97 (1976).
[60] *See* Ford v. Wainwright, 477 U.S. 399, 406–10 (1986).
[61] *See, e.g.*, THE SENTENCING PROJECT, *Criminal Justice Facts*, https://www.sentencingproject.org/ criminal-justice-facts/ (last visited, Oct. 1, 2019).
[62] *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 179 (1986) (noting that the prosecutor referred to the defendant as an animal and stating that this "deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair").
[63] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
[64] *Id.* at 313 (White, J., concurring).
[65] *Id.* at 291 (Brennan, J., concurring).

conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."[66] Justice Stewart characterized it as akin to "being struck by lightning."[67]

When the Supreme Court later upheld capital punishment in *Gregg v. Georgia*[68] in 1976, it emphasized the importance of ensuring that states did not impose capital punishment arbitrarily or capriciously. The Court explained that capital punishment cannot "be imposed under sentencing procedures that create[] a substantial risk that [the penalty] w[ill] be inflicted in an arbitrary and capricious manner."[69] Instead, a jurisdiction's statutes must guide jury sentencing discretion, providing the jury with the tools to distinguish the offenders deserving of death from those who are not. The new Georgia scheme cured the Eighth Amendment arbitrariness concerns articulated in *Furman* in two important ways. First, the scheme mandated the use of aggravating and mitigating circumstances in sentencing, requiring a factual finding for death eligibility and then requiring the jury to weigh such findings against mitigating evidence. Second, the state supreme court reviewed the determination of the jury in light of other cases, conducting a comparative proportionality review to promote consistency among jury decisions. Although not identical, jurisdictions across the country now provide capital sentencing juries with such guidance on their discretion, attempting to comply with the requirements of *Furman* under the Eighth Amendment.[70]

It is worth noting that this value of non-arbitrariness is sometimes in tension with the value of individualized sentencing. Every case is unique, so when attempting to achieve some uniformity or consistency in sentencing across cases, it often comes at the expense of considering individual differences in each case. Justice Scalia made this argument in *Walton v. Arizona*, finding that individualized sentencing and non-arbitrariness are inconsistent because individualized discretion is the source of arbitrary outcomes.[71] Justice Stevens disagreed, though, explaining that narrowing the class of death eligible offenders through requiring a finding of aggravating circumstances minimizes the concern of arbitrary outcomes, whereas individualized sentencing discretion is exercised within that narrowed group.[72] Regardless of whether they are in tension, the Court's cases have made clear that both individualized sentencing and non-arbitrariness are Eighth Amendment requirements.

Applying a strong version of the non-arbitrariness value could result in, once again,

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[66] *Id.* at 293.
[67] *Id.* at 309 (Stewart, J., concurring).
[68] Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).
[69] *Id.* at 188.
[70] Some have argued, though, that the guidance is, as a practical matter, insufficient to affect disparity concerns. Berry, *supra* note 52.
[71] Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part), *rev'd in part*, Ring v. Arizona, 536 U.S. 584 (2002).
[72] *Id.* at 708 (Stevens, J., dissenting). Comparative proportionality review could, in theory, help to reconcile the apparent incompatibility of non-arbitrariness and individualized sentencing discretion. *See* Berry, *supra* note 52.

striking down capital punishment.[73] The current use of the death penalty, with its consistent decline over the past decade, mirrors the conditions that the Court addressed in *Furman*. Today, only a few counties are responsible for most executions,[74] resulting in a lack of uniformity in the punishment's imposition. Further, only half of the states authorize the death penalty, and fewer than a quarter of them actively use it.[75] The same is true for JLWOP sentences, with many states abandoning the punishment after *Miller* and fewer than half of them currently imposing JLWOP sentences.[76]

Differentness

Unlike the previous values that seem to bear some connection to dignity, the pervasive value of differentness appears to move further afield. The Supreme Court has, for the most part, treated capital cases differently than non-capital cases under the Eighth Amendment. While not the Court's original approach, this distinction arose from the Court's determination that "death is different."[77] This oft-repeated concept stems from the idea that death is a unique punishment, both in its severity and its irrevocability. There is no more serious punishment than the death penalty. And once a state carries out an execution, there is no way to reverse it.

Using this principle, the Court has accorded capital cases heightened scrutiny under the Eighth Amendment. This value has served as the basis for categorical exclusions to the death penalty. It also has served as the basis for heightened procedural requirements in capital cases.

More recently, the court has decided that juveniles are also different.[78] This has meant, at the very least, that some of the categorical exclusions that apply to the death penalty also apply to juvenile offenders, at least in LWOP cases. It is possible that the procedural safeguards available in capital cases might also extend to JLWOP cases, but to date that has not happened.

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[73] *See* Berry, *supra* note 52.

[74] *See* Frank R. Baumgartner, *A Few Counties Are Responsible for the Vast Majority of Executions. This Explains Why.*, WASH. POST, Feb. 1, 2008, https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/01/a-handful-of-counties-are-responsible-for-the-vast-majority-of-executions-this-explains-why/?noredirect=on.

[75] *See State by State,* DEATH PENALTY INFO. CTR., 2019, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[76] *See* Berry, *supra* note 52.

[77] Justice Brennan's concurrence in *Furman v. Georgia* is the source of the Court's "death is different" capital jurisprudence. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States.").

[78] Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

It is also unclear what the broadening of differentness might mean for future expansions of the Eighth Amendment. As death is a punishment but juveniles are a class of offenders, it suggests that expansion is possible, albeit not likely in the near future. If death is different, the Court could in theory also find that other punishments are different such that they might deserve heightened substantive or procedural safeguards. These might include LWOP sentences, life sentences, or sentences that extend beyond an offender's life expectancy. If juveniles are different, other categories of offenders could, in theory, be different as well. One might imagine groups such as veterans, the elderly, or those with certain mental illnesses receiving the label of "different."

The consequence of the Court using the value of differentness has largely been positive for the "different" offenders and "different" offenses but has unfortunately had the consequence of preventing heightened scrutiny for "non-different" offenders and offenses. In other words, the Court has elected to limit Eighth Amendment scrutiny in non-capital cases in a comparatively restrictive manner.

With respect to future applications of this principle, another approach would be simply to de-emphasize the value rather than create new categories of differentness. Continuing to create new categories of differentness could exacerbate the inconsistency and fragmented nature of existing Eighth Amendment jurisprudence. Rather than creating a constitutional doctrine that mandates separation for death sentences in the form of higher scrutiny, it would also be possible to require a higher level of Eighth Amendment scrutiny for all cases. Although death may indeed be different, and children and LWOP sentences may also be different, courts may be able to accommodate these different characteristics within proportionality analyses and the more robust analyses typically applied in capital cases.

The Future of Eighth Amendment Values

The Eighth Amendment values discussed in this Chapter shed light on the constitutionality of a variety of criminal justice practices—from regularly litigated punishments like the death penalty to areas less considered like bail. These values help explain past Supreme Court decisions, but they also provide tools for Eighth Amendment litigants. Indeed, the question remains of how such values relate to the scope of the Eighth Amendment with respect to punishments that do not fit neatly into the Court's currently defined categories. While not dispositive, these values can help explain why the Court's doctrine should shift in particular circumstances over time.

With respect to the death penalty, for instance, Eighth Amendment values have much to say. As use of the death penalty in the United States continues to decline, the strength of the argument that the punishment contravenes the evolving standards of decency grows.[79] In addition, states increasingly impose the death penalty in an arbitrary

[79] *See* Berry, *supra* note 52. Such an outcome becomes magnified if one examines the use of the death penalty on a county level. *See* William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. __ (forthcoming 2020).

way, as demonstrated by statistics on the impact of geography, race, and socio-economic status on capital decisions.[80] Further, commentators have argued that the death penalty is a disproportionate punishment for all criminal offenses[81] and that it violates human dignity. An overwhelming number of nations have also adopted this position. In light of all of this evidence and the values illuminating Eighth Amendment meaning, there are real questions about the continuing constitutional viability of capital punishment, even though the Bill of Rights itself contemplates the punishment's use.

Juvenile LWOP sentences also create tension with a number of Eighth Amendment values. As the only country that imposes such sentences, the United States does not comply with evolving standards internationally. In addition, since the *Miller* decision in 2012, there has been a significant movement away from JLWOP even within the United States, with a number of states abolishing the punishment and many courts reducing sentences in light of *Miller*'s retroactive application.[82] Currently, more than half of the states do not have anyone serving a JLWOP sentence, raising real questions about arbitrariness and proportionality when a court imposes such a sentence.

The use of LWOP sentences in the United States similarly makes our nation an outlier internationally. There are more than 50,000 people serving LWOP sentences in the United States; the next three countries combined have fewer than 1,000 individuals serving such sentences. As with the punishments of death and JLWOP, adult LWOP sentences spark questions about offender dignity and proportionality—issues that have formed the basis for most other countries rejecting the practice. Further, many of the LWOP sentences imposed in the United States are the result of the abolition of parole, not a carefully considered decision that the offender deserves to die in prison. This creates significant concerns about respecting the values of individualized sentencing, non-arbitrariness, and humanness.

Similarly, mandatory sentences undermine some of the core values of the Eighth Amendment. They deny individualized consideration, can threaten human dignity, and often result in disproportionate sentences. Almost every single value animating the Eighth Amendment counsels against allowing mandatory punishments. Considering that the Court has generally refused to strike down mandatory punishments across the board, its intervention in at least select mandatory sentencing cases would be a step in the right direction.

Finally, these Eighth Amendment values can shed light on practices such as solitary confinement and even other Eighth Amendment areas like excessive bail and fines. Practices such as solitary confinement that leave lasting psychological damage on individuals clearly implicate questions about how to treat other human beings, even if they have committed terrible offenses. But if lasting psychological damage is a human dignity concern, then even relatively short stints in prison should receive serious Eighth Amendment scrutiny. Although Eighth Amendment application comes loaded with

[80] *See* Glossip v. Gross, 135 S. Ct. 2726, 2760–63 (Breyer, J., dissenting).
[81] Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005).
[82] *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

relevant values like dignity, it does not necessarily provide us with clear answers about the permissiveness of any particular practice. Still, these values remain important and help shape our understanding of the Eighth Amendment. Although most references to these values are in Eighth Amendment Punishments Clause cases, they are also relevant to the important, but generally less litigated, Excessive Bail and Excessive Fines Clauses as well.

To be sure, the current conservative tilt of the Supreme Court makes the expansion of Eighth Amendment protection less likely in the near future. Nonetheless, it is likely that these values will continue to inform the Court's Eighth Amendment decisions irrespective of whether the doctrine expands or contracts.