Unusual Deference

William W. Berry III

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UNUSUAL DEFERENCE

William W. Berry III*

Abstract

Three Eighth Amendment decisions—*Harmelin v. Michigan, Pulley v. Harris,* and *McCleskey v. Kemp*—have had enduring, and ultimately, cruel and unusual consequences on the administration of criminal justice in the United States. What links these cases is the same fundamental analytical misstep—the decision to ignore core constitutional principles and instead defer to state punishment practices. The confusion arises from the text of the Eighth Amendment where the Supreme Court has read the “cruel and unusual” punishment proscription to rest in part on majoritarian practices. This is a classical analytical mistake—while the Amendment might prohibit rare punishments, it does not make the corollary true—that all commonly used punishments must be constitutional.

The “unusual deference” to state punishment practices in light of this misconstruction of the text has opened the door to a proliferation of punishments that are disproportionate, arbitrary, and discriminatory. As such, this Article argues for a restoration of the Eighth Amendment from its present impotence by reframing the concept of unusualness in accordance with the Court’s stated Eighth Amendment values and unlinking it from its deferential subservience to state legislative schemes.

Part I of this Article explains the genesis of the Court’s unusual deference. Part II of this Article explores the manifestations of unusual deference, examining the flaws in the evolving standards of decency, differentness deference, and the three most far-reaching examples of unusual deference—*Harmelin, Pulley,* and *McCleskey.* Finally, this Article concludes in Part III by reimagining an Eighth Amendment free from the error of unusual deference and demonstrating how such an approach could begin to remedy the problem of mass incarceration.

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All men make mistakes, but a good man yields when he knows his course is wrong, and repairs the evil. The only crime is pride.

— Sophocles, Antigone

INTRODUCTION

The criminal justice system in the United States remains broken.1 Two central problems encapsulate the flawed system: (1) the conviction and punishment of innocent individuals,2 and (2) the excessive and arbitrary punishment of offenders that has resulted in a mass incarceration epidemic.3 This Article explores the latter problem from the perspective of a neglected safeguard—the Eighth Amendment to the United States Constitution.

While there are certainly many causes of the excessive imprisonment of criminal offenders in the United States, the absence of any serious constitutional limitation on such practices certainly constitutes, at the very least, an important enabling factor.4 Indeed, the U.S. Supreme Court bears significant responsibility for the current epidemic by failing to apply the Eighth Amendment to excessive, arbitrary, and discriminatory criminal punishments.

Three Eighth Amendment decisions—Harmelin v. Michigan,5 Pulley v. Harris,6 and McCleskey v. Kemp7—have had enduring, and ultimately cruel and unusual consequences on the administration of criminal justice in the United States.8 Harmelin has allowed the proliferation of disproportionate non-capital sentences, including draconian mandatory

1. See generally Alex Kozinski, Criminal Law 2.0, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, iii (2015) (noting that while many suggest the American criminal justice system benefits defendants, very few are acquitted).


8. Id. at 289; Harmelin, 501 U.S. at 965; Pulley, 465 U.S. at 43–44.
sentences and excessive sentences for non-violent offenders. Pulse allows state supreme courts to abandon their responsibility for preventing the arbitrary imposition of the death penalty as promised in Gregg v. Georgia. Finally, McCleskey has allowed racial discrimination to persist for over twenty-five years in capital cases, and has provided a doctrinal basis for the Court’s unfortunate lethal injection jurisprudence.

What links these cases is the same fundamental analytical misstep—the decision to conflate core constitutional principles with state punishment practices. The confusion arises from the text of the Eighth Amendment where the Court has read the “cruel and unusual” punishment proscription to rest in part on majoritarian practices. This is a classical analytical mistake—while the Amendment might prohibit rare punishments, it does not make the corollary true—that all commonly used punishments must be constitutional. Seizing upon this idea, the Court has exercised wide deference toward state punishment practices.

The “unusual deference” to state punishment practices in light of this misconstruction of the text has opened the door to a proliferation of punishments that are disproportionate, arbitrary, and discriminatory. As such, this Article argues for a restoration of the Eighth Amendment from its present impotence by reframing the concept of unusualness in accordance with the Court’s stated Eighth Amendment values and unlinking it from its deferential subservience to state legislative schemes.

If the Court were to reverse the decisions of Harmelin, Pulley, and McCleskey, it would be taking a significant step in this remediation effort. Further, this Article shows how reversing these decisions would begin to remedy the problems of excessive, arbitrary, and discriminatory sentences. Ultimately, this Article demonstrates how the Eighth Amendment could serve as a powerful tool to fix a broken criminal justice system.

Part I of this Article explains the genesis of the Court’s unusual deference. Part II of this Article explores the manifestations of unusual

10. Pulley, 465 U.S. at 43–46, 54 (holding that the Eighth Amendment requirement of relative proportionality does not require any particular scheme of review).
12. McCleskey, 481 U.S. at 292–93 (holding that the death sentence did not violate the Eighth or Fourteenth Amendments because petitioner failed to produce evidence of racial discrimination in his particular case).
13. As explained below, just because all states chose to adopt a brutal form of punishment—like drawing and quartering murderers—such a punishment would not be constitutionally acceptable. See infra Part I.

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deference, examining the flaws in the evolving standards of decency, differentness deference, and the three most far-reaching examples of unusual deference—Harmelin, Pulley, and McCleskey. Finally, this Article concludes in Part III by reimagining an Eighth Amendment free from the error of unusual deference and demonstrating how such an approach could begin to remedy the problem of mass incarceration.

I. THE GENESIS OF UNUSUAL DEFERENCE

To understand the Court’s embrace of unusual deference under the Eighth Amendment, it is instructive to examine its origins through the selective incorporation of the Bill of Rights and the backlash to the Court’s decision in Furman v. Georgia. These two beginnings set the stage for the manifestations of unusual deference detailed in Part II.

A. Selective Incorporation and State Deference

Even before the adoption of the Constitution, a fundamental question existed as to the proper relationship between state and federal governments. The initial experiment—the Articles of Confederation—rested on a decentralized model with state power trumping federal power in most circumstances. The adoption of the Constitution and the Bill of Rights started to move the needle in the direction of federal power, establishing the supremacy of the federal government. Over time, the Court made clear that the Bill of Rights incorporated limits on state power, not just federal power, albeit in a piecemeal fashion. Indeed, the Supreme Court has found that the Fourteenth Amendment incorporates almost all of the Bill of Rights such that it applies to the states, but has

15. 408 U.S. 238 (1972).
18. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding.”); Johnson, supra note 17, at 248 (“Under the Articles, the state governments had been supreme over the Congress . . . but when the ratification of the Constitution was completed, by the People, the state governments were made subject to the supremacy of the federal government.”).
done so one provision at a time.\textsuperscript{20} For instance, the Court did not hold that the Eighth Amendment applied to the states until its 1962 decision in \textit{Robinson v. California}.\textsuperscript{21}

Since the beginning, the Constitution and the Congress largely left the administration of criminal law to the states.\textsuperscript{22} Now, even after a century of proliferation of federal crimes in the areas of drugs, guns, and corporate crime, the states still impose a significant majority of criminal sentences in the United States.\textsuperscript{23}

The combination of the Court’s selective interventions and the broad state oversight of criminal justice led some Justices to resolve that, where possible, the Court ought to defer to the states rather than rigorously applying the Constitution to its practices.\textsuperscript{24} Perhaps the most obvious example of this is Justice Harry Blackmun’s dissenting opinion\textsuperscript{25} in \textit{Furman v. Georgia}.\textsuperscript{26} In his dissent, Justice Blackmun indicated that he was against the death penalty and would vote against it if he were a legislator.\textsuperscript{27} Nonetheless, he dissented from the Court’s decision to find the death penalty unconstitutional as applied, and explained that the Court should not interfere with the decisions of states concerning punishment of their criminal offenders.\textsuperscript{28}

B. The Furman Backlash

The \textit{Furman} case, as well as its aftermath, provides further insight into the Court’s deference to state legislatures in its application of the Eighth Amendment. At the time, public opinion polls showed that just under

\begin{itemize}
\item 21. 370 U.S. 660, 667 (1962) (holding that punishing an individual for being an addict violated the Eighth Amendment).
\item 25. Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting).
\item 26. 408 U.S. 238.
\item 27. \textit{Id.} at 405, 406.
\item 28. In \textit{Furman}, Justice Blackmun was unwilling to apply the language of the Eighth Amendment to assess whether death was a cruel and unusual punishment. \textit{Id.} at 410. Justice Blackmun’s view is particularly ironic given he wrote \textit{Roe v. Wade} a year after \textit{Furman}, having no issue with the Court interpreting the meaning of the Constitution to find a substantive due process right to abortion, \textit{without} any clear language as an anchor for doing so. \textit{Roe v. Wade}, 410 U.S. 113, 116, 154 (1973); see John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 YALE L.J. 920, 920 (1973).\end{itemize}
one-half of Americans supported the death penalty, and there had not been an execution in almost a decade. After the Court held in *Furman* that the death penalty violated the Eighth Amendment as applied, the public backlash was significant, both in terms of opinion and legislative response. Thirty-five states passed new death penalty statutes within the four years following *Furman*, with commentators and the general public alike widely criticizing the Court for perceived overreaching.

A mere four years later, the Court reinstated the death penalty when it upheld the capital statutes of Georgia, Texas, and Florida in 1976, based on safeguards adopted by the states to limit arbitrariness in capital sentencing. Nonetheless, over the next twenty years, the Court slowly but surely allowed states to water down and, in some instances, even completely ignore these safeguards.

One reading of the Court’s jurisprudence over this time views the Court as following the will of the people in its cases. The Court’s decision to adopt a deference-based doctrinal approach to the Eighth Amendment fits within this narrative, with the Court choosing to follow


31. Id. at 219; see also Corinna Barrett Lain, *Furman* Fundamentals, 82 WASH. L. REV. 1, 46–49 (2007) (describing the strong response of states in opposition to the *Furman* decision).


the lead of state legislatures rather than impose limits upon them.\textsuperscript{35} Certainly, the Court has displayed a general hesitancy in this area uncommon with other areas of the Bill of Rights. Perhaps the consequence of \textit{Furman} was a shell-shocked and cautious Court, at least in terms of placing limits on cruel and unusual punishments.

II. THE MANIFESTATIONS OF UNUSUAL DEFERENCE

Without a doubt, the costs of the Court’s unusual deference have been significant for individual offenders. They have permitted a proliferation of disproportionate punishments, allowed continued arbitrariness in the imposition of the death penalty, and allowed discrimination to pervade state criminal justice systems.

A. Adopting the Wrong Evolving Standards

After \textit{Furman}, the Court articulated its guiding framework for applying the Eighth Amendment in \textit{Coker v. Georgia},\textsuperscript{36} which considered whether the death penalty was a constitutional punishment for the offense of rape.\textsuperscript{37} Unlike other constitutional provisions in which the Court interpreted the applicable language as a limitation on the ability of the majority to place restrictions on the power of the minority, the Court looked to the majority practice as the basis for its decision.\textsuperscript{38}

Relying on language from its decisions in \textit{Weems v. United States}\textsuperscript{39} and \textit{Trop v. Dulles},\textsuperscript{40} the Court explained that the Eighth Amendment’s ban against cruel and unusual punishments was not static, but evolved over time.\textsuperscript{41} As such, the Court was to apply the “evolving standards of decency” as marked by the progress of a maturing society.\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{36} 433 U.S. 584 (1977).
  \item \textsuperscript{37} \textit{Id.} at 586, 592. The background to this case is important. At the time, Georgia was one of the only states executing criminal offenders for rape, and almost all of those who received the death penalty for rape in Georgia were African-American men accused of raping white women. \textit{Id.} at 595–96; Marvin E. Wolfgang & Marc Riedel, \textit{Rape, Race, and the Death Penalty in Georgia}, 45 AM. J. ORTHOPSYCHIATRY 658, 667 (1975); Berry, supra note 35.
  \item \textsuperscript{38} \textit{Coker}, 433 U.S. at 597. In cases involving the First, Second, Fourth, and Fourteenth Amendments, the Court balances the imposition of the government against the rights of the minority accorded under the Bill of Rights.
  \item \textsuperscript{39} 217 U.S. 349 (1910).
  \item \textsuperscript{40} 356 U.S. 86 (1958).
  \item \textsuperscript{41} \textit{Coker}, 433 U.S. at 592, 596 n.10.
  \item \textsuperscript{42} \textit{Trop}, 356 U.S. at 101. Despite Justice Antonin Scalia’s view to the contrary, there is clear evidence supporting the idea that the originalist understanding of the Eighth Amendment is that it was to evolve over time. See John Stinneford, \textit{The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation}, 102 NW. U. L. REV. 1739, 1815 (2008).
\end{itemize}
1. Proportionality and Dignity—The Ignored Standards

The question, though, was what would provide the content of this constitutional standard. As the Bill of Rights offers a protection of the rights of individuals against legislative overreach, one might begin with an investigation into such rights in the context of the Eighth Amendment. Here, the Eighth Amendment should protect individual criminal offenders against the imposition of cruel and unusual punishments by state and federal governments.

The content of this protection, at the time of \textit{Coker}, could have stemmed from the Court’s decisions in \textit{Weems} and \textit{Trop}. In \textit{Weems}, the Court found that the punishment of \textit{cadena temporal} for fifteen years, stemming from the falsification of documents, was unconstitutional under the Eighth Amendment; the Court explained that the Eighth Amendment prohibited disproportionate punishments—punishments excessive for the crime committed.\footnote{Indeed, it found that the constitutional infirmity of the punishment at issue was that it was more severe than punishments imposed for much more serious crimes.}

In \textit{Trop}, the Court further articulated some core Eighth Amendment principles. It explained that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”\footnote{\textit{Trop}, 356 U.S. at 100.} In addition, the Court stated that “[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”\footnote{Ryan, supra note 45, at 2146.} While opaque, this concept of dignity prohibited the use of torture, at a minimum.\footnote{Ryan, supra note 45, at 2146.}

At the very least, the Court’s reading of the Eighth Amendment could consist of two basic principles: (1) the punishment itself was proportionate to the crime committed, and (2) the punishment did not infringe on the dignity of the offender, particularly in the sense it imposed torture or other similar degrading punishments on the offender.


\footnote{\textit{Trotsky}, supra note 43, at 971.}

\footnote{Ryan, supra note 45, at 2146. The Court had also previously indicated “[p]unishments are cruel when they involve torture or a lingering death” in upholding a death sentence. \textit{In re Kemmler}, 136 U.S. 436, 447 (1890).}
2. The Majoritarian Misstep

In *Coker*, however, the Court only relied on *Trop* for the principle that the Eighth Amendment evolved over time. The substantive doctrine it created had two parts: an objective inquiry and a subjective inquiry.48

The objective inquiry examines the majority punishment practices with respect to the punishment in question.49 In other words, to determine the meaning of the Constitutional protection of individuals against tyrannical, majoritarian state legislative overreaching, the Court looks to the practices of the states themselves. Specifically, the Court engages in state-counting to determine whether a majority of jurisdictions use such a punishment.50 If most states do not, the Court will hold that the punishment violates the objective part of the evolving-standards-of-decency test.51 By adopting this approach, the Court has thus infused the content of a counter-majoritarian standard with the majoritarian practice.

By definition, the first part of the evolving-standards-of-decency test defers to state legislatures. To understand why such an approach eviscerates the power of the Eighth Amendment, imagine that every state adopted the penalty of life without parole (LWOP) for failing to pay one’s taxes in a timely manner. Despite the clearly cruel and unusual nature of this punishment, it would satisfy the objective inquiry of the evolving-standards-of-decency test because all states use the punishment.

One rationale for adopting this test lies in the language of the Constitution. The Court has seized on this majoritarian approach through its application of the word “unusual.” The Court has defined “unusual” to mean “rare,” which means an approach not commonly used. Through the lens of this rationale, it seems to make sense for the Court to look to the majority practice to inform its definition of “unusual.”52

The corollary to that rationale also shows why this is a poor standard. If a few states offer a particular punishment that is actually more effective and humane than the majority of other states, it would not make that punishment unconstitutional.

Popularity cannot be the appropriate measure of disproportionality or excessiveness. The content of unusualness, if linked to majority practice, entirely undermines the idea of cruelty. The provision—cruel and

49. *Id.*
51. *Id.*
unusual—cannot mean that cruelty is acceptable as long as it is widespread and common.53

There are three possible readings of the “and” in the phrase “cruel and unusual.” First, it could require punishments to be both cruel AND unusual.54 Second, it could mean that it prohibits cruel punishments and unusual punishments, meaning the “and” has a meaning of “or.”55 Finally, the phrase could be a hendiadys, where cruel and unusual are a unitary concept.56 In that reading, cruel and unusual constitutes one idea—cruel punishments are unusual in nature (assuming the Court is enforcing the Eighth Amendment), and unusual punishments are certainly cruel.57 The hendiadys understanding is the best reading of the conjunction in the Eighth Amendment.

To support the objective aspect of the Court’s inquiry, and the proposition that it is improper to link the word “unusual” to majoritarian standards, the Court also drew on the concept of the evolving standards defined in Trop. Indeed, the idea of an evolving standard necessitates some test for determining the content of a changing standard. Given the Court’s hesitancy to impute normative content into the Eighth Amendment, the Court naturally chose to look to majority practice to assess societal standards.

3. Subjective Shortcomings

The second part of the evolving-standards-of-decency test could, in theory, serve to partially remedy the Court’s analytical misstep of looking to majority trends as the basis for defining minority rights. In this part of the test, the Court articulates its own subjective judgment, “[bringing] to bear” its own views.58 The adopted method of the Court in this vein is to inquire whether any aspect of the punishment satisfies any of the purposes of punishment—retribution, deterrence, incapacitation, or rehabilitation. If the punishment does not satisfy any of the purposes, then the subjective judgment of the Court is that the sentence is unconstitutional.

The problem with this application is that the subjective and objective judgments of the Court have never been different. In every case where

54. See id. at 605.
55. See id.
57. Ryan, supra note 53, at 605.
58. Id. at 597.
the Court has concluded a majority of jurisdictions disfavor the application of a particular punishment in light of offender or offense characteristics, the Court has found that the punishment also lacks subjective justification.

Similarly, the Court has never found a punishment that has the objective support of a majority of jurisdictions subjectively unconstitutional. It is unclear what would happen if the objective and subjective indicia diverted. What seems to be clear is that the majoritarian-based objective requirement must be met in order for the Court to deem a punishment (or really the application of a punishment) cruel and unusual. Perhaps the subjective indicia exist only as a check on the overreach of the majority punishment practices, but in reality, it has never served as such.

Thus, the evolving-standards-of-decency paradigm adopted by members of the Court demonstrated a collective hesitancy to make normative determinations concerning the meaning of the cruel and unusual punishment proscription of the Eighth Amendment.

B. Differentness Deference

Another doctrinal manifestation of the deference the Court adopted at the time of *Furman* is worth noting—the concept of differentness. In *Furman*, Justice William Brennan first articulated the idea that “death is different,” meaning that the death penalty’s uniqueness entitles it to a higher degree of constitutional scrutiny in light of its severity and finality as a punishment.59

In later cases, however, this principle served to diminish the scrutiny of non-capital punishments under the Eighth Amendment, rather than to increase the constitutional scrutiny of capital cases. 60 This principle has essentially meant that the uniqueness of the death penalty limits consideration of other punishments because they are not as “unusual.”61

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Indeed, the Court has elected not to apply the evolving standards of decency in non-capital cases.62

Because death is different, the Court provides almost complete deference to states in punishing non-capital offenses, with the Eighth Amendment barring only punishments that are grossly disproportionate.63 There has only been one case that has ever met this standard, and even then, the Court subsequently narrowed that decision.64

In recent years, the Court has discovered another kind of differentness under the Eighth Amendment—juveniles.65 As a result, the Court has applied the Eighth Amendment to restrict the imposition of juvenile life-without-parole (JLWOP) sentences for non-homicide crimes and the imposition of mandatory LWOP sentences.66 Again, the instinct of the Court tracks majoritarian tendencies. The United States is the only country in the world that allows JLWOP sentences.67

The Court’s Eighth Amendment jurisprudence has used the concept of unusualness as a basis for hiding from its traditional role of interpreting the Constitution. Instead, the Court has demonstrated a preference for allowing the counter-majoritarian constitutional provision to track the


63. The Court has historically refused to extend the doctrine to non-capital cases, even where the sentence seems particularly excessive. See, e.g., Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin, 501 U.S. at 961, 996 (affirming sentence of LWOP for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming a LWOP sentence for felony theft of $120.75 by false pretenses where defendant had three prior convictions). But see Solem v. Helm, 463 U.S. 277, 279–84 (1983) (reversing sentence of LWOP for presenting a no account check for $100, where defendant had six prior felony convictions).

64. Compare Solem, 463 U.S. at 284, with Harmelin, 501 U.S. at 996.

65. See Miller, 567 U.S. at 479; Graham, 560 U.S. at 74; see also Berry, supra note 62, at 339, 345 (discussing the application of LWOP to juveniles).

66. See, e.g., Miller, 567 U.S. at 465 (banning mandatory JLWOP sentences); Graham, 560 U.S. at 74 (banning LWOP sentences for juvenile offenders in non-homicide crimes); see also Berry, supra note 62, at 328 (discussing the series of Supreme Court cases that have affected LWOP sentences); Berry, supra note 60, at 1068–69 (2013) (discussing the Supreme Court’s decision banning mandatory LWOP in juvenile sentences).

majoritarian trends in state legislatures. This unusual deference has not been without consequences. Three cases in particular demonstrate how the Court’s abdication of its role in protecting individual rights under the Eighth Amendment has resulted in widespread abuse and over-punishment by state legislatures and criminal justice systems.

C. The Problem of Disproportionate Sentences (Harmelin)

The first of these cases, Harmelin v. Michigan, imposed a cruel and unusual punishment on a first-time drug offender. Even worse, it closed the door on the examination of many similar cases under the Eighth Amendment.

1. Harmelin v. Michigan

In Harmelin, the Supreme Court considered whether the mandatory LWOP sentence imposed on Ronald Allen Harmelin, for possessing more than 650 grams of cocaine, violated the Eighth Amendment.68 As this conviction was his first criminal offense, Harmelin argued on appeal that the sentence was disproportionate to the offense, rendering it a cruel and unusual punishment.69

The Court rejected Harmelin’s argument based on two broad principles: (1) death is different70 and (2) deference to state legislatures.71 The majority split between the opinion of Justice Scalia, joined by Chief Justice William Rehnquist, and the plurality opinion of Justice Anthony Kennedy, joined by Justice Sandra Day O’Connor and Justice David Souter.72 In his opinion, Justice Scalia applied an originalist analysis and found that the Eighth Amendment did not include a proportionality guarantee.73 The plurality (and the dissenters) found otherwise, concluding that the Eighth Amendment did include a proportionality guarantee.74

Justice Kennedy’s plurality opinion, in comparison, emphasized the narrowness of this principle.75 Specifically, the opinion cited to the need to defer to state penological judgment, granting substantial deference to

68. Harmelin, 501 U.S. at 961.
69. Id. at 994.
70. Id. at 995.
71. Id. at 998–99 (Kennedy, J., concurring).
72. Id. at 960 (Scalia, J., concurring).
73. Id. at 965–85.
75. Harmelin, 501 U.S. at 997 (Kennedy, J., concurring).
legislative determinations. The opinion referenced the wide variety of state punishment practices, both in terms of purposes of punishment and sentencing practices, as a basis for the Court not intervening. The opinion also discussed the absence of objective factors by which to assess proportionality as a basis for deferring to states. The opinion ultimately settled on an approach of limiting the application of the Eighth Amendment to situations where the punishment is grossly disproportionate to the crime.

All five Justices then held that the mandatory nature of the sentence in this case did not violate Harmelin’s rights. Despite the Court’s adoption of individualized sentencing principles in Woodson v. North Carolina and Lockett v. Ohio, the Court limited these principles to capital cases, relying on its “death is different” concept.

The Court’s errors here lie in according too much deference to state legislatures and courts. Indeed, the incorporation of the Eighth Amendment into the Fourteenth exists for the purpose of defending criminal defendants against legislative overreach. Here, the Court seems inclined to defer to the states because there are many ways of administering criminal justice. That may be true, but the Court’s role is to distinguish the constitutional from the unconstitutional based on the concept of cruel and unusual punishments, which, at the very least, encompasses some notion of disproportionality.

An additional basis for the Court’s deference was its view that there is no objective standard for determining proportionality. Ironically, the Court has used the purposes of punishment in exactly this way in a series of cases that assess whether certain kinds of capital sentences are disproportionate.

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76. Id. at 998–99.
77. Id. at 999–1000.
79. Id.
80. Id. at 581.
83. Frase, supra note 78, at 582.
84. See Weems v. United States, 217 U.S. 349, 377–79 (1910); see also discussion supra Part I.
The Court likewise misreads the “death is different” concept as a basis for lowering scrutiny for non-capital sentences, a far cry from the purpose indicated at the genesis of the concept. By limiting Eighth Amendment claims in effect to capital cases, the Court has abdicated its role as preventer of excessive punishment at a state level and instead opened the door to mass incarceration.87 This decision has essentially led to two tracks of criminal justice—capital and non-capital.88 This arbitrary approach allows the court to further defer to states in non-capital cases by allowing mandatory sentences and denying offenders the ability to offer mitigating evidence at sentencing. Given the stakes of the Harmelin case itself, it seems particularly cruel to deny Harmelin the ability to plead for his life, as the state is effectively imposing a death sentence.89

2. The Consequences of Harmelin

At the heart of America’s mass incarceration problem remains the imposition of excessive punishments.90 The length of prison sentence awarded for many crimes in American jurisdictions, in many cases, far exceeds the sentence imposed in other Western countries for committing a similar crime.91 Furthermore, most American jurisdictions, particularly the federal government, impose a severe sentence increase for second and third time offenders.92 This recidivist premium often has an exponential dimension, drastically increasing the sentence, and becoming significantly larger with each increase in criminal history category.93

Similarly, mandatory minimum sentences often result in a higher sentence than a court might otherwise impose.94 The volume of mandatory sentences, and the amount of incarceration mandated by each sentence, has contributed significantly to the growth of the carceral state in America over the past three decades.95

88. See generally Barkow, supra note 60 (discussing the Court’s two approaches to substantive sentencing law involving capital and non-capital cases).
90. See DE LA VEGA ET AL., supra note 3, at 15.
91. See id. at 25–26.
93. Id.; see also Berry, Eighth Amendment Presumptions, supra note 4, at 78 (discussing various sources that contribute to the rise in incarceration).
94. See DE LA VEGA ET AL., supra note 3, at 8.
95. MAUER, supra note 87, at 32.
One clear problem with mandatory sentences is that they shift sentencing discretion from the Court to the prosecutor. If the Court lacks the discretion to determine the sentence, the prosecutor effectively chooses the sentence by deciding what level of crime to charge in a given case. And research has demonstrated that the increasingly punitive exercise of prosecutorial discretion at the local and state level has been one of the major drivers of the mass incarceration epidemic.96

In the capital context, the Court has placed restrictions on mandatory death sentences.97 Specifically, the Court has emphasized the importance of considering mitigating evidence and making individualized sentencing determinations.98 In addition, the Court has extended this right to juvenile offenders facing LWOP sentences.99

As I have argued elsewhere, the Court ought to extend the right to mitigation and individualized sentencing determinations to LWOP sentences, at a minimum, as well as to other lengthy sentences.100 The Court’s decision in Harmelin, however, currently forecloses such an application of the Eighth Amendment.101 The consequences of Harmelin are severe for criminal defendants, and ultimately free states to punish non-capital offenders without oversight or limit. Such an application of this decision serves to block constitutional review of disproportionate punishments in non-capital cases, rendering the Eighth Amendment a dead letter in these non-capital contexts.

This decision also allows for the imposition of mandatory sentences without restriction, reallocating sentencing discretion from judges to prosecutors. In doing so, Harmelin has denied many offenders the right to plead for mercy, and in many cases, for their life, at sentencing.102 Harmelin has removed the most obvious potential impediment to mass incarceration. It also facilitated the proliferation of LWOP sentences in the United States (41,000 and counting), unforeseen in the history of the world.103

100. Berry, supra note 62, at 345–46; Berry, supra note 60, at 1085.
101. Although, as Miller demonstrates, the strength of stare decisis on this point is dubious at best as a barrier to remedying this doctrinal error. See generally Berry, supra note 62 (discussing the effects of Miller on LWOP jurisprudence).
102. Id. at 335.
103. See John Tierney, Life Without Parole: Four Inmates’ Stories, N.Y. TIMES (Dec. 12,
A final corollary consequence of *Harmelin* has been with respect to the potential application of the Eighth Amendment to federal drug sentences. In establishing that the Eighth Amendment does not place any real restriction on non-capital sentences, excessive federal drug sentences (many of which were mandatory) continued to persist after *Harmelin*.  

3. Considerations of Stare Decisis

The Court’s approach in *Harmelin* itself lowered the bar for stare decisis in Eighth Amendment cases by reversing the Court’s prior approach from eight years before in *Solem v. Helm*.  The Court explained, “[w]e have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents, and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions.”

Recent history suggests that *Harmelin* ought to be hoisted on its own petard and overruled by the Court. Recent development of the principles of (1) proportionality, (2) differentness, and (3) individualized sentencing suggest that this decision is “in apparent tension with other decisions.”

Beginning in 2002, the Supreme Court has repeatedly held that the Eighth Amendment contains a proportionality guarantee that prohibits the imposition of certain death and JLWOP sentences. These cases apply the principle of the purposes of punishment to help determine excessiveness.

With respect to differentness, the Court has recognized a second kind of differentness—juvenile offenders. The Court has thus started to chip away at the differentness bright-line by applying the Eighth Amendment to restrict state punishment practices in non-capital cases.

Finally, in one of the JLWOP cases, *Miller v. Alabama*, the Court reinvigorated its principle from *Woodson* and *Lockett* that offenders deserve individualized sentencing consideration. This decision casts some doubt on the efficacy of the mandatory sentencing part of *Harmelin*.

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105. 463 U.S. 277, 279–84 (1983) (reversing sentence of LWOP for presenting a no account check for $100, where defendant had six prior felony convictions).
109. *See Berry, supra* note 62, at 347.
110. 567 U.S. 460.
111. *Id.* at 475 (banning mandatory JLWOP sentences).
D. The Problem of Arbitrary Death Sentences (Pulley)

While the problem of Harmelin is the absence of review of non-capital sentences, the problem of Pulley v. Harris is the absence of review of jury imposition of death sentences. As explained below, the failure to examine such decisions results in a series of arbitrary capital sentencing outcomes.

1. Pulley v. Harris

In Pulley, the petitioner appealed his death sentence on the ground that the California Supreme Court did not engage in comparative proportionality review of his sentence.112 The California scheme at the time required appellate review of death sentences but did not compare those sentences to other cases.113 The Court held that California’s system did not violate the Eighth Amendment, highlighting its prior decision in Jurek v. Texas,114 where it had affirmed Texas’s capital sentencing scheme that, likewise, did not mandate comparative proportionality review.115 The Court explained that the Constitution did not require comparative proportionality review.116 Rather, the Constitution merely demands meaningful appellate review such that the sentencing outcome is not arbitrary.117

2. The Consequences of Pulley

In addition to preventing the regulation of disproportionate and mandatory punishments, the Court’s unusual deference approach also enables states to impose arbitrary punishments, particularly in capital cases. The Court’s holding in Furman struck down the death penalty in large part because of the randomness of the outcomes in jury sentencing. Justice Potter Stewart famously likened the imposition of the death penalty at that time to being “struck by lightning.”118

113. Id. at 53 (recognizing that “[t]he [California] statute does not require comparative proportionality review”).
115. Pulley, 465 U.S. at 50–51. Part of the Court’s reaction to the Furman backlash described above, Jurek also is of questionable merit, particularly because it allows for death sentences based upon future dangerousness. See William W. Berry III, Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty, 52 ARIZ. L. REV. 889, 915–16 (2010). I do not discuss it separately here because its shortcomings are cabined to Texas.
117. Id. at 59 (Stevens, J., concurring in part and concurring in judgment) (noting that “meaningful appellate review is an indispensable component of the Court’s determination that the State’s capital sentencing procedure is valid”).
A quick look at the modern death penalty suggests little has changed. Annually, there are over 15,000 murders in the United States, and the number of executions has been fewer than fifty-five per year for the last decade. The individuals executed are often not the worst offenders. Rather, a number of inappropriate variables—geography, prosecutors, lawyering, and race—seem to have a determinative effect on who receives the death penalty.

Jury sentencing remains one source of the wide disparity in capital sentencing outcomes. Jurors historically lacked any guidance in sentencing capital cases, making for wide variations in sentencing results. After Furman, states adopted aggravating and mitigating

122. See Adam M. Gershowitz, Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty, 63 VAND. L. REV. 307, 308–09 (2010) (commenting that capital punishment is often sought only by a handful of counties).
124. See Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Joseph L. Rauh Lecture (Apr. 9, 2001), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a (“I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”); Charles Lane, O’Connor Expresses Death Penalty Doubt, WASH. POST (July 4, 2001), https://www.washingtonpost.com/archive/politics/2001/07/04/oconnor-expresses-death-penalty-doubt/bcafeb53-43d0-4af5-9f5f-b124c6c66cd5/?utm_term=.c592da5d8246 (“Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used,’ O’Connor said.”).
125. See generally David C. Baldus & George Woodworth, Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research, 39 CRIM. L. BULL. 194 (2003) (commenting that African-American defendants are sentenced to death more often when the victim is Caucasian, as opposed to any other defendant/victim combination).
126. Prosecutorial discretion also plays a major role here, but to date the Court has not applied the Constitution to restrict such discretion.
127. See McGautha v. California, 402 U.S. 183, 207 (1971) (holding that the broad discretion afforded to juries did not violate the petitioners’ due process rights under the Fourteenth Amendment), reh’g granted and vacated on other grounds by Crampton v. Ohio, 408 U.S. 941 (1972).
circumstances or similar guideposts to guide juries.\textsuperscript{128} Even so, studies since \textit{Furman} demonstrate wide variances in sentencing outcomes.\textsuperscript{129}

The Supreme Court in \textit{Gregg}, which reinstated the death penalty after \textit{Furman},\textsuperscript{130} allowed its reintroduction based not only upon the adoption of the aggravating and mitigating circumstances to frame jury discretion, but also appellate review by the state supreme court with respect to the proportionality of the sentence imposed.\textsuperscript{131} Specifically, this comparative proportionality review sought to identify outliers in outcomes to mandate some level of consistency in outcomes.\textsuperscript{132}

The tension between individualized sentencing determinations in capital cases and consistency in results remains.\textsuperscript{133} While the outcomes do not have to be identical, they certainly cannot be random or arbitrary given the consequences of the sentence (death).\textsuperscript{134} Comparative proportionality review by a state supreme court can reduce and even

\textsuperscript{128} See, e.g., Corinna Barrett Lain, \textit{Furman} Fundamentals, 82 \textit{WASH. L. REV.} 1, 58 (2007) (noting that, after \textit{Furman}, Georgia amended its death penalty statute to include aggravating circumstances).


\textsuperscript{130} \textit{Gregg v. Georgia}, 428 U.S. 153, 207 (1976) (plurality opinion).

\textsuperscript{131} \textit{Id.} at 196–98.


\textsuperscript{133} See Walton v. Arizona, 497 U.S. 639, 656, 664–65 (1990) (Scalia, J., concurring in part and concurring in judgment) (noting that “our jurisprudence and logic have long since parted ways” because “[t]he latter requirement ([individualized factual determinations]) quite obviously destroys whatever rationality and predictability the former requirement ([limitations on jury discretion]) was designed to achieve”), \textit{overruled by} \textit{Ring v. Arizona}, 536 U.S. 584, 589 (2002); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); \textit{Gregg}, 428 U.S. at 206; \textit{see also} William W. Berry III, \textit{Practicing Proportionality}, 64 \textit{FLA. L. REV.} 687, 690 (2012) (explaining that “the consideration of individualized, mitigating facts necessary for absolute proportionality review eviscerates the consistency achieved by relative proportionality parameters”); Berry, \textit{supra} note 132, at 71 (noting the balance courts must strike between case-by-case analysis and consistent results).

eliminate randomness in cases by comparing the case on appeal to similar cases and assessing the outcome in such cases.135 Nonetheless, this safeguard constituted a central reason why the Supreme Court in Gregg upheld Georgia’s revised capital scheme, as it provided protection against the random and arbitrary outcomes condemned in the opinions in Furman.136 To be clear, the central concern in Furman was the random and arbitrary administration of the death penalty, of which juries were a primary cause.137 As explained below, Pulley undermined this safeguard by removing it from the purview of the Eighth Amendment.138

Pulley’s consequences are twofold. First, petitioners cannot raise a constitutional challenge based on the lack of comparative proportionality imposed by states at sentencing.139 With this no longer being part of the Eighth Amendment, the Court has undermined a significant part of the safeguards it upheld in Gregg as the basis for satisfying the concerns identified in Furman.140 The appellate court merely has to pay lip service to the sentence by saying it was not arbitrary, as there is no required point of comparison to address the wild variances that arise from jury sentencing.141 Second, states that still utilize proportionality review merely violate state statutes by failing to apply it rigorously, leaving them free to administer it in a cavalier manner.142 Furthermore, there is a strong likelihood that pro-death penalty legislatures will eliminate comparative proportionality review if the courts use it to reverse death sentences.143

Indeed, the manner in which states apply proportionality review, for the most part, guarantees that no case will ever be disproportionate.144 Most state supreme courts that use this method compare the case on

135. See Berry, supra note 121, at 96–97.
136. Gregg, 428 U.S. at 206 (“The provision for appellate review ... serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.”).
137. See Furman, 408 U.S. at 253 (Douglas, J., concurring).
138. See infra text accompanying notes 140–49.
140. See Berry, supra note 121, at 74–75; Berry, supra note 133, at 697.
141. See Berry, supra note 121, at 75; Berry, supra note 133, at 707.
142. See Berry, supra note 133, at 697.
143. See id. at 696; Berry, supra note 121, at 74–75.
appeal to one or more similar death cases that involved the same statutory aggravating circumstance. Not only do the courts refuse to examine cases with similar fact patterns where the defendant received a life sentence, but they also use aggravating factors—concepts that can encompass a wide range of dissimilar factual situations—as the basis for identifying similar cases. In Walker v. Georgia, Justice John Paul Stevens’s dissent to the denial of certiorari made this point. Serving as one member who wrote the plurality opinion in Gregg, he chastised the Georgia Supreme Court for the cursory manner in which it conducted comparative proportionality review in capital cases. Justice Stevens explained:

Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. . . .

. . .

Particularly troubling is that the shortcomings of the Georgia Supreme Court’s review are not unique to this case. . . .

. . . And the likely result. . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

The reality, then, is that state supreme courts provide no check against disparities in jury sentencing—the problem identified in Furman—thus allowing arbitrariness to persist.

3. Considerations of Stare Decisis

Without comparative proportionality review, the Furman problem of arbitrary and random capital sentencing outcomes persist. Pulley is perhaps the most significant in a line of cases that largely undermines the protections affirmed in Gregg. As such, the Court could easily reverse Pulley on the grounds that it is inconsistent with Furman and allows the persistence of arbitrary death sentences.

145. See Berry, supra note 121, at 77; Berry, supra note 133, at 708.
146. See Berry, supra note 133, at 708.
148. Id. at 982–83 (Stevens, J., dissenting).
149. Id. at 982–84.
In addition, the Court has a long history of reversing its Eighth Amendment cases.\(^{150}\) For instance, it reversed *Penry v. Lynaugh*\(^{151}\) and *Stanford v. Kentucky*\(^{152}\) in its decisions in *Atkins v. Virginia*\(^{153}\) and *Roper v. Simmons*.\(^{154}\) Certainly, stare decisis should not preclude a careful re-examination of *Pulley* and arbitrariness in jury sentencing outcomes.

### E. The Problem of Discriminatory Death Sentences (McCleskey)

In addition to deferring to the states on the question of mandatory sentences, absolute proportionality, and comparative proportionality, the Supreme Court has ultimately deferred to states on the most fundamental question of fairness—racial discrimination.

#### 1. *McCleskey v. Kemp*

In *McCleskey v. Kemp*, Warren McCleskey challenged Georgia’s capital punishment system on the grounds that systemic race discrimination resulted in an arbitrary death penalty in violation of the Eighth and Fourteenth Amendments.\(^{155}\) To support his claim, McCleskey introduced two studies performed by David Baldus and his colleagues.\(^{156}\) These studies demonstrated clear evidence of racial discrimination in Georgia’s death penalty system.\(^{157}\)

Specifically, the Baldus studies showed that offenders who killed white victims were four times more likely to receive the death penalty than those who killed African-American victims.\(^{158}\) In addition to demonstrating the significant role race played in jury outcomes, the studies also showed how race influenced the decisions of prosecutors.\(^{159}\) Illustratively, cases in which an African-American killer murdered a

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157. See Baldus et al., *Comparative Review of Death Sentences*, supra note 144, at 731 ("Finally, our analyses suggest that Georgia’s death-sentencing system is tainted by the influence of arbitrary and capricious factors, notably the victim’s race . . ."); see also William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 459 n.91 (2011).

158. See Baldus et al., *Comparative Review of Death Sentences*, supra note 144, at 709.

159. Id.
white victim were substantially more likely to garner capital prosecutions than cases where a white killer murdered an African-American victim. 160

The Supreme Court did not challenge the results of Baldus’s studies and assumed, for purposes of the case, that the results were accurate. 161 Nonetheless, the Court denied McCleskey’s claims in a narrow 5–4 decision. 162 At the heart of the Court’s reasoning rested two central conclusions. First, in order to demonstrate prejudice warranting relief under the Eighth and Fourteenth Amendments, the Court held that McCleskey must have shown more than just systemic racial discrimination. 163 The Court concluded that to prevail, he must have shown that racial discrimination affected the outcome of his particular case. 164 The Court majority thus ignored the systemic discrimination because McCleskey lacked proof of individualized discrimination, despite both (1) the difficulty in proving such discrimination and (2) that his conviction and sentence occurred within a discriminatory system. 165

Second, the Court opined that ruling in McCleskey’s favor would open Pandora’s box to claims it did not want to pursue. For example, if the Court found that Baldus’s evidence regarding Georgia’s systematic racial discrimination in capital cases warranted relief for McCleskey, then, in theory, it would open the door for habeas corpus claims from all of Georgia’s death row. 166 Further, if similar evidence indicated that the systemic racial discrimination went beyond just capital sentencing, petitioners could challenge the entire criminal justice system in Georgia and have grounds for relitigating their convictions. 167 This slippery slope articulated by the Court served in part to justify its decision to ignore the Baldus evidence’s possible application to McCleskey and instead require proof of such discrimination on an individual level. 168

Again, deference to the states echoes through this decision. By deferring to states, even when states act maliciously, the Court prefers the majority practice to constitutional restriction.

160. Id. at 709 n.131.
161. See McCleskey, 481 U.S. at 291 n.7.
162. Id. at 319.
163. Id. at 292.
164. Id.
165. Id. at 292–93.
166. Id. at 315.
167. Id.
168. Id. at 314.
2. The Consequences of *McCleskey*

From the time of *Furman*, the Court has been aware of the influence of race in capital cases.\(^{169}\) For example, several of the concurring opinions in *Furman* highlighted the racial disparity in the administration of the death penalty.\(^{170}\) Over time, a number of studies have explored this issue. As explained below, such studies have consistently demonstrated that the race of the victim is predictive of death sentences, with homicides of white victims being more likely to result in death sentences than homicides of African-American victims.

There remains significant evidence that racial discrimination persists in the criminal justice system.\(^{171}\) This persistence becomes particularly troubling in capital cases, when the stakes are so high. The idea that race plays a significant role in determining which offenders receive the death penalty undermines the legitimacy of the criminal justice system as a whole.

The most obvious consequence of *McCleskey* rests in the persistence of race discrimination in capital cases, not only in Georgia, but also throughout the United States.\(^{172}\) Indeed, evidence continues to show that race plays a significant role in the administration of the death penalty in the United States, usually arising out of prosecutorial discretion and sentencing determinations.\(^{173}\)

This decision also discourages broader challenges to discrimination in state and federal sentencing practices. With the Court requiring proof of discrimination on an individualized level, it made attacks on discrimination in capital cases substantially more difficult.\(^{174}\) Perhaps more importantly, the *McCleskey* decision closed the door to systemic challenges to race discrimination.\(^{175}\) As a result, states lack any incentive, at least constitutionally driven ones, to engage in reform to cure race-based capital sentencing. Finally, the *McCleskey* decision invited the Court in later opinions to mandate that individual proof, and not systemic


\(^{170}\) Id. at 249–51 (Douglas, J., concurring); id. at 257 (Brennan, J., concurring); id. at 364 (Marshall, J., concurring).

\(^{171}\) See generally ALEXANDER, supra note 104 (highlighting racial disparity in the justice system); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (further highlighting racial inequality in sentencing); 13TH (Netflix 2016) (documentary examining the history of racial inequality in the prison system).


\(^{175}\) See id. at 292–97.
error, had to serve as a basis for relief for potentially afflicted offenders.176

The best example of this arises in execution cases when the Court requires that an offender demonstrate that a particular execution procedure creates a substantial risk of severe pain for him, and not generally.177 With a procedure like lethal injection that hides the effects of its drugs by using a paralytic, the petitioner cannot know what will happen to him with respect to pain.178 The design of the procedure is such that no one watching can know whether the potassium chloride caused pain, because the paralytic makes it impossible for the petitioner to have any visible reaction.179 And yet, the Court relied on the same reasoning as McCleskey in affirming two different versions of the lethal injection procedures. By requiring proof of individualized prejudice where such prejudice remains hidden, the Court essentially foreclosed legitimate challenges to systemic risks of constitutional violations, whether based on race discrimination or cruel and unusual infliction of torturous pain.

3. Considerations of Stare Decisis

The author of the majority opinion, Justice Lewis F. Powell, had second thoughts concerning the McCleskey decision.180 When asked by his former law clerk whether he would change his vote in a prior case, Justice Powell responded, “Yes, McCleskey v. Kemp.”181

With one member of its 5–4 majority later recanting his opinion, McCleskey is ripe for re-examination. This is particularly true because of the volume of additional social science evidence that supports Baldus’s Georgia studies. The overwhelming evidence demonstrates that race unfairly influences the imposition of the death penalty. Such a reality remains intolerable in a criminal justice system that purports to be just and fair.

In addition, the Pandora’s box argument from the Court remains overstated. Where there is compelling evidence of systemic discrimination in a state over a period of time, one easy solution would be to commute the death sentences during that time to LWOP. The practical difference might be insignificant, as states are slow to execute

176. See id. at 292.
178. See Berry & Ryan, supra note 45, at 425.
179. Id. at 406.
180. See Berry, supra note 157, at 442–43.
181. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (quoting a conversation between Justice Powell and his former law clerk, John Jeffries, which was recorded for a biography of Justice Powell that Jeffries wrote).
their offenders anyway, often taking over a decade to impose the sentence.182 Likewise, almost two-thirds of capital cases contain error that causes appellate courts to reverse them.183 Reversing a few more to remedy race discrimination does not seem so far-fetched.

Finally, the Court could use its death-is-different principle as a basis for only re-examining capital cases, rather than other examples of discrimination in criminal justice. To be sure, states should really make every effort to eliminate race discrimination in the present and future, as well as remedy instances of such injustice occurring in the past. The overwhelming nature of that project should not chill the Court from starting with capital cases to remedy the most serious of injustices.

III. REMEDYING UNUSUAL DEFERENCE

Part I of this Article demonstrated the genesis of the Court’s unusual deference to states in sentencing criminal offenders. In Part II, it demonstrated how the core absolute proportionality doctrine remains limited in its application because it relies on majoritarian concepts as the normative foundation for the counter-majoritarian constitutional proscription against cruel and unusual punishments.

Part II then examined three of the most egregious examples of how this cancer spread to accord states deference with respect to absolute proportionality, mandatory sentences, comparative proportionality, and discrimination. This Part concludes this Article by articulating a first principles approach to the Eighth Amendment that robustly defends individual rights and does not blindly defer to states.

A. The Basic Framework

Contrary to the Court’s decisions, it is possible to create a framework to apply the Eighth Amendment more broadly to undercut mass incarceration. At the very least, the individual rights of criminal offenders warrant doctrinal reconsideration.

1. Three Aspects: Type, Method, and Technique

The Eighth Amendment applies to three separate aspects of punishing criminal offenders: the type of punishment, the method of punishment, and the technique of punishment.184 In a lethal injection, for instance, the type of punishment is death, the method is lethal injection, and the

184. Berry & Ryan, supra note 45, at 409.
technique is the three-drug protocol. All three should be subject to the same inquiry under the Eighth Amendment.

Before exploring each, it is worth recalling that the Court’s cases and the originalist interpretations of the Eighth Amendment both envision a constitutional provision that evolves over time. Also, for purposes of this analysis, the concepts of “cruel and unusual” are applied as a unitary concept. In addition, each of these three aspects of punishment—the type, the method, and the technique—cannot be cruel and unusual in an individual sense or a systemic sense. The individual inquiry into whether the Constitution proscribes an aspect of punishment has two components: (1) core normative values and (2) absolute proportionality. The systemic inquiry likewise has two parts: (1) comparative proportionality and (2) systemic fairness.

2. Individual Inquiry (Core Values and Absolute Proportionality)

The first individual inquiry applies the core normative values of the Eighth Amendment—the dignity of man and the right to be free from torture. This concept, which needs further development by the Court, mirrors the Court’s decision in Trop v. Dulles, where it held that denationalization was an unconstitutional type of punishment. Other punishment types, methods, or techniques that compromise the dignity of an offender or are otherwise particularly brutal might fall under this proscription as well.

Further, the Court should require individualized sentencing determinations in all cases with serious punishments. At the very least, the Court should eliminate mandatory LWOP sentences in the same way it has eliminated mandatory JLWOP sentences and mandatory death sentences. As the Court’s capital cases show, the dignity of the offender requires individualized sentencing consideration in cases involving the punishment of death. This principle should apply irrespective of whether the death is in a prison cell or in an execution chamber.

The second individual inquiry, absolute proportionality, explores whether the punishment type, method, or technique is excessive in light of the crime committed. This assessment requires application of the purposes of punishment to make such a determination, as the Court has done in the application of its subjective view under the evolving-standards-of-decency doctrine. As in Weems, the Court should proscribe excessive punishments that are disproportionate. Unlike its current

185. See Bray, supra note 56.
189. See Berry, supra note 132, at 96.
190. See Berry, supra note 43. But see Stinneford, supra note 43, at 962.
practice, the Court should apply this absolute proportionality inquiry to all cases, not just capital and JLWOP ones, as punishments not approaching death can still be both wildly disproportionate and constitute cruel and unusual punishments.

3. Systemic Inquiry (Comparative Proportionality and Fairness)

The Eighth Amendment’s systemic inquiry exists to make sure that arbitrariness does not persist in the administration of punishment types, methods, or techniques. Comparative proportionality review in capital cases exists to remedy inconsistencies in jury verdicts. While this is less of a concern with lower level punishments, death sentences require some modicum of consistency or, at the very least, something more than complete arbitrariness. The Eighth Amendment should thus require appellate review of jury sentencing outcomes in capital cases by state supreme courts. Otherwise, the Court’s decision in Furman has no meaning.

The second systemic inquiry should read the Eighth Amendment to prohibit any pervasive influence of non-acceptable indicia, particularly race. Where the Court finds race discrimination or other systemic error, the Court cannot simply pretend as if it does not exist or otherwise wish it away as it did in McCleskey.

The Court can order remedies to address these problems, much like it has done in other contexts like affirmative action. While the cost of re-litigating cases is expensive, the cost of injustice is much higher, particularly in the context of the death penalty. While finality perhaps can trump justice in some contexts, the death penalty should not be one of them.

B. Some Applications of the Basic Principles

In addition to addressing the erroneous decisions in Harmelin, Pulley, and McCleskey, there are a number of obvious applications of the Eighth Amendment that rest on core values and not majoritarian pandering. The use of LWOP sentences is an obvious place to begin, with some regulation necessary to eliminate the arbitrariness inherent in death-in-prison sentences.

Further, the Court should abolish JLWOP under the Eighth Amendment. Doing so is possible even if the Court continues to use the

191. See Berry & Ryan, supra note 45, at 410.
192. See Berry, supra note 132, at 80.
broken evolving-standards-of-decency doctrine, with a number of states outlawing JLWOP and the United States remaining as the only country currently using JLWOP.195

Mandatory sentences, particularly ones with long sentences, deserve significant scrutiny. As discussed above, such sentences deny analysis of proportionality and individualized consideration of offenders. More generally, the Court should consider claims of disproportionality in sentencing under the Eighth Amendment. In the current regime, excessive sentences are common, and contribute significantly to the mass incarceration epidemic.

To the extent that the death penalty survives under a more robust Eighth Amendment, the safeguards approved in Gregg, including comparative proportionality review, serve as minimum requirements. Revisiting the Court’s execution-technique jurisprudence would also be advisable.

Finally, the Court should use the Eighth Amendment as a tool by which to eradicate racism in the criminal justice system, particularly in capital cases. At the very least, the Court should put the burden on the states to change their practices and combat race discrimination.

**CONCLUSION**

This Article has demonstrated that the Supreme Court’s Eighth Amendment jurisprudence rests on a faulty premise—that state punishment practices are entitled to broad deference by the Court. In particular, this Article explained how the misreading of “unusual” drives the missteps of the evolving-standards-of-decency cases. In addition, this Article showed how three decisions adhering to this principle—Harmelin, Pulley, and McCleskey—prevent the Court from applying core Eighth Amendment principles to limit disproportionate sentences, mandatory sentences, comparatively disproportionate sentences, and discriminatory sentences.

Having demonstrated the Court’s errors, this Article then articulated a holistic model of the Eighth Amendment that cures these errors. This Article ended by briefly suggesting some of the many applications of this improved jurisprudential model.

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