EVOLVED STANDARDS, EVOLVING JUSTICES? THE CASE FOR A BROADER APPLICATION OF THE EIGHTH AMENDMENT

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ABSTRACT

In its Eighth Amendment cases, the Supreme Court has often cited counter-majoritarian considerations as the basis for exercising judicial restraint. As a result, excessive and draconian punishments persist in the United States, with the Court being hesitant to use the Constitution to bar state punishment practices.

The Court's evolving standards of decency doctrine, however, is majoritarian. As this Article argues, the doctrinal framework of the Court alleviates the counter-majoritarian difficulty, as the Court's applications of the Eighth Amendment mirror majoritarian practices and only strike down outlier punishments.

Given the lack of justification for judicial restraint under the Eighth Amendment, the Article maps a series of possible applications of the Constitution in this area, both on a micro-level—to limit punishments in certain circumstances—and on a macro-level—to bar certain punishments altogether. In particular, the Article reveals the current ability of the Court to apply its Eighth Amendment doctrine to abolish the death penalty and juvenile life-without-parole sentences.

In short, the Article demonstrates that society's standards with respect to criminal punishments have evolved. The question remains whether the justices themselves will evolve accordingly.

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INTRODUCTION

If we do not step forward, then we step back. If we do not protect a right, then we deny it.

— Paul Martin

In 1972, the United States Supreme Court held 5–4 that the death penalty, as applied, constituted a "cruel and unusual punishment" that violated the

Eighth Amendment to the United States Constitution.[1] The public backlash was immediate, and the response from state legislatures was swift.[2] Within a year, thirty-five states had passed new capital statutes, and in 1976, the Court held that several state capital statutes were constitutional.[3] Indeed, the Supreme Court has not held that the Eighth Amendment completely bars any punishment since *Furman*.[4]

The core criticism of *Furman*, and a concern of several of the dissenting justices, centered around the legitimacy of the Court's decision to strike down a state statute, as doing so arguably meant substituting the judgment of the Court for the will of the people.[5] The majority believed, by contrast, that the state capital schemes violated the individual rights of criminal offenders (and the Constitution) by imposing the death penalty in an arbitrary and random manner.[6]

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

2. *See* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1 (2007); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267 (2002) (asserting that *Furman* "touched off the biggest flurry of capital punishment legislation the nation had ever seen."); Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 795 (2002) ("Few other decisions of the Supreme Court have ever received a more rapid legislative response."); LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE 83, 85 (1992); *Death Penalty Has Been Restored by 13 States*, N.Y. TIMES, May 10, 1973, at 18 (listing states that restored death penalty in 1973 legislative session); *The Death Penalty Gets a Big Push*, U.S. NEWS & WORLD REP., Mar. 26, 1973, at 70; MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 284–91 (1973).

3. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). *But see* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down a mandatory capital punishment statute); Roberts v. Louisiana, 428 U.S. 325 (1976) (same).

4. Indeed, the only punishment barred is loss of citizenship. Trop v. Dulles, 356 U.S. 86 (1958). The Court has, of course, placed limits on when certain punishments may be imposed. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (barring capital sentences for all non-homicide crimes, including child rape); Roper v. Simmons, 543 U.S. 551 (2005) (barring capital sentences for juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (barring capital sentences for intellectually-disabled offenders); Coker v. Georgia, 433 U.S. 584 (1977) (barring capital sentences for the crime of rape).

5. *See Furman*, 408 U.S. at 376 (Burger, C.J., dissenting) ("[I]t is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law."); *id.* at 411 (Blackmun, J., dissenting) ("We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these."); *id.* at 418 (Powell, J., dissenting) ("[This] is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped."). *See also* Lain, *supra* note 2, at 51; Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 18 (2002) (noting that *Furman* "fueled popular resentment of the federal government imposing its will on the states."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 406–10 (1995) (describing the popular and legislative backlash to the Court's decision in *Furman*).

6. *See Furman*, 408 U.S. at 304–05 (Brennan, J., concurring) ("The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few."); *id.* at 309–10 (Stewart, J., concurring) ("[T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

The counter-majoritarian difficulty—the legitimacy of five justices overruling state statutes—rests at the heart of much of the academic debate in constitutional law during the late twentieth century.[7] While this tension between respecting majority will and protecting the individual constitutional rights of political minorities has not stopped the Court from striking down state and federal statutes in other contexts,[8] the Court has demonstrated a reluctance to limit state punishment practices under the Eighth Amendment.[9] Indeed, with respect to the imposition of substantive punishments, the Eighth Amendment largely remained a dead letter for over two decades in the 1980s and 1990s.[10]

In the past decade, however, the Court has taken baby steps and started to impose some categorical limitations on state punishment practices under the Eighth Amendment. For instance, the Court has proscribed death sentences for intellectually disabled offenders,[11] juvenile offenders,[12] and child rape.[13] More recently, the Court has prohibited juvenile life-without-parole sentences in non-homicide cases[14] and when imposed as a mandatory sentence.[15]

During this era of Supreme Court passivity, a proliferation of cruel and unusual punishments has emerged in the United States. The United States remains one of the few Western nations that still use capital punishment,[16]

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7. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

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

9. *See* discussion *infra* Part II.

10. After *Coker v. Georgia*, 433 U.S. 584 (1977), the Court only placed two limitations on punishments until it decided *Atkins v. Virginia*, 536 U.S. 304 (2002). *See* Enmund v. Florida, 458 U.S. 782 (1982) (striking down a felony murder conviction where defendant did not kill or intend to kill); Solem v. Helm, 463 U.S. 277 (1983) (reversing sentence of life-without-parole for presenting a no-account check for $100, where defendant had six prior felony convictions).

11. Moore v. Texas, 137 S. Ct. 1039 (2017); Hall v. Florida, 134 S. Ct. 1986 (2014); *Atkins*, 536 U.S. at 304.

12. Roper v. Simmons, 543 U.S. 551 (2005).

13. Kennedy v. Louisiana, 554 U.S. 407 (2008); *Coker*, 433 U.S. at 584.

14. Graham v. Florida, 560 U.S. 48 (2010).

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

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

and its current usage is rife with error,[17] racial disparity,[18] arbitrary imposition,[19] and innocent individuals sentenced to death.[20] Similarly, American use of life-without-parole (LWOP) sentences dwarfs that of the rest of the world, with almost 50,000 offenders serving LWOP sentences.[21] Further, the United States is the only country in the world that allows the imposition of LWOP sentences on juvenile offenders.[22]

These practices are part of a larger mass incarceration epidemic in America,[23] with the United States responsible for a quarter of the world's prison population despite only having five percent of the world's total population.[24] Indeed, over the past decade, the United States has housed the largest prison population in the history of the world.[25]

This Article argues that the concerns of the counter-majoritarian difficulty with respect to deferring to the will of the people should have no bearing on the Court's application of the Eighth Amendment to state punishment practices, at least under the Court's current doctrine. In its application of the Eighth Amendment, the Supreme Court uses the evolving

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17. *See, e.g.*, Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004); James S. Liebman, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

18. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); McCleskey v. Kemp, 481 U.S. 279 (1987).

19. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2755–76 (2015) (Breyer, J., dissenting) (cataloging all of the many flaws with the modern death penalty in the United States, including arbitrariness).

20. Since 1973, 161 death row inmates have been exonerated and released. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/innocence-and-death-penalty [http://perma.cc/A5LE-2JCY].

21. *See, e.g.*, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), https://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf [http://perma.cc/C5LV-S2ZM]; Hanna Kozlowska, *One in Three Prisoners Serving a Life Term Anywhere is in the U.S.*, QUARTZ (May 3, 2017), https://qz.com/974658/life-prison-sentences-are-far-more-common-in-the-us-than-anywhere-else/ [https://perma.cc/K6TV-BWAY].

22. *See, e.g.*, Saki Knafo, *Here Are All the Countries Where Children Are Sentenced to Die in Prison*, HUFFPOST (Sept. 20, 2013), http://www.huffingtonpost.com/2013/09/20/juvenile-life-without-parole_n_3962983.html [https://perma.cc/QA86-H9N9].

23. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE (1999); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017); BRYAN STEVENSON, JUST MERCY (2014); 13TH (Netflix 2016).

24. *See, e.g.*, *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearing Before the J. Econ. Comm.*, 110th Cong. 1 (2008) (statement of Sen. Jim Webb, Member, J. Econ. Comm.) (commenting on the nation's prison population). Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system, and I choose to believe the latter." *Id.* at 1–2. *See also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?src=tp (comparing the prison population in the United States with those of other countries).

25. *See Criminal Justice Facts*, THE SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/L5W3-EAK6].

standards of decency doctrine to demarcate the line between constitutional punishments and cruel and unusual punishments.[26] What constitutes a cruel and unusual punishment is not static—the Supreme Court has made clear that the "evolving standards of decency" change over time, consistent with the maturing of society.[27]

What has happened is that society's standards have evolved, but the Court's cases have not. The views of the justices, perhaps, are still evolving to catch up with the shift in societal standards. A number of cruel and unusual punishments persist, but the Court seems unwilling to restrict these legislative overreaches.

The core of the Court's evolving standards doctrine mandates assessing the majoritarian practices of states. It does not substitute the Court's judgment for that of a particular state; it strikes down state punishment practices that are outliers as compared to the evolved standard—respecting the democratic norm of society. Further, the evolving-standards-of-decency doctrine ensures the protection of some individual rights by taking the step to strike down excessive state punishment practices. Finally, the Court's approach promotes judicial legitimacy, in theory, by simultaneously respecting democratic norms and individual rights.

After demonstrating why there is no counter-majoritarian tension related to the Court's Eighth Amendment doctrine and thus no reason not to apply the doctrine, the Article offers a holistic approach to the application of the Court's Eighth Amendment doctrine to current punishment practices in the United States. This assessment examines punishments on a micro (limiting a particular application) and a macro (complete prohibition) level. This includes explaining why current societal standards provide a basis both for the abolition of juvenile life-without-parole (JLWOP) sentences and the death penalty.

In Part I, the Article argues that the evolving standards doctrine enables judicial intervention through its simultaneous advancement of a pro-democratic analysis that supports the protection of individual rights. In Part II, the Article establishes that the Court's use of the doctrine has historically

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26. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (plurality opinion) (articulating the concept of evolving standards of decency); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (applying the doctrine to bar execution of intellectually disabled offenders). This approach has garnered serious criticism in that the Court has applied it largely only to death cases (and more recently, juvenile LWOP cases) creating essentially two tracks of criminal justice in the United States. 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) (acknowledging the Court's different treatment of capital cases).

27. *See, e.g.*, *Trop*, 356 U.S. at 99–101; Weems v. United States, 217 U.S. 349, 372 (1910). *See also* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1815 (2008) (arguing that the original meaning of the Eighth Amendment is that its scope will evolve over time).

been a majoritarian exercise. Given the absence of counter-majoritarian restrictions, Parts III and IV provide a road map for the evolving justices to apply the evolved standards to restrict excessive punishments. Part III explores the application of the doctrine to punishments on a micro level, identifying possible categorical exceptions similar to the Court's recent cases. Part IV of the Article examines the application of the evolving standards to punishments on a macro level, demonstrating the increasingly compelling basis for a determination that the Eighth Amendment prohibits both juvenile LWOP and the death penalty. Finally, Part V concludes the Article by briefly assessing whether and when the justices might evolve and constitutionalize society's evolved standards.

I. EIGHTH AMENDMENT JUDICIAL REVIEW

In the application of constitutional provisions to state legislative enactments,[28] a wide range of approaches is possible.[29] On this spectrum of judicial review,[30] a judge may adopt, at one extreme, a position completely deferential to state legislatures,[31] refusing to apply the constitutional provision to the statute.[32] On the other extreme, a judge could impose his or

28. Scholars have long debated the degree of deference courts should accord legislative interpretations of the Constitution. *Compare, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302 (2002), Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV L. REV. 5, 129 (2001), *and* JOHN HART ELY, DEMOCRACY AND DISTRUST 101–04 (1980), *with, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004), Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362–63 (1997), Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1275 (1996), *and* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993).

29. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); ELY, *supra* note 28; MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

30. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 PENN. L. REV. 541 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

31. While usually not complete, deference is one historical value inherent in the concept of judicial review. *See, e.g.*, THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008).

32. To be sure, state statutes enjoy a presumption of constitutionality. For an interesting discussion about the tension between this presumption and judicial review, see F. Andrew Hessick,

her political will, essentially acting as a super-legislator, using "constitutional interpretation" to substitute his or her political judgment for the determination of the legislature.[33] As discussed below, the ideal falls somewhere between these two extremes, and seeks to balance some level of deference to state legislative enactments with the protection of individual liberties guaranteed by the Constitution.[34]

The substitution of judicial will for legislative will and the larger justifications for the proper scope of judicial review have long been the subject of academic debate, framed as a counter-majoritarian difficulty.[35] The difficulty arises with the replacement of the views of the many "people"—the democratic majority—with the views of judges or justices—the political minority— in deciding cases. One attempt to justify such judicial review comes from the famous footnote four of the Court's decision in *Carolene Products*.[36] There the Court indicated that judicial intervention was more likely to be appropriate where legislation falls within the protections of individual liberties in the Bill of Rights or otherwise is discriminatory.[37] Statutes that impose cruel and unusual punishments would presumably fall within the situations where exercise of judicial will over

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Rethinking the Presumption of Constitutionality, 85 NOTRE DAME L. REV. 1447 (2010).

33. Interestingly, "activist" interpretations can stem from both original meaning and living constitution forms of interpretation. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

34. As I have argued elsewhere, the deference accorded to state legislatures under the Eighth Amendment has historically been excessive and compromised the individual rights of criminal defendants. William W. Berry III, *Unusual Deference*, 69 FLA. L. REV. (forthcoming 2018), https://ssrn.com/abstract=2922802 [hereinafter Berry, *Unusual Deference*].

35. *See* sources cited *supra* note 7 (posing the problem of the counter-majoritarian difficulty).

36. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

37. The famous footnote provided:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted).

political will would be appropriate on the basis of protecting individual constitutional rights.[38]

To be sure, the Court has established itself as the institution that determines *which* institution has the ultimate authority to interpret the Constitution and, in most cases, accords itself the position of being that final arbiter.[39] To the extent that state legislatures pass overreaching statutes that infringe upon individual rights protected in the Constitution, the Court plays an important role as a counter-majoritarian check against such lawless majorities.[40] Indeed, without the Court, states could legislate away core fundamental rights, particularly ones involving unpopular expression or manifestation.[41]

At the other extreme, interpreting the opaque language of the Constitution to strike down state legislative enactments can, in theory, allow the political views of five justices on the Supreme Court to trump the political will of a majority of state legislators. This "judicial activism," often discussed as a counter-majoritarian difficulty, underscores questions of the proper scope of judicial review and can strike at the legitimacy of the Supreme Court itself. Those who oppose such action by the Court cite the difficulty of reversing the Court's opinions; by interpreting the Constitution to have a particular meaning, the legislature is unable to overcome that view, short of amending the Constitution.

This Article does not seek to rehash the voluminous debates concerning the proper scope of judicial review.[42] Rather, it aims to explore the self-

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38. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 103–04 (1958) (plurality opinion); Weems v. United States, 217 U.S. 349, 382 (1910).

39. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177–78 (1803); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92–93 (1st ed. 1953) (discussing constitutional interpretation in light of *Marbury*).

40. Judicial review of legislative enactments in this manner is well-established. *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 31, at 466 (referencing "courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void"); *id.* at 467 ("[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 542, at 405 (Melville M. Bigelow ed., William S. Hein & Co. 1994) (1833); BICKEL, *supra* note 7, at 1 ("The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state."); *Judicial Review*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining judicial review as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional"); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 6 (1980) (referencing "the power of judicial review to declare unconstitutional legislative, executive, or administrative action").

41. *See, e.g.*, Erwin Chemerinsky, *The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 935–36 (2013) (book review); BICKEL, *supra* note 7, at 52–53.

42. To be sure, there are wide range of views concerning this subject. *Compare* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 175–76 (1999) (advocating for a constitutional amendment to abolish judicial review), *with* Steven L. Winter, *An Upside/Down View of*

regulation of some justices in the application of the Eighth Amendment to state criminal statutes, particularly in light of their own comments on the appropriateness of judicial intervention and regulation in this context.

A. The Spectrum of Judicial Review

The core question this Article begins with is where the Court might fall on the spectrum from judicial deference to judicial activism with respect to the Eighth Amendment's ban on cruel and unusual punishments. As discussed below, the core doctrine the Court has used to assess punishment is the evolving standards of decency. The language of the constitutional provision itself though—"nor cruel and unusual punishments inflicted"[43]—does not provide any clue as to the degree of deference, if any, the Court ought to apply when assessing the constitutionality of particular punishments.

To frame the question, I propose five broad Eighth Amendment categories of judicial review—complete deference, majoritarian-outlier, hybrid, proportionality, and normative. First, the Court could elect to defer entirely to state punishment practices, finding that all punishments adopted by states are constitutional (complete deference). This complete deference approach would never strike down any punishments, no matter how excessive or draconian.

Second, the Court could adopt a majoritarian-outlier approach, where it upholds all punishments that are not rare or unusual in light of the majority practice (majoritarian-outlier). In this approach, the Court would examine the majority practices and only strike down state punishment practices that are outliers, inconsistent with the majority approach.

Third, the Court could adopt a hybrid approach where it mixes the majoritarian-outlier approach with a second question—whether the punishment is proportional in light of the criminal conduct (hybrid). There are a number of ways that the Court could do this, but one way would be to assess whether the punishment in question is proportional to the purposes

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the Countermajoritarian Difficulty, 69 TEX. L. REV. 1881, 1924 (1991) (arguing that "judicial review is itself an institution so firmly established . . . that its continued existence is utterly unassailable."). *See also* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

43. U.S. CONST. amend. VIII. The text also does not indicate whether "and" is conjunctive, disjunctive, or a hendiadys. For differing views on this question, see Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567 (2010); Samuel L. Bray, *"Necessary AND Proper" and "Cruel AND Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 468–69 n.167 (2017).

of punishment—retribution, deterrence, incapacitation, and rehabilitation.[44] This hybrid approach would find a punishment unconstitutional when the punishment is *both* an outlier *and* disproportionate.

Fourth, the Court could simply apply the proportionality test to assess the punishment (proportionality). Here, the Court would simply assess whether one or more of the purposes of punishment justify the punishment, making it proportional. Disproportionate punishments under this approach would be unconstitutional.

Fifth, the Court could apply its own normative political views to the punishment to determine its constitutionality (normative). Under this approach, justices would apply their normative, political views as to whether the punishment in question is appropriate or excessive.

Of the approaches, only the fourth and fifth are truly counter-majoritarian. To the extent that the Court's primary role is to protect individual rights from majoritarian tyranny, one of these two approaches is necessary.[45] The Court, of course, could adopt other methods of determining the scope of the meaning of "cruel and unusual" besides proportionality or pure normative views, but to remain counter-majoritarian, it would have to bring its own judgment to bear, independent of majoritarian practices.

The other three approaches are majoritarian, at least in part, and defer to state legislative practices. Even the hybrid approach, which includes the justices' own analysis, requires that a majoritarian practice exist before striking down a particular state practice.

What is clear, nonetheless, is that none of these three majoritarian approaches create any meaningful counter-majoritarian difficulty. There is no concern about the justices overruling the practices of the states *because* they are only striking down minority jurisdictions, if they are striking down any statutes at all. Thus, the content of the constitutional provision *is* majoritarian, aligning the judicial and legislative will, at least holistically.

As explained below, this observation has significant consequences for the future application of the Eighth Amendment, as the Court has employed the hybrid approach described above for over three decades. If the Court continues to use a majoritarian standard, the counter-majoritarian difficulty ceases to be an impediment in applying the Eighth Amendment to minority (and disproportionate) punishment practices.

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44. Proportionality in this sense could refer just to retribution, *see* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 961 (2011), but a better approach would be to measure proportionality in light of all of the purposes of punishment. *See* William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. BRIEF 61, 62 (2011) [hereinafter Berry, *Separating Retribution from Proportionality*].

45. I have argued this elsewhere. *See* Berry, *Unusual Deference*, *supra* note 34, at 18.

B. Evolving Standards: The Eighth Amendment Model

The Eighth Amendment story is one of judicial deference to states and hesitancy to protect the individual rights of defendants. The presumption of many justices has been that states know best how to determine what punishments are appropriate for criminal offenders, even when such punishments are, by most accounts, excessive in light of the culpability of the offender and the harm caused.[46]

On this issue, Justice Blackman's dissent in *Furman v. Georgia* is instructive.[47] In voting to uphold Georgia's death penalty statute, Blackmun indicated that were he a legislator, he would vote against capital punishment, but as a justice, striking down Georgia's statute as unconstitutional would exceed his authority.[48] The other dissenting justices in *Furman* expressed similar concerns.[49] After *Furman*, the Court went over twenty years without applying this doctrine to create substantive limits on criminal punishments, with a couple of exceptions.[50] Similarly, Justice Scalia's dissents in *Atkins v. Virginia*[51] and *Roper v. Simmons*[52] chastised his fellow justices on the Court for allegedly substituting their personal views for those of legislators.[53]

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46. This has been particularly true in the non-capital context. *See* Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66, 285 (1980) (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions); *but see* Solem v. Helm, 463 U.S. 277, 281–84 (1983) (reversing by a 5–4 vote a sentence of life without parole for presenting a no account check for $100, where defendant had six prior felony convictions); *see also* Barkow, *supra* note 26, at 1146–47.

47. Furman v. Georgia, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

48. *Id.* at 406 ("Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.") This is particularly ironic in light of Blackmun's opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

49. *See supra* note 5.

50. *See* discussion *infra* Part II.

51. 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).

52. 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

53. As explained below, the majority legislative view in both cases was consistent with the Court's decisions. *See* discussion *infra* Part II.B.

Part of the Court's hesitancy with respect to the Eighth Amendment may stem from the public backlash to its decision in *Furman*.[54] Removing the ability of states to impose the death penalty was met with significant resistance and perhaps has made some on the Court think twice about limiting punishments. The Court's cases demonstrate this outcome, with the Court not establishing any meaningful categorical limits on sentences until 2002.[55]

Indeed, the Court's evolving standards of decency test itself reflects this deference to state legislatures. This standard is a hybrid one—it first examines the majority view of state legislatures before examining whether the purposes of punishment justify the kind of sentence in question.

The evolving standards doctrine assesses the punishment at issue in two ways.[56] First, the Court examines the societal consensus with respect to the punishment at issue ("objective indicia").[57] The predominant indicator of societal consensus for the Court has been the number of state and federal governments that authorize the punishment, resulting in a counting of state jurisdictions.[58] If less than half of the jurisdictions allow the punishment, it is evidence that the punishment might be suspect, and the societal standard might have moved away from the punishment.[59]

Second, the Court brings its "own judgment" to bear ("subjective indicia").[60] In this analysis, the Court asks whether any of the purposes of punishment—retribution, deterrence, incapacitation, or rehabilitation—justify the use of the punishment.[61] Specifically, this proportionality

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54. Lain, *supra* note 2.

55. *See* Steiker & Steiker, *supra* note 5, at 417–18; James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 40 (2007).

56. In practice, these assessments can occur on three different levels—the type of punishment, the method used to impose the punishment, and the technique used to implement the punishment. *See* William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 407 (2017) [hereinafter Berry & Ryan, *Cruel Techniques, Unusual Secrets*] (developing a taxonomy of the Court's Eighth Amendment decisions). This Article largely focuses on the first category—the punishment itself.

57. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (applying this doctrine to bar execution of intellectually disabled offenders); *Roper*, 543 U.S. at 563–67 (same for execution of juvenile offenders).

58. *Atkins*, 536 U.S. at 313–17; *Roper*, 543 U.S. at 564–67. The Court has relied on other indicators, including jury sentencing outcomes and international norms, but the legislative trends have provided the most consistent barometer. *See, e.g.*, *Atkins*, 536 U.S. at 313–17; *Roper*, 543 U.S. at 564–67.

59. While this approach is not without analogs among other constitutional provisions, *see* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009), it contains the fundamental flaw that it populates a counter-majoritarian standard—the Eighth Amendment—with majoritarian consensus. *See* Berry, *Unusual Deference*, *supra* note 34, at 38.

60. Coker v. Georgia, 433 U.S. 584, 597 (1977).

61. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 441–46 (2008) (applying this principle); Graham v. Florida, 560 U.S. 48, 71–75 (2010) (same). Interestingly, the Court has always reached the

analysis[62] measures the relationship between the punishment and the purpose in context to determine whether the punishment is excessive in light of the characteristics of the offender and the nature of the crime.[63]

Since the doctrine's adoption, the Court has used the evolving standards of decency in holding that the Eighth Amendment bars death sentences for rapes,[64] for some felony murder crimes,[65] for intellectually disabled offenders,[66] and for juvenile offenders,[67] as well as for JLWOP sentences imposed for non-homicide crimes.[68]

Even so, this line of cases has affected a relatively small number of criminal offenders; compared to the over 2.3 million in prison in the United States, these constitutional limits merely seem like a baby step in the right direction. As the next section demonstrates, all of these cases reflect a majoritarian view concerning the disproportionate nature of the sentence.

II. EIGHTH AMENDMENT MAJORITARIANISM

While the Court's forays into applying the Eighth Amendment have been few, each decision to do so first reflected a determination that the situational punishment ban was a minority or unusual practice. Indeed, in applying the Eighth Amendment's evolving standards of decency doctrine, the Court has never brought its own judgment to bear without examining the majority trend with respect to sentencing in the manner at issue before the Court. This Section demonstrates the majoritarian nature of the Court's cases by briefly exploring the genesis of the doctrine and its subsequent evolution.

A. Coker, Enmund, & Tison: Early Applications

In *Coker*, the Court first looked to the practice of state legislatures with

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same conclusion with respect to both questions—the majoritarian standard of societal consensus and the determination of whether a purpose of punishment justifies the use of the punishment.

62. *See supra* note 44.

63. *See, e.g.*, *Kennedy*, 554 U.S. at 441–46 (applying this principle); *Graham*, 560 U.S. at 71–75 (same).

64. *Kennedy*, 554 U.S. at 434 (barring capital sentences for all non-homicide crimes, including child rape); *Coker*, 433 U.S. at 592 (barring capital sentences for the crime of rape).

65. Enmund v. Florida, 458 U.S. 782, 788 (1982) (striking down a felony murder conviction where defendant did not kill or intend to kill); *but see* Tison v. Arizona, 481 U.S. 137, 138 (1987) (narrowing the holding in *Enmund* and allowing a capital sentence for individuals playing a major role in the crime without intent to kill). *See also* Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1206 (2017) (arguing for a mens rea standard of recklessness in capital felony murder cases).

66. Atkins v. Virginia, 536 U.S. 304, 311–12 (2002); Hall v. Florida, 134 S. Ct. 1986, 1990 (2014); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

67. Roper v. Simmons, 543 U.S. 551, 578 (2005).

68. *Graham*, 560 U.S. at 82.

respect to permitting the death penalty as a punishment for rape.[69] Prior to *Furman*, sixteen states permitted the death penalty for rape.[70] At the time of *Coker*, however, Georgia was the *only* state that made rape of an adult woman a capital offense.[71]

The Court also examined jury sentencing decisions and found that Georgia had, since the reinstatement of the death penalty, sentenced five rapists to death out of sixty-three cases that the Georgia Supreme Court reviewed.[72] Georgia juries imposed a capital sentence in less than 10 percent of rape cases.[73]

Finally, the Court brought its own judgment to bear, determining that death was a disproportionate penalty for a rape offense.[74] Despite the acknowledged seriousness of rape, the Court found that it did not merit death, even with aggravating circumstances.[75] On several levels—legislative majority, legislative trend, and jury verdicts, the majority consensus was that rape constituted an outlier as a basis for the death penalty, making it a candidate for constitutional exclusion under the Court's majoritarian doctrine.

In *Enmund v. Florida*, the Court applied the same majoritarian evolving standards of decency analysis as in *Coker*.[76] *Enmund* concerned the use of the death penalty for a felony murder conviction where the crime was robbery and another committed the killing.[77] Of the thirty-six jurisdictions that permitted the death penalty at the time, the Court noted that only eight jurisdictions authorized the death penalty for accomplices in felony murder robbery cases like *Enmund* without proof of additional aggravating circumstances.[78] In addition, another nine states allowed death sentences for felony murder accomplices where other aggravating factors were present.[79] The Court found that the legislative practice weighed "on the side of rejecting capital punishment for the crime at issue."[80]

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69. *Coker*, 433 U.S. at 586 (1977).

70. *Id.* at 593.

71. *Id.* at 595–96. As the Court noted, Florida, Mississippi, and Tennessee authorized the death penalty for child rape at the time of *Coker*. *Id.* at 595.

72. *Id.* at 596–97.

73. *Id.*

74. The Court did not specifically refer to the purposes of punishment, but the concept of proportionality implicitly refers to such aims. I have discussed this at length in other articles. *See* Berry, *Separating Retribution from Proportionality*, *supra* note 44, at 61; William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69 (2011) [hereinafter Berry, *Promulgating Proportionality*].

75. 433 U.S. at 600.

76. 458 U.S. 782, 788–89 (1982).

77. *Id.* at 783–87.

78. *Id.* at 789.

79. *Id.* at 791.

80. *Id.* at 793. The Court also considered jury sentences, although a difficult proposition given

As in *Coker*, the Court in *Enmund* brought its own judgment to bear, finding that the death sentence was inappropriate for Enmund.[81] Interestingly, the Court held that criminal culpability did not rise to the level required by just deserts retribution to warrant a death sentence.[82] The Court similarly dismissed deterrence as a supporting rationale for a death sentence in Enmund's case.[83] Finally, it is important to note that the Court's decision in *Enmund* appeared to focus only on his particular sentence.[84] The Court did not explicitly create a categorical rule with respect to death sentences for felony murder convictions.[85]

The Court narrowed the scope of *Enmund* five years later in *Tison v. Arizona*, where it again considered the Eighth Amendment limitations on felony murder in capital cases through its majoritarian lens.[86] *Tison* involved the prosecution of the two sons of Gary Tison, who brutally murdered a family after carjacking their car.[87] The sons participated both in helping Tison break out of prison and in the carjacking.[88] They were not present, however, when their father killed the family and were unaware that he intended to do so.[89]

The Court in *Tison* applied the same counting of state legislatures as in *Enmund*, but combined the jurisdictions that allowed felony murder for any accomplice with those that only allowed felony murder with additional aggravating circumstances.[90] The Court reasoned that, unlike Enmund, the Tison sons played an active role in the crime (particularly the prison escape), and as a result *both* categories of jurisdictions should count, leading to a finding that only eleven jurisdictions did not allow death sentences in felony murder cases like *Tison*.[91]

The Court's subjective judgment likewise found that the death sentences

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the variety in felony murder cases and state felony murder laws. *Id.* at 794–96.

81. *Id.* at 797.

82. *Id.* at 800–01.

83. *Id.* at 799–800. To be fair, retribution appears to be the only purpose that could justify the death penalty, and it might not accomplish that. *See* discussion *infra* Part III.B.

84. 458 U.S. at 801.

85. *Id.*

86. 481 U.S. 137, 152–58 (1987).

87. *Id.* at 139–41. For a chilling account of Gary Tison's escape from prison and subsequent crime spree, see JAMES W. CLARKE, LAST RAMPAGE: THE ESCAPE OF GARY TISON (1988).

88. 481 U.S. at 139–40.

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

90. 481 U.S. at 152–55.

91. *Id.* The Court focused on the recklessness demonstrated by the sons in busting Tison out of prison, particularly considering their knowledge of his dangerous character and criminal past. *Id.* at 151–52.

imposed on the Tison sons were not disproportionate.[92] Specifically, the Court cited the reckless endangerment of the Tison sons as providing a level of intent that made a death sentence appropriate even though the sons did not participate in the killing itself.[93] The distinction, then, between the outcomes in *Enmund* and *Tison* was the intent of the felony murder accomplices.[94] Unlike in *Enmund* and *Coker*, the Court made clear that the majority view did not provide a consensus view in favor of eliminating the application of the punishment at issue.[95]

For fifteen years after *Enmund*, the Court did not apply the evolving standards of decency doctrine or the Eighth Amendment to a substantive punishment. Then, in 2002, the Court began applying the doctrine to a series of cases, deciding six cases over the next twelve years.

B. Atkins, Roper, & Kennedy: The Death Penalty

In *Atkins v. Virginia*, the Court held that the evolving standards of decency and the Eighth Amendment prohibited death sentences for intellectually disabled offenders.[96] The Court again applied the majoritarian objective indicia, focusing again on state legislative practices that permitted such sentences.[97] Thirty states, including twelve states that prohibited capital punishment, proscribed the execution of intellectually disabled offenders.[98] Further, the Court emphasized that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change[,]"[99] noting that seventeen of the states banning the execution of intellectually disabled offenders had done so in the decade since the Court's decision in *Penry*.[100] Finally, the Court gave weight to the absence of new state legislation authorizing executions of intellectually disabled offenders,

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92. *Id.* at 155–58.

93. *Id.* at 157–58.

94. *Id.* For an argument that a recklessness mens rea should be required for capital punishment for felony murder, see Binder et al., *supra* note 65, at 1142.

95. 481 U.S. at 157–58.

96. 536 U.S. 304, 321 (2002).

97. *Id.* at 313–17.

98. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) (citing *Atkins*, 536 U.S. at 313–15). Justice Scalia's dissent in *Atkins* took issue with the counting method, instead claiming that eighteen out of thirty-eight death-penalty states (47%) had banned such executions—not enough to establish a national consensus. 536 U.S. at 342 (Scalia, J., dissenting).

99. 536 U.S. at 315. Interestingly, the Court also cited three other states that currently had bills pending that would ban the execution of intellectually disabled offenders. *Id.*

100. *Id.* at 314–15. *See also* Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. at 304. The Court had reached the opposite conclusion in *Penry* but reversed that decision in *Atkins* based in part on the legislative shift (demonstrating national consensus). 536 U.S. at 314–16.

as well as the small number of executions after *Penry*.[101]

With respect to the subjective indicia, the Court in *Atkins* determined that none of the purposes of punishment justified the execution of intellectually disabled offenders.[102] The purpose of retribution did not justify execution of intellectually disabled offenders, according to the Court, because such offenders by definition did not possess the required culpability.[103] The Court similarly found that exempting the intellectually disabled from the death penalty would have no effect on the ability of the death penalty to deter criminal offenders.[104]

Three years later, the Court applied similar reasoning in *Roper v. Simmons*, holding that the evolving standards of decency and the Eighth Amendment prohibited death sentences for juvenile offenders.[105] As in *Atkins*, the application of the majoritarian objective indicia commenced with counting the state laws, and like *Atkins*, thirty states prohibited the execution of juvenile offenders (twelve of which banned the death penalty altogether).[106] Also like *Atkins*, the Court in *Roper* was assessing whether the evolving standards of decency provided enough evidence of changed circumstances to reverse its prior decision in *Stanford v. Kentucky* sixteen years earlier.[107]

The Court also noted the presence of objective evidence moving toward ending juvenile executions, although only five states (as compared to sixteen in *Atkins*) had abandoned the juvenile death penalty since *Stanford*.[108] Further, no state had, as in *Atkins*, reinstated the juvenile death penalty since *Stanford*.[109]

With respect to the subjective standards, the Court developed the idea that juveniles were offenders that, by definition, possessed a diminished

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101. 536 U.S. at 316.

102. *Id.* at 318–20.

103. *Id.* at 319.

104. *Id.* at 319–20. The Court also focused on the likelihood of error as a reason for abolishing the execution of intellectually disabled offenders. *Id.* at 320–21. The likelihood of false confessions and the offender's inability to aid the lawyer in his defense rested at the heart of this concern. *Id.* Interestingly, the Court in *Atkins* did not address the broader question of whether the holding applied to mental illness as well as mental retardation. And it failed to even define mental retardation, leaving that determination up to individual states. For an exploration of possible applications of *Atkins* to mentally ill offenders through the intersection of the Eighth and Fourteenth Amendments, see Nita A. Farahany, *Cruel and Unequal Punishment*, 86 WASH. U. L. REV. 859 (2009).

105. 543 U.S. 551, 578–79 (2005).

106. *Id.* at 564–65.

107. *Id. Stanford* held that the execution of seventeen-year-old offenders did not violate the Eighth Amendment. 492 U.S. 361, 380 (1989) *abrogated by Roper*, 543 U.S. at 551.

108. 543 U.S. at 565. Even though the change in *Roper* was less pronounced than in *Atkins*, the Court still emphasized that it found it "significant." *Id.*

109. *Id.* at 566.

level of culpability.[110] Specifically, the Court cited the (1) lack of maturity and undeveloped sense of responsibility, (2) the susceptibility of juveniles to outside pressures and negative influences, and (3) the unformed nature of juveniles' character as compared to adults.[111]

In light of the diminished level of culpability, the purposes of punishment, in the Court's view, failed to justify the imposition of juvenile death sentences.[112] Such death sentences failed to achieve the purpose of retribution in light of the diminished culpability.[113] Likewise, the Court concluded that execution of juveniles did not achieve a deterrent effect—offenders with diminished capacity will be unlikely to be susceptible to deterrence.[114] In addition, the Court found no evidence that a juvenile death sentence would add any deterrent value beyond that achieved by a LWOP sentence.[115]

One other important aspect of the decision in *Roper* bears mentioning. At the end of its analysis, the Court also cited to the relevance of international standards and practices in determining the meaning of the evolving standards.[116] In particular, the Court emphasized that the United States was the only country in the world that permitted the juvenile death penalty.[117] Again, the majoritarian approach to judicial review explains the Court's decision to strike down the statute—the broad consensus, at home and abroad, justified the Court's action and captured the political shift since its prior decision in *Stanford*.

Three years later, the Court expanded its holding in *Coker* in *Kennedy v. Louisiana*, striking down Louisiana's child rape statute under the Eighth Amendment.[118] Specifically, the Court held that the evolving standards of decency foreclosed the imposition of a death sentence for all non-homicide crimes against individuals.[119]

In applying the majoritarian objective indicia, the Court determined that forty-four states did not allow capital punishment for child rape.[120] As this number exceeded the number of states in *Atkins* (thirty), *Roper* (thirty), and *Enmund* (forty-two), the Court concluded that the objective consensus

110. *Id.* at 569–70.
111. *Id.*
112. *Id.* at 570–71.
113. *Id.* at 571.
114. *Id.* at 571–72.
115. *Id.* at 572.
116. *Id.* at 575–78; *see* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).
117. 543 U.S. at 575.
118. 554 U.S. 407, 421 (2008).
119. *Id.* at 446–47.
120. *Id.* at 423.

banned child rape.[121] As with the earlier cases, the majority approach drives the content of the cruel and unusual punishment proscription and defines which punishments have become unconstitutional.

With respect to the subjective indicia, the *Kennedy* Court explained that retribution did not justify a penalty of death for a child rape because, as indicated in *Coker*, such a penalty was disproportionate.[122] With respect to deterrence, the Court concluded that the crime of child rape is underreported, and allowing the death penalty as a punishment would only increase the incentive to hide the crime.[123] As such, death for child rape would likely not advance the purpose of deterrence.[124]

C. Graham & Miller: JLWOP

Two years after *Kennedy*, the Court decided *Graham v. Florida*, applying its decision in *Kennedy* to JLWOP sentences.[125] *Graham* was particularly significant in that it applied the evolving standards of decency doctrine to a non-homicide crime for the first time.[126] Prior to *Graham*, the Court had reserved this majoritarian doctrine to capital cases, resting on its differentness principle[127] as the basis for the doctrine's limited application.[128] In *Graham*, however, the Court made clear that JLWOP

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121. *Id.* at 425–26. Interestingly, the Court discounted the direction of change, as six states had adopted statutes allowing the death penalty for child rape in the five years prior to *Kennedy*. *Id.* at 431–32. The Court dismissed this change as insignificant when compared to *Atkins* and *Roper*. *Id.* Another implicit reason for the Court's view here might be the idea that the evolving standards of decency only evolve in one direction—away from severe punishments. *See* Stinneford, *supra* note 27, at 1825.

122. 554 U.S. at 441–42.

123. *Id.* at 444–45.

124. *Id.* at 445.

125. 560 U.S. 48, 82 (2010).

126. This practice was quite curious given that the evolving standards of decency concept emerged predominately from non-capital cases. *See* Trop v. Dulles, 356 U.S. 86 (1958).

127. The Court has long held that "death is different." *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming). Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. Steiker & Steiker, *supra* note 5, at 370 (crediting Justice Brennan as the originator of this line of argument); *see also* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence).

128. *See, e.g.*, 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) (acknowledging the Court's different treatment of capital cases); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861 (2008).

sentences are "different" too for the purpose of the evolving standards of decency and the Eighth Amendment.[129] At the time, it was not clear whether the juvenile character of the offender, the punishment of LWOP, or both, constituted the differentness.[130]

On the heels of the Court's decision in *Roper* five years earlier, the public had become increasingly interested in the degree to which juveniles should receive adult punishments.[131] With the death penalty unavailable, it was natural that increased scrutiny concerning JLWOP became part of the democratic consciousness.

With respect to the majoritarian objective indicia, the Court in *Graham* recognized that a majority of states permitted JLWOP sentences in non-homicide cases, particularly rape.[132] The Court, however, found that the legislative analysis was less important than the actual sentencing practices with respect to JLWOP in non-homicide cases.[133] Because only 123 offenders were serving JLWOP for non-homicide crimes, the Court found a national consensus against JLWOP.[134] For the Court, the relationship between the number of such sentences as compared to the opportunity for their imposition provided the basis for its analysis.[135]

As to the subjective indicia, the Court expanded upon its discussion in the *Roper* case concerning the lessened culpability of juvenile offenders.[136] In addition, the Court emphasized the diminished culpability of offenders that do not commit homicide.[137] The "twice diminished moral culpability" combining the offender (juvenile) and the offense (non-homicide) made JLWOP, a kind of death sentence, a disproportionate punishment.[138] As a result, the Court found that the purpose of retribution does not justify JLWOP.[139] Deterrence likewise did not justify JLWOP sentences in non-

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129. 560 U.S. at 79.

130. *See* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010) [hereinafter Berry, *More Different than Life*] (arguing that LWOP is a "different" kind of punishment). *See also* Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 61–64 (2012).

131. *See, e.g.*, Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 179–80 (2007); Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1155 (2005); Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9, 65 (2008).

132. 560 U.S. at 62–66.

133. *Id.* at 62–65.

134. *Id.*

135. *Id.*

136. *Id.* at 67–75.

137. *Id.* at 71.

138. *Id.* at 69.

139. *Id.* at 71.

homicide cases because juveniles are less susceptible to deterrence, and deterrence does not offer a justification for disproportionate punishments.[140]

Two years later, in *Miller v. Alabama*, the Court followed its approach in *Graham,* again applying a categorical exclusion to juvenile offenders.[141] The Court held in *Miller* that the evolving standards of decency and the Eighth Amendment prohibited the imposition of mandatory JLWOP sentences,[142] mirroring its prior decision in *Woodson v. North Carolina*, which proscribed mandatory death sentences.[143]

The Court in *Miller* also clarified that the differentness at issue was the juvenile character of the offender.[144] The Court explained, that if "'death is different,' children are different too."[145] This makes sense as the character of juveniles, and the popular reconsideration of juvenile offenses, provided the basis for the Court to expand its doctrine.

Given that the case rested at the confluence of two doctrines—the juveniles are different of *Graham* and the evolving standards AND the individualized sentencing requirement (and prohibition of mandatory death sentences) of *Woodson*—the Court applied a synthesized approach that looked at both doctrines.[146]

As to the majoritarian objective indicia of the evolving standards of decency, the Court determined that twenty-nine states allowed mandatory JLWOP sentences.[147] As in *Graham* (where thirty-nine jurisdictions allowed the practice at issue), the Court in *Miller* de-emphasized the overall importance of state counting as the prime determinant of the objective inquiry.[148] Rather, in most cases, the mandatory JLWOP sentences resulted from a confluence of two statutes—one that provided for juveniles to be tried as adults in some situations, and one that imposed the mandatory LWOP sentence.[149]

Because states had not considered these together in one determination about the propriety of mandatory JLWOP, the state counting did not create dispositive proof of consensus.[150] In light of the Court's concerns related to the denial of individualized sentencing rights, the Court did not further address whether a consensus existed, but largely presumed its presence in

140. *Id.* at 72.
141. 567 U.S. 460 (2012).
142. *Id.* at 465.
143. 428 U.S. 280 (1976).
144. 567 U.S. at 480.
145. *Id.* at 481.
146. *Id.*
147. *Id.* at 482.
148. *Id.*
149. *Id.* at 485–86.
150. *Id.*

its analysis.[151]

With respect to its typical subjective inquiry, the Court recounted its application of the purposes of punishment in *Graham*, and suggested that the same conclusions applied in *Miller*.[152] Further, the Court focused on the *Woodson* precedent in emphasizing the need for individualized sentencing determinations.[153]

D. Hall v. Florida and Moore v. Texas: The Most Recent Applications

The Court's most recent evolving standards decisions occurred in two cases applying the rule from *Atkins*.[154] In both *Hall v. Florida* and *Moore v. Texas*, the Supreme Court struck down state schemes pursuant to *Atkins v. Virginia*.[155] In *Hall*, the Court held that using IQ as the sole method for determining whether intellectual disability existed was unconstitutional.[156] The Court instead required, under the evolving standards, an inquiry into other indicia of intellectual disability—meaning that IQ could not serve as the sole basis for concluding an offender was not intellectually disabled.[157]

In its exploration of majoritarian objective indicia, the Court determined that, at most, nine states imposed a strict IQ cutoff at seventy for determining intellectual disability.[158] "Thus[,] in 41 [s]tates[,] an individual in Hall's position—an individual with an [IQ] score of 71—would not be deemed automatically eligible for the death penalty."[159]

Further, the Court highlighted the consistency of the direction of change with respect to the use of a strict IQ cutoff.[160] In the twelve years since *Atkins*, two states had adopted a strict cutoff, while eleven states had abandoned a cutoff or abolished the death penalty altogether.[161]

With respect to the subjective indicia, the Court focused on the prevailing medical view concerning the relationship between IQ and intellectual disability.[162] Earlier, it established that none of the purposes of punishment justify the execution of intellectually disabled offenders, citing its earlier

151. *Id.*
152. *Id.* at 483.
153. *Id.*
154. Hall v. Florida, 134 S. Ct. 1986 (2014); Moore v. Texas, 137 S. Ct. 1039 (2017).
155. *Hall*, 134 S. Ct. at 1990; *Moore*, 137 S. Ct. at 1053.
156. *Hall*, 134 S. Ct. at 2000. *Hall* may have implications beyond Eighth Amendment jurisprudence. *See, e.g.*, Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of a "Scientific Stare Decisis,"* 23 WM. & MARY BILL RTS. J. 415 (2014).
157. *Hall*, 134 S. Ct. at 2001.
158. *Id.* at 1997.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 2001.

work in *Atkins*. Its own judgment, then, related to its view, based on expert testimony, that IQ alone was not an adequate measure of intellectual disability.[163]

Similarly, the Court in *Moore* struck down the procedure adopted by Texas. The approach of Texas to determining intellectual disability was similarly an outlier, as prohibited the use of newer medical standards in favor of older ones.[164] Given the majority consensus against Texas— the only state using such an out-of-date approach—the Court had no difficulty finding that the test did not meet the objective standards.[165] With respect to the subjective standards, the Court found that no purpose of punishment justified the use of antiquated mental health standards.[166]

E. Micro vs. Macro Applications

When considering the Court's evolving standards of decency, their trajectory, and the potential future applications of the doctrine, it is worth noting that none of the decisions had the effect of completely excluding a particular punishment. Both JLWOP and the death penalty have survived. Instead, the Court's categorical rules have operated on a micro-level, excluding the death penalty or JLWOP as an available punishment based on the character of the offender or the character of the offense.

The individual impact of such decisions can be quite significant—the difference between life and death or prison and parole. The systemic effect, though, remains somewhat small, given the limited number of offenders that fall into the excluded category as compared to the overall number of offenders serving the punishment at issue. The number of death sentences for juveniles before *Roper*, for instance, pales in comparison to overall death row population. Similarly, the number of child rape death sentences at the time of *Kennedy*, constituted a very small percentage of death sentences, particularly because almost all jurisdictions had a legislative prohibition against such sentences already.

The open question, then, is whether the Court will extend the evolving standards of decency beyond its pattern of micro-applications to extend to macro-applications. Specifically, one wonders whether the next step in the evolving standards of decency is to declare that a particular punishment is always cruel and unusual.

As explored below, the leading candidates for such a determination are the death penalty and JLWOP. The doctrine itself, including its theoretical

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163. *Id.*
164. Moore, 137 S. Ct. at 1044.
165. *Id.* at 1052.
166. *Id.* at 1051.

underpinnings as a doctrine that evolves over time, certainly does not foreclose a macro application.

III. EVOLVED STANDARDS (MICRO LEVEL)

In light of the Court's evolving standards of decency and its prior applications, the next question is whether the usage of certain punishments has evolved such that they contravene the Eighth Amendment. Because there is no counter-majoritarian issue, the Court is free to evolve to catch up with the majoritarian shifts in society with respect to different punishments.

This section explores potential applications on a micro-level—involving certain applications of the doctrine to otherwise permissible punishments. The next section explores potential applications on a macro-level—to eliminate a punishment entirely under the Eighth Amendment.

As indicated below, the micro exclusions tend to involve punishments where the exclusion fits with the Court's prior rationale and have a current subjective rationale that justifies Eighth Amendment application. In most cases, the majoritarian consensus is not there with reference to the exclusion because state legislatures have not statutorily excluded that practice.

Nonetheless, a majoritarian basis may exist for all of these exclusions because a majoritarian exclusion exists for the crime itself, on a macro level, as explored in Part IV. For example, a majority of states may not have abolished JLWOP for intellectually disabled offenders, but a majority may have abolished JLWOP itself.

Following the Court's recent jurisprudence, two kinds of punishment currently warrant heightened scrutiny in light of their differentness—JLWOP and the death penalty. After exploring some possible micro-level applications to those two kinds of punishment, the section concludes by suggesting other possible candidates for differentness and heightened scrutiny.

A. JLWOP Sentences

Both of the Court's JLWOP cases—*Graham* and *Miller*—have mirrored prior applications of the Eighth Amendment to the death penalty. *Graham*'s categorical prohibition of JLWOP sentences in non-homicide cases is an analog to *Coker* and *Kennedy*'s prohibition of death sentences in non-homicide cases (rape and child rape). Similarly, *Miller*'s categorical prohibition of mandatory JLWOP sentences adopts the reasoning of *Woodson*, which barred mandatory death sentences and required individualized sentencing consideration. This makes sense, as the public consciousness with respect to JLWOP, while not the same as the death

penalty, has significantly expanded under the label of its own kind of differentness.[167]

The obvious place, then, to look for the next categorical JLWOP exemption is to the remaining death penalty exemptions. After *Graham* and *Miller*, the two other categories of cases are felony murder cases (*Enmund / Tison*) and intellectually disabled offenders (*Atkins*).

1. Felony Murders

As explored above, the application of the death penalty to felony murder offenders has two different Eighth Amendment rules. Where the offender played a minor role and demonstrated no intent to kill, *Enmund* appears to bar death sentences. By contrast, where the offender played a more significant role and exhibited some intent, even if recklessness, *Tison* suggests that the Eighth Amendment does not place a limitation on death sentences.

A logical application of the *Enmund/Tison* principle to JLWOP cases could in theory bar JLWOP sentences in felony murder cases where the offender played a minor role and did not display any intent to commit murder.

The objective indicia indicate that states place some limits on felony murder. But the limits are in the cases that fall within the doctrine, not with respect to the punishment itself. As a result, the objective criteria would not be met in this context unless the Court were willing to draw lines as to how states could define felony murder itself, much like the ALI has done with the Model Penal Code.[168] The political will would need to arise, as in *Miller*, from some source other than state-counting. Unfortunately, as with *Enmund/Tison*, the view of felony murder generally will not be enough to establish a complete categorical exception; the objectionable nature of the felony murder doctrine comes from its unfairness in certain factual situations (like in *Enmund*). If the Court, as it is likely to do, continues to operate under the majoritarian principle, a majoritarian limitation on JLWOP in felony murder cases must relate to the specific situation, or kind of situation, at issue.

The subjective indicia by contrast would strongly support adoption of this felony murder exception. As the Court has indicated, a LWOP sentence in many ways constitutes its own kind of death sentence.[169] Under the

167. *See* Berry, *More Different than* Life, *supra* note 130; William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053 (2013) [hereinafter Berry, *Eighth Amendment Differentness*].

168. MODEL PENAL CODE, § 210.2(1)(b) (AM. LAW INST., Proposed Official Draft, 1962).

169. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 474–75 (2012).

purposes of punishment, the punishment of JLWOP would not accord the felony murder accomplice his just deserts; it would result in an excessive sentence. The JLWOP sentence for an individual who was a minor participant in a crime, who did not kill, and who did not intend to kill would not achieve the purpose of retribution based on the offender's diminished culpability. Deterrence would also not result from the imposition of such a sentence because future offenders in similar cases also would not intend to kill and would only act in a minor role in the crime.

Incapacitation also does not justify JLWOP sentences for minor felony murder participants without intent to murder, because such offenders are unlikely to be inherently dangerous individuals. Merely being in the presence of a murder should not serve as the aggravating fact that condemns an offender to die in prison. Finally, rehabilitation counsels against JWLOP sentences generally, and specifically where rehabilitation appears a real possibility. Certainly, offenders like *Enmund* have not exhibited any behavior during the felony murder that would provide a basis for concluding that a JLWOP sentence is necessary to rehabilitate them.

Limiting the imposition of JLWOP in this context could be very significant. Almost one-quarter of all JLWOP sentences result from felony murder cases or cases with accomplice liability, and while this approach might not result in complete categorical exclusion, it could further define, consistent with majority view, some restrictions on JLWOP in felony murder cases.[170]

2. *Intellectually Disabled Offenders*

The application to JLWOP of the prohibition of intellectually disabled offenders receiving capital sentences provides a second logical analog for the Supreme Court. The proscription of such sentences rests in part on the diminished culpability of such offenders and on the inability of such offenders to understand why the state is killing them—an important part of retributive justice.[171]

It is clear that these concerns have less purchase with JLWOP offenders. The juvenile character of JLWOP offenders already takes into account the diminished culpability of an offender. It may be difficult to assess the degree to which mental disability should further increase the mitigation applied at sentencing. In addition, the concern that the offender cannot appreciate the

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170. *Facts & Infographics*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, https://www.fairsentencingofyouth.org/media-resources/facts-infographics/ [https://perma.cc/X7E3-7UNS].

171. *See* Panetti v. Quarterman, 551 U.S. 930, 958 (2007); *see also* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009).

nature of their sentence—that they will die in prison—raises fewer concerns than a failure to appreciate that the state will execute them and the reasons for their capital sentence.

Nonetheless, these concepts still provide a basis for expansion of the evolving standards of decency consistent with the Court's decision in *Atkins*. Where juvenile offenders have a low IQ, such offenders may be correspondingly less culpable than other offenders. In addition, the JLWOP sentence is a kind of death sentence, warranting increased scrutiny by the Court under the evolving standards of decency doctrine.

With respect to objective indicia, there is no national consensus concerning the appropriate test to determine intellectual disability. Further, states have not placed limitations upon LWOP sentences based on intellectual disability. Without shifts in state legislative policy, the objective indicia with respect to JLWOP would not be satisfied. The Court could, however, look to larger trends, including the overall trend toward abolition of JLWOP altogether as a broader basis for restricting JLWOP in this context.[172]

With respect to the subjective indicia, it is certainly possible to make a case that none of the purposes of punishment supports JLWOP sentences for intellectually disabled offenders. The purpose of retribution may not support JLWOP sentences for intellectually disabled juvenile offenders in two senses.

First, the culpability of such offenders may be lower, in that the offender's mental condition may have inhibited his ability to fully appreciate the consequences of his actions and thus lower his level of criminal desert.

Second, the mental condition of the offender may make the communication of the public censure so central to retribution difficult to achieve. The state may be unable to accomplish the purpose of retribution if the offender is unable to understand the relationship between his criminal act and his condemnation to die in prison.

For deterrence, there are similar difficulties related to the intellectual disability of the offender. Such offenders are not generally susceptible to deterrence. In addition, there is little evidence that JLWOP would provide significant marginal deterrence in excess of life sentences.

With respect to dangerousness, the lower IQ of the offender may suggest continued need for incarceration. This sentence is unnecessary to achieve this purpose of punishment, however, as allowing for the possibility of parole does not mandate a release. Indeed, a life sentence with parole would be adequate to assess dangerousness over time, particularly given the youth

172. *See* discussion *infra* Part IV.

of the offender. Further, in some cases, other institutions may be preferable to prison for some intellectually disabled offenders. To say, then, that incapacitation justifies JLWOP for intellectually disabled offenders seems dubious because the states could achieve the same purpose with a lesser sentence.[173] Finally, JLWOP clearly does not achieve the purpose of rehabilitation. It forecloses the possibility of the offender returning to society.

The normative sentiments certainly would open the door to a categorical exclusion in this context if the Court could find a majoritarian hook for such a constitutional interpretation. Rather than creating categorical exceptions, however, a better approach would be to abolish JLWOP altogether in light of the evolving standards of decency. The Article makes that case in Part IV below.

B. Death Sentences

1. Mental Illness

Collectively, *Atkins* and *Hall* prohibit the execution of the intellectually disabled and develop parameters for determining which offenders fall into that category. Intellectual disability, however, is not the only mental deficiency that warrants scrutiny under the Eighth Amendment.

Apart from insanity and intellectual disability, other mental illnesses might also bear upon one's eligibility for the death penalty (given the current status quo of permitting executions generally). In most jurisdictions, courts and juries weigh mental illness as a mitigating factor when considering the death penalty.

It is possible that certain types of mental illness could rise to the level of deserving a categorical exclusion, as with mental retardation. As most states do not have a clear statutory prohibition in this context, one must look, as the Court did in *Miller*, to the on-the-ground results in cases involving a particular mental illness. Over time, it is possible, and even likely, that certain kinds of mental illness will capture the public imagination such that they provide an excuse on some level for criminal activity such that the majority will is in favor of restricting the death penalty in that context. As throughout, shifts in majority view will shape the development of the doctrine in this context.

With respect to subjective indicia, the central arguments with respect to retribution would again relate to (1) diminished culpability and (2) inability

173. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889 (2010).

to censure. For certain mental illnesses, the offender's diminished culpability might provide the basis for determining that retribution is not achievable. Similarly, where the offender could not adequately understand the state's condemnation as related to the death sentence, such a punishment might fail to satisfy the purpose of retribution.

With respect to deterrence, the same arguments from *Atkins* would apply. Executing a mentally ill offender does not have any significant deterrent effect, both because similar offenders are not susceptible to deterrence and because the marginal effect of deterrence in this context does not justify an execution.

Currently, states make such decisions, as mentioned, on a case-by-case basis. One could imagine, however, that certain mental illnesses exist such that the death penalty would never be appropriate.[174] As such, the evolving standards of decency could remove the possibility of death in those cases through a categorical constitutional rule.

2. *Methods of Execution*

In recent years, a number of states have had increasing difficulty obtaining the drugs needed to conduct lethal injections.[175] As a result, several states have explored using other methods of execution, including firing squads, hanging, and the electric chair.[176] Under the evolving standards of decency, the use of such methods might be unconstitutional. As the implementation of a death sentence, the doctrine could apply to assess such practices.[177]

In the Court's two most recent methods of execution cases, *Baze v. Rees*[178] and *Glossip v. Gross*,[179] the Court's analysis has focused on whether the risk of substantial pain makes the punishment cruel and unusual.[180] In

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174. The same difficulty demonstrated by *Atkins*, *Hall*, and *Moore*—determining which offenders fall in the proscribed category—could also be an issue depending on the condition in question.

175. *See* Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1360–66 (2014); Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1380 (2014).

176. Note that the Court evaluates techniques under a pain-based standard. *See* Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015); Baze v. Rees, 553 U.S. 35, 52 (2008); Berry & Ryan, *Cruel Techniques, Unusual Secrets*, *supra* note 56. (differentiating between type, method, and technique).

177. It is not clear whether the evolving standards would apply to execution methods, but it is likely they would. The only methods cases in which the Court affirmed a particular method (as opposed to a technique) predated the adoption of the evolving standards. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (mechanical accident during first execution by electrocution did not make second cruel under the Eighth Amendment); *In re* Kemmler, 136 U.S. 436, 444 (1890) (electrocution is a permissible form of execution under the Eighth Amendment).

178. 553 U.S. at 35.

179. 135 S. Ct. at 2726.

180. *See* Berry & Ryan, *Cruel Techniques, Unusual Secrets*, *supra* note 56 (discussing these

both those cases, however, the Court assessed a protocol involving the only form of capital punishment widely used—lethal injection.[181] And the question before the Court in both cases focused on whether the kind of injection created a constitutional problem, not whether the concept of injecting an inmate with lethal drugs itself constituted a cruel and unusual punishment.[182]

With respect to other methods, though, states have largely abandoned them based on a perception that they were draconian, and certainly more brutal than lethal injection.[183] The question, then, would be whether the evolving standards of decency would foreclose such a reversal by states.[184] The Court has noted on more than one occasion that it has never struck down a method of execution as a violation of the Eighth Amendment.[185] The states' use of methods, though, has always moved in the direction of choosing (at least purportedly) more humane options.[186]

As a matter of objective indicia, it seems clear states have, for the most part, not used methods other than lethal injection in recent years.[187] With respect to state statutes, lethal injection remains the predominant method, with some states allowing other methods as alternatives.[188] As for actual executions, 1301 out of 1476 executions since the reinstatement of the death penalty in 1976 have been by lethal injection.[189]

Given the majoritarian undercurrent influencing the determination of evolving standards, the majority view with respect to methods could foreclose the adoption of new methods under the Eighth Amendment, despite a few states moving in that direction in recent years.[190]

The subjective indicia could also, in theory, support a determination that the evolving standards of decency barred the use of firing squads,[191]

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cases).

181. *Id.*

182. *Id.*

183. *See id.*

184. *See* Stinneford, *supra* note 27.

185. Glossip v. Gross, 136 S. Ct. 2726, 2732 (2015); Baze v. Rees, 553 U.S. 35, 48 (2008).

186. *See* Berry & Ryan, *Cruel Techniques, Unusual Secrets*, *supra* note 56.

187. *See Searchable Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/views-executions [https://perma.cc/AER9-CUJM].

188. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-execution [https://perma.cc/B4SE-2DRU].

189. *See Searchable Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&sex_1=All&method[]=Lethal+Injection&federal=All&foreigner=All&juvenile=All&volunteer=All [https://perma.cc/8SB3-WMQM].

190. Tennessee recently amended its statute to allow for electrocution. *Tennessee Governor Signs Forced Electrocution Bill*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/5778 [https://perma.cc/R57Q-X7XR].

191. Interestingly, lethal injection with midazolam may be a more severe punishment than death

hangings, and electrocutions. Retribution, for instance, does not require the use of a less humane method of execution, particularly when a more humane one exists. Similarly, there is no evidence that a hanging, firing squad, or an electrocution would have more deterrent value than a lethal injection.[192] If anything, adoption of one or more of these methods might deter the use of the death penalty itself.[193] With respect to incapacitation and rehabilitation, neither would justify the use of the older methods. As explored below, dangerousness and rehabilitation do not justify the death penalty itself, much less favor one method over another.

C. Other Categories of Differentness

In addition to the potential micro-level categorical exemptions explored above, the Court could also expand the evolving standards of decency doctrine by developing other categories of differentness besides the death penalty and juvenile offenders, consistent with shifting majoritarian views on particular kinds of offenders and offenses. Interestingly, of the two categories of differentness, one is a type of punishment (the death penalty) and one is a type of offender (juveniles). In theory, then, other categories of differentness—scenarios warranting the higher scrutiny of the evolving standards of decency approach under the Eighth Amendment—might involve either other categories of punishment or other categories of offenders.

1. Other Possible Categories of "Different" Punishments

The most obvious category for differentness among non-capital punishments is life without parole (LWOP). First, LWOP is its own kind of death sentence—a sentence to die in the custody of the state with no possibility for release. In addition, the Court already limits the use of LWOP in one context—juveniles.[194]

As I have suggested in other papers, LWOP can serve as its own kind of different, warranting higher scrutiny than other punishments in certain contexts.[195] Putting aside the question of a macro-exclusion, the lack of

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by firing squad. *See* Mark Joseph Stern, *Justice Sotomayor Takes Aim at Lethal Injection*, SLATE (Feb. 21, 2017, 1:48 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/justice_sotomayor_takes_aim_at_lethal_injection_our_most_cruel_experiment.html.

192. As explored below, there are serious questions as to whether capital punishment has *any* deterrent value at all. *See* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

193. AUSTIN SARAT, GRUESOME SPECTACLES (2014).

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

195. William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327 (2014) [hereinafter

careful legislative consideration with respect to LWOP suggests the need for categorical exclusions.[196] Indeed, in many jurisdictions, LWOP sentences are simply the product of a state legislature's decision to abolish parole, such that fifteen to twenty year sentences have become automatic death-in-prison sentences.[197] Further, were the Court to even consider a categorical LWOP exclusion, states may be more likely to re-examine their use of LWOP.[198] This has certainly been the case with mental retardation (the response to *Penry*) and juvenile death sentences (the response to *Stanford*).

a. Mandatory LWOP

Mandatory LWOP sentences provide one clear category for possible proscription under the evolving standards of decency.[199] There is a basis already, in *Woodson* and *Miller*, for creating this kind of exclusion under the Court's application of the Eighth Amendment. To be sure, the concerns of both *Woodson* and *Miller* apply to LWOP sentences.[200]

With respect to *Woodson*, the Court made clear that offenders require individualized consideration of their crime and background prior to the imposition of death sentences.[201] *Lockett v. Ohio* further expanded this idea, providing justification to use mitigation evidence at capital sentencing, including the opportunity for the offender to plead for mercy.[202]

Miller likewise embraced these principles, but also reflected on LWOP as a punishment.[203] It focused on the finality of such a determination and the need for a judicial determination in that such a sentence foreclosed the possibility of rehabilitation and return to society. LWOP as a sentence thus had such a significant effect that its application (at least to juvenile

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Berry, *The Mandate of* Miller]; Berry, *Eighth Amendment Differentness*, *supra* note 167.

196. William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67 (2015) [hereinafter Berry, *Eighth Amendment Presumptions*]; William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051 (2015) [hereinafter Berry, *Life-with-Hope Sentencing*].

197. Berry, *Life-with-Hope Sentencing*, *supra* note 196.

198. Berry, *Eighth Amendment Presumptions*, *supra* note 196; Berry, *Life-with-Hope Sentencing*, *supra* note 196.

199. Berry, *The Mandate of* Miller, *supra* note 195; Berry, *Eighth Amendment Differentness*, *supra* note 167.

200. Berry, *The Mandate of* Miller, *supra* note 195; Berry, *Eighth Amendment Differentness*, *supra* note 167.

201. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Berry, *Promulgating Proportionality*, *supra* note 74, at 69.

202. Lockett v. Ohio, 438 U.S. 586 (1978).

203. Miller v. Alabama, 567 U.S. 460 (2012); Berry, *The Mandate of* Miller, *supra* note 195.

offenders) violated the evolving standards.[204]

As to the application of objective indicia, the Court elected not to use state counts in *Miller* as the basis for its application of evolving standards. The lack of state statutes barring mandatory LWOP, then, might not foreclose its consideration under the evolving standards.

To the extent that the Court looked to international standards, a stronger case for objective indicia would arise. The United States, as with JLWOP and the juvenile death penalty before *Roper*, remains an outlier with respect to its use of LWOP.[205] The United States has over 40,000 offenders serving LWOP sentences, while the next three most populous LWOP countries—the UK, the Netherlands, and Australia—account for less than 150 offenders.[206] Data concerning the number of mandatory LWOP sentences is not readily available, but the broader use of LWOP in the United States as compared to the rest of the world does bear on its relationship to the evolving standards. As with *Roper*, the Court's finding of a majority here would rest on a broader framing of the popular will.

Finally, it is important to note that in *Miller*, a clear precedent, the Court did not rely on objective indicia alone in its determination that mandatory JLWOP sentences were cruel and unusual. Rather, the substance of the individualized consideration principle provided an alternative basis for a categorical constitutional exclusion.

With respect to subjective indicia, retribution may not justify LWOP when it is mandatory for several reasons. If retribution aims to measure the just deserts of the offender, imposing a mandatory sentence may preclude the Court from determining whether such a sentence achieves the purpose of retribution. Further, for many of the applications of mandatory LWOP, it is clear that not every case achieves the purpose of retribution, particularly in light of potential mitigating factors.

The Court has previously approved a mandatory LWOP sentence in *Harmelin*, but could reverse course for a number of reasons.[207] First, as demonstrated by the reversal of *Penry* by *Atkins* and *Stanford* by *Roper*, the evolving standards do, indeed, evolve.[208] In addition, the Court in *Harmelin* did not accord a level of differentness to LWOP.[209] Doing so would result

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204. Berry, *The Mandate of* Miller, *supra* note 195, at 340.

205. Berry, *Life-with-Hope Sentencing*, *supra* note 196.

206. *Id.* at 1076; ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 7 (2009), http://www.njjn.org/uploads/digital-library/resource_1393.pdf [https://perma.cc/S3HR-NDME]; Ashley Nellis, *Throwing away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010).

207. Harmelin v. Michigan, 501 U.S. 957 (1991). *See* Berry, *Unusual Deference*, *supra* note 34.

208. *See* discussion *supra* Part II. Eighth Amendment Majoritarianism

209. 501 U.S. at 957. Although, perhaps it should have done so. *See* Berry, *Unusual Deference*,

in a more rigorous analysis of mandatory LWOP sentences.[210]

With respect to the subjective indicia, many of the concerns expressed in *Woodson* and *Miller* (as discussed above) would apply. Likewise, in many cases, the difference between a seventeen-year old JLWOP offender and an eighteen-year old LWOP offender can be razor thin, even illusory, in some cases. The science that the Court embraced in *Graham* and *Miller* further suggests that offenders under the age of 25 should receive some mitigation based on age at sentencing, given the incomplete development of their brains. Indeed, mandatory LWOP sentences preclude consideration of such evidence, which in some cases may provide grounds for mitigation.

b. Non-Homicide LWOP

Another possible categorical exclusion with respect to LWOP would be for non-homicide crimes. Such an approach would follow the Court's analysis in *Kennedy* and *Graham*. Given the recent national conversation concerning mass incarceration, the majority will might support such a limitation.[211]

With respect to the objective indicia, state legislatures still allow non-homicide LWOP, so the initial evaluation might be unsuccessful. A broader inquiry, however, looking at actual sentencing practices—the number of non-homicide LWOP sentences compared to overall LWOP sentences—might provide some basis for moving toward a consensus. Also, as mentioned above, the outlier status of the United States with respect to LWOP might indicate an international consensus. In short, there must be more movement in this direction to form the basis for a consensus, given that the majoritarian approach still undergirds the application of evolving standards.

With respect to the subjective indicia, however, there exists a much stronger case for advancing the evolving standards to proscribe such sentences. By their very nature, LWOP sentences in many, if not all cases, arguably are excessive punishments for non-homicide crimes.[212] Understanding LWOP sentences as a type of death sentence helps advance this conceptualization.

As with other examples, there is little evidence that deterrence justifies a LWOP sentence where the offender commits a non-homicide crime. Rather,

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supra note 34; Berry, *The Mandate of* Miller, *supra* note 195; Berry, *Eighth Amendment Differentness*, *supra* note 167.

210. Berry, *The Mandate of* Miller, *supra* note 195.

211. *See generally* MAUER, *supra* note 23; STEVENSON, *supra* note 23; ALEXANDER, *supra* note 23; 13TH, *supra* note 23.

212. Berry, *Life-with-Hope Sentencing*, *supra* note 196.

a life with parole sentence could, in most cases, achieve a similar deterrent effect on future offenders.

Incapacitation likewise does not justify LWOP sentences for non-homicide offenses, as the nature of the offense itself might cast doubt on the dangerousness of the offender. This becomes particularly true when one realizes that the justification must find that the offender will *always* be dangerous, requiring a death-in-prison sentence.

Finally, as with the death penalty, LWOP sentences forego the possibility of rehabilitation. Offenders receiving LWOP will never rejoin society. Perhaps the normative disconnect between the purposes of punishment and non-homicide LWOP sentences will spur the Court to broadly frame the makeup of the political majority in this context.

2. *Other Possible Categories of "Different" Offenders*

Just as the differentness inherent in JLWOP could reflect a potential differentness in the punishment of LWOP, it could also reflect a kind of differentness in juvenile offenders.[213] If juveniles are a different kind of offender, it raises the possibility that other kinds of offenders could be different. This subsection explores some possibilities and their potential implications.

Given that one's relative youth constitutes a basis for differentness, it might be equally possible that one's old age might serve as a basis for differentness. Unlike youth, though, where brain science ascribes a characterization of diminished culpability for juvenile offenders, older offenders cannot claim a diminished culpability based on immaturity, lack of development, or naiveté. Rather, older offenders might be different in that the impact of a criminal sentence might be more severe than upon a young adult or middle-aged offender. This impact can occur in two senses.

First, as a percentage of one's remaining life, a sentence for an elderly offender can often be much higher than for a younger offender. Where this seems to matter most is where a term sentence on an elderly offender has the likely effect (even certainty in some cases) of becoming a life sentence. A ten-year sentence, for instance, for a seventy-year-old offender has a different impact in some ways than a ten-year sentence for a twenty-five-year-old offender in that the older offender most likely loses the possibility of leaving custody before death, whereas the younger offender most likely does not.

Particularly in cases involving less serious crimes, query whether age ought to provide a basis for mitigation for elderly offenders, or at the very

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213. Berry, *The Mandate of* Miller, *supra* note 195; Berry, *Eighth Amendment Differentness*, *supra* note 167.

least, require an inquiry by the Court into this issue. Were advanced age to serve as a kind of differentness, for instance, the Court could extend its decisions in *Woodson* and *Miller* to mandatory sentences imposed on elderly offenders.

In other words, where an elderly offender commits an offense such that the practical consequence would be to impose a LWOP sentence on account of the offender's remaining life expectancy combined with the mandatory minimum sentence, the evolving standards of decency would require individualized sentencing consideration, barring such mandatory sentences. The effect would be the same as with *Woodson* and *Miller*, just applied to what amounts to a different kind of death sentence.

Second, a lengthy sentence might have a disproportionate effect on elderly offenders in a physical sense, as confinement may strain such offenders in ways that it might not younger offenders. Likewise, health conditions (clearly more prevalent in elderly offenders) might also offer the basis for differentness. The practices of states with respect to mental, emotional, and physical health, then, might be relevant under the Eighth Amendment both as matters of sentence length and conditions of confinement.

Both avenues of establishing elderly differentness—the impact of a sentence in light of proximity to death and the increased physical and emotional toll of incarceration on older offenders—could open the door to further constitutional analysis and protection against legislative punitive excesses. Under the evolving standards, however, such an approach is unlikely to gain traction until some jurisdictions elect to advance some set of safeguards for elderly offenders at sentencing. Once a basis for objective determinations of shifting evolving standards emerges, the basis for articulating a subjective basis would follow.

The most promising approach appears to be barring mandatory sentences for elderly offenders that approach life expectancy. In *Woodson* and *Miller*, the Court focused less on jurisdiction counting in making its objective determination and more on the need for individualized sentencing determinations, as discussed above. The same idea would apply here, with a sentence exceeding one's life expectancy receiving the same kind of scrutiny as discussed with mandatory LWOP in the previous section.

The basic principle would be that where an offender faces a sentence that will probably result in him dying in prison, the imposition of that sentence should not be mandatory. Given the stakes—death in prison—one ought to have the Court give individualized consideration to that person's criminal acts and character before making such a weighty determination. Similarly, the offender should have the opportunity, as described in *Woodson* and *Lockett*, to offer mitigating evidence at sentencing.

Further, none of the purposes of punishment require the imposition of the mandatory sentence. Imposing just deserts on an elderly offender can result just as easily from a judicial decision regarding the appropriate sentence as from a legislative decision concerning a mandatory sentence. Indeed, the judicial determination is much more likely to accord the offender his just deserts largely because the judge can make an individualized sentencing determination. It is possible that the removal of a mandatory consequence could lessen the deterrent value of such a sentence, but there is little evidence that the mandatory nature of a sentence creates a deterrent effect. Otherwise, the substantive sentencing outcome is likely to be similar in many cases. With respect to dangerousness, individualized determinations are likewise preferable because the judge can actually attempt to measure the individual's character, instead of simply applying a pre-determined legislative sentencing formula. Similarly, removal of the mandatory nature of a sentence provides a much better opportunity to evaluate an offender's capacity for rehabilitation than a mandatory sentence could.

As with LWOP, one could imagine a similar analysis with respect to the imposition of lengthy sentences that approach the offender's life expectancy in cases involving non-homicide crimes. As with LWOP, there does not yet appear to be a clear societal consensus for the expansion of the evolving standards in this direction.

Other possible categories of "different" offenders might include (1) veterans, (2) mentally ill offenders, and (3) intellectually disabled offenders. To date, state legislatures have not developed significant categorical limitations to punishing these groups outside of the capital punishment context. Each group, though, has mitigating characteristics that could serve as the basis for evolving standards of decency exclusions.

IV. EVOLVED STANDARDS (MACRO LEVEL)

Perhaps the most important question with respect to the future application of the evolving standards of decency doctrine is whether the Court will make the leap from micro-level (creating limits to particular punishments) to macro-level (eliminating the punishments themselves) applications. Interestingly, the case for proscribing JLWOP and even the death penalty under the evolving standards of decency and the Eighth Amendment appears stronger than for any of the above-described potential micro-level exceptions. Before Part V makes the case for why the Court should move in this direction, this Part examines the merits of the arguments under the evolving standards of decency in light of the current status quo.

A. JLWOP Abolition

The question of application of the Eighth Amendment to the sentence of JLWOP under the evolving standards of decency begins with an assessment of the applicable objective indicia. To date, twenty states and the District of Columbia have banned JLWOP sentences.[214] Another six states allow JLWOP sentences, but currently do not have anyone serving JLWOP sentences.[215] Out of fifty-one jurisdictions, over half do not have an offender serving a JLWOP sentence or have banned JLWOP prospectively.[216]

In addition, the prevailing trend is strongly away from JLWOP sentences. Since the Court decided *Miller v. Alabama* in 2012, fifteen states have abolished JLWOP sentences.[217] The most significant of these may have been California, creating parole opportunities for one of the largest JLWOP populations in the United States.[218] By one 2009 estimate, California had over 300 JLWOP offenders.[219] After abolition in and California, two states— Louisiana, Pennsylvania and Michigan—account for two-thirds of the remaining JLWOP sentences.[220]

In addition to the current legislative breakdown and clear trend toward abolition of JLWOP, the international consensus (which the Court looked to in *Roper*)[221] is unanimously against JLWOP sentences.[222] In fact, the United States is the only country in the world that allows the imposition of JLWOP sentences.[223]

All of these objective facts make a strong case for a determination that the evolving standards of decency and the Eighth Amendment now ban

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214. Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming have abolished JLWOP. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Oct. 13, 2017), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/ESC8-8DYD] [hereinafter, Sentencing Project JLWOP Brief]. *See also The Map*, JUVENILE LIFE WITHOUT PAROLE, https://juvenilelwop.org/map/ [https://perma.cc/59WZ-EMKC] (last updated Nov. 20, 2017) [hereinafter, JLWOP Map].

215. Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island all fall in this category. Sentencing Project JLWOP Brief, *supra* note 214; JLWOP Map, *supra* note 214.

216. Sentencing Project JLWOP Brief, *supra* note 214; JLWOP Map, *supra* note 214.

217. The states are as follows: California (2017), Colorado (2016), Connecticut (2013), Delaware (2013), Hawaii (2014), Iowa (2016), Massachusetts (2013), Nevada (2015), New Jersey (2017), South Dakota (2016), Texas (2013), Utah (2016), Vermont (2015), West Virginia (2014), Wyoming (2013). *See* JLWOP Map, *supra* note 214.

218. Sentencing Project JLWOP Brief, *supra* note 214.

219. JLWOP Map, *supra* note 214.

220. Sentencing Project JLWOP Brief, *supra* note 214.

221. Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

222. *See* Knafo, *supra* note 22.

223. *See id.*

JLWOP sentences. The objective evidence, while not as strong as *Coker*, certainly is comparable to, if not better than the evidence that the Court accepted in *Atkins* and *Roper*. The majoritarian approach certainly would embrace this expansion of the evolving standards of decency.

With respect to the Court's subjective judgment, the case for JLWOP abolition is equally strong. The Court's prior cases, in establishing that juveniles are different, have emphasized the diminished level of culpability possessed by juvenile offenders. Assuming this diminished level of culpability, it does not seem a reach to determine that JLWOP sentences never satisfy the purpose of retribution because the just deserts of juvenile offenders does not ever warrant a death-in-custody sentence.

With respect to deterrence, JLWOP sentences similarly fail. Presuming that juvenile offenders cannot fully appreciate the consequence of their actions, the likelihood of a JLWOP sentence having a strong deterrent effect becomes low.

Similarly, JLWOP does not satisfy the purpose of dangerousness. First, by converting the sentence to life with parole, the offender does not necessarily leave state custody. A parole board will determine whether the offender is dangerous. Further, the age of the offender in JLWOP cases makes it likely at some point that the individual will no longer be a danger to society, at least in some cases. As such, JLWOP sentences do not satisfy the purpose of incapacitation.

Finally, it is clear that JLWOP sentences do not satisfy the purpose of rehabilitation. Indeed, one of the strongest arguments against JLWOP sentences is the amount of time available for rehabilitation for juvenile offenders, a possibility a JLWOP sentence forecloses.

Unlike the more controversial question of the death penalty (addressed below), JLWOP abolition ought to be less controversial because in many cases it will not change the sentencing outcome for the juvenile offender. Abandoning JLWOP does not mean juvenile offenders might not serve life sentences until their death.[224] Rather, it simply gives an opportunity for a juvenile offender to rehabilitate himself and eventually rejoin society.[225]

B. Death Penalty Abolition

As with JLWOP, there is an increasingly substantial argument that the death penalty violates the Eighth Amendment, at least with respect to the evolving standards of decency test currently employed by the Supreme

224. Berry, *Life-with-Hope Sentencing*, *supra* note 196.

225. For a more developed explanation of why LWOP sentences (and not just JLWOP sentences) should be abolished, see *id.*

Court. With respect to the objective indicia, a small majority of jurisdictions retain the death penalty, with thirty-one states permitting capital punishment.[226] Nineteen states and the District of Columbia have abolished the death penalty.[227] In addition, four states have current gubernatorial moratoria on the death penalty.[228] That means that twenty-three out of fifty-one jurisdictions currently ban the death penalty.[229]

Further, the death penalty in a number of states constitutes a level of de facto abolition. Of the states that retain the death penalty, ten states—Nebraska, Pennsylvania, Kentucky, Montana, Idaho, South Dakota, Oregon, Colorado, Wyoming, and Connecticut—have had fewer than five executions in the forty years since *Gregg* reinstated the death penalty in 1976.[230] If one adds the *de facto* states to the *de jure* states, thirty-three out of fifty-one states do not actively use the death penalty.[231]

With respect to the death penalty, it is clear that its use is concentrated in a few states. Oklahoma, Virginia, and Texas account for over half of the executions in the past forty years.[232] Only ten states—the three just mentioned plus Florida, Missouri, Georgia, Alabama, Ohio, Arkansas, and Arizona—currently execute offenders on an annual or bi-annual basis.[233]

The number of executions has diminished from a high of ninety-eight in 1999 to less than fifty per year over the past six years, including just twenty in 2016 and twenty-three in 2017.[234] Even more drastic has been the steady decrease in the number of death sentences imposed annually, from 295 in 1998 to just 39 in 2017.[235] Clearly, juries are becoming less and less likely

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226. Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming still retain the death penalty as a punishment. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), http://www.deathpenalty info.org/states-and-without-death-penalty [https://perma.cc/AZ36-MVQV].

227. Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin prohibit death sentences. *Id.*

228. Oregon (2011), Colorado (2013), Washington (2014), and Pennsylvania (2015) all have moratoria. *Id.*

229. *Id.*

230. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo. org/documents/FactSheet.pdf [https://perma.cc/JPF6-NY3F] (last updated May 17, 2018).

231. *Id.*

232. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., ht tp://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 [https://perma.cc/XGE3-7L6 D] (last updated Mar. 28, 2018).

233. *Id.* Arkansas is a new addition to this group, as it executed four inmates in 2017, the first since 2005. *Id.*

234. *Id.*

235. *Facts About the Death Penalty*, *supra* note 232.

to impose death sentences, particularly with the availability of LWOP sentences.[236]

The recent trend of states likewise supports a determination that the death penalty has become disfavored under the evolving standards of decency. In the past decade, eight states—New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Nebraska (2015), and Delaware (2016)—have legislatively or judicially abolished the death penalty.[237] Only Nebraska has reinstated it.[238]

Several other data sources inform the majoritarian objective indicia with respect to the death penalty. While not used in prior cases, they provide additional context to the state counting approach. First, a recent report by the Fair Punishment Project at Harvard Law School demonstrates that the five "deadliest" prosecutors are responsible for 440 death sentences, or about 15% of the cases.[239]

Similarly, geography has become highly correlated with the death penalty.[240] Ten counties (all in Texas or Oklahoma except one) account for a quarter of all post-*Furman* executions. Further, less than 15% of counties in the United States (454 out of 3146) have had an execution in the past forty years.[241] Even more telling, only thirty-six counties have executed four or more offenders in the past forty years—one percent of counties in the United States.[242] If the Court were to assess the objective indicia on a county level rather than a state level, the overwhelming national consensus is against the death penalty, at least in terms of its actual usage.

Internationally, there is evidence that the United States has increasingly become an outlier concerning its use of the death penalty, particularly with respect to Western nations.[243] Virtually all of Europe has abolished the death

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236. Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1838 (2006).

237. *States with and Without the Death Penalty*, *supra* note 226. Note that Nebraska voted to reinstate the death penalty by statewide referendum in November 2016. *Nebraska*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/nebraska-1 [https://perma.cc/Z82X-6P2J].

238. *Nebraska*, *supra* note 237.

239. *See* FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 18 (2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf [https://perma.cc/NZA6-CE5Y].

240. *See* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 227–46 (2012); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–11 (2010) (commenting that there is a geographic arbitrariness within death penalty states).

241. *See* FRANK R. BAUMGARTNER, DEATH PENALTY INFO. CTR., THE GEOGRAPHY OF THE DEATH PENALTY 3 (2010), http://www.deathpenaltyinfo.org/documents/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf [https://perma.cc/9ZKZ-TUKA].

242. *Id.* at 5.

243. *See generally* DAVID GARLAND, PECULIAR INSTITUTION (2010); HOOD & HOYLE, *supra* note 16.

penalty, as have almost all of the countries in North and South America except for the United States.[244]

Of the 140 nations in the world, more than two-thirds have abolished the death penalty or have ceased using it.[245] In 2015, the United States was again one of the top five countries in terms of number of executions, along with China, Iran, Pakistan, and Saudi Arabia.[246]

By all accounts, then, the volume of objective indicia creates the strongest case for death penalty abolition in the past four decades. If the current trajectory continues, the case will only become stronger as the number of new death sentences and executions both continue to decrease. For abolitionists, this becomes a question of properly reading the public will or otherwise risking a *Furman*-type backlash.

With respect to the subjective indicia, the question becomes whether any of the purposes of punishment justify the use of capital punishment. Typically, the Court has considered retribution and deterrence as the two possible legitimate justifications for the death penalty. Retribution does not constitute a valid purpose for capital punishment, as there are other ways to achieve that purpose than by killing an offender.[247] Indeed, the execution of an offender forecloses the possibility of rehabilitation.

Incapacitation also does not provide an adequate ground for the death penalty. LWOP creates the ability to protect society from dangerous offenders. Dangerousness does not require executions.

Deterrence likewise does not justify the use of capital punishment, largely because there is no evidence that the death penalty actually deters crime.[248] At best, the results of social science studies concerning the deterrent value of the death penalty are inconclusive.[249] The predominant view, based on a number of studies, remains that the death penalty does not

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244. *Death Penalty 2015: Facts and Figures*, AMNESTY INT'L (Apr. 6, 2016), https://www.amnesty.org/en/press-releases/2016/04/death-penalty-2015-facts-and-figures/ [https://perma.cc/RH8C-DXDM] [hereinafter AMNESTY INT'L]. *See also* HOOD & HOYLE, *supra* note 16; Oliver Smith, *Mapped: The 58 Countries that Still Have the Death Penalty*, THE TELEGRAPH (Sept. 1, 2016), https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/ (providing a map showing retentionist and abolitionist countries).

245. AMNESTY INT'L, *supra* note 245.

246. *Id.* The number of executions in North Korea is not publicly available, so it could possibly be in this group as well.

247. Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring); 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).

248. *See* Steiker, *supra* note 192, at 753; Gregg v. Georgia, 428 U.S. 153, 184–86 (1976); John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS' VOICE (Apr. 2016), http://www.deathpenaltyinfo.org/files/pdf/DonohueDeter.pdf [https://perma.cc/2B8H-LU34].

249. The Court has admitted as much in *Gregg v. Georgia*. 428 U.S. 153 (1976).

deter crime.[250]

Retribution, then, provides the only plausible justification for the use of capital punishment. Just deserts retribution, the dominant strain of the theory, rests on the principle that the offender will receive the punishment commensurate with his culpability and harm caused. It is not clear, though, that retribution ever requires the imposition of the death penalty. As explained by Andrew von Hirsch and others, just deserts as a theory can give an ordinal ranking to punishments but is unable to ascribe a cardinal value to particular crimes.[251] In other words, just deserts retribution requires proportionality but cannot determine that the death penalty is a proportional punishment for any crime.

Indeed, as discussed above, most of the world has concluded that the death penalty is an excessive punishment for all crimes. It would not be a stretch for the Court to conclude, in light of evolving standards of decency, that death is an excessive punishment for any crime and therefore retribution does not justify the death penalty.[252]

Retribution might also not provide a justification for capital punishment in another sense. For some, the core of retribution lies in the communication of censure by the state to the criminal offender. What matters, then, is the ability of the state to adequately communicate its condemnation of the offender. The Court has focused on this aspect of retribution in *Atkins v. Virginia* and *Panetti v. Quarterman*, emphasizing the negative impact on the concept of retribution resulting where a mental impairment of the offender makes him unable to appreciate the reason for and the reality of his punishment.[253]

The question remains whether an execution is necessary to adequately communicate the state's condemnation in a particular case. A LWOP sentence, which is its own kind of death sentence, arguably can achieve the same communicative purpose as a death sentence. In the sentencing theory, there is not a clear connection between the censure itself and the volume of hard treatment required as part of the communication. The punishment simply has to be adequate to communicate the state's condemnation. It is not clear that the death penalty is necessary to accomplish this goal.

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250. Donohue & Wolfers, *supra* note 250.

251. *See* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment* 16 CRIME & JUST. 55 (1992); *see, e.g.*, Paul Brady, *Just Deserts: Can a Retributivist Theory of Punishment Be Justified?*, 12 IRISH STUDENT L. REV. 86, 113 (2004).

252. For a more developed argument concerning why retribution does not justify capital punishment, see Markel, *supra* note 247.

253. Perhaps the most heartbreaking example of this problem is the case of Ricky Ray Rector, the Arkansas inmate who decided to save his dessert for later at his final meal before his execution. *See* Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105.

In the final analysis, the Court has enough majoritarian objective evidence (at least compared to its earlier cases in *Atkins* and *Roper*) to find that the evolving standards of decency now consider the death penalty to be a cruel and unusual punishment. Moving the analysis down a level, from states to counties, makes the objective case simple and even more compelling. With respect to subjective indicia, the purpose of retribution provides the only intellectual hurdle, but certainly not an insurmountable one given the Court's conjectural application of the purposes of punishment in other cases.[254]

A final consideration with respect to advancing the evolving standards of decency to abolish JLWOP and the death penalty is the question of stare decisis. It is instructive to consider the degree to which the Court's prior rulings limit its ability in this context.

On their face, both questions—whether JLWOP and the death penalty violate the Eighth Amendment in light of the evolving standards of decency that mark the progress of a maturing society—are ones of first impression. The Court has considered the constitutionality of the death penalty in *Furman* and again in *Gregg*, but neither case analyzed the punishment under the current doctrine of evolving standards. In addition, those decisions are forty years old.

The decisions upholding death sentences and JLWOP sentences, however, do provide some level of implicit approval of the punishments. Indeed, the Court has affirmed a significant number of each kind of sentence, creating a sense of precedent that such sentences are constitutional.

The evolving standards of decency, however, do not rest on past precedent.[255] Rather, they shift the meaning of the Eighth Amendment to make it consistent with societal standards—the standards that mark the progress of a maturing society. The expectation, then, remains that, over time, the Court will determine that certain punishments have now reached a threshold such that they have *become* unconstitutional *because* society's progress now finds them to be indecent and excessive.

Reversing prior determinations concerning whether a punishment is cruel and unusual has certainly happened before. Two cases are instructive.

In *Penry v. Lynaugh*, the Court held that the execution of an intellectually

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254. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 445–46 (2008) (where Justice Kennedy postulates that if states used the death penalty in child rape cases, then assailants would always kill their victims).

255. *See* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847 (2007) (arguing that stare decisis applies differently under the Eighth Amendment).

disabled offender did not constitute a cruel and unusual punishment.[256] Thirteen years later, the Court reached the opposite conclusion in *Atkins v. Virginia*, holding that the evolving standards of decency proscribed the execution of intellectually disabled offenders.[257]

Similarly, in *Stanford v. Kentucky*, the Court held that the execution of sixteen and seventeen-year-old offenders did not constitute a cruel and unusual punishment.[258] Sixteen years later, the Court reversed that decision in *Roper v. Simmons*, where the Court held that the evolving standards of decency and the Eighth Amendment proscribed the execution of juvenile offenders.[259]

To find that JLWOP and the death penalty violate the evolving standards of decency and the Eighth Amendment would not require the Court to take the steps required in either *Atkins* or *Roper* with respect to stare decisis. Accordingly, stare decisis does not pose a serious impediment to the Court applying the evolving standards of decency in the manner proposed here.

V. WHY THE JUSTICES SHOULD EVOLVE

The Court's history and jurisprudence provide a sound basis for expanding the Eighth Amendment to address the evolved standards explored above. To do so would not constitute judicial activism; to the contrary, the majoritarian underpinnings of the evolving standards of decency *invite* judicial review of cruel and unusual state punishment practices.

A. Jurisprudential Consistency

Certainly, a broadening of the Eighth Amendment would be consistent with the Court's prior cases. Creating additional categorical exclusions as explored in Part III would simply extend the Court's progress over the past decade in excluding outlier punishments. Requiring some majoritarian basis for each categorical exclusion would be consistent with the Court's cases over the past two decades.

In addition to the cases providing a basis for exclusions, *Graham* and *Miller* provide precedents for applying the Eighth Amendment to non-capital cases, at least cases involving juvenile LWOP sentences. Further, the Court's early Eighth Amendment cases, *Weems v. United States*[260] and

256. 492 U.S. 302 (1989).
257. 536 U.S. 304 (2002).
258. 492 U.S. 361 (1989).
259. 543 U.S. 551 (2005).
260. 217 U.S. 349 (1910).

Trop v. Dulles,[261] both provide examples of Eighth Amendment applications to non-capital cases.

Further, *Trop* provides a basis for instituting a macro-level exclusion, as does *Furman*. It is not outside the scope of the Court's past cases to decide to abolish a particular punishment under the Eighth Amendment.

In short, the Court has previously made decisions similar to the ones proposed above in Parts III and IV. The question is whether a majoritarian consensus exists for additional micro or macro exclusions, and if so, whether the Court is willing to follow its past precedents. This is particularly true with respect to JLWOP and the death penalty.

B. Eighth Amendment Normative Values

Even if the Court abandoned its majoritarian approach, it has developed a set of Eighth Amendment values that guide its analysis in determining whether a particular punishment practice is cruel and unusual. Two concepts emerge from *Weems* and *Trop* that are instructive.

Weems made clear, and *Trop* reaffirmed, that a core Eighth Amendment value is the "dignity of man."[262] This means that punishments that involve torture or otherwise dehumanize offenders violate the Eighth Amendment.

A corollary concept related to dignity is proportionality. Proportionality prohibits the imposition of excessive punishments, and the Court's cases provide a framework for applying this principle using the purposes of punishment.

Together, these two ideas constitute a basis for assessing state punishment practices beyond the simple majoritarian analysis. To be sure, when punishments—whether micro or macro—transgress these core values *and* a majority of jurisdictions elects not to utilize them, the Court should examine carefully whether the practice violates the Eighth Amendment. As discussed, there is no need for the Court to hesitate when applying the Eighth Amendment.

C. Evolving Justices?

Given the many ways in which the societal standards of decency have evolved, then, the question becomes whether and when the justices on the Supreme Court will evolve in such a way as to begin to apply the Eighth Amendment to remedy the gap between constitutional doctrine and unconstitutional punishments.

The current composition of justices on the Supreme Court makes further

261. 356 U.S. 86 (1958).
262. *Weems*, 217 U.S. at 349; *Trop*, 356 U.S. at 100.

inroads possible. The five-justice majority from *Graham* and *Miller*—Kennedy, Breyer, Sotomayor, Ginsburg, and Kagan—is still on the Court, and could opt to pursue any of the approaches in Parts III and IV if so inclined, particularly in light of the frequency such cases are appealed to the Supreme Court.

This group of justices certainly seems committed to the principle that juvenile offenders merit heightened Eighth Amendment scrutiny. Similarly, these five justices seem serious about enforcing the holding in *Atkins* that proscribes the execution of intellectually disabled defendants.

Finally, two justices—Ginsburg and Breyer—seem serious about re-examining the constitutionality of the death penalty. Breyer's dissenting opinion in *Glossip v. Gross*, which Ginsburg joined, chronicled all the shortcomings of the death penalty, and argued that the Court should revisit whether its use complies with the Eighth Amendment.[263]

In light of the mass incarceration epidemic in the United States and the degree to which many criminal justice practices in America raise human rights questions, it is certainly possible that the Court might choose to intervene in one or more of the circumstances outlined in Parts III and IV. As this Article has established, counter-majoritarian concerns should not be an obstacle to advancing the Eighth Amendment doctrine.

CONCLUSION

This Article has demonstrated the fallacy that the counter-majoritarian difficulty provides a reason for the Court not to apply the Eighth Amendment to state punishment practices. To the contrary, the Court's doctrine shields it from any criticism with respect to counter-majoritarian detractors precisely *because* it incorporates majoritarian determinations into its analysis.

Having shown that the Court is free to apply the doctrine, the Article has then explored a number of micro and macro applications of the Eighth Amendment. Interestingly, the strongest majoritarian consensus exists for the punishments themselves, with the macro applications becoming disfavored for both juvenile LWOP and the death penalty. One wonders whether the justices will evolve to catch up with these evolved standards.

263. 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).