ARTICLES

CRUEL AND UNUSUAL NON-CAPITAL PUNISHMENTS

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ABSTRACT

The Supreme Court has rendered the Eighth Amendment a dead letter with respect to non-capital, non-juvenile life-without-parole sentences. Its cases have erected a gross disproportionality standard that seems insurmountable in most cases, even for draconian and excessive sentences. State courts have adopted a similar approach in interpreting state constitutional Eighth Amendment analogues, often finding that they are no broader than the Supreme Court's narrow interpretation of the Eighth Amendment, despite linguistic variations in many cases.

Nonetheless, in a handful of state cases, state courts have found that state punishments violate the Eighth Amendment or its state constitutional analogue. This Article examines those cases to identify which non-capital punishments have caused courts to limit state punishment practices even in the shadow of an overwhelming, albeit unfortunate, trend of according constitutional deference to state punishment practices. In light of these decisions, this Article advances a series of possible arguments by which to attack state and federal punishment practices in an effort to create more exceptions to the draconian status quo constitutional rule.

In Part I, the Article begins by providing an overview of Eighth Amendment gross disproportionality doctrine and its use in state constitutional analogues to the Eighth Amendment. Part II examines the handful of state court cases that have found punishments unconstitutionally disproportionate. In Part III, the Article advances one set of arguments—both systemic and case-based—for use in attacking non-capital state punishments under state constitutions. Part IV then advances a second set of arguments—both systemic and case-based—for use in attacking non-capital state punishments under the Eighth Amendment. The Article concludes that such arguments can be successful in the future, even where they may have failed in the past.

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INTRODUCTION

In the modern era, the Supreme Court has rendered the Eighth Amendment a dead letter with respect to non-capital, non-juvenile life-without-parole sentences.[1] Its cases have erected a gross disproportionality standard that seems insurmountable in most cases, even for draconian and excessive sentences.[2] State courts have adopted a similar approach in interpreting state constitutional Eighth Amendment analogues, often finding that they are no broader than the Supreme Court's narrow

1. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145, 1179–80 (2009).
2. *See infra* text accompanying note 10.

interpretation of the Eighth Amendment, despite linguistic variations in many cases.[3]

Nonetheless, in a handful of cases, state courts have found that state punishments violate the state constitutional analogue to the Eighth Amendment. This Article examines those cases to identify which non-capital punishments have caused courts to limit state punishment practices even in the shadow of an overwhelming, albeit unfortunate, trend of according constitutional deference to state punishment practices. In light of these decisions, this Article advances a series of possible arguments by which to attack state and federal punishment practices in an effort to create more exceptions to the draconian status quo constitutional rule.

In Part I, the Article begins by providing an overview of Eighth Amendment gross disproportionality doctrine and its use in state constitutional analogues to the Eighth Amendment. Part II examines the handful of state court cases that have found punishments unconstitutionally disproportionate. In Part III, the Article advances one set of arguments—both systemic and case-based—for use in attacking non-capital state punishments under state constitutions. Part IV then advances a second set of arguments—both systemic and case-based—for use in attacking non-capital state punishments under the Eighth Amendment.

I. WHICH PUNISHMENTS ARE CRUEL AND UNUSUAL?

The Eighth Amendment proscribes cruel and unusual punishments.[4] The Supreme Court has not agreed upon the definitional meanings of the terms "cruel"[5] and "unusual"[6] in its cases,[7] but instead has often articulated the general principle that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[8]

With a few exceptions, the unfortunate approach of the Supreme Court to this important individual right to be free from excessive punishment has generally been

3. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1252 (2020).

4. U.S. CONST. amend. VIII.

5. *See* John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 444 (2017).

6. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1764 (2008).

7. *See* Furman v. Georgia, 408 U.S. 238, 258 (1972) (per curiam); *see also* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 58 (2007) (explaining that the Supreme Court has struggled to articulate standards for imposing the death penalty). Scholars have debated whether the "and" in "cruel and unusual" is conjunctive or acts as a hendiadys proscribing "unusually cruel" punishments. *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 569 (2010) (arguing for the conjunctive reading); Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695, 712 (2016) (arguing for the hendiadys reading); Stinneford, *supra* note 5, at 468 n.167 (criticizing the hendiadys reading). Indeed, multiple readings of the "and" are possible.

8. Trop v. Dulles, 356 U.S. 86, 100 (1958); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2131–32 (2016).

to defer to the punishment decisions of the states,[9] even when they are draconian.[10] State courts, in applying their own state analogues to the Eighth Amendment, have uniformly used the Court's federal constitutional doctrine, rejecting almost all challenges under state constitutions.[11]

A. The Federal Approach

Initially, the Supreme Court's approach to Eighth Amendment challenges for excessive punishments was promising, with the Court reversing two early cases.[12] Both were non-capital cases in which the Court found the sentence to be cruel and unusual. As explored below, the Court's modern Eighth Amendment evolving standards of decency doctrine retains the underpinning of these cases—that the Eighth Amendment evolves over time—but ultimately limits this approach to capital cases and juvenile life without parole ("JLWOP") cases.

1. *Weems* and *Trop*

In *Weems v. United States*, the Court considered the constitutionality of the punishment of fifteen years of *cadena temporal* for the crime of falsifying a public and official document.[13] The Court held that the punishment imposed by the Philippine Commission violated the Eighth Amendment because of its excessive, disproportionate nature.[14] In addition to casting doubt on the use of *cadena temporal* in any

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9. *See* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 318 (2018). This deference has made courts blind to other possible applications of Eighth Amendment values as well. *See, e.g.*, Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987, 988–89 (2015) (arguing for the application of the Eighth Amendment to policing).

10. *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 the defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 30–31 (2003) (plurality opinion) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs where the defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 996 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 371, 375 (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 life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions).

11. *See* Berry, *supra* note 3, at 1214.

12. *See* Weems v. United States, 217 U.S. 349, 382 (1910); *Trop*, 356 U.S. at 104. Prior to *Weems*, the Court upheld Eighth Amendment challenges to a $50 fine and three-months imprisonment for a violation of a prohibition law. Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 479–80 (1866). The Court also upheld a Utah statute allowing the state court to choose the execution method for a capital offense among the options of shooting, hanging, or beheading. Wilkerson v. Utah, 99 U.S. 130, 136–37 (1878).

13. *Weems*, 217 U.S. at 357–58. The Court described *cadena temporal* as a form of hard labor. *Id.* at 364 ("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." (citation omitted)).

14. *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."). The Philippines was a U.S. territory at the time. Like many of the states discussed below, the Philippine Bill of Rights contained an analogue to the Eighth Amendment using almost identical language. *Id.* at 367.

situation, the Court established that the meaning of the Eighth Amendment was not fixed,[15] but progressive,[16] and could shift over time to account for growth in societal understanding of dignity.[17]

Nearly fifty years later, in *Trop v. Dulles*, the Court followed *Weems* and its analysis in striking down another non-capital punishment under the Eighth Amendment.[18] The Court held that denationalization was an excessive punishment for the crime of treason.[19] The decision again showed that non-capital punishments are subject to the Eighth Amendment.

Trop also cemented the Court's explanation in *Weems* that the Eighth Amendment evolves over time.[20] In establishing that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[21] the Court in *Trop* set the foundation for its evolving standards of decency doctrine by which it would evaluate "different" punishments.[22]

2. Differentness and the Evolving Standards

Under its evolving standards of decency doctrine, the Court has employed a two-part test—one part objective and the other subjective—to determine whether a punishment violates the Eighth Amendment. The first part of the test, arguably a proxy for unusualness, explores majoritarian, objective indicia—typically state statutes—to determine whether the punishment is still constitutional.[23] Where the

15. *Id.* at 373 ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. 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.").

16. *Id.* at 378 ("The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (citation omitted)).

17. *Id.* at 373 (explaining that if the Eighth Amendment did not change over time, "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas" in that "[r]ights declared in words might be lost in reality"); *see also* Ryan, *supra* note 8, at 2148.

18. 356 U.S. 86, 102–03 (1958).

19. *Id.*

20. This interpretation is apparently accurate irrespective of whether one subscribes to a living constitutionalist or an originalist method of constitutional interpretation. *See* Stinneford, *supra* note 6, at 1743 (noting that the two approaches to the Cruel and Unusual Punishments Clause "are not nearly so different as they seem").

21. *Trop*, 356 U.S. at 100–01 (noting the *Weems* Court's recognition "that the words of the [Eighth] Amendment are not precise, and that their scope is not static").

22. I have argued elsewhere that the evolving standards have moved far beyond what the Court has been willing to recognize to date. William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 109–11 (2018).

23. *See id.* at 117. While this part of the approach seems contrary to protecting individual rights against the overreach of majoritarian legislatures, the Court has used similar state-counting approaches in other constitutional tests. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 367–70 (2009); *see also* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1144–46 (2014) (arguing for an Eighth Amendment

Court has found that thirty or more states have abandoned a punishment practice, the Court has concluded that the practice violates the objective prong of the evolving standards of decency.[24]

In the second part of the test, arguably a proxy for cruelty, the Court's own subjective judgment is "brought to bear."[25] The Court assesses the proportionality of the punishment by assessing whether one or more of the purposes of punishment—retribution, deterrence, incapacitation, or rehabilitation—justify the imposition of the punishment.[26] If none of the purposes of punishment justify the imposition of the punishment, it violates the second prong of the evolving standards of decency test.[27]

The Court has used the Eighth Amendment evolving standards of decency test to proscribe death sentences of intellectually disabled offenders[28] and juvenile offenders,[29] as well as death sentences for rape,[30] child rape,[31] and some felony murders.[32] In addition, the Court more recently has found that mandatory JLWOP sentences violate the evolving standards of decency.[33]

The Court, however, only applies the evolving standards to crimes that are "different."[34] For "non-different" crimes, it applies an almost insurmountable gross disproportionality standard.[35] The Court initially determined that "death is

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model that accords more value to individual rights); William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 75 (2015) (same). The Court has also looked at jury verdicts, *Coker v. Georgia*, 433 U.S. 584, 596–97 (1977) (plurality opinion), as well as the direction of state legislative change and international norms, *Roper v. Simmons*, 543 U.S. 551, 565–68, 575–78 (2005), in its analysis of objective indicia. For a discussion on the use of international norms in American law, see David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

24. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–15 (2002) (thirty-three states); *Roper*, 543 U.S. at 564 (thirty states); Enmund v. Florida, 458 U.S. 782, 792–93 (1982) (forty-two states).

25. *Coker*, 433 U.S. at 597; Berry, *supra* note 22, at 117–18.

26. *See, e.g.*, *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 571–72; Kennedy v. Louisiana, 554 U.S. 407, 441–46 (2008). Typically, in capital cases, the only relevant purposes of punishment are retribution and deterrence. *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, 903–04 (2010) (arguing that incapacitation should not be a justification for the death penalty). *But see* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1243–45 (2013) (proposing a rethinking of the relationship between rehabilitation and the death penalty).

27. *See, e.g.*, *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 571–72; *Kennedy*, 554 U.S. at 441–46.

28. *Atkins*, 536 U.S. at 321.

29. *Roper*, 543 U.S. at 568.

30. *Coker*, 433 U.S. at 597.

31. *Kennedy*, 554 U.S. at 421.

32. *See* Enmund v. Florida, 458 U.S. 782, 784–85, 801 (1982) (striking down a felony murder conviction for a getaway driver accomplice as excessive under the Eighth Amendment). *But see* Tison v. Arizona, 481 U.S. 137, 158 (1987) (finding that the imposition of capital punishment for felony murder on accomplices who did not possess intent to kill was not inherently unconstitutional).

33. Miller v. Alabama, 567 U.S. 460, 465 (2012) (homicide); Graham v. Florida, 560 U.S. 48, 82 (2010) (nonhomicide).

34. *See* Barkow, *supra* note 1, at 1146–49 (acknowledging the Court's different treatment of capital cases); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N. U. L. REV. 861, 871–72 (2008) (distinguishing between capital and non-capital sentencing systems).

35. *See supra* text accompanying note 10.

different"[36] because it is the most severe punishment and is an irrevocable punishment.[37] As such, the death penalty has received the heightened constitutional scrutiny accorded by the evolving standards of decency.[38] In non-capital cases, the Court has applied a much lower standard, as discussed below.[39] And after four decades of a bright line between capital and non-capital cases, the Court decided that juveniles were also different, expanding the application of the evolving standards of decency doctrine to JLWOP cases.[40]

3. Non-Capital, Non-JLWOP Cases

Despite its holdings in *Weems* and *Trop*, the Court's application of the Eighth Amendment to non-capital, non-JLWOP cases since *Furman* has been narrow, and has resulted in finding that almost all punishments satisfy the requirements of the Constitution. In *Rummel v. Estelle*, the Court upheld a Texas recidivist statute that sentenced the defendant to a mandatory life-with-parole sentence despite the defendant's crimes involving a total of approximately $230 stolen over three offenses.[41] The crime at issue involved obtaining $120.75 by false pretenses, but the Court found that the life sentence was not grossly disproportionate to the crime, noting the possibility that the defendant could receive parole in twelve years.[42]

Similarly, in *Hutto v. Davis*, the Court upheld a sentence of forty years and a $20,000 fine under Virginia law for possession with intent to distribute, and the

36. Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion) (stating that death is qualitatively and profoundly different from other penalties); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117–18 (2004) (discussing the Court's death-is-different jurisprudence and requesting additional procedural safeguards "when humans play at God").

37. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row are "unreliable" is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."), *overruled on other grounds by* Hurst v. Florida, 577 U.S. 92 (2016); Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (plurality opinion) (distinguishing the death penalty as "unique and irreversible"); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) ("There is no question that death as a punishment is unique in its severity and irrevocability." (citations omitted)).

38. The unfortunate consequence of according death higher scrutiny is the diminishment of any scrutiny at all for non-capital cases. *See infra* Section IV.A.2.

39. *See* Barkow, *supra* note 1, at 1146; Berman, *supra* note 34, at 871–72.

40. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) (holding that a mandatory JLWOP sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that a JLWOP sentence for a nonhomicide juvenile offender is inconsistent with basic principles of decency). For a further discussion on *Graham*, see 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 (2010).

41. 445 U.S. 263, 265–66 (1980).

42. *Id.* at 280–81.

distribution of, nine ounces of marijuana.[43] Relying on *Rummel*, the Court held that Hutto's sentence did not violate the Eighth Amendment and was not grossly disproportionate to his crime.[44] Justice Powell concurred in the judgment, despite finding Hutto's sentence to be disproportionate, because, in his view, *Rummel* controlled the outcome.[45]

In *Solem v. Helm*, the Court attempted to broaden the gross disproportionality inquiry under the Eighth Amendment, finding that a punishment of life without parole for the crime of uttering a no-account check for $100 under South Dakota's recidivist statute was unconstitutional.[46] The Court's analysis began by emphasizing the importance of proportionality as a core principle of the Eighth Amendment.[47] Consistent with the differentness principle, the Court nonetheless emphasized the deference to be accorded to states in non-capital sentencing.[48] 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.[49]

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.[50] Even with the recidivist premium, the Court found that the punishment of life without parole for passing a bad check was grossly disproportionate.[51]

Less than a decade later, however, the Court substantially narrowed its decision in *Solem*, moving back toward the trajectory of *Rummel*. In *Harmelin v. Michigan*, the Court upheld a mandatory sentence of life without parole for a first-time offense of possession of 672 grams of cocaine.[52] In a 5-4 decision, the Justices in the majority splintered on the reasoning for the decision.[53] In a clear attempt to narrow *Solem*, Justice Scalia, joined by Chief Justice Rehnquist, held that the Eighth

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43. 454 U.S. 370, 370–72 (1982) (per curiam).
44. *Id.* at 372–75.
45. *Id.* at 375 (Powell, J., concurring).
46. 463 U.S. 277, 281–82, 303 (1983). The defendant had six prior felony convictions. *Id.* at 279–80.
47. *Id.* at 284–90 ("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.").
48. *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.").
49. *Id.* at 292.
50. *Id.* at 296–300.
51. *Id.* at 303.
52. 501 U.S. 957, 961, 996 (1991).
53. *Id.* at 961.

Amendment does not contain a proportionality guarantee, and therefore Harmelin's sentence could not be unconstitutionally disproportionate.[54] In contrast, Justices Kennedy, Souter, and O'Connor found that the Eighth Amendment has a proportionality guarantee, but that Harmelin's sentence was nonetheless proportionate in light of the deference accorded to states in non-capital sentencing.[55] Justice Kennedy determined that the *Solem* three-part analysis remained useful, 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."[56]

Justice Kennedy described the tools for the *Solem* analysis as including the following ideas:

> The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." . . . The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. . . . Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . The fourth principle at work in our cases is that proportionality review by federal courts should be informed by "objective factors to the maximum possible extent." . . . [These factors] inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.[57]

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.[58]

Two cases in 2003 underscored this presumption of constitutionality. In *Lockyer v. Andrade*, the Court affirmed two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes where the defendant had three prior felony convictions.[59] Similarly, in *Ewing v. California*, the Court affirmed a

54. *Id.* at 961, 965.

55. *Id.* at 996–1001 (Kennedy, J., concurring).

56. *Id.* at 1005.

57. *Id.* at 998–1001 (internal citations omitted). 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* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005) (developing a robust conception of "political proportionality" and explaining that proportionality can be broader than the retributive concept of "just deserts"). *But see* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 961 (2011) (arguing that Eighth Amendment conceptions of proportionality should be based only on just deserts retribution in light of its original meaning).

58. For an argument that *Harmelin* was wrongly decided, see Berry, *supra* note 9, at 328–30.

59. 538 U.S. 63, 66, 77 (2003).

sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs where the defendant had four prior felony convictions.[60] Importantly, the Court upheld three strikes laws in finding that neither sentence was grossly disproportionate under the Eighth Amendment.[61]

B. State Analogues

The Eighth Amendment does not offer the only path for challenging disproportionate non-capital, non-JLWOP punishments. Most states have state constitutional analogues to the Eighth Amendment that place, in theory, some restriction on the power of the state to punish.[62]

Eleven states use identical language to the Eighth Amendment, proscribing "cruel and unusual" punishments in their state constitutions.[63] Another thirteen states have adopted the "cruel and unusual" language and supplement it with additional requirements.[64] Other state constitutions contain a disjunctive constitutional analogue that proscribes cruel *or* unusual punishments.[65] And six states proscribe cruel, but not unusual, punishments in their respective state constitutions.[66]

The overwhelming majority of states—forty—follow the Supreme Court's approach in the cases described above, applying a gross disproportionality standard

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60. 538 U.S. 11, 30–31 (2003) (plurality opinion).

61. Three strikes laws punish recidivists by imposing a life sentence for a third felony conviction. *See Lockyer*, 538 U.S. at 67–68; *Ewing*, 538 U.S. at 24–26.

62. *See* ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, para. XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. BILL OF RIGHTS § 9; KY. CONST. § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. DECLARATION OF RIGHTS art. 16; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. XXXIII; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

63. These states are Arizona, Colorado, Georgia, Idaho, New Mexico, New York, Ohio, Tennessee, Utah, Virginia, and Wisconsin. Berry, *supra* note 3, at 1252.

64. Indiana, Maine, New Hampshire, Oregon, and West Virginia, for instance, add a proportionality requirement. *Id.* at 1252–53. Florida explicitly incorporates the Eighth Amendment into its state constitution. *Id.* Louisiana adds excessive punishments as well. *Id.* Montana adds a dignity requirement. *Id.* Iowa, Missouri, and Nebraska make "punishments" singular. *Id.* Alaska adds the purposes of punishment to its state constitutional analogue. *Id.* New Jersey adds its own special death penalty rule. *Id.*

65. These states include Alabama, Arkansas, California, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming. *Id.* Of these, South Carolina adds a corporal punishment provision. *Id.* California, Michigan, and Minnesota add a combination of the evolving standards with the gross disproportionality standard, allowing for subjective consideration in addition to objective consideration. *Id.*

66. These states are Delaware, Kentucky, Pennsylvania, Rhode Island, South Dakota, and Washington. *Id.* at 1254.

to determine constitutionality under the state constitution.[67] In these jurisdictions, the state and federal constitutional provisions are indistinguishable in their application despite the linguistic differences that exist in many cases.[68] The ten states that adopt their own analysis under their respective state constitutions incorporate elements of Supreme Court doctrine or concepts of proportionality in most cases, but they use analysis beyond the Court's *Solem* and *Harmelin* decisions.[69]

Whether under the Eighth Amendment or its state analogues, it is clear that the ability to make a valid constitutional claim of disproportionality in a non-capital, non-juvenile case remains a difficult proposition. Nonetheless, state courts have, in some cases, held that non-capital punishments are unconstitutionally disproportionate. The next Part explores these decisions before the Article assesses what hints they might offer for successful strategies for future challenges under the Eighth Amendment or state constitutional analogues.

II. CRUEL AND UNUSUAL NON-CAPITAL STATE PUNISHMENTS

Of the three non-capital, non-JLWOP punishments overturned by the Court under the Eighth Amendment, only one—*Solem*—involved a state punishment.[70] There have been a small number of state court decisions finding that punishments have violated the Eighth Amendment or separate state constitutional provisions. This Part will compare the approaches of states that adopt the Eighth Amendment to those that do not.

A. States Adopting the Eighth Amendment Approach

In attempting to extrapolate possible applications of these decisions, it is helpful to note whether the state uses a separate analysis under its state constitution or simply tracks the Supreme Court's analysis under the Eighth Amendment. The cases in this Section—from courts in Arizona, Indiana, Louisiana, and Rhode Island—generally do not add any separate state constitutional analysis beyond the Eighth Amendment to the assessment of punishments.

1. Arizona

Arizona views its state constitutional analogue to the Eighth Amendment as identical in scope to the Eighth Amendment.[71] As with most jurisdictions, Arizona has found almost all punishments in its state constitutional.[72]

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67. *Id.* at 1252–54.

68. *Id.* at 1252.

69. These states are Alaska, California, Connecticut, Illinois, Michigan, Minnesota, New Jersey, Oregon, Washington, and West Virginia. *Id.* at 1252–54.

70. Technically, *Robinson v. California* was also an Eighth Amendment violation, but the Court's decision focused on the behavior punished—addiction—as the basis for its decision. 370 U.S. 660, 667 (1962). The Constitution does not allow punishment for a state of being; criminal law must punish a specific criminal act. *Id.* at 666.

71. State v. Davis, 79 P.3d 64, 68 (Ariz. 2003) (en banc).

72. *See* Berry, *supra* note 3, at 1215.

There have been two notable exceptions, however. In *State v. Bartlett*, the Arizona Supreme Court applied the *Harmelin* decision to strike down a forty-year sentence without possibility of parole for two acts of statutory rape.[73] The twenty-three-year-old defendant had engaged in two acts of consensual sex with fourteen-year-old girls.[74] The trial court imposed consecutive mandatory sentences of fifteen and twenty-five years, but the Arizona Supreme Court found the sentences to be grossly disproportionate under the Eighth Amendment.[75] In particular, the court found the absence of violence or any threat of violence as well as the defendant's lack of a prior criminal record as facts that minimized the severity of the crime.[76] The court also conducted an intra- and inter-jurisdictional comparative analysis and found that the defendant's sentence was comparatively disproportionate.[77]

State v. Davis involved facts similar to *Bartlett*, with the defendant, a twenty-year-old, sentenced to fifty-two years in prison without possibility of parole for having sex with two post-pubescent girls aged thirteen and fourteen.[78] As in *Bartlett*, the sentences were consecutive mandatory sentences.[79] The *Davis* court held that the sentence imposed violated the Eighth Amendment because it was grossly disproportionate for similar reasons to *Bartlett*.[80] The Arizona Supreme

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73. 830 P.2d 823, 824, 832 (Ariz. 1992).

74. *Id.* at 824, 827. Interestingly, the Supreme Court granted Arizona's appeal of the initial state supreme court rejection of the sentence, and then remanded in light of the *Harmelin* case which it decided during the same term. *Id.* at 824–25.

75. *Id.* at 824, 828.

76. *Id.* at 828–29. As described by the *Davis* court, the complete list of relevant factors included:

> (a) the absence of either the threat or the commission of violence to induce the victims to engage in sex; (b) the victims' willing participation in the acts; (c) Bartlett's lack of a criminal record, including any crime against children; (d) his immaturity; (e) the sociological fact that "sexual conduct among post-pubescent teenagers is not uncommon"; and (f) the broad scope of the governing statute.

79 P.3d at 68. Indeed, the *Bartlett* court pointed out that the sentence the defendant received was more than he would have been given had he "been provoked, become violent, killed the girls, and been convicted of second-degree murder." 830 P.2d at 829.

77. *Bartlett*, 830 P.2d at 831–32; *see also* State v. Bartlett, 792 P.2d 692, 700–03 (Ariz. 1990), *aff'd en banc*, 830 P.2d 823 (Ariz. 1992) (exploring the comparative disproportionality of the sentence in more detail).

78. 79 P.3d at 66–67. It is worth noting that the Arizona Supreme Court explicitly limited its *Bartlett* holding in *State v. DePiano*, where it upheld two consecutive seventeen-year sentences for a mother who unsuccessfully attempted to commit suicide and kill her two young sons through carbon monoxide poisoning in a closed garage. 926 P.2d 494, 495–96 (Ariz. 1996) (en banc), *overruled by* State v. Davis, 79 P.3d 64 (Ariz. 2003).

79. *Davis*, 79 P.3d at 67 (four thirteen-year sentences).

80. The court explained:

> (1) Davis's sexual relations with the girls involved neither actual nor threatened violence; in each instance the girls knew what they were doing and willingly participated. Indeed, the victims sought Davis out; all acts occurred after the victims went voluntarily to Davis's home. (2) Davis does not have an adult criminal record, nor has he committed any previous crimes against children. (3) Post-pubescent sexual conduct appears to be no less common today than it was in 1990. (4) There is evidence in the record that Davis's intelligence and maturity level fell far below that of a normal young adult. (5) Like Bartlett, Davis was caught in the very broad sweep of the

Court also conducted a similar inter- and intra-jurisdictional analysis to *Bartlett*.[81]

2. Indiana

Indiana's state constitution adds a proportionality requirement to an identical language analogue, but the state interprets the state constitution as identical in scope to the Eighth Amendment.[82] The state has almost exclusively upheld challenges under the state constitution.[83]

One exception is *Fointno v. State*, where the Indiana Supreme Court held that a 104-year sentence for one count of class A felony rape, three counts of class A felony criminal deviant conduct, two counts of confinement (class B felony), and one count of robbery (class B felony) was unconstitutionally excessive.[84] The court explained that the state constitutional provisions proscribing cruel and unusual punishments[85] and promoting reformation,[86] taken together, convey "an underlying concern" that "the State criminal justice system must afford an opportunity for rehabilitation where reasonably possible."[87] In its analysis, the court cited the trial court's failure to consider mitigating evidence and the absence of "aggravated brutality."[88] It is clear from the court's opinion that a long sentence for the crimes at issue would have been constitutional, but providing no opportunity for rehabilitation or release contravened the state constitution.

> governing statute, which makes any sexual conduct with a person younger than fifteen years old by a person older than eighteen years old a "dangerous crime against children," whether the offense is a rape-incest by a step-parent who forces sex on a trusting ward or a pedophile who uncontrollably preys upon young children, . . . or the more benign boyfriend-girlfriend situation in which one party is older than eighteen and the other younger than fifteen.

Id. at 71–72 (footnote and citation omitted).

81. *Id.* at 72–74. One other nuance the court considered was the disproportionate effect of consecutive, as opposed to concurrent, sentences. *Id.* at 74–75.

82. *See, e.g.*, Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012).

83. *See id.* at 880; Dunlop v. State, 724 N.E.2d 592, 597 (Ind. 2000); Eubank v. State, 456 N.E.2d 1012, 1017–18 (Ind. 1983); Kelly v. State, 452 N.E.2d 907, 912 (Ind. 1983); Johnson v. State, 432 N.E.2d 1358, 1362 (Ind. 1982); Marts v. State, 432 N.E.2d 18, 22 (Ind. 1982); Stuck v. State, 421 N.E.2d 622, 625 (Ind. 1981); Fryback v. State, 400 N.E.2d 1128, 1133–34 (Ind. 1980); Jennings v. State, 389 N.E.2d 281, 283 (Ind. 1979); Phelps v. State, 969 N.E.2d 1009, 1021 (Ind. Ct. App. 2012); Newkirk v. State, 898 N.E.2d 473, 477–80 (Ind. Ct. App. 2008).

84. 487 N.E.2d 140, 141, 149 (Ind. 1986). The trial court had sentenced Fointno: (1) to enhanced terms of forty years for the class A felony rape and criminal deviate conduct counts, the three criminal deviate conduct counts to be served concurrently but consecutively to the rape count; (2) to two presumptive terms of ten years for the class B felony confinement counts, to be served concurrently but consecutively to the other counts; (3) to a presumptive term of ten years for the class B felony robbery count, to be served consecutively to the other counts; and (4) to an enhanced four-year term for the class D felony intimidation count, to be served consecutively to all the other sentences, for a total term of 104 years. *Id.* at 147.

85. IND. CONST. art. I, § 16 ("Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted.").

86. *Id.* § 18 ("The penal code shall be founded on the principles of reformation, and not of vindictive justice.").

87. *Fointno*, 487 N.E.2d at 143–44.

88. *Id.* at 148. The court indicated that Fointno had no criminal record prior to this assault and had served as a fireman for about ten years, apparently with no serious problems or disciplinary citations. *Id.*

In addition to the Eighth Amendment state constitutional analogue, the Indiana Supreme Court also possesses the authority to reduce excessive sentences under the state constitution.[89] Specifically, the court can reduce a sentence that is both disproportionate, i.e., "manifestly unreasonable in light of the nature of the offense and the character of the offender," and for which "no reasonable person could find such sentence appropriate to the particular offense and offender."[90] In *Walton v. State*, the court used this provision to reverse a 120-year sentence for a sixteen-year-old mentally ill individual who brutally beat and stabbed his adoptive parents to death as they lay asleep in bed.[91] The court remanded the case for the imposition of two consecutive forty-year sentences.[92]

Under the same provision, the Indiana Supreme Court also reduced a sixty-year sentence to a fifty-year sentence in a murder case, *Brewer v. State*.[93] The defendant had turned himself in and confessed to the crime fourteen years after its commission, and the court found that the trial court had given insufficient weight to this mitigating factor of accepting responsibility.[94]

3. Louisiana

Louisiana's state constitutional analogue prohibits the imposition of a "cruel, excessive, or unusual punishment."[95] Louisiana courts have applied a gross disproportionality test under the state constitution, using similar language to the Eighth Amendment cases.[96] According to the Louisiana courts, the term "excessive" in the state constitution is synonymous with gross disproportionality.[97] As such,

89. IND. CONST. art. VII, § 4 ("The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.").

90. Walton v. State, 650 N.E.2d 1134, 1136 (Ind. 1995) (quoting *Fointno*, 487 N.E.2d at 145).

91. *Id.* at 1135, 1137.

92. *Id.* at 1137.

93. 646 N.E.2d 1382, 1386 (Ind. 1995).

94. *Id.*

95. LA. CONST. art. I, § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.").

96. *See, e.g.*, State v. Howard, 987 So. 2d 330, 338 (La. Ct. App. 2008) ("A sentence violates La. Const. art. 1, § 20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. . . . A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice." (citations omitted)); State v. Smith, 839 So. 2d 1, 4 (La. 2003); State v. Weaver, 805 So. 2d 166, 174 (La. 2002); State v. Lobato, 603 So. 2d 739, 751 (La. 1992); State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993); State v. Bonanno, 384 So. 2d 355, 358 (La. 1980); State v. Robinson, 948 So. 2d 379, 381 (La. Ct. App. 2007); State v. Bradford, 691 So. 2d 864, 865 (La. Ct. App. 1997).

97. *See, e.g.*, State v. Taylor, 740 So. 2d 216, 223 (La. Ct. App. 1999); State v. Bowers, 746 So. 2d 82, 85 (La. Ct. App. 1999); State v. Zeno, 742 So. 2d 699, 711 (La. Ct. App. 1999); State v. Alexander, 734 So. 2d 43, 46 (La. Ct. App. 1999).

Louisiana courts have typically rejected state constitutional cruel punishment claims.[98]

In *State v. Dixon*, however, the Louisiana Court of Appeals reversed a sentence for being both unconstitutionally excessive and statutorily lenient at the same time.[99] The court found the defendant's ninety-nine-year sentence for his convictions for sexual battery of a juvenile under the age of thirteen was unconstitutionally excessive.[100] The court considered (1) the nature of the crime, (2) the nature and background of the offender, and (3) sentences imposed for similar or more serious crimes.[101] Specifically, the court found that there was important mitigating evidence, including the defendant's lack of prior offenses, and that his conduct, while criminal, was not as severe as other cases receiving ninety-nine-year sentences.[102] The court concluded that a sentence of thirty-five to forty years was more constitutionally appropriate.[103]

4. Rhode Island

The Rhode Island state constitutional analogue to the Eighth Amendment proscribes cruel punishments, but not unusual ones, and includes a proportionality requirement.[104] The Rhode Island courts, however, do not distinguish between the state constitution and the Eighth Amendment, using the gross disproportionality test as a bar to state constitutional claims of cruel and unusual punishment.[105]

While most Rhode Island cases have not violated the state constitution, one exception is *State v. Ballard*, where the Rhode Island Supreme Court reversed two consecutive life sentences plus an additional sixty-five years as grossly disproportionate under the Eighth Amendment for nonhomicide crimes.[106] Ballard was convicted of conspiracy to kidnap with intent to extort, two counts of kidnapping with intent to extort, kidnapping, carrying a pistol without a license, and three counts of

98. *See, e.g.*, State v. Stetson, 317 So. 2d 172, 176–77 (La. 1975); State v. Miller, 269 So. 2d 829, 830 (La. 1972); State v. Crook, 221 So. 2d 473, 476 (La. 1969); *Howard*, 987 So. 2d at 339. *But see* State v. Dixon, 254 So. 3d 828, 836, 840–41 (La. Ct. App. 2018).

99. 254 So. 3d 828, 836, 840–41 (La. Ct. App. 2018).

100. *Id.* at 837.

101. *Id.* at 837–40.

102. *Id.* at 840–41.

103. *Id.* at 841. Interestingly, the court found the twenty-year sentence at hard labor for defendant's child pornography crimes was too short under the applicable statute, and raised that sentence to thirty-five to forty years to run concurrently with defendant's sexual assault crimes. *Id.*

104. R.I. CONST. art. I, § 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offense.").

105. *See, e.g.*, State v. Miguel, 101 A.3d 880, 883 (R.I. 2014); Alessio v. State, 924 A.2d 751, 755 (R.I. 2007); State v. Monteiro, 924 A.2d 784, 795–96 (R.I. 2007); McKinney v. State, 843 A.2d 463, 473 (R.I. 2004); Ret. Bd. of Emps.' Ret. Sys. v. Azar, 721 A.2d 872, 880–81 (R.I. 1998), State v. Smith, 602 A.2d 931, 938 (R.I. 1992). *But see* State v. Ballard, 699 A.2d 14, 17 (R.I. 1997) (holding that two consecutive life sentences were manifestly excessive), *declined to follow by* State v. Coleman, 984 A.2d 650, 656 (R.I. 2009).

106. 699 A.2d 14, 17 (R.I. 1997).

assault with a dangerous weapon.[107] By contrast, his co-conspirators, Alan R. Gomel and Salvatore L. Savastano, Jr., entered guilty pleas before trial and were sentenced to serve twenty-five years.[108]

In concluding that Ballard's sentences were grossly disproportionate to his crimes, the court noted there were aggravating circumstances related to his crime of kidnapping with the intent to extort.[109] Even with those aggravating circumstances, the court believed that the severity of the punishment outweighed the severity of the crimes.[110] It highlighted the disparity between the defendant's sentence and those of his coconspirators.[111] The court amended Ballard's sentence to have his two life sentences and his sixty-five year sentence run concurrently, allowing for the possibility of parole.[112] The Rhode Island Supreme Court subsequently held that *Ballard* "was an aberration" and "is of little or no precedential value."[113]

B. States Using a Separate State Constitutional Approach

The cases in this Section—from courts in Alaska, California, Maine, Washington, and West Virginia—generally add some kind of separate state constitutional analysis to the assessment of punishments beyond the Supreme Court's Eighth Amendment doctrine. The analysis of each case or group of cases will also explain the state constitutional nuance in application of its Eighth Amendment analogue.

1. Alaska

Alaska applies its own state constitutional test independent of the Eighth Amendment.[114] Part of the difference stems from the second sentence in the state constitutional provision that requires criminal sentences to be based on the various purposes of punishment.[115] The Alaska test, which is the same for cruel and unusual punishments and violations of state substantive due process, states:

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107. *Id.* at 14.

108. *Id.*

109. *Id.* at 16–17.

110. *Id.* at 17.

111. *Id.*

112. *Id.* at 15, 19 ("[W]e are of the opinion that the time to be served by Ballard for all the crimes he committed should be served concurrently.").

113. State v. Coleman, 984 A.2d 650, 656 (R.I. 2009).

114. ALASKA CONST. art I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation."); *see, e.g.*, Burnor v. State, 829 P.2d 837, 839–40 (Alaska Ct. App. 1992); Dancer v. State, 715 P.2d 1174, 1177 (Alaska Ct. App. 1986).

115. Alaska courts seem to cherry pick from these purposes rather than choosing one over the other. *See* Smith v. State, 691 P.2d 293, 295 (Alaska Ct. App. 1984) (explaining that although the court must in each instance consider permissible sentencing goals, it is the court's prerogative to decide the weight and order of priority to be given each goal based on the circumstances of the individual case, and that the sentencing court is not required to give priority to rehabilitation in imposing a sentence). Such an approach is common to such

> Only those punishments which are cruel and unusual in the sense that they are inhuman or barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process [and cruel and unusual punishment] clauses . . . .[116]

Alaska courts distinguish this test from the Eighth Amendment test used by the Supreme Court[117] and use it to strike down excessive sentences.[118] The approach taken by the Alaska Supreme Court in these cases has simply been to assess whether, based on the facts, the sentence was excessive in the sense that it was disproportionate by not satisfying one or more of the purposes of punishment.[119]

For example, in *Galaktionoff v. State*, the Alaska Supreme Court reversed a sentence of one year for petty larceny, finding it excessive.[120] Specifically, the defendant had stolen one-half gallon of orange sherbet and two packages of cigarettes.[121] The court held that a sentence of imprisonment with a probationary focus for less than a year would be more appropriate considering "the small value of the property involved, and the lack of previous offenses."[122]

In *Mattern v. State*, the Alaska Supreme Court reduced an eighteen-month sentence of imprisonment for burglary to a sentence of probation with a requirement of psychiatric care.[123] In this case, the court determined that the lower court had not given enough weight to the mitigating evidence in the case and found psychiatric treatment a more appropriate sentencing response to the burglary crime.[124]

In *Huff v. State*, the Alaska Supreme Court held that a sentence of eight years of imprisonment was excessive where the defendant was addicted to heroin and "[a]ll he got out of the sales he arranged for was the drug itself."[125] The defendant, "on two separate occasions . . . sold to police informants a quarter ounce each of heroin for approximately $700 for each sale" for the purpose of feeding his own drug

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provisions, even though the consequence of choosing one purpose of punishment over another might be a different criminal sentence. *See* William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and its Progeny*, 40 CONN. L. REV. 631, 650–53 (2008).

116. Green v. State, 390 P.2d 433, 435 (Alaska 1964) (footnotes omitted); Moore v. State, 262 P.3d 217, 222 (Alaska Ct. App. 2011); McNabb v. State, 860 P.2d 1294, 1298 (Alaska Ct. App. 1993).

117. *Dancer*, 715 P.2d at 1180.

118. *See, e.g.*, Kelly v. State, 622 P.2d 432, 440 (Alaska 1981); Wharton v. State, 590 P.2d 427, 430 (Alaska 1979); Hansen v. State, 582 P.2d 1041, 1045–46 (Alaska 1978); Szeratics v. State, 572 P.2d 63, 67 (Alaska 1977); Black v. State, 569 P.2d 804, 805 (Alaska 1977); Huff v. State, 568 P.2d 1014, 1020 (Alaska 1977); Mattern v. State, 500 P.2d 228, 234 (Alaska 1972); Galaktionoff v. State, 486 P.2d 919, 924–25 (Alaska 1971); Yu v. State, 706 P.2d 348, 351 (Alaska Ct. App. 1985); Husted v. State, 629 P.2d 985, 986–87 (Alaska Ct. App. 1981).

119. *See supra* text accompanying note 118 (listing Alaska cases where the court reversed the sentence for being excessive with respect to the purposes of retribution and deterrence).

120. 486 P.2d at 920, 924–25.

121. *Id.* at 921.

122. *Id.* at 924.

123. 500 P.2d at 234–35.

124. *Id.*

125. 568 P.2d 1014, 1020 (Alaska 1977).

habit.[126] The court found that a sentence not to exceed four years' imprisonment would better serve the "goals of penal administration" than eight years.[127]

Similarly, in *Szeratics v. State*, the Alaska Supreme Court found that a sentence of fifteen years for a single armed robbery count and one year on each of two petty larceny counts, to be served concurrently with the robbery sentence, was excessive.[128] The armed robbery involved the eighteen-year-old defendant and her two accomplices using a gun to steal $31 from a Quik Stop convenience store.[129] As the defendant was not the "worst type of offender" and the crime was her first offense, the court found her punishment to be excessive.[130]

In *Black v. State*, the Alaska Supreme Court found a fifteen-year sentence for obtaining money by false pretenses and forgery to be excessive.[131] The total amount stolen by the defendant was around $500, which the court held did not support a fifteen-year sentence.[132]

Another example of the Alaska Supreme Court striking down a sentence as disproportionate came in *Hansen v. State*, where the court revised a five-year sentence for larceny to time served and probation.[133] A store security guard observed the defendant "place an old sales receipt on a chainsaw box and leave the store with it."[134] The court held that the sentence was far in excess of what was necessary for a crime that could be classified as a misdemeanor.[135]

In *Wharton v. State*, the Alaska Supreme Court held that a one-year sentence for cocaine possession was excessive.[136] The court noted that the eighteen-year-old defendant had no prior criminal record and a good employment history, making the sentence disproportionate for the crime.[137]

In *Husted v. State*, the Alaska Court of Appeals held that a fifteen-year sentence for manslaughter violated the state constitution.[138] Specifically, the court found that the sentence was excessive for a defendant who had no prior felony convictions, who was not a danger to the public, and for whom "a jail term [was] not necessary to accomplish his rehabilitation."[139] The court found that ten years was a more appropriate sentence, or alternatively, fifteen years with five years suspended.[140]

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126. *Id.* at 1017.
127. *Id.* at 1020.
128. 572 P.2d 63, 63–64, 67 (Alaska 1977).
129. *Id.* at 64.
130. *Id.* at 67.
131. 569 P.2d 804, 804–05 (Alaska 1977).
132. *Id.* at 805.
133. 582 P.2d 1041, 1046–48 (Alaska 1978).
134. *Id.* at 1042.
135. *Id.* at 1046.
136. 590 P.2d 427, 430–31 (Alaska 1979).
137. *Id.* at 429–31.
138. 629 P.2d 985, 987 & n.7 (Alaska Ct. App. 1981).
139. *Id.* at 987.
140. *Id.* at 987–88.

The Alaska Supreme Court held two different drug sentences unconstitutional in *Kelly v. State*.[141] First, the court found that the defendant's five-year sentence for the sale of marijuana to be excessive, with three years being the maximum permissible sentence.[142] Second, the court held that the defendant's ten-year sentence (with five years suspended) for the sale and possession of cocaine was also unconstitutionally excessive.[143] The court mandated that his sentence for the cocaine conviction should not exceed five years, with two years suspended.[144]

Finally, in *Yu v. State*, the Alaska Court of Appeals considered whether a fifty-year sentence for second-degree murder was excessive.[145] The court held that a sentence in the twenty-to-thirty-year range would "satisfy the multiple goals of imprisonment."[146] The murder resulted from an altercation related to relational jealousy where a gun was discharged, which from the court's perspective did not mandate a fifty-year sentence to rehabilitate the defendant.[147]

2. California

California's constitutional analogue to the Eighth Amendment uses "or" instead of "and."[148] California courts have explained that this distinction is "purposeful and substantive rather than merely semantic."[149] The courts thus construe the state constitution separately from the Eighth Amendment[150] and apply it more broadly than its federal constitutional counterpart.[151]

The standard under the California Constitution is that "a punishment" may be unconstitutional "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."[152] Specifically, California courts examine three criteria to identify unconstitutional punishments: (1) "the nature of the offense and/or the offender, with particular regard to the degree of danger both

141. 622 P.2d. 432, 439–40 (Alaska 1981).

142. *Id*. at 439.

143. *Id*. at 439–40.

144. *Id*. at 440.

145. 706 P.2d 348, 348 (Alaska Ct. App. 1985).

146. *Id*. at 351. The court determined that the sentencing judge failed to properly consider rehabilitation in his sentencing decision in contravention of the Alaska Constitution. *Id*. at 350 n.2.

147. *Id*. at 349–51.

148. CAL. CONST. art. 1, § 17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed.").

149. People v. Baker, 229 Cal. Rptr. 3d 431, 442 (Ct. App. 2018) (quoting People v. Carmony, 26 Cal. Rptr. 3d 365, 378 (Ct. App. 2005)).

150. People v. Palafox, 179 Cal. Rptr. 3d 789, 798 (Ct. App. 2014).

151. *See* People v. Smithey, 978 P.2d 1171, 1225 n.1 (Cal. 1999) (Mosk, J., concurring); *see also* People v. Anderson, 493 P.2d 880, 883 (Cal. 1972) (en banc) (explaining that, in contrast to the Eighth Amendment, the California Constitution prohibits punishments that are either cruel *or* unusual). Decided just before *Furman v. Georgia*, *Anderson* held the death penalty unconstitutional under the California Constitution. *Id*. at 899.

152. *In re* Lynch, 503 P.2d 921, 930 (Cal. 1972) (en banc); People v. Garcia, 213 Cal. Rptr. 3d 217, 224–25 (Ct. App. 2017).

present to society"; (2) the punishment for "more serious" offenses; and (3) the punishments for the same offense in other jurisdictions.[153] It is worth noting that a defendant only needs to establish one of the criteria to demonstrate a constitutional violation.[154] This inquiry examines both the crime and the defendant's criminal acts, as well as the defendant's relevant personal mitigating characteristics.[155]

Importantly, California courts have emphasized that in determining whether a punishment violates the state constitution, they "must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society."[156] "This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment."[157] Further, "cruel" as used in the California Constitution has retained its ordinary meaning of "causing physical pain or mental anguish of an inhuman or torturous nature."[158]

Even with the broader analysis under their state constitution, California courts have not migrated away from the idea of gross disproportionality,[159] and have even upheld draconian three strikes sentences.[160] Indeed, California courts typically reject challenges to punishments under state constitutional law.[161]

The California Supreme Court first rejected a punishment as grossly disproportionate under the state constitution in *In re Lynch*, decided in 1972—the same year as *Furman v. Georgia*.[162] In *Lynch*, the court held that an indeterminate life-maximum sentence for second-offense indecent exposure was unconstitutionally excessive.[163] Relying on *Weems* and *Trop*, the court emphasized the non-violent nature

153. *In re Lynch*, 503 P.2d at 930–32; *accord In re* Nuñez, 93 Cal. Rptr. 3d 242, 254 (Ct. App. 2009) (applying the *Lynch* criteria); People v. Em, 90 Cal. Rptr. 3d 264, 271 (Ct. App. 2009) (same); People v. Dillon, 668 P.2d 697, 720, 726 n.38 (Cal. 1983) (en banc) (same).

154. *In re Nuñez*, 93 Cal. Rptr. 3d at 254; *Dillon*, 668 P.2d at 726 n.38.

155. *See, e.g.*, People v. Landry, 385 P.3d 327, 382 (Cal. 2016); People v. Cage, 362 P.3d 376, 405 (Cal. 2015); People v. Mendez, 114 Cal. Rptr. 3d 870, 884–85 (Ct. App. 2010).

156. People v. Watson, 214 Cal. Rptr. 3d 48, 56 (Ct. App. 2017) (internal quotation marks omitted) (quoting Graham v. Florida, 560 U.S. 48, 58 (2010)).

157. *Id.* at 56–57 (alteration in original) (internal quotation marks omitted) (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).

158. People v. Anderson, 493 P.2d 880, 892 (Cal. 1972) (en banc).

159. *See, e.g.*, People v. Edwards, 193 Cal. Rptr. 3d 696, 768 (Ct. App. 2015).

160. *See, e.g.*, People v. Mantanez, 119 Cal. Rptr. 2d 756, 758, 763–64 (Ct. App. 2002) (upholding a sentence of twenty-five years to life imposed pursuant to California's Three Strikes Law following a conviction for receiving stolen property and possession of heroin).

161. *See* People v. Carmony, 26 Cal. Rptr. 3d 365, 368 (Ct. App. 2005) ("It is a rare case that violates the prohibition against cruel and/or unusual punishment."); People v. Christensen, 177 Cal. Rptr. 3d 712, 732 (Ct. App. 2014) (noting the rarity of cases finding gross disproportionality in sentencing under the California Constitution); *see also, e.g.*, People v. Cage, 362 P.3d 376, 406 (Cal. 2015) (upholding a sentence of death for a defendant convicted of murdering two people); People v. Cunningham, 352 P.3d 318, 364 (Cal. 2015) (upholding a sentence of death for a defendant convicted of three robbery and burglary murders); People v. Jackson, 319 P.3d 925, 934, 962 (Cal. 2014) (upholding a sentence of death for a defendant convicted of first-degree murder, willful, deliberate, and premeditated attempted murder, and being a felon in possession of a firearm); People v. Abundio, 165 Cal. Rptr. 3d 183, 190 (Ct. App. 2013) (upholding a sentence of life without the possibility of parole for an eighteen-year-old defendant convicted of murder).

162. *In re* Lynch, 503 P.2d 921, 930 (Cal. 1972) (en banc).

163. *Id.* at 939.

of the crime, the relatively less serious nature of the crime as compared with other California crimes receiving the same sentence, and the less serious sentences received by individuals committing similar crimes in other jurisdictions.[164]

In the case of *In re Rodriguez*, the court granted the habeas petition of a defendant who served twenty-two years for a non-violent act of child molestation.[165] The court explained that the sentence was grossly disproportionate in light of the manner in which the defendant committed the offense and his past history and personal traits.[166]

Another example is *People v. Dillon*, which held that, under the circumstances of the case, a sentence of life imprisonment for first-degree felony-murder was cruel and unusual.[167] The underlying felony in *Dillon* was attempted robbery, and the killing was done in the heat of the moment, without premeditation.[168] Further, the trial judge had initially attempted to sentence Dillon, who was seventeen-years-old at the time of the crime, to a juvenile sentence.[169] The California Supreme Court remanded for resentencing but suggested that a sentence consistent with second-degree murder was appropriate.[170]

The California Courts of Appeal have likewise nullified a number of statutory penalties under the state constitution. In three cases, the courts invalidated excessively high minimum parole provisions for narcotics violations.[171] In two other cases, the courts struck down indeterminate life-maximum sentences as grossly disproportionate to the crimes. In one, *People v. Keogh*, the court found that punishment excessive for four counts of forged checks totaling less than $500.[172] And in the other case, *In re Wells*, the court struck down the same sentence for a second offense of non-violent child molestation.[173]

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164. *Id.* at 932–39.

165. *In re* Rodriguez, 537 P.2d 384, 387, 395–97 (Cal. 1975) (en banc).

166. *Id.* at 395–96. The court explained:

> Nor do the particular characteristics of this offender at the time of the offense justify 22 years' imprisonment. He was only 26 years old at the time of the offense. His conduct was explained in part by his limited intelligence, his frustrations brought on by intellectual and sexual inadequacy, and his inability to cope with these problems. He has no history of criminal activity apart from problems associated with his sexual maladjustment. Thus, it appears that neither the circumstances of his offense nor his personal characteristics establish a danger to society sufficient to justify such a prolonged period of imprisonment.

Id.

167. 668 P.2d 697, 727 (Cal. 1983) (en banc).

168. *Id.* at 700–01, 725.

169. *Id.* at 725–26.

170. *Id.* at 727.

171. *See* People v. Vargas, 126 Cal. Rptr. 88, 92, 103–04 (Ct. App. 1975) (invalidating a mandatory minimum thirty-six-month sentence for furnishing amphetamines on the basis that the harshness of the sentence classified the defendant along with "robbers, burglars, rapists, or arsonists"); People v. Ruiz, 122 Cal. Rptr. 841, 845–47 (Ct. App. 1975) (invalidating a five-year mandatory minimum for marijuana possession); People v. Malloy, 116 Cal. Rptr. 592, 598–600 (Ct. App. 1974) (invalidating a five-year mandatory minimum for sale of LSD).

172. 120 Cal. Rptr. 817, 822–23 (Ct. App. 1975).

173. 121 Cal. Rptr. 23, 26, 31 (Ct. App. 1975).

3. Maine

Like Indiana, Maine's Eighth Amendment analogue uses identical language to the Federal Constitution but adds a proportionality requirement.[174] The Maine Supreme Court explained, "Under the Maine Constitution, whether a punishment is unconstitutionally disproportionate to the offense committed or is otherwise cruel or unusual are closely related, but not identical, questions."[175] Unlike Indiana, the Maine Supreme Court has established a two-part test to correspond to the two separate provisions: the court first looks to whether the penalty is greatly disproportionate, and then, if not, it looks to whether it offends the prevailing notions of decency.[176] If a sentence fails either test, it is unconstitutional.[177]

When applying the greatly disproportionate part of the test, the court largely tracks the analysis under the Eighth Amendment. The court assesses disproportionality by comparing the gravity and the severity of the offense; where that comparison results in an inference of gross disproportionality, the court then compares the present case with other similar cases in Maine.[178] Where an offense is not grossly disproportionate, the prevailing notions of decency test simply looks to see whether one or more purposes of punishment justify the sentence.[179] The consequence of adopting this two-part test has been that many sentences satisfy both tests and are upheld.[180]

The one exception is *State v. Stanislaw*, where the Maine Supreme Court reversed a twenty-seven-year sentence for four counts of unlawful sexual contact.[181] The court held that the decision to impose the sentences consecutively resulted in an overall sentence that was disproportionate to the crimes committed.[182] The court found that the sentence was grossly disproportionate to the offenses, particularly in light of the age of the defendant (fifty-three), and

174. ME. CONST. art. I, § 9 ("Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.").

175. State v. Lopez, 184 A.3d 880, 885 (Me. 2018) (quoting State v. Ward, 21 A.3d 1033, 1037 (Me. 2011)).

176. *See id.* (citing *Ward*, 21 A.3d at 1038 n.4).

177. *Id.* (citing *Ward*, 21 A.3d at 1038 n.4); *see also* State v. Frye, 390 A.2d 520, 521 (Me. 1978).

178. *Lopez*, 184 A.3d at 886; State v. Stanislaw, 65 A.3d 1242, 1251 (Me. 2013).

179. *See Lopez*, 184 A.3d at 887; *Stanislaw*, 65 A.3d at 1257.

180. *See, e.g.*, *Lopez*, 184 A.3d at 887 (finding no disproportionality between the offense and the sentence); State v. Hoover, 169 A.3d 904, 913 (Me. 2017) (holding that the sentence "neither carries an inference of gross disproportionality nor offends prevailing notions of decency"); State v. Bennett, 114 A.3d 994, 1000 (Me. 2015) (finding that a sentence of "two weeks in the county jail and a $500 fine" was not "unconstitutionally disproportionate, or cruel and unusual"); *Ward*, 21 A.3d at 1038 (finding no disproportionality because of the violent nature of the crime); State v. Worthley, 815 A.2d 375, 376–77 (Me. 2003) (upholding a sentence of one week in jail and one year of probation for a second offense of operating under the influence of intoxicants).

181. 65 A.3d at 1257. Specifically, the defendant pled guilty to three counts of class B unlawful sexual contact and one count of class C unlawful sexual contact. *Id.* at 1246. The defendant's criminal conduct "involved exposing himself, touching and kissing his victims, and walking in on his victims and hugging them while they were unclothed or only partially clothed. Some of the touching was skin to skin, some involved touching through clothing. The record includes no evidence that any touching involved penetration." *Id.* at 1245.

182. *Id.* at 1256–57.

reinforced its conclusion by comparing the case at bar to other sexual offense cases.[183] The court decided that the appropriate constitutional sentence should be between one-third and one-half of the twenty-seven-year sentence.[184]

4. Washington

Washington's constitutional analogue to the Eighth Amendment proscribes cruel punishments and does not require them to also be unusual.[185] Washington courts have made clear that the state constitution offers broader protections than the Eighth Amendment.[186]

With respect to non-capital offenses, Washington conducts a separate analysis, using a four-part test that contains elements of the Eighth Amendment's gross disproportionality test and seldom allows defendants to prevail.[187] Specifically, the test examines: "(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction."[188]

The case of *State v. Fain* is one example of a defendant prevailing with a gross disproportionality constitutional claim under Washington's state constitution.[189] Fain received a sentence of life imprisonment under the habitual offender statute, despite the three underlying convictions involving the use of fraud to obtain small funds of money adding up to a total of less than $470.[190] The Washington Supreme Court held that the nature of the offense in question and its statutory purpose counseled against such a harsh sentence.[191] Likewise, comparable sentences did not

183. *Id.* at 1255–56.

184. *Id.* at 1257.

185. WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."); *accord* State v. Witherspoon, 329 P.3d 888, 894 (Wash. 2014) (en banc) ("The Eighth Amendment bars cruel and unusual punishment while article I, section 14 bars cruel punishment.").

186. *See* State v. Whitfield, 134 P.3d 1203, 1216 (Wash. Ct. App. 2006); State v. Roberts, 14 P.3d 713, 733 (Wash. 2000) (en banc); State v. Ames, 950 P.2d 514, 517 n.8 (Wash. Ct. App. 1998). In some cases, the Washington Supreme Court has elected to impose a categorical ban under the state constitution on specific types of "different" punishments. Recently, for example, Washington courts have held that the death penalty and JLWOP violate the state constitution. *See* State v. Gregory, 427 P.3d 621, 642 (Wash. 2018); State v. Bassett, 428 P.3d 343, 355 (Wash. 2018).

187. *See* State v. Fain, 617 P.2d 720, 726–28 (Wash. 1980) (en banc) (reversing a grossly disproportionate sentence). *Fain* notwithstanding, defendants have often failed in such cases. *See, e.g.*, Wahleithner v. Thompson, 143 P.3d 321, 326 (Wash. Ct. App. 2006); State v. Magers, 189 P.3d 126, 136 (Wash. 2008) (en banc); State v. Rivers, 921 P.2d 495, 503 (Wash. 1996) (en banc); State v. Thorne, 921 P.2d 514, 533 (Wash. 1996) (en banc); State v. Manussier, 921 P.2d 473, 489 (Wash. 1996) (en banc); State v. Grenning, 174 P.3d 706, 720 (Wash. Ct. App. 2008); *Whitfield*, 134 P.3d at 1216–17; State v. Flores, 56 P.3d 622, 624–25 (Wash. Ct. App. 2002); State v. Gimarelli, 20 P.3d 430, 436 (Wash. Ct. App. 2001); *In re* Haynes, 996 P.2d 637, 643 (Wash. Ct. App. 2000); State v. Morin, 995 P.2d 113, 118 (Wash. Ct. App. 2000); *Ames*, 950 P.2d at 517–18.

188. *Fain*, 617 P.2d at 726.

189. *Id.* at 728.

190. *Id.* at 722, 726.

191. *Id.* at 725–28.

impose such severe sentences for such low-level criminal conduct.[192] Interestingly, the court distinguished its state constitution from the Eighth Amendment in *Fain* as it found that *Rummel* precluded federal constitutional relief for Fain.[193]

5. West Virginia

The West Virginia Constitution employs identical language to the Eighth Amendment, but also contains a separate proportionality requirement.[194] West Virginia courts apply this state constitutional test in two parts. They first assess whether the sentence is subjectively disproportionate in that it "shocks the conscience and offends fundamental notions of human dignity"—much like the Eighth Amendment's gross disproportionality test.[195] If the punishment survives the first test, the state courts then apply an objective assessment of proportionality that requires the court to consider: "(1) 'the nature of the offense,' (2) 'the legislative purpose behind the punishment,' (3) how the punishment compares 'with what would be inflicted in other jurisdictions,' and (4) how the punishment compares to the punishments of 'other offenses within the same jurisdiction.'"[196] Some punishments survive both tests,[197] but West Virginia courts have reversed several cases under its state constitutional proportionality principle.[198]

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192. *Id.* at 728.

193. *Id.* at 723.

194. W. VA. CONST. art. III, § 5 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the state for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.").

195. State v. Shafer, 789 S.E.2d 153, 159 (W. Va. 2015) (citation omitted); *accord* State v. Mann, 518 S.E.2d 60, 71–72 (W. Va. 1999) (per curiam); State v. Cooper, 304 S.E.2d 851, 857 (W. Va. 1983).

196. *Shafer*, 789 S.E.2d at 159 (quoting Wanstreet v. Bordenkircher, 276 S.E.2d 205, 211 (W. Va. 1981)); *see also* Martin v. Leverette, 244 S.E.2d 39, 43 (W. Va. 1978); State v. Cook, 723 S.E.2d 388, 397 (W. Va. 2010) (per curiam).

197. *See, e.g.*, State v. Woodson, 671 S.E.2d 438, 450–51 (W. Va. 2008) (per curiam) (upholding the defendant's thirty-five-year prison term because it was within the limits set by statute); State *ex rel.* Appleby v. Recht, 583 S.E.2d 800, 811 (W. Va. 2002) (holding that a recidivist life sentence could be appropriate given that the defendant had three previous DUI convictions); State v. Blevins, 744 S.E.2d 245, 253, 268 (W. Va. 2013) (per curiam) (holding that a life sentence does not violate the legislative intent of the state constitution); State v. Adams, 565 S.E.2d 353, 357 (W. Va. 2002) (per curiam) (holding that a ninety-year sentence is not disproportionate under a totality of the circumstances test); State v. King, 518 S.E.2d 663, 669–71 (W. Va. 1995) (upholding the sentences as proportionate under the totality of the circumstances test); State v. Farr, 456 S.E.2d 199, 202 (W. Va. 1995) (per curiam) (upholding sentences of one to ten years to be served consecutively for three counts of breaking and entering).

198. *See, e.g.*, State v. Kilmer, 808 S.E.2d 867, 871 (W. Va. 2017) (holding that a recidivist life sentence for driving with a revoked license because of a DUI violates the proportionality principle of the West Virginia Constitution); State v. Wilson, No. 11-0432, 2012 WL 3031065, at *2 (W. Va. Mar. 12, 2012) (holding that a recidivist life sentence for a third felony conviction when none of the felonies were actual or threatened violence violates the proportionality principle of the West Virginia Constitution); State v. David D. W., 588 S.E.2d 156, 160, 165–66 (W. Va. 2003) (per curiam) (holding that a cumulative sentence of over 1,140 years for thirty-eight counts of sexual offenses violates the proportionality principle of the West Virginia Constitution because it shocks the conscience of the court); State v. Miller, 400 S.E.2d 897, 900–01 (W. Va. 1990) (per curiam) (holding that a recidivist life sentence is disproportionate where the underlying felony offenses were non-violent); *Bordenkircher*, 276 S.E.2d

In *Wanstreet v. Bordenkircher*, the West Virginia Supreme Court of Appeals granted a recidivist offender's writ of habeas corpus and released the defendant from confinement.[199] The offense that resulted in the life sentence was a forged check in the amount of $43, and the prior offenses were for driving a motor vehicle without a license, arson of a barn, and forgery of a check for $18.62.[200] The court determined that in light of the non-violent nature of the offense, the incongruence between the purpose of the recidivist statute and the defendant's conduct, and the approach to similar punishments in other jurisdictions, the defendant's punishment was unconstitutionally disproportionate.[201]

In *State v. Miller*, the court similarly found a recidivist life sentence to be unconstitutionally disproportionate.[202] The conviction in question was for an unlawful assault in which Miller shot his friend during an argument.[203] The prior felonies that provided the basis for the recidivist sentence were convictions for breaking and entering, forgery and uttering, and false pretenses.[204] The court found that the combination of a maximum sentence for the final felony of ten years and the non-violent nature of the prior offenses indicated that a life sentence was unconstitutionally disproportionate.[205]

Another case, *State v. David D. W.*, involving child sexual abuse and incest, resulted in a holding of a disproportionate, unconstitutional punishment.[206] The defendant "was convicted of 38 counts of first degree sexual assault for which he received consecutive sentences of 15 to 35 years for each count; 38 counts of incest for which he received consecutive sentences of 5 to 15 years for each count; 38 counts of sexual abuse by a parent, guardian, or custodian, for which he received consecutive sentences of 10 to 20 years for each count; and 38 counts of first degree sexual abuse for which he received consecutive sentences of 1 to 5 years for each count."[207] In sum, the defendant was sentenced to a total of 1,140 years to 2,660 years in a penitentiary.[208] The court found that the sentence imposed "shock[ed] the conscience" of the court because it was so disproportionate.[209]

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at 214 (holding that a recidivist life sentence for a realtor's third check forgery offense violates the proportionality principle of the West Virginia Constitution).

199. 276 S.E.2d at 214.

200. *Id.* at 207.

201. *Id.* at 211–14.

202. 400 S.E.2d at 900–01.

203. *Id.* at 898.

204. *Id.*

205. *Id.* at 900–01.

206. 588 S.E.2d 156, 160–61, 166 (W. Va. 2003) (per curiam).

207. *Id.* at 160–61.

208. *Id.* at 161.

209. *Id.* at 166. *But see* State v. Slater, 665 S.E.2d 674, 683 (W. Va. 2008) (declining to follow *David D. W.*, noting that it is "better practice to decline to review sentences that are within statutory limits and where no impermissible sentence factor is indicated").

In *State v. Wilson*, the court again struck down a recidivist life sentence as excessive in a case involving non-violent crimes.[210] The conviction triggering the sentence was conspiracy related to a drug sale, and the prior convictions were for grand larceny and possession of a firearm.[211] The court emphasized the non-violent nature of the defendant's conduct as the reason why the life sentence imposed violated the state constitution.[212]

The court also reversed a recidivist life sentence triggered by prior convictions of driving on a license revoked for DUI in *State v. Kilmer*.[213] Following an event arising from an altercation with his girlfriend, the defendant was found guilty of "two counts of unlawful assault (a lesser included offense under malicious assault), two counts of domestic battery, and one count of sexual assault in the second degree (a lesser included offense under first degree sexual assault)."[214] The court found the presence of prior convictions for driving on a license revoked for DUI insufficient to justify increasing the sentence imposed for the assault and battery convictions to a life sentence.[215] Without a prior violent felony conviction, the imposition of the recidivist life sentence was disproportionate under the West Virginia Constitution.[216]

Most recently, the West Virginia Supreme Court of Appeals held in *State v. Lane* that a life sentence with mercy, imposed under a recidivist statute for the defendant's drug conviction, violated the proportionality clause of the state constitution.[217] Lane's recidivist life sentence with mercy was "based upon a felony conviction for two counts of delivery of a controlled substance and two prior felony convictions for unlawful wounding and conspiracy to commit the felony of transferring stolen property."[218] While the prior conviction was a violent one, the court noted that it had been twenty years prior, with no other convictions until the felony drug conviction.[219] In addition, the facts surrounding the triggering felony—the delivery of four Oxycodone pills—"did not involve any actual or threatened violence."[220] These facts led to the conclusion that the sentence violated the West Virginia Constitution because it was disproportionate.[221]

210. No. 11-0432, 2012 WL 3031065, at *2 (W. Va. Mar. 12, 2012).
211. *Id.*
212. *Id.*
213. 808 S.E.2d 867, 871 (W. Va. 2017).
214. *Id.* at 868.
215. *Id.* at 871.
216. *Id.*
217. 826 S.E.2d 657, 664 (W. Va. 2019).
218. *Id.* at 659.
219. *Id.* at 664.
220. *Id.*
221. *Id.*

III. CHALLENGING NON-CAPITAL PUNISHMENTS UNDER STATE CONSTITUTIONAL ANALOGUES

Having explored state cases in which defendants actually won some relief with respect to their sentence either under the Eighth Amendment or a state constitution, the next question becomes what wisdom such cases might offer to defendants considering making constitutional arguments in appealing excessive sentences. To answer that question, this Part explores the differences between interpretations of state constitutions and the Eighth Amendment and then tries to make sense of the cases described above in which defendants have successfully challenged their sentences.

A. State Constitutions Are Broader Than and Different From the Eighth Amendment

An initial point is that many state supreme courts have been unwilling to engage with the idea that state constitutional provisions are different from the Eighth Amendment, and as such are broader than the U.S. Constitution. A majority of states simply apply the Supreme Court's gross disproportionality doctrine, irrespective of the language of the state constitution.[222]

Where the state constitutional language is identical to the Eighth Amendment, the state precedent is likely to carry significant weight. Basic principles of interpretation might suggest that the state provision would be superfluous and pointless if it offered no additional protection to that provided by the Federal Constitution, particularly if the state constitution was adopted after the Federal Constitution in 1787. The Supreme Court, however, did not provide for the incorporation of the cruel and unusual punishment clause of the Eighth Amendment until its 1962 decision in *Robinson v. California*.[223] This could explain why states might want their own version of the Eighth Amendment if the Eighth Amendment previously did not apply to the states.

In many cases, however, the state constitutional language is different from the Eighth Amendment, and often in significant ways, including adding a proportionality requirement. Further, some states have a disjunctive analogue; other states proscribe cruel, but not unusual, punishments. States should accord these differences some meaning. Indeed, these linguistic differences provide the basis for broader, or at least different, coverage of state punishments.

B. Making Sense of the Winning Cases

While it is difficult to make broad generalizations given the small sample size of successful Eighth Amendment and state constitutional analogue cases, the cases do reveal several possible lines of attack for current and future litigants. It is worth

222. Berry, *supra* note 3, at 1252.
223. 370 U.S. 660, 667 (1962).

noting that most cases face an almost overwhelming presumption of constitutionality.

When one examines the kinds of cases that state courts have found unconstitutional, a few categories emerge. First, the state courts reversed several sexual assault cases involving draconian penalties for statutory rape. These cases have a few mitigating factors that may explain their outcomes. First, the cases in question involved young offenders not so far in age from their victims—they clearly crossed the legal line, but not in a way that demanded life sentences. Also, the victims in those cases engaged in the sexual encounters consensually, again suggesting that such a severe punishment might be inappropriate. The low-level nature of some other sexual offenses—particularly where there was no violence or long-term physical injury—also has served as the basis for finding a particular sentence was excessive and unconstitutional.

Another category of cases involved the sale of drugs. Given the increasing movement towards the legalization of marijuana,[224] similar arguments might be promising for excessive punishments. The First Step Act[225] and amendments to the sentencing guidelines[226] in the past decade likewise suggest that the appetite for draconian punishments, while still perhaps present, may be decreasing.

Another basis for unconstitutionality that appeared multiple times in the cases related to the decision to impose sentences consecutively rather than concurrently. This might be a promising avenue of appeal in some cases because it allows the appellate court to reduce a sentence for a procedural type of reason as opposed to a substantive one. In other words, the correction in this kind of case relates to the positioning of the sentences, not their individual length, but could have a major effect on many cases.

Habitual offender statutes also provided a basis for relief for defendants where the court thought that the consequence of the sentence did not fit the crime. This was particularly true not only where the crime that gave rise to the application of the statute was non-violent or seemed less serious, but also where the prior crimes collectively were non-violent, low-level felonies.

Another basis of relief in some cases related to the failure to consider mitigating evidence. Appellate courts reviewing excessive sentences sometimes based reversal on the failure to give weight to mitigating evidence that signaled that the imposed sentence was excessive. The corollary was also true in certain cases, with the absence of aggravating evidence providing a basis to reverse a sentence on state constitutional grounds.

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224. *See Map of Marijuana Legality by State*, DISA GLOB. SOLS., https://disa.com/map-of-marijuana-legality-by-state (last visited Jan. 24, 2021) (reflecting the states that have legalized marijuana completely and medicinally).

225. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person ("First Step") Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified in scattered sections of 18 and 34 U.S.C.).

226. *See Amendments*, U.S. SENT'G COMM'N, https://www.ussc.gov/topic/amendments (last visited Jan. 24, 2021) (listing guideline amendments).

The split among the jurisdictions regarding how to read their states' Eighth Amendment analogues also revealed something that might be self-evident: states that read their constitution independently of the Eighth Amendment are more likely to find punishments unconstitutional. This is not just because the states may use a different constitutional standard than the Eighth Amendment; it relates just as much perhaps to a court's approach of engaging in independent thinking with respect to draconian punishments.

Even so, it is clear that the Supreme Court's Eighth Amendment cases—particularly *Harmelin*, *Lockyer*, and *Ewing*—continue to cast a long shadow over state constitutional assessments of punishments. A significant number of the cases highlighted above in Part II, even in jurisdictions that have struck down several punishments, occurred prior to the *Harmelin* decision in 1991. Even the courts that seem willing to consider draconian punishments unconstitutional rarely do so and only in extreme cases. Outside of Alaska and West Virginia, the idea that clearly disproportionate sentences should be unconstitutional seems foreign to most state courts. Perhaps if litigants continue to try to make these arguments, courts will begin to understand that reversing draconian sentences is not only within their power, but also is consistent with their respective state constitutions.

There were also several cases where the appellate courts diminished outlandish sentences for brutal crimes, but in a way that had no practical effect. These cases seem more about the appellate courts signaling to trial courts not to impose symbolic sentences—a thousand years—and less about mitigating excessive punishments.

IV. CHALLENGING NON-CAPITAL PUNISHMENTS UNDER THE EIGHTH AMENDMENT

As *Harmelin* and its progeny seem to provide the most significant obstacle to claims of gross disproportionality in non-capital, non-JLWOP cases, it is worth considering whether the Supreme Court's doctrine needs re-examination. Certainly, the Court's JLWOP cases raise the possibility. This Part suggests three pathways for reassessment: (a) consideration of the extent to which *Miller v. Alabama* undermined the Court's reasoning in *Harmelin v. Michigan*; (b) contemplation of the fact that there must be *some* disproportionate punishments; and (c) analogizing from state constitutional law.

A. Miller *Undermines* Harmelin

In *Miller v. Alabama*, the Supreme Court held that the imposition of mandatory JLWOP sentences violates the Eighth Amendment.[227] The case presented the intersection of two lines of cases—the evolving standards of decency cases and the individualized sentencing cases. The evolving standards line, as discussed above, established the idea that juvenile offenders were "different" and deserved

227. 567 U.S. 460, 465 (2012).

heightened scrutiny under the Eighth Amendment. The Court's prior decisions in *Roper v. Simmons*—which held that the death penalty was unconstitutional for juvenile offenders[228]—and in *Graham v. Florida*—which held that JLWOP sentences were unconstitutional for nonhomicide crimes[229]—provided the foundation for this reading of the Eighth Amendment.

The individualized sentencing line of cases began in *Woodson v. North Carolina* and *Roberts v. Louisiana*, which struck down mandatory death penalty statutes as unconstitutional under the Eighth Amendment.[230] The Court expanded this concept in *Lockett v. Ohio*, which required individualized sentencing consideration in all capital cases, including all relevant mitigating evidence.[231]

The dissenting justices in *Miller* argued that the decision crossed the bright-line established in *Harmelin*, such that to rule in Miller's favor would overrule *Harmelin* by striking down a mandatory non-capital case under the Eighth Amendment.[232] The majority opinion explained that *Miller* involved juveniles, and as such, did not overrule or contradict *Harmelin*.[233]

The question of the efficacy of *Harmelin*, though, provides the basis for a future argument. If the Court finds mandatory JLWOP sentences objectionable, then at some point, it might be inclined to similarly find mandatory adult LWOP sentences unconstitutional under the Eighth Amendment, particularly if other mitigating factors are present, which is what juvenile differentness is. The evolving standards certainly could evolve to a place where mandatory LWOP sentences violate the Eighth Amendment.[234] On a similar note, *Miller* could also serve for the general proposition that non-capital cases are subject to the Eighth Amendment, and the Court should be open to considering the constitutionality of draconian sentences.[235]

1. Differentness

Miller raises the possibility that there may be other kinds of differentness.[236] These could be "different" kinds of punishments such as LWOP or sentences beyond the defendant's life expectancy.[237] Or they could be "different" kinds of

228. 543 U.S. 551, 578–79 (2005).

229. 560 U.S. 48, 82 (2010).

230. 428 U.S. 280, 305 (1976) (plurality opinion); 428 U.S. 325, 336 (1976) (plurality opinion).

231. 438 U.S. 586, 604–05 (1978) (plurality opinion).

232. *Miller*, 567 U.S. at 480–82.

233. *Id.*

234. *See* Berry, *supra* note 22, at 109–11.

235. *See* William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 338–40 (2014) (arguing that "the principles reaffirmed in *Miller* give rise to Eighth Amendment limits . . . [on] mandatory sentences in all death-in-custody cases").

236. *See* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1086 (2013).

237. *Id.* at 1084–86; *see also* Berry, *supra* note 40, at 1128–30 (discussing differing standards for LWOP and death penalty sentences).

individuals such as veterans or intellectually disabled people.[238] Nonetheless, if the Court continues to insist on using differentness as the barometer for according any level of Eighth Amendment scrutiny, it is possible for the Court to add additional kinds of differentness for punishments or individuals for which excessive punishments can arise.

2. Higher Scrutiny for Non-Capital Cases

Even if the Court is unwilling to expand the concept of differentness beyond capital and JLWOP cases, there is still an argument that the Court has failed to accord non-capital cases sufficient review under the Eighth Amendment. The point of the differentness doctrine is that "different" cases receive heightened scrutiny. It does not impose the corollary idea that non-different cases deserve reduced scrutiny.

And yet, that is exactly how the Court has treated non-capital, non-JLWOP Eighth Amendment challenges since *Furman*. To be clear, this approach is a stark departure from the Court's prior precedents in *Trop* and *Weems*, where the Court applied the Eighth Amendment to find non-capital punishments constitutionally disproportionate under the Eighth Amendment.

Certainly, part of the impetus for narrowing the application of the Eighth Amendment in non-capital cases was the view of Justices Scalia and Rehnquist that the Eighth Amendment did not provide any proportionality guarantee. This view, however, was never adopted by a majority of the Court, and should not foreclose review of draconian punishments under the Eighth Amendment.

Part of the path to move the doctrine back to its rightful place of assessing and striking down excessive punishments might be to challenge *Harmelin* and its progeny with cases that appeal to conservative sensibilities or even have aisle-crossing purchase. Excessive sentences for gun convictions, for instance, might provide such a path. Similarly, challenges to excessive punishments for the sale and distribution of marijuana might have greater appeal than a decade ago given the national shift toward legalization.

B. There Must Be Some Disproportionate Punishments

Beyond doctrinal changes, there are still straightforward arguments that a punishment is unconstitutionally excessive. With respect to the Eighth Amendment, *Weems*, *Trop*, and *Solem* are the best and maybe only examples of such decisions, but these cases show that, at some point, states and federal trial judges cross the constitutional line. Part of the purpose of this Article is to demonstrate that there are a number of times—at least twenty—in which state courts have come to a similar conclusion.

238. Berry, *supra* note 236, at 1077–81.

In litigating this kind of argument, then, the approach is not to suggest that the court change the doctrine, but rather to find the case at bar to be the exception that warrants judicial intervention. Doing so successfully requires a deep dive into the facts and the circumstances of the case involved. It requires diminishing the perceived culpability of the defendant and demonstrating the consequences of the decision, not only on the defendant, but also on third parties, and the cost to society more generally.

So many state and federal criminal laws are "lumpy"—meaning that they lump individuals with widely different levels of culpability and criminality together.[239] The felony murder conviction for the individual supervising a killing is quite different than one for the getaway driver who never entered the crime scene. Demonstrating the details of the specific case and differentiating it from the other cases that might fall under the same criminal statute can be helpful in some situations.

Increasing judicial awareness of prison conditions might also make judges more open to considering the consequence of the particular sentence and help them to better understand its draconian nature. In many cases, there appears to be a disconnect between what one supposes a punishment to be and what the punishment actually is.

C. Analogizing from State Constitutional Law

One final approach under the Eighth Amendment is to analogize from state constitutional law decisions. The argument would be that a punishment found unconstitutional under a state constitution in one jurisdiction might also be unconstitutional under the Eighth Amendment in a case with similar facts.

The way in which many states use the Eighth Amendment as the constitutional approach to their state analogue suggests that such precedents would have persuasive value in other Eighth Amendment constitutional challenges. One might argue, for instance, that a punishment violates the Eighth Amendment because, in a different jurisdiction, that punishment violates the state constitutional law analogue to the Eighth Amendment—particularly where the state reads its analogue as an application of the Eighth Amendment. The problem, unfortunately, is that there are a limited number of state constitutional precedents from which to choose, as this Article demonstrates.

CONCLUSION

This Article has sought to explore and document cases where state courts have found state punishments unconstitutional under the Eighth Amendment or the state's constitutional analogue to the Eighth Amendment. The idea of this inquiry is to raise the possibility that such arguments have been successful in the past and can therefore be successful in the future, even despite the low level of past success, in addressing gross disproportionality in non-capital punishments.

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239. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 19–37 (2019).