# THE EVOLVING STANDARDS, AS APPLIED

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Abstract

In *Jones v. Mississippi*, the Supreme Court of the United States adopted a narrow reading of its Eighth Amendment categorical bar on mandatory juvenile life-without-parole (JLWOP) sentences. Specifically, the Court rejected Jones's claim that the Eighth Amendment categorical limit required a sentencing jury or judge make a finding of permanent incorrigibility—that the defendant is beyond hope of rehabilitation—as a prerequisite to imposing a JLWOP sentence.

In dicta, the Court suggested that Jones could have made an individual as-applied challenge to his sentence under the Eighth Amendment by claiming that his JLWOP sentence was disproportionate to the crime he committed. While the Court has used a narrow disproportionality standard in non-capital, non-JLWOP cases, it is unclear what standard would apply to individual as-applied Eighth Amendment challenges in capital and JLWOP cases. The Court customarily reviews such cases categorically under a heightened evolving standards of decency standard, which suggests that an individual as-applied challenge would also merit some heightened level of review.

Accordingly, this Article argues for the adoption of heightened standards of Eighth Amendment review for individual as-applied proportionality challenges in capital and JLWOP cases. Part One of this Article describes the Court's evolving standards of decency doctrine and Eighth Amendment's categorical limitations on capital and JLWOP sentences. In Part Two, this Article explains the other side of the application of the Eighth Amendment—the narrow disproportionality test that the Court uses to evaluate as-applied challenges in individual non-capital, non-JLWOP cases. Part Three then argues for the adoption of heightened as-applied standards of review in individual capital and JLWOP cases as an application of the evolving standards of decency doctrine.

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## INTRODUCTION

In the 2020–21 Supreme Court term, the Court decided *Jones v. Mississippi*,[1] its latest foray into the scope of the Eighth Amendment's proscription against "cruel and unusual" punishments.[2] Petitioner Brett Jones challenged the imposition of a life-without-parole (LWOP) sentence by the State of Mississippi as a punishment for the murder of his grandfather.[3] Jones's crime received heightened scrutiny[4] under the Eighth Amendment because he was fifteen years old at the time of the crime.[5]

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1. 141 S. Ct. 1307 (2021).

2. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). For purposes of this Article, all references to the Eighth Amendment include both the application of the Amendment to federal crimes and the application of the Amendment, through the Fourteenth Amendment, to state crimes. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (finding that state law making it a criminal offense to be addicted to narcotics violated the cruel and unusual punishments clause); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating the excessive fines clause); McDonald v. City of Chicago, 561 U.S. 742, 765 n.12 (2010) (including the excessive bail clause on the list of incorporated rights and citing *Schilb v. Kuebel*, 404 U.S. 357 (1971) as incorporating the prohibition against excessive bail).

3. *Jones*, 141 S. Ct. at 1311–12. The facts of the case are unsettling. On August 9, 2004, Brett Jones killed his grandfather, Bertis, twenty-three days after Jones's fifteenth birthday, during a fight about Jones's girlfriend, Michelle Austin. *Id.* at 1312; *id.* at 1338 (Sotomayor, J., dissenting). Less than two months before, Jones had moved to Shannon, Mississippi, to stay with his grandparents to escape his mother and stepfather's violent household. *Id.* After Jones moved to Mississippi, Austin fled her parents' house to secretly stay with Jones in his grandparents' house. *Id.* The altercation between Jones and his grandfather began when his grandfather discovered Austin in Jones's bedroom and angrily ordered her out of the house. *Id.* at 1312 (majority opinion). Later that day, Jones was making a sandwich when his grandfather entered the kitchen. *Id.* The two began to argue and started pushing each other after Jones said "something disrespectful" to his grandfather. *Id.* at 1339 (Sotomayor, J., dissenting). Jones's grandfather then swung at him, and Jones stabbed his grandfather with the steak knife he had been using to make a sandwich. *Id.* When his grandfather came at him again, Jones continued stabbing him, grabbing a second knife after the first one broke; he ultimately stabbed his grandfather a total of eight times, killing him. *Id.* After the altercation, Jones found Austin, and the two set out to tell Jones's grandmother what had happened. *Id.* Police arrested Jones and Austin at a gas station several miles away from Jones's grandfather's house. *Id.* at 1312 (majority opinion).

4. The Court refers to this increased scrutiny as "differentness" under the Eighth Amendment. *See infra* Section I.A.2. There are similarities between the Court's approach to the Eighth Amendment and other constitutional provisions. *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 368–69 (2009). *Compare* McGautha v. California, 402 U.S. 183, 196, 207–08 (1971) (rejecting a Fourteenth Amendment procedural due process challenge to death sentences), *vacated*, Crampton v. Ohio, 408 U.S. 941 (1972), *with* Furman v. Georgia, 408 U.S. 238 (1972) (accepting procedural arbitrariness as the basis for an Eighth Amendment violation).

5. *See* Graham v. Florida, 560 U.S. 48, 68, 74–75 (2010) (finding that juveniles are different and receive heightened scrutiny under the Eighth Amendment in LWOP cases and barring JLWOP sentences for non-homicide crimes).

In 2012, the Court held that mandatory LWOP sentences imposed on juvenile offenders violated the Eighth Amendment in *Miller v. Alabama*.[6] The Court's decision merged two lines of cases—one that proscribed mandatory death sentences[7] and one that imposed heightened scrutiny for juvenile offenders under the Eighth Amendment.[8] The former line of cases emphasized the Eighth Amendment requirement of giving offenders individualized sentencing consideration, including full consideration of mitigating evidence, in capital cases.[9] The latter line of cases focused on the heightened mitigating evidence present in cases involving juvenile offenders, particularly their potential for rehabilitation.[10] Because LWOP sentences are a kind of death penalty[11] and foreclose the possibility of rehabilitation in which the offender rejoins society, a mandatory LWOP sentence for a juvenile offender violated the Eighth Amendment.[12]

After the *Miller* decision, state supreme courts split on the question of whether the decision applied retroactively—that is, to offenders sentenced prior to the decision.[13] Under the applicable Supreme Court precedent, *Teague v. Lane*,[14] new substantive rules of constitutional law

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6. 567 U.S. 460, 479 (2012).

7. *Id.* at 470; *see* Woodson v. North Carolina, 428 U.S. 280, 301, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (concluding that North Carolina's mandatory capital punishment statute violated the Eighth Amendment); Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976) (plurality opinion) (concluding that Louisiana's mandatory capital punishment statute violated the Eighth Amendment).

8. *Miller*, 567 U.S. at 470; *see* Graham, 560 U.S. at 74–75.

9. *Woodson*, 428 U.S. at 303–05 (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604–08 (1978) (plurality opinion) (finding limits on the consideration of mitigating evidence in capital cases unconstitutional); *see also* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 48–49 (2019) (arguing for a broader application of the *Woodson–Lockett* principle).

10. *Graham*, 560 U.S. at 74–75; *Miller*, 567 at 489; *see also* Montgomery v. Louisiana, 577 U.S. 190, 206 (2016) (applying the Court's decision in *Miller* retroactively).

11. An LWOP sentence means that the sentence of the offender is to die in prison, with no possibility of release. *See* MARC MAUER ET AL., THE SENT'G PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 4 (2004), http://www.sentencingproject.org/doc/publications/inc-meaningoflife.pdf [http://perma.cc/ 7633-4SZB]; DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 1 (2002). LWOP sentences are sometimes called "flat life," "natural life," or "whole life" sentences. "Death-in-prison" or "a civil death" is perhaps a more accurate way of characterizing LWOP sentences. *See* Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 5 (2010). *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

12. *Miller*, 567 U.S. at 489.

13. *Montgomery*, 577 U.S. at 194. Interestingly, one effect of *Miller* has been a movement among state legislatures to abolish JLWOP sentences. *See* Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/3R3J-KEC5].

14. 489 U.S. 288 (1989).

apply retroactively, while procedural rules of constitutional law generally do not.[15] In *Montgomery v. Louisiana*,[16] the Court held that the rule in *Miller*—that mandatory JLWOP sentences violated the Eighth Amendment—was substantive in nature.[17] As a result, *Miller* applied retroactively.[18]

Jones received a mandatory LWOP sentence for the murder of his grandfather in 2004.[19] In 2013, after *Miller*, the Mississippi Supreme Court granted Jones's request for a new sentencing hearing.[20] During the sentencing hearing, the Mississippi Circuit Court considered "*Miller* factors,"[21] mitigating aspects of juvenile offenders derived from the Court's language in *Miller*.[22] The circuit court resentenced Jones to life without parole.[23]

On appeal, Jones claimed that *Miller* and *Montgomery* require a determination that a juvenile offender is "permanently incorrigible" before a court can impose a JLWOP sentence.[24] According to Jones, the substantive rule of law from *Miller* that justified its retroactive application in *Montgomery* was that the Eighth Amendment "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[25] The Court, however, rejected

15. *Id*. at 307, 311–13 (plurality opinion). Although the Court found an exception for the bar against retroactivity for "watershed rules of criminal procedure," *see id.* at 311, the Court reversed course and found that "[n]ew procedural rules do not apply retroactively," regardless of "watershed status." Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021). For an alternative proposal to the *Teague* rule, see generally William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485 (2016).

16. 577 U.S. 190.

17. *Id.* at 212.

18. *See id.*

19. Jones v. Mississippi, 141 S. Ct. 1307, 1312 (2021).

20. *Id.* at 1312–13. Even before *Montgomery*, Mississippi applied *Miller* retroactively. Jones v. State, 122 So. 3d 698, 703 (Miss. 2013).

21. *Jones*, 141 S. Ct. at 1340 (Sotomayor, J., dissenting). The *Miller* factors are: (1) the juvenile's age and immaturity; (2) the juvenile's family home environment; (3) the circumstances of the offense; (4) the incapacities of youth that may have disadvantaged the juvenile in assisting the juvenile's defense; and (5) the chance of rehabilitation. *See* Parker v. State, 119 So. 3d 987, 995–96 (Miss. 2013) (citing Miller v. Alabama, 567 U.S. 460, 477–78 (2012)).

22. *Jones*, 141 S. Ct. at 1313.

23. *Id.*

24. *Id.*; *see* Miller v. Alabama, 567 U.S. 460, 472–73; Montgomery v. Louisiana, 577 U.S. 190, 209 (2016).

25. *See Jones*, 141 S. Ct. at 1333 (Sotomayor, J., dissenting) (quoting *Montgomery*, 577 U.S. at 209).

Jones's claim, finding that the Eighth Amendment did not require any factual finding[26] prior to a state court imposing a JLWOP sentence.[27]

In dicta in his majority opinion, Justice Brett Kavanaugh noted that Jones did not raise an individual as-applied Eighth Amendment claim of disproportionality.[28] Indeed, as the amicus brief for the United States explained, Jones only challenged the scope of the Court's Eighth Amendment categorical exemption of mandatory JLWOP sentences after *Miller* and *Montgomery*.[29] Interestingly, Justice Kavanaugh cited Justice Anthony Kennedy's concurrence in *Harmelin v. Michigan*[30] as the basis for the as-applied proportionality test.[31]

It is unclear, though, that the narrow disproportionality test applied in *Harmelin* and other non-capital cases would be the appropriate as-applied test for *Jones* or other individuals sentenced to JLWOP. In *Graham v. Florida*,[32] for instance, Chief Justice John Roberts's concurrence found that Graham's sentence was unconstitutional as applied because of his juvenile character, suggesting that juveniles might deserve heightened scrutiny in as-applied cases.[33]

In its application of the Eighth Amendment, the Supreme Court has differentiated capital cases and JLWOP cases from all other criminal

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26. If the Court had found that the Eighth Amendment did require some kind of factual finding prior to imposing a JLWOP sentence, the Sixth Amendment would require that fact to be found by a jury. *See* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448, 451 (2019); Hurst v. Florida, 577 U.S. 92, 99 (2016) (the Sixth Amendment "require[s] a jury to find every fact necessary to render [a defendant] eligible for the death penalty").

27. *Jones*, 141 S. Ct. at 1318–19. The Court's holding focused on the statements from *Miller* and *Montgomery* that no additional fact finding was required under the Eighth Amendment. *Id.* at 1318. The dissent essentially claimed that even though that was what the Court said, it was clearly not what it meant. *Id.* at 1330–31 (Sotomayor, J., dissenting). It is worth noting that the Court in *Jones* did not disturb *Miller*'s conclusion that mandatory JLWOP sentences violate the Eighth Amendment. *Id.* at 1321 (majority opinion). One consequence of *Jones* could be increased arbitrariness in JLWOP sentencing. *See* Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 837–48 (2020) (arguing that individualized sentencing alone does not prevent arbitrariness in the imposition of the death penalty).

28. *Jones*, 141 S. Ct. at 1322 ("Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence.").

29. *See* Brief for United States as Amicus Curiae Supporting Respondent at 11, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

30. 501 U.S. 957 (1991).

31. *Jones*, 141 S. Ct. at 1322 (citing *Harmelin*, 501 U.S. at 996–1009 (Kennedy, J., concurring in part and concurring in judgment)).

32. 560 U.S. 48 (2010).

33. *Id.* at 91 (Roberts, C.J., concurring in the judgment) ("Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults.").

cases.[34] In capital cases and JLWOP cases, the Court applies its heightened evolving standards of decency doctrine to determine whether the Eighth Amendment proscribes the imposition of the death penalty or JLWOP to certain classes of defendants[35] or as a punishment for certain kinds of offenses.[36] In these cases, the Court assesses whether to impose a categorical constitutional rule on a class of cases; the Court never considers whether the individual case alone is disproportionate.[37] Classes of cases that fail to meet the heightened evolving standards of decency—based objectively on state punishment practices and subjectively on the Court's application of the purposes of punishment—are unconstitutional, much like most laws that receive strict scrutiny review under the Fourteenth Amendment.[38]

In non-capital, non-JLWOP cases, the Court uses a lower standard—narrow disproportionality—to assess the as-applied challenge.[39] These

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34. *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, 1146 (2009) (describing the Court's different approaches under the Eighth Amendment between capital and non-capital cases).

35. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 408–10 (1986) (finding death sentences for insane individuals unconstitutional); Roper v. Simmons, 543 U.S. 551, 578 (2005) (juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (intellectually disabled offenders); Hall v. Florida, 572 U.S. 701, 724 (2014) (requiring that the intellectual disability determination be based on more than just IQ); Moore v. Texas, 137 S. Ct. 1039, 1053 (2017) (requiring that the intellectual disability determination apply modern definitional approaches).

36. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597–600 (1977) (plurality opinion) (finding death sentences for rape unconstitutional); Kennedy v. Louisiana, 554 U.S. 407, 446–47 (child rape), *as modified on denial of reh'g*, 554 U.S. 945 (2008); Enmund v. Florida, 458 U.S. 782, 797–801 (1982) (some felony murders). *But see* Tison v. Arizona, 481 U.S. 137, 152, 158 (1987) (narrowing the holding from *Enmund* by finding the death sentence constitutional where the defendant significantly participated in underlying felony and acted with reckless indifference to human life).

37. *See* cases cited *supra* notes 35–36. In two cases, justices have concurred in the respective decisions on individual as-applied grounds, but not with respect to the categorical exemption. *See Coker*, 433 U.S. at 601 (Powell, J., concurring in the judgment in part and dissenting in part); *Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment).

38. *See* cases cited *supra* notes 35–36; Lain, *supra* note 4, at 389.

39. *See* Lockyer v. Andrade, 538 U.S. 63, 66–68, 77 (2003) (upholding 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, 18–20, 30–31 (2003) (plurality opinion) (upholding 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, 996 (1991) (upholding mandatory LWOP sentence for possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–71, 374 (1982) (per curiam) (upholding 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, 266, 285 (1980) (upholding life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior felony convictions). *But see* Solem v. Helm, 463 U.S. 277, 279–82, 303 (1983)

challenges are almost never successful, much like equal protection or due process challenges under rational basis scrutiny.[40]

What is unclear, however, is whether the narrow disproportionality standard applies to individual as-applied challenges under the Eighth Amendment for capital and JLWOP cases. Because the Court applies a heightened evolving standards requirement to these kinds of cases when considered as a class of cases, it follows that individual as-applied challenges should also receive heightened scrutiny.

Accordingly, this Article argues for the adoption of heightened standards of Eighth Amendment review for individual as-applied proportionality challenges in capital and JLWOP cases. Instead of applying a narrow disproportionality standard, in which the presumption of the Court is that the punishment imposed by the state is constitutional, the Court should view capital sentences and JLWOP sentences with increased skepticism for all of the reasons that the Court has accorded categorical limits to these punishments in certain kinds of cases.[41]

Part One of this Article describes the Court's evolving standards of decency doctrine and Eighth Amendment's categorical limitations on capital and JLWOP sentences. In Part Two, this Article explains the other side of the application of the Eighth Amendment—the narrow disproportionality test the Court uses to evaluate as-applied challenges in individual non-capital, non-JLWOP cases. Part Three then argues for the adoption of heightened as-applied standards of review in individual capital and JLWOP cases as an application of the evolving standards doctrine.

## I. THE CATEGORICAL LIMITS OF THE EVOLVING STANDARDS

In its Eighth Amendment jurisprudence, the Court has interpreted the cruel and unusual punishment clause to place substantive limits on categories of disproportionate punishment. The Court has held that the Eighth Amendment bars the execution of intellectually disabled

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(finding unconstitutional, by a 5–4 vote, LWOP sentence for presenting a no-account check for $100 where the defendant had six prior felony convictions). The results are not any more promising at the state level under the Eighth Amendment or its state constitutional analogues. *See* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1642–52 (2021) (summarizing state cases in which non-capital, non-JLWOP defendants have prevailed under state constitutional Eighth Amendment analogues).

40. *See* cases cited *supra* note 39; Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016). To pass the rational basis test, a statute must have a legitimate state interest, and there must be a rational connection between the statute's means and its goals. *See, e.g.*, Chemerinsky, *supra*; United States v. Carolene Prods., 304 U.S. 144, 152 (1938). Under the Eighth Amendment, the Court has almost completely deferred to state punishment practices in non-capital, non-JLWOP cases. *See* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 327 (2018).

41. *See* discussion *infra* Part III.

offenders,[42] juvenile offenders,[43] and insane offenders.[44] Additionally, it bars the execution of individuals for the crimes of rape,[45] child rape,[46] and some felony murders,[47] as well as the imposition of mandatory death sentences.[48] More recently, the Court has also barred JLWOP sentences for non-homicide crimes[49] and mandatory JLWOP sentences.[50] The doctrinal basis for these decisions is the evolving standards of decency doctrine.

### A. *The Doctrine*

Three core principles animate the Eighth Amendment's evolving standards of decency doctrine: (1) the evolving nature of the standards, (2) the use of "differentness" as a basis for giving some cases heightened constitutional scrutiny, and (3) the test itself, which involves both objective and subjective indicia. At its heart, the evolving standards of decency doctrine measures whether a particular punishment is proportionate to the conduct and character of the offender.[51] Disproportionate punishments violate the Eighth Amendment.[52]

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42. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

43. Roper v. Simmons, 543 U.S. 551, 578 (2005); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (finding death sentences for those under sixteen years old unconstitutional prior to *Roper*).

44. Ford v. Wainwright, 477 U.S. 399, 408–10 (1986).

45. Coker v. Georgia, 433 U.S. 584, 597–600 (1977) (plurality opinion).

46. Kennedy v. Louisiana, 554 U.S. 407, 446–47, *as modified on denial of reh'g*, 554 U.S. 945 (2008).

47. Enmund v. Florida, 458 U.S. 782, 797–801 (1982); Tison v. Arizona, 481 U.S. 137, 152, 158 (1987).

48. Woodson v. North Carolina, 428 U.S. 280, 301, 305 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976) (plurality opinion).

49. Graham v. Florida, 560 U.S. 48, 68, 74–75 (2010).

50. Miller v. Alabama, 567 U.S. 460, 479 (2012).

51. Proportionality in this sense could just refer 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. IN BRIEF 61, 62 (2011); *cf.* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005) (arguing that proportionality "can and should be understood as a limitation on government power that is independent of any specific penological theory"). A more developed normative framework could certainly help clarify the Court's approach. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 589 (2005) (explaining that the Court has not made clear the relation between proportionality and non-retributive theories of punishment).

52. *See* cases cited *supra* notes 35–36.

### 1. Why the Standards Evolve

Judges and constitutional scholars, partially in light of Supreme Court jurisprudence, adopt different interpretive methods with respect to language in the United States Constitution.[53] A central conflict relates to whether constitutional language is static[54] or, alternatively, evolves over time.[55] A static approach[56] to the Eighth Amendment would find that the punishments that were cruel and unusual at the time of the adoption of the Eighth Amendment would be the only unconstitutional punishments,[57] or that the meaning of the words "cruel" and "unusual" at

53. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (discussing when the differing forms of constitutional interpretations should govern); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing for a common law approach to constitutional interpretation over originalist and textualist approaches); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981) (discussing whether the Constitution should be interpreted in a manner that seeks to determine the Framers' original intent or in a manner that accommodates evolving values); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) (discussing the implications of various forms of constitutional interpretation).

54. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997) (arguing for an originalist approach to constitutional interpretation).

55. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (arguing for a living constitutionalist approach to constitutional interpretation).

56. Justice Antonin Scalia advocated for such an approach. *See supra* note 54; Harmelin v. Michigan, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J.) (looking to the historical evidence regarding the original meaning of the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) ("The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."); Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 54, at 129, 145 (arguing that the Cruel and Unusual Punishments Clause does not mean "whatever may be considered cruel from one generation to the next, but what we consider cruel today; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation" (internal quotation marks omitted)).

57. *See* Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."). Unfortunately for advocates of a static approach, "[e]ighteenth-century notions of acceptable punishment were sometimes much more robust than those that prevail today. In eighteenth-century England, for example, it was legally permissible to publicly disembowel or burn traitors alive." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 376–77 (Garland Publ'g, Inc. 1978) (1769). Even so, that does not mean that punishments that were unconstitutional can now become constitutional. Stinneford, *supra*, at 1742 (highlighting the one-way ratchet of unusualness).

the time of the adoption would be the relevant meaning in applying the Eighth Amendment.[58]

An evolving approach, by contrast, would find that the content of the prohibition changes as societal conceptions of what constitutes cruel and unusual change over time.[59] As society matures and becomes less draconian in its approaches to punishment,[60] punishments that were previously constitutional may become unconstitutional.[61]

Fortunately, these two approaches merge under the Eighth Amendment. The meaning of the proscription at the time of the adoption of the Eighth Amendment was that it would evolve over time.[62] In other words, the Eighth Amendment proscribes cruel and unusual punishments as understood at the time of the imposition of the punishment.[63]

Two Supreme Court cases underscore this understanding. In *Weems v. United States*,[64] the Court emphasized the importance of reading the cruel and unusual punishment clause more broadly than just the evils it was enacted to address.[65] According to the *Weems* Court, constitutional provisions are not meant to be static, but instead "designed to approach immortality as nearly as human institutions can approach it."[66] The Court cemented this reading in *Trop v. Dulles*,[67] the case responsible for the "evolving standards of decency" moniker.[68] Citing *Weems*, the Court explained, "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static."[69] As a result, the Eighth Amendment

58. Punishments not considered cruel and unusual at the time of adoption included public flogging, pillorying, or mutilation. Stinneford, *supra* note 57, at 1742 (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993)). The death penalty was also available for non-violent crimes such as counterfeiting. *Id.* (citing Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 14, 1 Stat. 112 (1790)).

59. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion); Weems v. United States, 217 U.S. 349, 373 (1910).

60. *Trop*, 356 U.S. at 101 (plurality opinion).

61. *Atkins*, 536 U.S. at 307, 316–21 (holding death sentences for intellectually disabled offenders unconstitutional and finding *Penry v. Lynaugh*, 492 U.S. 302 (1989), no longer applicable in light of society's evolving standards); Roper v. Simmons, 543 U.S. 551, 574 (2005) (holding the death penalty for juveniles to be unconstitutional and finding *Stanford v. Kentucky*, 492 U.S. 361 (1989), to be "no longer controlling on this issue").

62. Stinneford, *supra* note 57, at 1813–15.

63. *See id.; see also* John F. Stinneford, *The Original Meaning of "Cruel*," 105 GEO. L.J. 441, 494, 497–98 (2017) (arguing that a given punishment should be compared against prior longstanding practice to determine if it is cruel and unusual).

64. 217 U.S. 349.

65. *See id.* at 373 ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.").

66. *Id.* (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821) (Marshall, C.J.)).

67. 356 U.S. 86 (1958).

68. *Id.* at 101 (plurality opinion).

69. *Id.* at 100–01.

"must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[70]

### 2. Differentness

The Supreme Court has long noted that "death is different."[71] This is because death is unique both in that it is the most severe[72] punishment, and because it is irrevocable.[73] The "differentness" of death has justified the Court's application of higher scrutiny in capital cases. In other words, because of the consequences of a death sentence in its severity and irrevocability, the Court has been willing to place categorical restrictions on death sentences, prohibiting their imposition on certain individuals[74] and for certain crimes.[75]

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70. *Id.* at 101.

71. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United 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, 370 (1995) (crediting Justice Brennan's concurrence in *Furman* as the originator of this line of argument); *see also, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring in the judgment) (explaining that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Brennan, J., concurring in the judgment) (noting that death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) (stating that "the death sentence is unique in its severity and in its irrevocability"), *overruled by* Hurst v. Florida, 577 U.S. 92 (2016); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and arguing that it requires additional procedural safeguards "when humans play at God").

72. In some senses, LWOP is more severe than the death penalty because the consequence is the same: death, but without a particular defined end point, and a much lower chance of success on appeal. *See, e.g.*, CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 56 (Jane Grigson trans., Marsilio Publishers 1996) (1764) (suggesting that LWOP sentences may be harsher than the death penalty); John Stuart Mill, Speech in Favor of Capital Punishment (Apr. 21, 1868) (transcript available at https://americanliterature.com/author/john-stuart-mill/essay/speech-in-favor-of-capital-punishment [https://perma.cc/B6GP-39RH]) ("What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?"). The Court, however, generally views the death penalty as worse. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 89 (2010) (Roberts, C.J., concurring in the judgment) ("A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment.").

73. *See* cases cited *supra* note 71.

74. *See* cased cited *supra* note 35.

75. *See* cases cited *supra* note 36.

More recently, the Court has unearthed a second category of differentness—juveniles.[76] Juveniles, individuals under the age of eighteen at the time of the commission of the crime,[77] are different because they possess lower culpability,[78] are more vulnerable to outside influences,[79] and have a higher potential, at least in terms of time, for rehabilitation.[80] The Court has used this second category to place Eighth Amendment limits on JLWOP sentences.[81]

For crimes that are different—JLWOP and the death penalty—the Court has used its evolving standards of decency doctrine. The applications of this doctrine have not been individual; they have only served to carve out categorical Eighth Amendment limitations. For crimes that are not "different," the Court has used a narrow disproportionality test, in which it asks whether the punishment imposed is grossly disproportionate to the conduct of the offender.[82] The Court has

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76. Miller v. Alabama, 567 U.S. 460, 481 (2012) ("So if (as *Harmelin* recognized) 'death is different,' children are different too."); *Graham*, 560 U.S. at 91 (Roberts, C.J., concurring in the judgment) ("Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults.").

77. In departing from *Stanford v. Kentucky*, 492 U.S. 361 (1989), the *Roper* Court appeared to draw the line between adult and juvenile at age eighteen. 543 U.S. at 555–56.

78. *Id.* at 569 (noting that juveniles possess a "lack of maturity and an underdeveloped sense of responsibility"); *Miller*, 567 U.S. at 471 (quoting this language from *Roper* and suggesting that these qualities lead to "recklessness, impulsivity, and heedless risk-taking"). Brain science supports this view, suggesting brains are not fully developed until one's early- to mid-twenties. *See, e.g.*, Ruben C. Gur, *Development of Brain Behavior Integration Systems Related to Criminal Culpability from Childhood to Young Adulthood: Does It Stop at 18 Years?*, 7 J. PEDIATRIC NEUROPSYCHOLOGY 55, 62–63 (2021); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL'Y & L. 410, 413 (2017). *See generally* John H. Blume et al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper*'s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEX. L. REV. 921 (2020) (arguing for an expansion of *Roper*'s categorical ban); Michael N. Tennison & Amanda C. Pustilnik, *"And if Your Friends Jumped off a Bridge, Would You Do It Too?": How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533 (2015) (exploring implications of the neuroscience research for juvenile justice).

79. *Roper*, 573 U.S. at 569 (noting that juveniles "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers, and have limited "control[] over their own environment"); *Miller*, 567 U.S. at 471 (quoting *Roper* and suggesting that these qualities are especially problematic because juveniles "lack the ability to extricate themselves from horrific, crime-producing settings").

80. *Miller*, 567 U.S. at 471 (noting that the character of a juvenile is not as "'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]'") (quoting *Roper*, 573 U.S. at 570)).

81. *See* cases cited *supra* notes 5–6. *But see* Jones v. Mississippi, 141 S. Ct. 1307, 1313, 1318–19 (2021) (electing not to require a factual finding of "irreparable corruption" prior to the imposition of a JLWOP sentence).

82. *See supra* note 39 and accompanying text.

considered individual crimes, not categorical limits, under this approach, with the punishment almost always being proportionate.[83]

### 3. Objective and Subjective Indicia

When analyzing punishments under the evolving standards of decency doctrine, the Court has employed a two-part test, examining objective indicia and then subjective indicia.[84] In assessing a particular punishment's application categorically, the objective indicia involve examining the practices of state jurisdictions with respect to the punishment in question.[85] The Court's most common objective indicator is state legislative action, counting the states that prohibit the application of the punishment in question.[86] The Court has also looked to state sentencing outcomes,[87] the direction of legislative change,[88] and international practices.[89] Under the objective indicia, if a supermajority of states prohibit the category of punishment in question, it suggests that the punishment violates the Eighth Amendment.[90] One way of understanding the examination of objective indicia relates to the proscription against unusual punishments—a punishment not allowed by a majority of jurisdictions is unusual.[91]

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83. *See supra* notes 39–40 and accompanying text.

84. *See* cases cited *supra* notes 35–36.

85. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593–94 (1977) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 789–93 (1982); Tison v. Arizona, 481 U.S. 137, 152–55 (1987); Atkins v. Virginia, 536 U.S. 304, 313–17 (2002); *Roper*, 543 U.S. at 564–67; Kennedy v. Louisiana, 554 U.S. 407, 421, *as modified on denial of reh'g*, 554 U.S. 945 (2008).

86. *See supra* note 85.

87. *See, e.g.*, *Coker*, 433 U.S. at 596–97 (plurality opinion); *Enmund*, 458 U.S. at 794–96; Thompson v. Oklahoma, 487 U.S. 815, 831–33 (1988) (plurality opinion); Graham v. Florida, 560 U.S. 48, 62–66 (2010).

88. *See, e.g.*, *Atkins*, 536 U.S. at 315–16; *Roper*, 543 U.S. at 567.

89. *See, e.g.*, *Thompson*, 487 U.S. at 830–31 (plurality opinion); *Roper*, 543 U.S. at 575–78.

90. *See Enmund*, 458 U.S. at 792–93 (forty-two states); *Roper*, 543 U.S. at 564–65 (thirty states); *Kennedy*, 554 U.S. at 426 (forty-five states).

91. Nonetheless, this remains a flawed approach because the Court is using a majoritarian standard—the practices of a majority of states—to determine the content of a counter-majoritarian right: the protection of individuals from cruel and unusual punishments imposed by governments. *See generally* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 105–29 (2018) (exploring the majoritarian nature of the evolving standards of decency). Part of the Court's hesitancy here in hiding behind a majoritarian approach may relate to the backlash of states in responding to its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), striking down the death penalty. *Id.* at 117; *see also* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–48 (2007) (noting the immediate response of state legislatures to the decision). *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS SHAPED THE MEANING OF THE CONSTITUTION (2009) (demonstrating the connection between the Court's reading of the Constitution and popular opinion).

After the Court assesses the objective indicia, it then brings its own judgment to bear,[92] looking to subjective indicia.[93] This inquiry involves the Court asking whether the category of punishment in question satisfies one or more of the purposes of punishment.[94] In capital cases, the Court assesses whether the category of punishment satisfies the goals of retribution[95] or deterrence.[96] In JLWOP cases, the purposes of incapacitation and rehabilitation are also relevant.[97] Where a category of punishment does not satisfy one or more of the purposes of punishment, it suggests that the punishment violates the Eighth Amendment.[98] One way of understanding the examination of subjective indicia relates to the proscription against cruel punishments—a punishment not supported by a purpose of punishment is cruel.

Interestingly, the Court has always reached the same conclusion with respect to the objective and subjective indicia of a category of punishment.[99] The Court has never had a case in which the category of punishment satisfied the objective indicia and failed the subjective indicia, or in which the category of punishment satisfied the subjective indicia and failed the objective indicia. And in almost all of the cases,[100] the category of cases failed both categories and violated the Eighth Amendment.[101]

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92. *Coker*, 433 U.S. at 597 (plurality opinion).

93. *See id.* at 597–98; *Enmund*, 458 U.S. at 797–801; *Atkins*, 536 U.S. at 318–21; *Roper*, 543 U.S. at 568–72; *Kennedy*, 554 U.S. at 434–41.

94. *Atkins*, 536 U.S. at 318–20; *Roper*, 543 U.S. at 571–72; *Kennedy*, 554 U.S. at 441–46.

95. *Atkins*, 536 U.S. at 319; *Roper*, 543 U.S. at 571; *Kennedy*, 554 U.S. at 441–44.

96. *Atkins*, 536 U.S. at 319–20; *Roper*, 543 U.S. at 571–72; *Kennedy*, 554 U.S. at 441, 444–46.

97. Graham v. Florida, 560 U.S. 48, 71–74 (2010); Miller v. Alabama, 567 U.S. 460, 472–73 (2012).

98. *See, e.g.*, *Atkins*, 536 U.S. at 318–20; *Roper*, 543 U.S. at 572–73; *Kennedy*, 554 U.S. at 446.

99. *See* cases cited *supra* notes 35–36.

100. The exceptions are few, and two are no longer controlling. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 158 (1987); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (opinion of Scalia, J.), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (opinion of O'Connor, J.), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). Presumably the Court would not take a case unless a majority of the justices thought that the category of punishment violated the Eighth Amendment. *See, e.g.*, Hidalgo v. Arizona, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., respecting denial of certiorari) (agreeing to deny certiorari despite the lower court's apparent error because the record was not sufficiently developed).

101. *See* Coker v. Georgia, 433 U.S. 584, 597–600 (1977) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 797–801 (1982); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion); *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 568, 578; *Kennedy*, 554 U.S. at 446–47. *But see Tison*, 481 U.S. at 158 (considering the proportionality of execution in felony murder cases where the majority of jurisdictions authorize capital punishment); *Penry*, 492 U.S. at 335 (declining to create a categorical prohibition against the execution of "mentally retarded

## B. *Categorical Limits*

While it is easy to list the categories of punishment that the Court has held violated the Eighth Amendment, it is instructive to examine the applications of the evolving standards of decency before making the case that similar review should apply to individual cases alone, and not just categorically.

### 1. The Death Penalty

The first categorical limitation applied by the Court was a proscription against mandatory death sentences. In *Woodson v. North Carolina*,[102] the Court held that North Carolina's mandatory death penalty statute violated the Eighth Amendment.[103] The Court reasoned that because of the severity of a death sentence, each individual had an Eighth Amendment constitutional right to an individualized sentencing determination.[104] This decision was part of the review of a series of state death penalty statutes passed in response to *Furman v. Georgia*.[105] While citing the evolving standards of decency idea but not providing any doctrinal framework, *Woodson* established a clear categorical exception to a kind of punishment—a mandatory death sentence—under the Eighth Amendment.[106]

The first explicit application of the evolving standards of decency doctrine with the objective and subjective indicia came in *Coker v.*

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people convicted of capital offenses" without sufficient evidence of a national consensus); *Stanford*, 492 U.S. at 380 (opinion of Scalia, J.) (denying Eighth Amendment challenge because the Court found "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age").

102. 428 U.S. 280 (1976).

103. *Id.* at 301 (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court also struck down Louisiana's mandatory death penalty statute in a companion case, *Roberts v. Louisiana*, 428 U.S. 325 (1976).

104. *Woodson*, 428 U.S. at 302–05 (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court developed this principle further in *Lockett v. Ohio*, 438 U.S. 586, 604–08 (1978) (plurality opinion), prohibiting statutory limits on mitigating evidence. *See generally* Berry, *supra* note 9 (arguing for an extension of this principle to all felonies, including non-capital, non-JLWOP crimes); William W. Berry III, *Individualized Executions*, 52 U.C. DAVIS L. REV. 1779 (2019) (arguing for an extension of this principle to execution methods).

105. 408 U.S. 238 (1972). The Court decided four other cases on the day that *Woodson* was decided. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (upholding Georgia's death penalty statute); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (upholding Florida's death penalty statute); Jurek v. Texas, 428 U.S. 262, 276 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (upholding Texas's death penalty statute); Roberts, 428 U.S. 325, 336 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (striking down Louisiana's death penalty statute).

106. *Woodson*, 428 U.S. at 301 (joint opinion of Stewart, Powell, and Stevens, JJ.) (finding mandatory sentences inconsistent with "the evolving standards of decency that mark the progress of a maturing society" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

*Georgia*,[107] where the Court categorically barred death sentences for the crime of rape.[108] With respect to the objective indicia,[109] Georgia was the only state that permitted a death sentence for the crime of rape of an adult[110] woman.[111] Applying the subjective indicia,[112] the Court found that the punishment of death was grossly disproportionate to the crime of rape because the punishment resulted in death while the crime did not.[113] As explored further below, Justice Powell found that the death sentence was unconstitutional as applied, but dissented with respect to the categorical rule.[114]

The Court next applied the evolving standards in assessing the categorical question of when death sentences for accessories to felony

107. 433 U.S. 584 (1977).

108. *Id.* at 592 (plurality opinion).

109. The Court looked at jury verdicts in Georgia, finding that six of sixty-three adult rape cases were sentenced to death, meaning that such sentences were unusual for the crime in question. *See id.* at 596–97.

110. *See id.* at 595 (noting that Florida, Mississippi, and Tennessee authorized the death penalty for child rape, although Tennessee's law was found unconstitutional because it was mandatory).

111. *Id.* at 595–96. When *Furman v. Georgia* was decided five years earlier, sixteen states had allowed death sentences for rape. *Id.* at 594.

112. Unlike in later cases, the Court did not specifically refer to the purposes of punishment, but implicitly referenced them in finding that the punishment was disproportionate. *See id.* at 597–600; *see also supra* note 51 and accompanying text (highlighting the connection between proportionality and purposes of punishment).

113. *Coker*, 433 U.S. at 597–600 (plurality opinion). Justice Warren E. Burger's dissent, joined by Justice William Rehnquist, rejected this idea. *See id.* at 611–12 (Burger, C.J., dissenting) ("A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. . . . Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that 'the death penalty . . . is an excessive penalty' for the perpetrator of this heinous offense." (second ellipsis in original)). Justice Powell's partial dissent echoed this sentiment. *See id.* at 603 (Powell, J., concurring in the judgment in part and dissenting in part) ("[T]here is indeed 'extreme variation' in the crime of rape. Some victims are so grievously injured physically or psychologically that life *is* beyond repair.").

114. *Id.* at 601; *see infra* notes 238–43 and accompanying text.

murder crimes might be excessive.[115] In *Enmund v. Florida*,[116] the Court held that a death sentence for a felony murder accomplice violated the Eighth Amendment when the individual did not kill or intend to kill.[117] Looking at the objective indicia, the Court found that only eight states allowed death sentences for felony murder accomplices without proof of additional aggravating circumstances, and another nine states allowed death sentences for felony murder without proof of the defendant's mental state where aggravating circumstances outweighed mitigating factors.[118] Thus, only eight out of thirty-six death penalty states allowed capital punishment solely for being an accomplice to felony murder.[119] As a result, the Court found that the legislative practice weighed "on the side of rejecting capital punishment for the crime at issue."[120] With respect to the subjective indicia, the Court held that Enmund's criminal culpability did not rise to the level required by just deserts retribution[121] to warrant a death sentence.[122]

The Court, however, narrowed the scope of *Enmund* five years later in *Tison v. Arizona*.[123] Again considering the Eighth Amendment limits on death sentences for the crime of felony murder, the *Tison* Court assessed whether the death penalty was appropriate for the sons of Gary Tison,[124] an escaped convict who had brutally murdered a family after carjacking them in the desert.[125] The sons participated both in helping Tison break out of prison and in the carjacking.[126] They were not present,

115. Several recent articles have suggested limiting capital felony murder further under the Eighth Amendment. *See* Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1206–13 (2017) (arguing for a mens rea standard of recklessness in capital felony murder cases); Guyora Binder et al., *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549, 552–53 (2018) (arguing that capital punishment for any inadvertent killing violates the Eighth Amendment); William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY 605, 642–49 (2021) (arguing for a capital-felony merger doctrine whereby capital felony murder would merge into first-degree murder for death penalty purposes, such that the prosecution would have to prove an aggravating factor in addition to the felony murder before the death penalty can be imposed).

116. 458 U.S. 782 (1982).

117. *Id.* at 797–801. Enmund was the getaway driver for a home robbery and had no knowledge that his fellow participants would kill the residents. *See id.* at 783–88.

118. *See id.* at 789–91.

119. *See id.* at 792.

120. *Id.* at 792–93.

121. *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005) (discussing how just deserts retribution requires that a punishment be proportionate to the offender's culpability and the harm caused).

122. *Enmund*, 458 U.S. at 800–01.

123. 481 U.S. 137 (1987).

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

125. *Tison*, 481 U.S. at 139–41.

126. *Id.* at 139–40.

however, when their father killed the family and were unaware that he intended to do so.[127]

Under the evolving standards of decency framework, the Court examined the objective indicia of states that allowed the death penalty for felony murder.[128] The Court found that only eleven of the thirty-two capital states prohibited the death penalty in the category of cases of felony murder where "the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."[129] This meant that the objective indicia did not contravene the Eighth Amendment.[130]

Similarly, the Court subjectively found that the Tison sons possessed the requisite culpability to justify capital punishment even though they did not intend to kill.[131] Specifically, the Court modified the rule in *Enmund*, holding in *Tison* that death sentences for felony murders did not violate the Eighth Amendment where the defendant was a major participant in the crime and demonstrated reckless indifference to human life.[132]

A year before *Tison*, the Court found that the Eighth Amendment categorically barred executing insane offenders in holding that the defendant was entitled to a hearing in the case of *Ford v. Wainwright*.[133] With no state allowing the execution of insane offenders and a common law tradition barring such punishments,[134] the Court did not need to go through the complete analysis to reach its decision.

In *Thompson v. Oklahoma*,[135] the Court created a categorical Eighth Amendment rule against executing a fifteen-year-old offender.[136] The Court found that the execution of anyone under sixteen at the time of the crime violated the objective indicia because all of the eighteen states that defined an age of eligibility for the death penalty banned execution of offenders aged fifteen and younger.[137] The Court also found that the overwhelming number of jury verdicts in homicide crimes did not result

127. *See id.* at 140–41. Tison died of exposure in the desert after a police manhunt. *Id.* at 141. His death may have increased the public desire (or at least that of the prosecutor) to seek death sentences for his sons. *See* CLARKE, *supra* note 124, at 263–66.

128. *See Tison*, 481 U.S. at 152–55.

129. *Id.* at 147, 154.

130. *See id.* at 158.

131. *See id.* at 156–58. For alternative perspectives, see sources cited *supra* note 115.

132. *Tison*, 481 U.S. at 158.

133. 477 U.S. 399, 408–10, 418 (1986).

134. *Id.* at 406–08.

135. 487 U.S. 815 (1988).

136. *Id.* at 838 (plurality opinion). The age in question is the age of the individual at the time of the crime, not the age at the time of execution. *Id.* at 832–33, 838.

137. *Id.* at 824–25, 824 n.22; *id.* at 867 (Scalia, J., dissenting). The Court also noted all of the other ways states treat individuals under sixteen as minors. *Id.* at 824 (plurality opinion). It also highlighted the international consensus against execution of minors. *Id.* at 830–31.

in death sentences for individuals under age sixteen.[138] With respect to the subjective indicia, the Court found that the execution of a fifteen-year-old did not satisfy either the purpose of retribution or the purpose of deterrence.[139]

In *Penry v. Lynaugh*,[140] the Court held that the Eighth Amendment's evolving standards of decency doctrine did not bar the execution of intellectually disabled offenders.[141] The objective indicia, as found by the Court, did not support a categorical rule because only two states barred the execution of intellectually disabled offenders.[142] The Court did not reach the question of whether retribution and deterrence supported the execution of intellectually disabled offenders because it found no objective consensus, but Justice Sandra Day O'Connor opined that such sentences were proportionate based in large part on the limited scientific record before the Court.[143]

In *Stanford v. Kentucky*,[144] the Court placed a limit on the reach of *Thompson* by electing not to impose an Eighth Amendment categorical ban on the execution of sixteen- and seventeen-year-olds.[145] With respect to the objective indicia, the Court found that of the thirty-seven states permitting the death penalty, only fifteen prohibited its imposition on sixteen-year-olds, and twelve prohibited its imposition on seventeen-year-olds.[146] The plurality declined to engage in a subjective analysis of

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138. *Id.* at 832–33 ("Department of Justice statistics indicate that during the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide (murder and non-negligent manslaughter) each year. Of that group of 82,094 persons, 1,393 were sentenced to death. Only 5 of them, including the petitioner in this case, were less than 16 years old at the time of the offense.").

139. *Id.* at 836–38.

140. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

141. *See id.* at 140 (opinion of O'Connor, J.). In *Penry* and *Atkins*, the Court used the now-disfavored term "mentally retarded" to describe the intellectual disability at issue. *E.g.*, *id.* at 328 (majority opinion); *Atkins*, 536 U.S. at 306.

142. *Penry*, 492 U.S. at 333–34. Penry did not offer any evidence concerning jury verdicts in similar cases. *Id.* at 334.

143. *Id.* at 336–39 (opinion of O'Connor, J.).

144. 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

145. *Id.* at 380 (plurality opinion); see *id.* at 381 (O'Connor, J., concurring in part in the judgment) (distinguishing *Thompson* in finding no national consensus against execution of sixteen- and seventeen-year-old offenders).

146. *Stanford*, 492 U.S. at 370 (majority opinion). If the Court had used the *Atkins* method of counting (i.e., by also including the states that prohibit capital punishment altogether), it would have been much closer to a consensus, with twenty-eight states prohibiting the execution of sixteen-year-olds and twenty-five states prohibiting the execution of seventeen-year-olds. *See Atkins*, 536 U.S. at 313–16. The Court also rejected the small percentage of death sentences for sixteen- and seventeen-year-olds as evidence of a jury consensus because it could mean that juries believe such sentences should be rarely applied, not never applied. *Stanford*, 492 U.S. at 373–74.

the evolving standards given the lack of objective consensus of unconstitutionality.[147]

Over a decade later, in *Atkins v. Virginia*,[148] the Court found that *Penry* was no longer controlling in light of society's evolved standards and barred death sentences where the defendant was intellectually disabled.[149] Applying the objective indicia, the Court found that thirty states prohibited the execution of intellectually disabled offenders.[150] In addition, the Court looked objectively at the "consistency of the direction of change,"[151] noting that sixteen of the states banning execution of intellectually disabled defendants had done so in the prior decade.[152]

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.[153] 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.[154] 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.[155]

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147. *Stanford*, 492 U.S. at 377–80 (plurality opinion).

148. 536 U.S. 304 (2002).

149. *Atkins*, 536 U.S. at 316–21. The Court unfortunately left the definition of intellectual disability up to the states. *Id.* at 317. This has led to additional litigation, including two cases where the Court has further defined the scope of this category. In *Hall v. Florida*, 572 U.S. 701, 724 (2014), the Court held that one's IQ cannot be the only parameter used in assessing intellectual disability. And in *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017), the Court held that modern standards had to be used to assess intellectual disability.

150. *See Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) (noting that twelve states prohibited capital punishment altogether and that eighteen of the capital states prohibited execution of the intellectually disabled). Justice Scalia took exception to counting the non-capital states in his dissent. *See id.* at 342–43.

151. *Id.* at 315 (majority opinion).

152. *Id.* at 314–15. The Texas Legislature had also unanimously passed a similar bill, but the governor vetoed the bill because of purported procedural flaws. *Id.* at 315 & n.16. The Court also highlighted the absence of recent legislation allowing the execution of intellectually disabled offenders and the small number of states (five) that actually executed intellectually disabled offenders since the Court's decision in *Penry*. *Id.* at 315–16.

153. *Id.* at 319–20.

154. *Id.* at 319.

155. *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 intellectual disability. And it failed to even define "intellectual disability," leaving that determination up to individual states. *Id.* at 317. For an exploration of possible applications of *Atkins* to mentally ill offenders through the intersection of the Eighth and Fourteenth Amendments, see generally Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009).

Three years later, the Court applied similar reasoning in *Roper v. Simmons*,[156] departing from *Stanford* and holding that the evolving standards of decency and the Eighth Amendment prohibited death sentences for juvenile offenders.[157] As in *Atkins*, the application of the majoritarian objective indicia commenced with counting the state laws, and, as in *Atkins*, thirty states prohibited the execution of juvenile offenders.[158] The objective indicia included the direction of change like in *Atkins*,[159] and emphasized the relevance of international standards and practices in determining the meaning of the evolving standards as well.[160]

Applying the subjective standards, the Court developed the idea that juveniles were offenders that, by definition, possessed a diminished level of culpability.[161] Specifically, the Court cited (1) the lack of maturity and undeveloped sense of responsibility in juveniles, (2) the susceptibility of juveniles to outside pressures and negative influences, and (3) the unformed nature of juveniles' character as compared to adults.[162] 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.[163] Such death sentences failed to achieve the purpose of retribution in light of the diminished culpability.[164] 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.[165] In addition, the Court suggested that a juvenile death sentence would add little deterrent value beyond that achieved by a LWOP sentence.[166]

Three years later, the Court expanded its *Coker* holding in *Kennedy v. Louisiana*,[167] striking down Louisiana's child rape statute under the

156. 543 U.S. 551 (2005).

157. *Id.* at 568–75.

158. *Id.* at 564. Justice Scalia's dissent again protested counting the states that abolished the death penalty. *Id.* at 610–11 (Scalia, J., dissenting).

159. *Roper*, 543 U.S. at 564–67 (majority opinion). Although only five states had abandoned the juvenile death penalty since *Stanford* (as compared to sixteen states prohibiting execution of intellectually disabled defendants after *Penry* and before *Atkins*), *id.* at 565, the Court concluded that the slower pace of change was "counterbalanced by the consistent direction of the change," *id.* at 566.

160. *Id.* at 575–78 (noting that the United States was the only country in the world that allowed the juvenile death penalty). *See generally* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) (exploring the appropriateness of using international law in determining constitutional meaning).

161. *Roper*, 543 U.S. at 569–73.

162. *Id.* at 569–70.

163. *Id.* at 571–73.

164. *Id.* at 571.

165. *Id.* at 571–72.

166. *See id.* at 572.

167. 554 U.S. 407, *as modified on denial of reh'g*, 554 U.S. 945 (2008).

Eighth Amendment.[168] In applying the majoritarian objective indicia, the Court determined that forty-four states did not allow capital punishment for child rape.[169] Applying the subjective indicia, the *Kennedy* Court explained that retribution did not justify a penalty of death for a child rape.[170] 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.[171]

### 2. JLWOP

Beyond the Court's categorical exemptions under the Eighth Amendment in capital cases, the Court has more recently found two categorical exemptions in JLWOP cases. At the heart of these decisions is the understanding that "children are different."[172]

In *Graham v. Florida*, the Court held that JLWOP sentences as punishments for non-homicide crimes violate the Eighth Amendment.[173] With respect to the majoritarian objective indicia, the Court in *Graham* recognized that a majority of states permitted JLWOP sentences in non-homicide cases.[174] The Court, however, found that the legislative analysis was less important than the actual sentencing practices with respect to JLWOP in non-homicide cases.[175] Because only 123 offenders were serving JLWOP for non-homicide crimes, the Court found a national consensus against JLWOP.[176] For the Court, the relationship between the numbers of such sentences as compared to the opportunity for their imposition provided the basis for its analysis.[177]

As to the subjective indicia, the Court expanded upon its discussion in *Roper* concerning the lessened culpability of juvenile offenders.[178] In addition, the Court emphasized the diminished culpability of offenders that do not commit homicide.[179] The "twice diminished moral culpability"[180] resulting from combining the offender (juvenile) and the

168. *Id.* at 413, 446–47.

169. *Id.* at 423. This number exceeded the number of states in *Atkins* (thirty), *Roper* (thirty), and *Enmund* (forty-two). *Id.* at 426.

170. *Id.* at 441–44.

171. *Id.* at 444–46.

172. Miller v. Alabama, 567 U.S 460, 480 (2012).

173. *Id.* at 74–75.

174. *Id.* at 62.

175. *See id.* at 62–63, 66.

176. *Id.* at 62–64, 67.

177. *See id.* at 62–67. It is also worth noting that many of the states changed their laws to allow juveniles to be more readily charged in adult court and to abolish parole, such that JLWOP sentences were not necessarily intended at the time the statutes were adopted. *See id.* at 66–67.

178. *Graham*, 560 U.S. at 67–68.

179. *Id.* at 69.

180. *Id.*

offense (non-homicide) made JLWOP, a kind of death sentence,[181] a disproportionate punishment.[182] As a result, the Court found that the purpose of retribution did not justify JLWOP.[183] Deterrence likewise did not justify JLWOP sentences in non-homicide cases because juveniles are less susceptible to deterrence.[184] The purposes of incapacitation and rehabilitation also did not justify JLWOP sentences in non-homicide cases.[185]

Two years later, in *Miller v. Alabama*, the Court followed its approach in *Graham*, again applying a death penalty categorical exclusion to juvenile offenders.[186] The Court held in *Miller* that the evolving standards of decency and the Eighth Amendment prohibited the imposition of mandatory JLWOP sentences.[187]

As to the majoritarian objective indicia of the evolving standards of decency, the Court determined that twenty-nine jurisdictions allowed mandatory JLWOP sentences.[188] As in *Graham* (where thirty-seven states allowed the practice at issue),[189] the Court in *Miller* deemphasized the overall importance of state counting as the prime determinant of the objective inquiry.[190] Rather, in most cases, the mandatory JLWOP sentences resulted from a confluence of two kinds of statutes—one that provided for juveniles to be tried as adults in some situations, and one that imposed the mandatory JLWOP sentence for all individuals tried as adults.[191]

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.[192] In light of the Court's concerns related to the denial of individualized sentencing rights,[193] the Court did not further address whether a consensus existed, but largely presumed its presence in its analysis.[194]

With respect to its typical subjective inquiry, the Court recounted its application of the purposes of punishment in *Graham* and *Roper* and

181. *See id.* at 79; *supra* note 11 and accompanying text (explaining why LWOP sentences are a kind of death sentence).
182. *See Graham*, 560 U.S. at 69–71.
183. *Id.* at 71–72.
184. *Id.* at 72.
185. *Id.* at 72–74.
186. *Miller*, 567 U.S. at 465.
187. *Id.*
188. *Id.* at 482–83.
189. *Graham*, 560 U.S. at 62.
190. *Miller*, 567 U.S. at 482–87.
191. *Id.* at 485–86.
192. *Id.* at 485–87.
193. *Id.* at 475–80.
194. *See id.* at 482–83.

suggested that the same conclusions applied in *Miller*.[195] Further, the Court focused on *Woodson* in emphasizing the need for individualized sentencing determinations.[196]

### C. *The End of Categorical Limits?*

After describing the categorical limits adopted by the Supreme Court, the next question becomes whether the Court will adopt any additional categorical limits. The likelihood of additional Eighth Amendment categorical limitations in the near future is remote. The evolving standards decisions, including *Atkins* and subsequent cases, were almost all 5–4 decisions, with Chief Justice Roberts joining the majority in *Graham* to make it 6–3 in that case.[197] With the replacement of Justice Kennedy with Justice Kavanaugh, and the replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett, there are likely only three votes (four with Justice Roberts) in favor of categorical expansions of the Eighth Amendment. To the extent that *Jones v. Mississippi* provided a litmus test, six Justices decided against expanding the Eighth Amendment with respect to JLWOP cases.[198]

So, for the time being, new categorical Eighth Amendment exceptions are likely not happening.[199] But, as discussed below in Part III, this new Court composition actually opens the door to expanding the Eighth Amendment through as-applied challenges.

## II. THE AS-APPLIED LIMITS OF GROSS DISPROPORTIONALITY

In non-capital, non-JLWOP cases, the Court has not considered constitutional challenges categorically like it does under the evolving standards of decency.[200] Instead, the Court examines cases individually as as-applied challenges under a gross disproportionality standard.[201] As

195. *Id.* at 471–74.

196. *See id.* at 475–80.

197. *See* cases cited *supra* notes 35–36. Chief Justice Roberts's vote in *Graham* was not in favor of categorical expansion, but in favor of finding Graham's JLWOP sentence unconstitutional as applied. *See supra* notes 32–33 and accompanying text.

198. *See supra* notes 24–27 and accompanying text.

199. *See generally* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020) (exploring the legal doctrine, history, and future uses of the Eighth Amendment).

200. *See generally* 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 (2009) (describing the "two-track approach" to sentencing); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death*,*"* 34 OHIO N.U. L. REV. 861 (2008) (arguing that the Court has devoted too much energy and time to capital cases, with detrimental consequences for capital and non-capital cases alike).

201. *See* cases cited *supra* note 39.

explored below, the Court has rejected most of these challenges in the modern era.[202]

### A. *The Historical Baseline*

The Court's historical application of the Eighth Amendment involved two as-applied challenges in which the Court found the punishments to be disproportionate in violation of the Eighth Amendment. In *Weems*, the Court considered the constitutionality of the punishment of fifteen years of *cadena temporal*[203] for the crime of falsifying a public and official document.[204] The Court held that the punishment imposed by the Philippine Commission[205] violated the Eighth Amendment because of its excessive, disproportionate nature.[206]

Nearly fifty years later, in *Trop*,[207] the Court followed *Weems* and its analysis in striking down another individual as-applied non-capital punishment under the Eighth Amendment.[208] In *Trop*, the Court held that denationalization was an excessive punishment for the crime of treason.[209] The decision in *Trop* again showed that non-capital punishments were subject to individual as-applied challenges under the Eighth Amendment.

### B. *The Modern Standard*

Despite its holdings in *Weems* and *Trop*, the Court's application of the Eighth Amendment to non-capital, non-JLWOP cases in the past fifty years has been narrow and has resulted in finding that almost all punishments satisfy the requirements of the Constitution. In *Rummel v. Estelle*,[210] the Court upheld a mandatory life-with-parole sentence under a Texas recidivist statute despite the defendant's crimes involving a total of $230 stolen over three offenses.[211] The crime at issue involved obtaining $120.75 by false pretenses, but the Court found that the life

202. *See* cases cited *supra* note 39.

203. The Court described *cadena temporal* as a form of hard labor: "They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." Weems v. United States, 217 U.S. 349, 364 (1910).

204. *Id.* at 357–59.

205. The Philippines was a United States territory at the time. *See id.* at 357–61.

206. *Id.* at 380–82; *see also id.* at 366–67 ("Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

207. 356 U.S. 86 (1958).

208. *Id.* at 100–03 (plurality opinion).

209. *Id.* at 101–03.

210. 445 U.S. 263 (1980).

211. *Id.* at 265–66, 285.

sentence was not grossly disproportionate to the crime, noting that it was likely that the defendant would receive parole in twelve years.[212]

Similarly, in *Hutto v. Davis*,[213] the Court upheld a combined sentence of forty years and a $20,000 fine under Virginia law for possession with intent to distribute and the distribution of nine ounces of marijuana.[214] Relying on *Rummel*, the Court held that Hutto's sentence did not violate the Eighth Amendment and was not grossly disproportionate to his crime.[215]

In *Solem v. Helm*,[216] the Court attempted to broaden the narrow disproportionality inquiry under the Eighth Amendment in finding that a punishment of life without parole under South Dakota's recidivist statute for the crime of uttering a no-account check for $100 was unconstitutional.[217] The Court's analysis began by emphasizing the importance of proportionality as a core principle of the Eighth Amendment.[218] Consistent with the differentness principle, the Court nonetheless emphasized the deference to be accorded to states in non-capital sentencing.[219] The *Solem* Court then articulated a three-part test to assess the proportionality of a punishment:

> [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[220]

Applying these concepts, the Court held that Helm's sentence violated the Eighth Amendment because it was a far less severe crime than others for which the punishment—the most serious other than death—had been applied.[221] Even with the recidivist premium, the Court found that the

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212. *Id.* at 269–71, 280–81, 284–85.

213. 454 U.S. 370 (1982) (per curiam).

214. *Id.* at 370–73.

215. *Id.* at 372–74. Justice Powell concurred in the judgment despite finding Hutto's sentence to be disproportionate because, in his view, *Rummel* controlled the outcome. *Id.* at 375, 379–80 (Powell, J., concurring in the judgment).

216. 463 U.S. 277 (1983).

217. *Id.* at 281–82, 303. The defendant had six prior felony convictions. *Id*. at 279-80.

218. *Id.* at 284–86; *see also id.* at 290 ("In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.").

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

220. *Id.* at 292.

221. *Id.* at 296–300; *see also supra* note 11 (likening LWOP sentences to the death penalty).

punishment of life without parole for passing a bad check was grossly disproportionate.[222]

Less than a decade later, however, the Court substantially narrowed its decision in *Solem*, moving back toward the trajectory of *Rummel*. In *Harmelin*, the Court upheld a mandatory LWOP sentence for a first time offense of possession of 672 grams of cocaine.[223] In a 5–4 decision, the Justices in the majority splintered on the reasoning for the decision.[224] In a clear attempt to narrow *Solem*, Justice Scalia, joined by former Chief Justice William Rehnquist, held that the Eighth Amendment did not contain a proportionality guarantee, and therefore Harmelin's sentence could not be unconstitutionally disproportionate.[225] The controlling plurality—Justices David Souter, Kennedy, and O'Connor—found that the Eighth Amendment had a proportionality guarantee,[226] but that Harmelin's sentence was nonetheless proportionate in light of the deference accorded to states in non-capital sentencing.[227] Justice Kennedy determined that the *Solem* three-part analysis remained useful,[228] but a reviewing court should consider the second and third factors—that is, the intra- and inter-jurisdictional analyses—only if "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[229]

The plurality described the tools for the *Solem* analysis as including the following ideas:

> First, the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations. Second, there are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation, and the Eighth Amendment does not mandate adoption of any one such scheme. Third, marked divergences both in sentencing theories and the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure, and differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of terms for particular crimes. Fourth, proportionality review by federal courts

222. *Solem*, 463 U.S. at 296–303.
223. *Id.* at 961, 996.
224. *Id.* at 960–61.
225. *Id.* at 962–94 (opinion of Scalia, J.).
226. *Id.* at 996–98 (Kennedy, J., concurring in part and concurring in the judgment).
227. *Id.* at 999, 1003, 1008–09.
228. *Id.* at 1004–05.
229. *Id.* at 1005.

> should be informed by objective factors to the maximum extent possible, and the relative lack of objective standards concerning length, as opposed to type, of sentence has resulted in few successful proportionality challenges outside the capital punishment context. Finally, the Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime.[230]

The import of this framing has been a return to *Rummel*, where there is a strong presumption that non-capital punishments are constitutional, no matter how disproportionate.[231]

Two cases in 2003 underscored this presumption of constitutionality. In *Lockyer v. Andrade*,[232] the Court upheld on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where the defendant had three prior felony convictions.[233] Similarly, in *Ewing v. California*,[234] the Court upheld a sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where the defendant had four prior felony convictions.[235] The Court upheld these three strikes laws in finding that neither sentence was grossly disproportionate under the Eighth Amendment.[236]

## III. THE EVOLVING STANDARDS, AS-APPLIED

Doctrinally, there are two categories of Eighth Amendment sentencing analysis—for "different" cases (JLWOP and the death penalty) there is an evolving standards of decency categorical approach and, for all other cases, there is an as-applied gross disproportionality individual approach. The Court has not articulated, in a majority opinion, the approach for an individual, as-applied challenge to a JLWOP or death penalty case.[237]

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230. *Id.* at 959. In the Court's usage, gross disproportionality thus means that the sentence imposed is grossly excessive in light of the criminal actions of the defendant and the applicable purposes of punishments, including utilitarian purposes. *See supra* note 51.

231. For an argument that *Harmelin* was wrongly decided, see Berry, *supra* note 40, at 329–32.

232. 538 U.S. 63 (2003).

233. *Id.* at 66–68, 77.

234. 538 U.S. 11 (2003).

235. *Id.* at 18–20, 30–31 (plurality opinion).

236. *See id.* at 14–17 (explaining that three strikes laws punish recidivists by imposing a life sentence for a third felony conviction).

237. Two concurring opinions have used individual as-applied analyses. *See* Coker v. Georgia, 433 U.S. 584, 601–04 (1977) (Powell, J., concurring in the judgment in part and dissenting in part); Graham v. Florida, 560 U.S. 48, 86–96 (2010) (Roberts, C.J., concurring in the judgment).

The first evolving standards case to apply the objective and subjective indicia, *Coker*,[238] highlighted the division between categorical decisions and individual as-applied decisions and demonstrated that the latter is within the Court's purview. Justice Lewis Powell concurred in the result of the case—that Coker's death sentence was disproportionate to his crime of rape—but dissented from the categorical exception that the Court adopted prohibiting the death penalty as a punishment for all rapes.[239]

Justice Powell reasoned that "ordinarily death is disproportionate punishment for the crime of raping an adult woman."[240] And, he added, "Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury."[241]

In particular, Justice Powell found that an as-applied outcome was preferable to a categorical one in *Coker* because there was "extreme variation" in the crime of rape.[242] Certainly, the same thing is true for homicide, the basis for both JLWOP and death sentences.[243]

Perhaps the closest opinion to an individual as-applied approach would be the concurring opinion of Chief Justice Roberts in *Graham*.[244] In *Graham*, Chief Justice Roberts agreed with the outcome of the case—that Graham's sentence violated the Eighth Amendment—but did not agree with the majority's conclusion that the Eighth Amendment required a categorical prohibition against JLWOP sentences in non-homicide cases.[245] Instead, Chief Justice Roberts analyzed Graham's appeal as an individual as-applied challenge under the Eighth Amendment.[246]

Citing the Court's gross disproportionality cases applying its narrow proportionality principle,[247] Chief Justice Roberts acknowledged the historical deference given to states by the Court under the Eighth Amendment.[248] But his analysis did not stop there because Graham's claim came at the intersection of that line of cases and the *Roper* line of

238. *See supra* note 107 and accompanying text.

239. *Coker*, 433 U.S. at 601, 604 (Powell, J., concurring in the judgment in part and dissenting in part).

240. *Id.* at 601.

241. *Id.*

242. *Id.* at 603–04.

243. Justice Powell also argued for a case-by-case approach in *Furman v. Georgia*, 408 U.S. 238, 461 (1972) (Powell, J., dissenting).

244. *Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment).

245. *Id.* at 86.

246. *See id.* at 86. Justice Samuel Alito took issue with this approach, arguing that Graham had not raised such a challenge below. *Id.* at 124–25 (Alito, J., dissenting).

247. *Id.* at 87 (Roberts, C.J., concurring in the judgment).

248. *Id.* ("We have, however, emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors.").

cases, which emphasized the unique character of juvenile offenders.[249] Indeed, Chief Justice Roberts explained, "On the contrary, our cases establish that the 'narrow proportionality' review applicable to noncapital cases itself takes the personal 'culpability of the offender' into account in examining whether a given punishment is proportionate to the crime."[250]

Not only was Graham's juvenile character part of the Eighth Amendment proportionality calculus but also it was enough to overcome the narrow proportionality threshold and violate the Eighth Amendment. The weight Chief Justice Roberts gave to Graham's age is notable:

> Graham's age places him in a *significantly different category* from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults. . . . There is no reason to believe that Graham should be denied the *general presumption of diminished culpability* that *Roper* indicates should apply to juvenile offenders.[251]

Finding that Graham's sentence created an inference of disproportionality, Chief Justice Roberts then applied the second and third parts of the *Solem* test in making intra- and inter-jurisdictional comparisons.[252] He found that Florida was an outlier in imposing such sentences and that Graham's sentence was excessive compared to similar crimes in Florida.[253]

While technically applying the narrow proportionality analysis used in non-capital, non-JLWOP cases, Chief Justice Roberts relied on the differentness of Graham as a juvenile to find an Eighth Amendment violation. At the very least, the analysis was different in its outcome; instead of a rational basis-type deference to the state-imposed sentence, Chief Justice Roberts found an as-applied constitutional violation.

There is certainly room for doctrinal expansion here. As Justice Roberts noted, the Court has emphasized that it has "not established a clear or consistent path for courts to follow" in applying the narrow proportionality analysis.[254]

### A. *The Case for Heightened Scrutiny*

If one considers the implications of the Court's differentness distinction and its evolving standards of decency doctrine, applying

249. *Id.* at 87–90.

250. *Id.* at 90.

251. *Id.* at 91–92 (emphasis added).

252. *Id.* at 93.

253. *Id.*

254. *Id.* at 87 (quoting Lockyer v. Andrade, 538 U.S. 63, 72 (2003)); *see also* Kennedy v. Louisiana, 554 U.S. 407, 437, *as modified on denial of reh'g*, 554 U.S. 945 (2008) ("Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed.").

heightened as-applied scrutiny to JLWOP and death penalty sentences logically follows the Court's jurisprudence. This is both because the Court treats "different" cases differently and there is no reason to distinguish between categorical and individual cases with respect to their differentness.

### 1. Categorical Restrictions Only Apply to "Different" Cases

As discussed above, the Court has gone to great lengths to identify capital cases as different such that categorical limits are appropriate. Similarly, the Court has treated juveniles as being different, meaning that JLWOP sentences are also subject to categorical limitation.

With respect to all other kinds of punishment and kinds of offenders, the Court has not entertained categorical claims to such challenges. And its analysis of such claims as individual as-applied challenges has been with a rational basis-type deference to the punishment practices of states. This is true even when the punishment seems excessive in light of the culpability and the conduct of the offender.[255]

The lesson from the Court's cases, then, is that the death penalty and, more recently, JLWOP, are categorically different for purposes of the Eighth Amendment.[256] As such, they should be entitled to increased scrutiny, irrespective of whether the analysis is individual or categorical.

### 2. As-Applied "Different" Cases Require a Heightened Standard

There is no constitutional basis for differentiating the standard of review for categorical challenges as compared to individual as-applied challenges. Certainly, in other constitutional contexts, there is no distinction in the applicable standard of review between facial and as-applied challenges.[257] Rather, the distinction between categorical

255. *See* cases cited *supra* note 39.

256. Justice Clarence Thomas's dissent in *Graham* underscores this point, as he disagreed with expanding the differentness concept to JLWOP cases. 560 U.S. at 102–03 (Thomas, J., dissenting) ("Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are 'most deserving of execution.' Of course, the Eighth Amendment itself makes no distinction between capital and noncapital sentencing, but the 'bright line' the Court drew between the two penalties has for many years served as the principal justification for the Court's willingness to reject democratic choices regarding the death penalty. Today's decision eviscerates that distinction. 'Death is different' no longer." (citations omitted)).

257. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239 (1994); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321–22 (2000) (summarizing the conventional account of facial and as-applied challenges); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360–

challenges and as-applied challenges under the Eighth Amendment rests on the consequence of the decision, not the standard by which the Court makes the determination.[258]

Justice Roberts's concurrence in *Graham* betrays as much. He is reviewing Graham's challenge not as a categorical challenge, but as an as-applied challenge. While not explicitly exploring the concept of scrutiny, he recognizes that the application of the narrow proportionality principle requires consideration of Graham's youth.[259] In other words, the differentness inherent in Graham, as a juvenile, provided Chief Justice Roberts the justification to conclude that Graham's as-applied challenge was successful. The difference, then, between Chief Justice Roberts's concurring opinion and the majority opinion is not the level of scrutiny, but the nature of the constitutional consequence—individual as opposed to categorical.

Assuming that "different" cases receive heightened Eighth Amendment review in individual as-applied challenges just like categorical challenges, the next two sections map out how such a doctrine might apply.

### B. *Heightened As-Applied Scrutiny for JLWOP*

JLWOP should receive heightened scrutiny because juveniles are different.[260] JLWOP is the second-most severe punishment available.[261] Further, the Supreme Court's decision in *Jones* indicates a hesitancy to expand the scope of JLWOP exceptions under the Eighth Amendment.[262] As such, JLWOP may be a candidate for heightened as-applied

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61 (1998); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 658–59 (2010).

258. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 55–56 (2006) ("The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions; a deference to legislative judgments; and a reluctance to resort to the 'strong medicine' of constitutional invalidation unless absolutely necessary."); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1348 (2005) ("As-applied adjudication, of course, carries with it important benefits. . . . [I]t ensures that courts do not make uncertain speculations about how a law operates outside of the facts generated by the controversy before it."); Kreit, *supra* note 257, at 658 ("[T]he law strongly favors as-applied challenges on the grounds that they are more consistent with the goals of resolving concrete disputes and deferring as much as possible to the legislative process.").

259. *Graham*, 560 U.S. at 91–92 (Roberts, C.J., concurring in the judgment).

260. *See* discussion *supra* Section I.B.2.

261. *See, e.g.*, *Graham*, 560 U.S. at 92 (Roberts, C.J., concurring in the judgment) ("This is the second-harshest sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense.").

262. 141 S. Ct. 1307, 1321–23 (2021).

scrutiny,[263] which would be consistent with Chief Justice Roberts's concurrence in *Graham*.[264]

### 1. The Test

The narrow proportionality test generally accords a high degree of "rational-basis" deference to state sentencing decisions. A heightened level of scrutiny in as-applied JLWOP challenges would be far less deferential. Instead, the Court would assess proportionality without the thumb on the scale in favor of upholding the sentence. In essence, a heightened scrutiny test would simply make a de novo assessment of whether the JLWOP sentence was a proportionate punishment.

The language that Jones attempted to marshal in while arguing for a categorical fact-finding requirement under the Eighth Amendment would not only be relevant, but in many cases, determinative. As the Court made clear in *Miller* and *Montgomery*, JLWOP sentences are disfavored and should be used rarely, if ever.[265] The kind of juvenile offender for which a JLWOP punishment is proportional would be one who is permanently incorrigible.[266]

This is where the purposes of punishment that the Court uses in its categorical analysis are helpful. The *Jones* appeal focused on juvenile incorrigibility, but the analysis should also include (and maybe begin with) just deserts retribution. In determining the proportionality of a JLWOP sentence, the Court should ask whether the offender deserves to die in a prison cell. This proportionality determination cannot just focus on the homicide the juvenile committed.[267] Just deserts retribution is based on *both* the harm caused and the culpability of the offender.[268] And the Court has been clear about the diminished culpability of juveniles, a fact increasingly supported by the brain science.[269]

For most homicides, retribution would suggest that JLWOP is a disproportionate sentence.[270] Juveniles do not possess the same level of

263. The Court has done something similar in its First Amendment cases, using an "exacting scrutiny" standard in challenges to compelled disclosure requirements. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam). The Court reiterated this approach this term in *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

264. *See Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment).

265. Montgomery v. Louisiana, 577 U.S. 190, 208–09 (2016); Miller v. Alabama, 567 U.S. 460, 479–81 (2012).

266. *Montgomery*, 577 U.S. at 208–09; *Miller*, 567 U.S. at 479–80.

267. Indeed, this is where many state appellate judges stop in the analysis, focusing only on the harm caused and not the culpability of the offender. *See, e.g.*, Berry, *supra* note 39, at 1648–52.

268. *See supra* note 121.

269. *See supra* note 78 and accompanying text.

270. The rest of the world agrees, as the United States is the only country that imposes JLWOP sentences. Graham v. Florida, 560 U.S. 48, 80–81 (2010).

culpability as adults, and this diminished capacity makes attributing the same level of blame and harm needed for an LWOP sentence difficult to find. Even in the case of premeditated murder, a juvenile offender would need to possess some level of maturity and sophistication that would make an LWOP sentence appropriate.

The utilitarian purposes of punishment are also relevant. Deterrence likely has a diminished prospect of success in light of the immaturity of juveniles.[271] It is difficult to determine that an individual will continue to be dangerous into middle and old age. The permanent incorrigibility label encapsulates the question of rehabilitation. In the Court's language, the only one for whom a JLWOP sentence is proportionate is an individual beyond rehabilitation.[272] Certainly, all three of these utilitarian purposes would be difficult to satisfy in a JLWOP case.

Also, counseling against any sort of deference to state JLWOP sentences would be the comparative proportionality of JLWOP sentences. Over half of the states have either abolished JLWOP or have no individuals serving JLWOP sentences.[273] By comparison, then, whether intra- or inter-jurisdictional, a JLWOP sentence is likely to fall outside the range of proportional punishments for homicide.

In sum, a heightened standard of review for as-applied JLWOP challenges encompasses a proportionality analysis of the punishment as compared to the crime. This analysis would employ the purposes of punishment to assess the absolute proportionality of the punishment and secondarily engage in comparative proportionality review to assess similar cases.[274]

### 2. The Justification

Beyond Chief Justice Roberts's clear invitation to see juveniles as different with respect to as-applied JLWOP challenges under the Eighth Amendment, a heightened standard is appropriate for several reasons related to both the Court's prior Eighth Amendment jurisprudence and the unique nature of JLWOP itself.

#### a. JLWOP is Cruel

The refrain throughout the Court's decisions in *Thompson*, *Roper*, *Graham*, *Miller*, and *Montgomery* remains that juveniles are different in that they possess significantly diminished culpability. Punishments of

271. *See supra* notes 165, 184 and accompanying text.
272. Miller v. Alabama, 567 U.S. 460, 479–80 (2012).
273. *See* Rovner, *supra* note 13.
274. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 75 (2011).

juveniles should thus reflect this unique character.[275] In other words, it is cruel for states to punish juvenile offenders in the same way that states punish adult offenders.

The plurality in *Thompson* stressed, "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult . . . explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[276] Also, the plurality noted that those under age sixteen are unlikely to engage in "the kind of cost-benefit analysis that attaches any weight to the possibility of execution," making deterrence unlikely.[277]

*Roper* identified three general differences between juveniles under eighteen and adults that demonstrate that juvenile offenders cannot, with reliability, be classified among the worst offenders.[278] First, "A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . [, which] often result[s] in impetuous and ill-considered actions and decisions."[279] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[280] Third, "the character of a juvenile is not as well formed as that of an adult," as the "personality traits of juveniles are more transitory, less fixed."[281]

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275. *See generally* Allison A. Bruff, *The Juvenile Discount*, 54 CRIM. L. BULL. 829 (2018) (arguing for a "discount" on juvenile sentences by way of an automatic twenty-five percent downward departure from what an adult would be sentenced to).

276. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion).

277. *Id.* at 837; *see also* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (noting that "existing evidence for deterrence is surprisingly fragile" in regard to the death penalty). *See generally* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that capital punishment is not morally justified by a theory of deterrence). *But see generally* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing that executions are morally required if they deter murders). Part of the explanation for this may be the long period of time between the conviction and the execution—typically more than a decade. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 CASE W. RSRV. L. REV. 1, 3–4 (1995) (explaining that the number of executions compared to the number of people who have been sentenced to death is miniscule because of the long period of time between the conviction and the execution).

278. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

279. *Id.* at 569 (first alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

280. *Id.*; *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

281. *Roper*, 543 U.S. at 570. *See generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) (explaining that adolescents face an identity crisis that is more severe than that faced by more developed age groups).

*Graham* echoed the language from *Roper* and emphasized that none of the purposes of punishment supported a JLWOP sentence in a non-homicide case.[282] The juvenile character of the offender in a JLWOP case is a central part of why the Court found a categorical exception in *Graham*.[283]

*Miller* demonstrated that this was true, explaining that if "'death is different,' children are different, too."[284] As such, "children are constitutionally different from adults for purposes of sentencing,"[285] meaning that "they are less deserving of the most severe punishments."[286] Agreeing with *Roper* and *Graham*, the *Miller* Court noted that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[287]

*Montgomery*, in holding that *Miller* articulated a substantive rule that applied retroactively, emphasized the language in *Miller* that JLWOP sentences should be rare. Specifically, while there may be a "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified,"[288] "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[289] Consequently, "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[290] Thus,

> because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.[291]

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282. Graham v. Florida, 560 U.S. 48, 68, 71–74 (2010).

283. *Id.* at 68–69. At the time, some read *Graham* as being more about LWOP than juveniles. *See, e.g.*, William W. Berry III, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L. J. 1109, 1112 (2010).

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

285. *Id.* at 471.

286. *Id.* (quoting *Graham*, 560 U.S. at 68).

287. *Id.* at 472.

288. Montgomery v. Louisiana, 577 U.S. 190, 208 (2016).

289. *Id.* (quoting *Miller*, 567 U.S. at 479).

290. *Id.* (quoting *Miller*, 567 U.S. at 479).

291. *Id.* (first quoting *Miller*, 567 U.S. at 479–80; and then quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002)).

For all of these reasons, JLWOP sentences are generally cruel punishments. They are unsupported by the purposes of punishment and are disproportionate in almost all cases.

### b. JLWOP is Unusual

JLWOP sentences are unique. The United States is the only country in the world that sentences juvenile offenders to LWOP.[292] And less than half of the states in America allow JLWOP sentences or have someone serving a JLWOP sentence.[293]

After *Miller*, the number of jurisdictions allowing JLWOP sentences has significantly decreased,[294] and several mandatory JLWOP sentences have been retroactively changed by legislatures.[295] Currently, twenty-five states and the District of Columbia have banned JLWOP, and in another nine states, there is no one currently serving a JLWOP punishment.[296]

According to the Sentencing Project, 1,465 people were serving JLWOP sentences at the start of 2020, reflecting a 38% drop since 2016 and a 44% drop since *Miller*.[297] Historically, an overwhelming majority of JLWOP cases have come from just five jurisdictions: Pennsylvania, Michigan, Louisiana, Florida, and California.[298]

Additional evidence indicates that the individuals who receive JLWOP sentences are among the most vulnerable in society, with 80% witnessing violence in their homes and more than half witnessing weekly violence in their neighborhoods.[299] Further, 80% of girls and nearly half of all individuals sentenced to JLWOP have been physically abused; 77%

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292. Graham v. Florida, 560 U.S. 48, 80 (2010) ("There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over."). All countries except the United States have ratified the United Nations Convention on the Rights of the Child, which prohibits JLWOP sentences. *See* U.N. Convention on the Rights of the Child art. 37(a), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; *UN Lauds South Sudan as Country Ratifies Landmark Children's Rights Treaty*, UNITED NATIONS (May 4, 2015), https://news.un.org/en/story/2015/05/497732 [https://perma.cc/J3WA-39M7].

293. *See* Rovner, *supra* note 13.

294. Indeed, thirty-two states and the District of Columbia have changed their laws for juveniles convicted of homicide since *Miller*. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* Over 700 people originally sentenced to JLWOP have been released since *Montgomery*. *National Trends in Sentencing Children to Life Without Parole*, CAMPAIGN FOR FAIR SENT'G YOUTH (Feb. 2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf [https://perma.cc/NE4G-URMD].

298. *Facts & Infographics*, CAMPAIGN FOR FAIR SENT'G YOUTH, https://cfsy.org/media-resources/facts-infographics/ [https://perma.cc/3NGP-RGKR]; *A State-by-State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 31, 2017), https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85 [https://perma.cc/8FLQ-SEB6].

299. *See Facts & Infographics*, *supra* note 298.

of girls and 20% of all individuals serving JLWOP sentences have been sexually abused.[300] And Black youth receive JLWOP sentences at a per capita rate that is ten times that of White youth.[301]

All of these facts demonstrate the unusualness of JLWOP sentences. Given the uneven and unequal imposition of JLWOP sentences, the Court should, in individual JLWOP cases, see the potential for constitutional violation as higher and accord JLWOP sentencing decisions increased scrutiny.

### 3. Likely Cases

If the Court elected to apply a heightened level of Eighth Amendment scrutiny to JLWOP in individual as-applied cases, there are several kinds of cases in which such challenges might succeed.[302] This subsection considers which cases might have the most merit.

As the Court has made clear that the Eighth Amendment categorically limits certain applications of JLWOP, it follows that some individual applications might also constitute cruel and unusual punishments. Cases that are obvious examples are those adjacent to categorical limitations.[303] *Graham* eliminates all non-homicide cases, but that does not mean that all homicides deserve JLWOP.[304] It is likely then that JLWOP might be a disproportionate punishment in individual homicide cases, especially cases that did not involve first-degree or aggravated murder. Unlike death sentences, there are no statutory aggravating circumstances required as a prerequisite for JLWOP sentences.[305]

Likewise, felony murder JLWOP cases are likely candidates for disproportionate punishments in individual cases. As in *Enmund*, these

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300. *Id.*

301. *Id.*; *see also* Rovner *supra* note 13 (highlighting racial disparity in JLWOP sentencing).

302. Of course, ultimate success might depend on whether states are willing to actually release these offenders. *See* Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1217 (2021) (explaining that parole decisions are often left to the unreviewable discretion of the parole board).

303. Certainly, bright-line rules can create unfair outcomes at the margins. *See generally* Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141–42 (explaining the practical drawbacks to unworkable rules); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213 (2017) (arguing against the use of a bright-line Sixth Amendment rule because it creates unfair outcomes); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (highlighting unfair outcomes resulting from bright-line tests in Fourth Amendment jurisprudence).

304. *See, e.g.*, People v. Gutierrez, 324 P.3d 245, 262–67 (Cal. 2014) (interpreting state sentencing statute as not imposing a presumption in favor of JLWOP in special circumstance murder cases to avoid raising serious Eighth Amendment concerns).

305. *See* Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 7) (on file with author).

cases could involve situations where the juvenile did not kill or intend to kill.[306]

Juvenile offenders that possess some level of intellectual disability who receive JLWOP sentences would also be candidates for as-applied Eighth Amendment challenges. These individuals would possess double mitigation—youth and intellectual disability.

### C. *Heightened As-Applied Scrutiny for the Death Penalty*

The death penalty receives heightened scrutiny because death is different.[307] The number of categorical exemptions under the Eighth Amendment that the Court has already found—juveniles, intellectually disabled, rape cases, child rape cases, some felony murder cases, and mandatory sentences—suggests that capital sentences have a propensity for disproportionality.[308]

Death is the most severe punishment and is irrevocable.[309] As such, the death penalty should receive heightened scrutiny in individual as-applied Eighth Amendment challenges. As the evolving standards of decency is nearing a categorically unconstitutional level of usage[310] and the number of executions and death sentences continues to diminish,[311] the Court should be skeptical of death sentences.

#### 1. The Test

Where the narrow proportionality test puts a rational basis-type thumb on the scale in favor of deferring to the state punishment imposed, review of as-applied challenges to death sentences should put a thumb on the scale in favor of striking down the death sentence. The question of demonstrating that death is a proportional punishment should be a burden of the state, with a presumption of disproportionality. This is because, despite state safeguards, the application of the death penalty continues to be random and arbitrary.[312]

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306. *Cf., e.g.*, State v. Seam, 805 S.E.2d 302, 303 (N.C. Ct. App. 2017) (noting, in a felony murder case, that after receiving a JLWOP sentence the defendant was resentenced under *Miller* because he was sixteen years old at the time of the offense). One-third of JLWOP sentences in North Carolina occurred in felony murder cases. Ben Finholt et al., *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141, 155 (2020).

307. *See supra* notes 71–75 and accompanying text.

308. *See* discussion *supra* Section I.B.1.

309. *See supra* notes 71–72.

310. *See* discussion *supra* Section I.C.

311. DEATH PENALTY INFO. CTR., *Executions Overview*, https://deathpenaltyinfo.org/executions/executions-overview [https://perma.cc/A5EJ-AMVU]; *see infra* note 335 and accompanying text.

312. *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 908–09 (2015) (Breyer, J., dissenting) (arguing that the Court should revisit whether the death penalty is constitutional in light of

The Court should not presume that, for a homicide in which the state has established aggravating circumstances, the death penalty is proportional.[313] The aggravating circumstances that most states use are collectively broad enough to allow almost any homicide to be death-eligible.[314] Similarly, the Court cannot assume that a death sentence is comparatively proportionate either, as state review of comparative proportionality is virtually standardless.[315]

The question of proportionality with respect to a death sentence should explore whether it is a homicide that is narrow. In other words, the Court should examine whether the case has some factual disposition that suggests it is more severe than the garden-variety murder. Murders involving children, sex crimes, multiple victims, or intentional suffering are all the kinds of cases that might satisfy this kind of less deferential form of proportionality. In practice, most capital cases would not fall in one of these categories.

The purposes of punishment would likewise be of use in the analysis. To the extent that retribution can ever support a death sentence,[316] the

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mounting evidence showing that administration of the death penalty still suffers from unreliability and arbitrariness).

313. *See, e.g.*, Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C. R.-C.L. L. REV. 223, 232–38 (2011) (arguing that the proliferation of aggravating factors has rendered them useless as a means by which to narrow the class of murderers eligible for the death penalty); Kathleen D. Weron, Comment, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1141–49 (arguing that Utah's system of aggravating factors is unconstitutional because they fail to relate to a defendant's personal culpability); William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 691–92, 706–09 (2012) (highlighting the problems with comparative proportionality review).

314. A recent study in Missouri concluded that 76% of those convicted of homicide were death-eligible under the state's statute. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 309 (2009). In California, 87% of adults convicted of first-degree murder are eligible to receive a death sentence. CAL. COMM'N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 120 (Gerald Uelmen & Chris Boscia eds., 2008), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs [https://perma.cc/NC4F-5BSJ].

315. Walker v. Georgia, 555 U.S. 979, 983–84 (2008) (Stevens, J., respecting denial of certiorari) ("The Georgia Supreme Court's failure to [examine cases where the death penalty was not imposed] creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations. . . . And the likely result of such a truncated review . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."); *see also* Berry, *supra* note 313, at 691–92, 706–09 (highlighting the problems with comparative proportionality review).

316. *But see, e.g.*, 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, 410 (2005) (arguing that "a retributivist not only *can* but *should* accommodate [a] blanket commutation" of death sentences). Retribution may be especially pertinent to the extent that one's

crime would need to be a particularly brutal or gruesome killing, and the offender would need to possess an unusual degree of culpability. It would be unlikely that the utilitarian purposes of punishment would support a death sentence.[317] The social science evidence suggests that the death penalty does not deter crime.[318] And the other utilitarian purposes—incapacitation and rehabilitation—are not relevant.[319]

Comparative proportionality would also serve as a useful barometer for determining the constitutionality of a death sentence under an as-applied challenge. Given the lack of death sentences, it would be difficult in many cases to establish that the proportional response to the homicide at issue would be a death sentence in light of the number of similar homicides that did not receive one.[320]

In sum, the heightened standard of review for as-applied death sentence challenges encompasses a proportionality analysis of the punishment as compared to the crime. This analysis would employ the purposes of punishment to assess the absolute proportionality of the punishment, and secondarily engage in comparative proportionality review to assess similar cases. Under this standard, most death sentences would be as-applied violations of the Eighth Amendment.

### 2. The Justification

As explained above, death is different in its severity and irrevocability. As such, imposing a death sentence should be a weighty proposition subject to aggressive appellate review and should require states to provide persuasive justifications in individual cases. The individualized doctrinal requirements underscore the need to carefully consider all of the aggravating and mitigating evidence before imposing such a sentence.

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conception of retribution incorporates communication. *See* Panetti v. Quarterman, 551 U.S. 930, 958 (2007) (considering that one potential way retribution might be served is by making the offender recognize the gravity of his crime); *see also* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1164 (2009) [hereinafter Markel, *Executing Retributivism*] (arguing that "*Panetti* understands retributive punishment as a form of humane *communicative* state action directed at the offender").

317. *See supra* note 277. *See generally* 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) (arguing against dangerousness as a justification for the death penalty). *But see* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1233–34 (2013) (arguing that rehabilitation is relevant to capital cases).

318. *See supra* note 277.

319. *See supra* note 317.

320. *See supra* note 315.

### a. The Death Penalty is Cruel

In most cases, the death penalty is a cruel punishment because it is excessive in light of the harm caused and the culpability of the offender. The utilitarian purposes of punishment do not support the death penalty. It is not appropriate based on an individual's dangerousness;[321] it is not a tool for rehabilitation;[322] and it likely does not deter crime.[323]

The only justifying purpose of punishment, then, might be retribution. But some that subscribe to just deserts retribution do not believe that the death penalty is a proportionate punishment for any crime.[324] Others believe that the death penalty cannot satisfy the communicative requirements of retribution.[325]

Even if in some cases the death penalty could, in theory, be a proportionate punishment, states execute individuals for whom it is disproportionate.[326] The idea that states execute the worst of the worst offenders[327] is inconsistent with the practical reality. For many that receive the death penalty, the punishment is excessive, and thus cruel.[328]

The manner in which states conduct the death penalty makes capital punishment cruel in practice even where it is not cruel in theory. First, the death penalty is cruel because courts are unreliable in choosing the individuals who receive it and have a likelihood of choosing innocent

321. *See generally* Berry, *supra* note 317.

322. Killing someone is generally not a way to rehabilitate them. *But see* Ryan, *supra* note 317, at 1233–34.

323. *See supra* note 277.

324. *See supra* note 121.

325. *See generally* Markel, *Executing Retributivism*, *supra* note 316.

326. *See* Glossip v. Gross, 576 U.S. 863, 917–23 (2015) (Breyer, J., dissenting) (detailing evidence suggesting that the death penalty is imposed arbitrarily, with weight attached to improper factors such as race and gender).

327. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (noting that the death penalty should be for "the worst of the worst" (internal quotation marks omitted)); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability make them 'the most deserving of execution.'" (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))); Kennedy v. Louisiana, 554 U.S. 407, 420 (noting that capital punishment must be limited to those who commit the most serious crimes and who are the most culpable), *as modified on denial of reh'g*, 554 U.S. 945 (2008).

328. *See, e.g.*, William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L. J. 67, 70–71 (2015).

people.[329] Second, the death penalty is cruel because it is arbitrary[330]—issues such as the prosecutor,[331] geography,[332] and race[333] are more likely to drive sentencing outcomes than culpability.

### b. The Death Penalty is Unusual

In most cases, the death penalty is an unusual punishment because it is excessive as compared to most other individuals who commit similar crimes.[334] Of the tens of thousands of homicides annually, states sentence fewer than fifty people to death annually and execute fewer than thirty per year.[335] Thirty states have either abolished capital punishment or have not conducted an execution in over a decade.[336] The disparity is even more evident on a county level, with sixty-six counties out of the 3,143 in the United States being responsible for half of the death sentences imposed between 1973 and 1997.[337]

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329. *See Glossip*, 576 U.S. at 909–15 (Breyer, J., dissenting); *List of Exonerations*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/UZA7-R2EG] (listing over 3,000 death penalty cases since 1989 where the defendants were exonerated).

330. *See Glossip*, 576 U.S. at 917–23 (Breyer, J., dissenting). The death penalty still fits Justice Stewart's description in *Furman v. Georgia*:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.

*Id.* at 916 (alterations in original) (quoting *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

331. *See, e.g.*, FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 18 (2016), https://files.deathpenaltyinfo.org/documents/FairPunishmentProject-Top5Report_FINAL_2016_06.pdf [https://perma.cc/2GJA-FLQW] (showing that five prosecutors are responsible for one in seven of the executions since the reinstatement of the death penalty in 1976).

332. *See, e.g.*, Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–09 (2010) (discussing the uneven use of the death penalty across the nation); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 228 n.2, app. (2012) (showing that only 303 out of 3,141 counties sentenced at least one individual to death between 2004 and 2009); Barnes et al., *supra* note 314, at 305–07.

333. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 2 (1990) (concluding that arbitrariness and racial discrimination still infect capital sentencing); McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

334. *See, e.g.*, Berry, *supra* note 328, at 71–72; *Glossip*, 576 U.S. at 938 (Breyer, J., dissenting) (noting that only seven states carried out an execution in 2014).

335. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021: YEAR END REPORT 1–2 (2021), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf [https://perma.cc/E522-GG6X].

336. *See Glossip*, 576 U.S. at 940 (Breyer, J., dissenting).

337. *Id.* at 941.

The consistency of the direction of change, as highlighted in *Atkins* and *Roper*, is evident as well.[338] A state has abolished the death penalty in each of the last four years,[339] and the number of death sentences and executions continues to decline annually.[340] The historic decline in the number of death sentences and executions means that the death penalty is indeed unusual.

### 3. Likely Cases

If the Court elected to apply a heightened level of Eighth Amendment scrutiny to the death penalty in individual as-applied cases, there are several kinds of cases in which such challenges might succeed.[341] This subsection considers which cases might have the most merit.

Because the Court has made clear that the Eighth Amendment categorically limits certain applications of the death penalty, it follows that some individual applications might also constitute cruel and unusual punishments. Obvious examples of potentially cruel and unusual punishments at the individual level include those that are adjacent to the established categorical limitations.[342] A case involving an individual who is a few days past his eighteenth birthday[343] might result in a death sentence that is disproportionate as-applied to the offender in light of his youth.[344] Similarly, an individual who approaches intellectual disability might lack the culpability for a death sentence, even though he falls slightly outside the categorical bright-line.[345] A death sentence in a felony murder case in which an offender falls within the *Tison* standard but nonetheless did not kill or intend to kill might similarly be disproportionate.[346]

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338. *Id.* at 942; Atkins v. Virginia, 536 U.S. 304, 315–16 (2002); Roper v. Simons, 543 U.S. 551, 567 (2005).

339. The states are Washington (2018), New Hampshire (2019), Colorado (2020), and Virginia (2021). *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/QP5Y-3P3Y].

340. *See* DEATH PENALTY INFO. CTR., *supra* note 335, at 2.

341. The success of these claims may depend in part on the ability of judges to overcome death penalty denialism. *See* Jenny-Brooke Condon, *Denialism and the Death Penalty*, 97 WASH. U. L. REV. 1397, 1400–02 (2020) (explaining how the Court overlooks empirical evidence challenging the Court's narratives about the death penalty).

342. *See supra* note 303 and accompanying text.

343. A different way of dealing with the same issue would be to give a penumbral effect to the categorical limitations. *See* William W. Berry III, *Eighth Amendment Presumptive Penumbras (and Juvenile Offenders)*, 106 IOWA L. REV. 1, 5–6 (2020).

344. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (finding death sentences for juvenile offenders unconstitutional).

345. *See supra* note 149 and accompanying text.

346. *See supra* notes 115–32 and accompanying text. Indeed, the Governor of Arizona commuted the death sentences of the Tison sons because he believed that the sentences were

The Court has historically scrutinized death sentences categorically, going as far as abolishing the death penalty in *Furman v. Georgia*[347] before reinstating it four years later in *Gregg v. Georgia*.[348] The central concern from *Furman*—the arbitrary and random imposition of death sentences[349]—is particularly applicable in the as-applied context.[350] Courts should look at the aggravating factors justifying death sentences to determine whether the state process has adequately narrowed the class of murderers.[351] Given the absence of robust comparative proportionality review, review of individual as-applied challenges in capital cases is paramount.[352]

## CONCLUSION

This Article has highlighted a gap in the Eighth Amendment doctrine—the consideration of as-applied challenges in death penalty and JLWOP cases. To that end, this Article argued that these two categories of sentences deserve heightened scrutiny in individual as-applied challenges, not just in categorical Eighth Amendment challenges. Specifically, this Article argued for heightened scrutiny for JLWOP cases and death penalty cases. Just because the door to categorical exclusions has probably been shut does not mean that the Eighth Amendment could not be opened to broaden as-applied challenges.

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excessive. *See* David D. Haskell, *Brothers Finally Free from Death Sentence After 13 years*, UPI (Sept. 11, 1992), https://www.upi.com/Archives/1992/09/11/Brothers-finally-free-from-death-sentence-after-13-years/4398716184000/ [https://perma.cc/M99U-KN5M].

347. 408 U.S. 238, 239–40 (1972) (per curiam).

348. 428 U.S. 153, 207 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

349. *See supra* note 330.

350. *Cf.* Coker v. Georgia, 433 U.S. 584, 601 (1977) (Powell, J., concurring in the judgment in part, dissenting in part) (finding that the death penalty is generally, but not invariably, disproportionate for rape).

351. *See* Walton v. Arizona, 497 U.S. 639, 653–54 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002)).

352. *See supra* note 315.