FRAMING INDIVIDUALIZED SENTENCING FOR POLITICS AND THE CONSTITUTION

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INTRODUCTION

For decades, there was not much growth in the U.S. Supreme Court's interpretation and application of the Eighth Amendment's prohibition on cruel and unusual punishments.[1] In recent years, though, the Court has expanded the Amendment's scope to prohibit executing intellectually disabled and juvenile offenders,[2] to ban capital punishment for all non-homicide offenses against individuals,[3] and to forbid life-without-parole sentences for juveniles when that punishment was mandatorily imposed or imposed on non-homicide offenders.[4] With changing politics and

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1. *See Introduction* to THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 1 (Meghan J. Ryan & William W. Berry III eds., 2020) (noting that "the Eighth Amendment has, for decades, remained largely a dead letter").

2. Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that [executing intellectually disabled offenders] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citations omitted)).

3. Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) ("As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.").

4. Miller v. Alabama, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); Graham v. Florida, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition

a changing Court, any further expansion of Eighth Amendment protections will likely be difficult for years to come. With the recent confirmation of Amy Coney Barrett as the newest Supreme Court Justice, the Court has become even more conservative.[5] Politics certainly influences law, even at the Supreme Court level,[6] so future changes in politics even outside the Court could affect Eighth Amendment interpretations. When making Eighth Amendment arguments to the Court, then, framing is important.

This Article suggests that, in this political landscape, there may be some hope for expanding the constitutional requirement of individualized sentencing under the Eighth Amendment. Part I explains that, while the Court has historically reserved this requirement for capital cases, its more recent precedents have whittled away at the distinction between capital and non-capital cases under the Eighth Amendment. Further, the Court has already extended its constitutional requirement of individualized sentencing beyond the capital context, at least to some degree. Part II notes that, while recent cases suggest that the Court is positioned to further expand the Eighth Amendment requirement of individualized sentencing, politics will likely play a role. Thus, how one frames the individualized sentencing argument will be important. Part III explains why persons across the political spectrum may find enhancing individualized sentencing under the Eighth Amendment appealing. First, expanding this requirement could result in more progressive sentencing practices, including the prohibition of mandatory sentences and mandatory minimum sentences. It could also work to effect more humane prison conditions. These results would likely appeal to individuals with more progressive views of criminal justice. The Article notes, however, that further emphasizing individualized sentencing comes with the risk of weakening uniformity and equality in sentencing. The Article next points out that expanding the individualized sentencing requirement may have appeal across the political aisle with religious conservatives —at least theoretically. Individualized sentencing is rooted in the notion of human dignity, which is central to Christian beliefs. Further, individualized sentencing

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of a life without parole sentence on a juvenile offender who did not commit homicide."); *Introduction*, *supra* note 1, at 2. Beyond the prohibition on cruel and unusual punishments, the Court has also finally explicitly incorporated the Excessive Fines Clause of the Eighth Amendment such that it now applies to the states. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.").

5. *See* Veronica Rocha, *Amy Coney Barrett's Senate Confirmation Vote*, CNN: POL. (Oct. 27, 2020), https://www.cnn.com/politics/live-news/amy-coney-barrett-senate-confirmation-vote/index.html.

6. *See* MORRIS P. FIORINA & PAUL E. PETERSON, THE NEW AMERICAN DEMOCRACY 503 (2d ed. 2002) (explaining that "Supreme Court decisions have fluctuated with changes in public opinion"); Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2010) ("[T]he public mood directly constrains the justices' behavior and the Court's policy outcomes, even after controlling for social forces that influence the public *and* the Supreme Court."); Isaac Unah, Kristen Rosano & K. Dawn Milam, *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293, 295 (2015) ("We argue that in American democracy, public mood (an aggregation of individual policy sentiments) has a statistically significant effect on the voting behavior of individual Justices even though Supreme Court Justices are unelected and therefore unaccountable to the people.").

allows greater room for reform and rehabilitation, which are often achieved through religious means. Finally, the Article explains that the increasing practice of individualization throughout our lives—from individualized medicine to individualized advertising—is conditioning Americans to expect enhanced individualization in many areas. A heightened constitutional focus on individualized sentencing would be consistent with such expectations. Further, improved science and technology are regularly arming us with additional tools to better achieve individualized determinations related to issues such as culpability, deterrence, and rehabilitation. All this provides a foundation for the Court to build on its precedents to further expand the Eighth Amendment requirement of individualized sentencing.

I. THE COURT'S FOCUS ON INDIVIDUALIZATION IN SENTENCING

Individualized sentencing—examining the individual facts in each case to determine the appropriate sentence—is a well-accepted value in criminal cases.[7] Courts have long extolled the virtue of individualized sentencing, and it is an important value under the Eighth Amendment as well.[8] In *Woodson v. North Carolina*, a plurality of the Court famously emphasized the importance of individualization when it explained that, not only had mandatory death penalty statutes been largely rejected in the United States,[9] but "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[10] It further explained that "[c]onsideration of both the

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7. *See* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country."). Although the importance of individualized sentencing is well accepted, the Court has explained:

> Severe, mandatory penalties . . . are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. . . . [M]andatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century.

Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (majority opinion); *see also* Woodson v. North Carolina, 428 U.S. 280, 292–99 (1976) (plurality opinion) (sketching "the history of mandatory death penalty statutes in the United States").

8. *See* William W. Berry III & Meghan J. Ryan, *Eighth Amendment Values*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 1, at 61; *see also Miller*, 567 U.S. at 465 (explaining that the mandatory imposition of life-without-parole sentences on juvenile offenders "runs afoul of [the Court's] cases' requirement of individualized sentencing for defendants facing the most serious penalties"); *Woodson*, 428 U.S. at 304–05 (prohibiting the mandatory imposition of capital punishment and explaining that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of . . . the individual offender . . . .").

9. *Woodson*, 428 U.S. at 292–93 ("The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.").

10. *Id.* at 304 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)); *see also Lockett*, 438 U.S. at 605 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."[11]

The *Woodson* Court lauded the importance of individualized sentencing and struck down mandatory death sentences as unconstitutional, but it also emphasized that its conclusion "rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."[12] Indeed, in *Furman v. Georgia*,[13] Justice Brennan explained that death is different—"in its pain, in its finality, . . . in its enormity,"[14] and in "the infrequency with which we resort to it."[15] The Court cemented this sentiment just four years later in *Gregg v. Georgia*, where it stated that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[16] And in *Harmelin v. Michigan*, the Court shot down an argument that a mandatory life-without-parole sentence for the crime of possessing 672 grams of cocaine was unconstitutional, stating that the Court has "drawn the line of required individualized sentencing at capital cases."[17]

Viewing death as different has led the Court to apply largely different analyses in capital and non-capital cases. Where death is at issue, the Court has emphasized the evolving nature of the Eighth Amendment. In doing so, it examines, first, whether there is a consensus either in favor of or against the punishment at issue, and second, whether the Court's own independent judgment indicates that the punishment is unconstitutional.[18] In contrast, in non-capital cases, the Court has determined that only grossly disproportionate punishments violate the Eighth Amendment.[19] This gross-disproportionality test has proved difficult for defendants, as only rarely have courts struck down sentences for being grossly disproportionate to the crime committed.[20] One interesting twist with these two different

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11. *Woodson*, 428 U.S. at 304.

12. *Id.* at 305.

13. 408 U.S. 238 (1972) (per curiam).

14. *Id.* at 287 (Brennan, J., concurring). Justice Stewart similarly stated:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306 (Stewart, J., concurring).

15. *Id.* at 291 (Brennan, J., concurring).

16. 428 U.S. 153, 188 (1976) (plurality opinion).

17. 501 U.S. 957, 996 (1991).

18. *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, 586–91 (2010) (discussing the Court's two step-approach, which amounts to an objective measure of unusualness and a subjective assessment of cruelty in the Eighth Amendment context).

19. *See Harmelin*, 501 U.S. at 965.

20. *See* Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 115 (2010) (explaining that the Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983), which struck down a life-without-parole sentence for the crime of uttering a "no account" check and being a habitual offender, was "one of those rare cases" in which a proportionality challenge to a non-capital punishment under the Eighth Amendment would be successful).

analytical frameworks is that, while the Court has emphasized the importance of individualized sentencing in capital cases, its Eighth Amendment analyses in this area create categorical rules—for example, striking down capital punishment for *all* insane persons,[21] intellectually disabled persons,[22] or juvenile offenders.[23] In contrast, the Court's Eighth Amendment analyses in *non*-capital cases have examined the "challenges to the length of term-of-years sentences given all the circumstances in a particular case."[24] Still, after the Court's emphasis on the death-is-different doctrine in cases like *Woodson*, *Gregg*, and *Harmelin*,[25] it seemed clear that individualization in sentencing was constitutionally required only where death was a possible punishment.

Despite the Court's repeated statements that death is different, in recent years the Court has chipped away at this distinction. In the 2010 case of *Graham v. Florida*, the Court used the analysis that it had previously applied only in capital cases to strike down the imposition of life without parole for juvenile non-homicide offenders.[26] Instead of tying the analysis used in capital cases to the death-is-different doctrine, the Court reframed the selection of the proper analysis as one that turns on whether the legal challenge "implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[27] In other words, the Court moved away from its previously important death-is-different distinction and focused instead on whether the legal challenge was categorical in nature.[28] (This, of course, falls prey to clever attorneys reframing their challenges to take advantage of an analytical framework more likely to favor their desired outcomes.) The Court also diluted the death-is-different doctrine in its 2012 case of *Miller v. Alabama*, where it held that mandatory life-without-parole sentences are unconstitutional when imposed on juvenile offenders.[29] The Court attempted to justify and limit its holding by emphasizing how juvenile

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21. Ford v. Wainwright, 477 U.S. 399, 401 (1986) ("For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.").

22. Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal." (internal quotation marks omitted)).

23. Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

24. Graham v. Florida, 560 U.S. 48, 59 (2010).

25. *See supra* notes 12–17 and accompanying text.

26. *See Graham*, 560 U.S. at 61–62 (explaining that "[t]he approach in cases such as *Harmelin*" is inapplicable and that "the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*").

27. *Id.* at 61.

28. *See id.* ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence."); *see also id.* at 103 (Thomas, J., dissenting) ("Today's decision eviscerates that distinction. 'Death is different' no longer.").

29. 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'").

offenders are different than adult offenders[30] and by summarizing its previous holdings as requiring individualized sentencing where "the most serious penalties"—rather than just capital punishment—are at issue.[31]

So, the Court now has applied its capital-only analysis to non-capital cases, and, even more importantly, it has stretched its requirement of individualization in sentencing beyond the capital context. Accordingly, the extent to which the death-is-different doctrine still stands remains unclear. One might argue that death is different but that now children are different as well.[32] Or, one might argue that cases involving life-without-parole sentences are now on more equal footing with capital cases. Perhaps, instead, individualization is now more important than ever, and the Court's distaste for non-individualized sentencing may extend beyond the capital context or even scenarios involving children or life-without-parole sentences.[33] Perhaps everyone deserves individualized sentencing under the Eighth Amendment.

Despite this chipping away at the death-is-different doctrine and the expansion of individualization requirements under the Eighth Amendment, it is difficult to predict the Court's direction going forward. The Court took a conservative turn under the Trump Administration, and many of the Justices are getting on in years.[34] The Senate recently confirmed Amy Coney Barrett as the newest Supreme Court Justice, and she will likely be a conservative force on the Court for years to come. Moreover, Democrats now have the slimmest possible majority in the Senate, which could further affect the Court's composition.[35] All of this suggests that future expansion of convicted persons' sentencing rights might be quite limited. The extent to which the Court expands its individualization requirement under the Eighth Amendment may very well depend on how advocates frame the issue.

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30. *Id.* (referencing "a juvenile's lessened culpability and greater capacity for change" (internal quotations omitted)); *see also id.* at 481 ("We think th[e] argument [that the Court's holding here effectively overrules *Harmelin* is] myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders.").

31. *Id.* at 465 (explaining that imposing mandatory life-without-parole sentences for juvenile offenders "runs afoul of our cases' requirement of individualized sentencing for juveniles facing the most serious penalties").

32. *See* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2177 ("In [*Woodson* and *Miller*], the Court emphasized how either capital punishment, or juveniles, are different . . . ."); Meghan J. Ryan (@MeghanJRyan), TWITTER (June 26, 2012, 8:33 AM), https://twitter.com/MeghanJRyan/status/217611454331883520 ("#Miller opinion largely piggybacks on #Graham. Ct seems to be moving from 'death is different' to 'kids are different.'").

33. For an argument that the Court's Eighth Amendment requirement of individualized sentencing should extend to all felony cases, see generally William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019).

34. *See Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 14, 2021) (providing ages of the Justices and the President that appointed each of them).

35. *U.S. Senate Election Results*, WASH. POST, https://www.washingtonpost.com/elections/election-results/senate-2020/ (last visited March 14, 2021). Further, discussions about potential "Court-packing" could also complicate and affect the direction of the Court in future years. *See* Adam Liptak, *The Precedent, and Perils, of Court Packing*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/supreme-court-packing.html.

II. THE POLITICS OF PUNISHMENT

Politics influences punishment practices in the United States, and this is particularly relevant today as our nation has become increasingly politically divided. Democrats tend to support shorter prison sentences, banning mandatory minimum sentences,[36] bail reform,[37] and second chances.[38] The Republican Party has historically been the "law and order" party,[39] which often translates into support for harsher punishments. But the Republican Party has recently become more splintered.[40] Long the party of severe prison sentences, mandatory minima, three-strikes laws, harsh prison conditions, and capital punishment,[41] the Republican Party—or at least a significant fraction of it—has more recently supported some reforms. The

36. *See* DEMOCRATIC NAT'L CONVENTION, 2020 DEMOCRATIC PARTY PLATFORM, at 38, https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf ("Democrats support allowing judges to determine appropriate sentences, which is why we will fight to repeal federal mandatory minimums, incentivize states to do the same, and make all sentencing reductions retroactive so judges can reconsider past cases where their hands were tied."). *But see infra* note 41 (noting Democrats' contributions to harsh sentences).

37. DEMOCRATIC NAT'L CONVENTION, *supra* note 36, at 37–38 ("Democrats support eliminating the use of cash bail and believe no one should be imprisoned merely for failing to pay fines or fees, or have their driver's licenses revoked for unpaid tickets or simple violations.").

38. *See id.* at 36 ("And Democrats believe that children who do enter the juvenile justice system should be given a true second chance, including by automatically sealing and expunging juvenile records."); *id.* at 39 ("Democrats believe in redemption. We must deepen our commitment to helping those who have served their time re-enter society, earn a good living, and participate in our democracy as the full citizens they are.").

39. *See* Philip Rucker & Robert Costa, *Once the Party of Law and Order, Republicans Are Now Challenging It*, WASH. POST (Feb. 3, 2018), https://www.washingtonpost.com/politics/once-the-party-of-law-and-order-republicans-are-now-challenging-it/2018/02/03/98ff3f3c-084f-11e8-8777-2a059f168dd2_story.html (noting that "the GOP . . . has long positioned itself as the party of law and order"); Ayesha Rascoe, *How Trump's 'Law And Order' Message Has Shifted As He Seeks A 2nd Term*, NPR (Aug. 27, 2020), https://www.npr.org/2020/08/27/905916276/how-trumps-law-and-order-message-has-shifted-as-he-seeks-a-second-term ("There are three words never far from President Trump's lips this summer: 'law and order.'").

40. *See* Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016), https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice (noting "recent tensions in conservative circles" regarding criminal justice); *see also* Tim Ryan, *GOP Plank Reverses Push on Crime and Punishment*, COURTHOUSE NEWS SERV. (July 21, 2016), https://www.courthousenews.com/gop-plank-reverses-pushon-crime-and-punishment/ (noting that, "[l]ong the party of 'tough on crime' stances, the GOP adopted a platform [in 2016] embracing the reduction of mandatory minimum sentences for non-violent crimes").

41. *See* REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 40, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf ("condemn[ing] the Supreme Court's erosion of the right of the people to enact capital punishment in their states" and noting the "important tool" of mandatory minimum sentencing); Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 183–85 (discussing how Republican lawmakers pushed for "harsh criminal penalties," such as those resulting from three-strikes laws); Michael G. Turner, Jody L. Stundt, Brandon K. Applegate & Francis T. Cullen, *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROB. 16, 19 (1995) ("Consistent with traditional crime ideologies, these get-tough policies were more often sponsored by Republicans (43.4 percent) than by Democrats (35.6 percent), but this difference was not large."). As one expert has noted, however, Democrats have been far from blameless in the enactment of harsh sentencing laws: "Ted Kennedy was the principal sponsor of the Sentencing Reform Act, Joe Biden was the principal sponsor of the legislation imposing mandatory minimum sentences in drug cases and of the Violent Crime Control Act, and Bill Clinton signed both the AEDPA and the Violent Crime Control Act." Adelman, *supra*, at 185.

Koch brothers (armed with their significant economic power) have been major supporters of this Republican shift toward reform.[42] Around the time of the 2008 recession, the parties came together somewhat around the goal of criminal justice reform. The economic crisis brought to light the significant resources that were being spent on incarcerating millions of people in the United States[43]—a country which continues to have an incarceration rate higher than any other country in the world.[44] In 2018, a bipartisan coalition in Congress passed the First Step Act of 2018,[45] which provided a range of sentencing reforms, including reducing the applicability of some mandatory minimum sentences,[46] making retroactive a previous reduction of sentencing disparities between crack and powder cocaine drug offenses,[47] and expanding the availability of sentencing reductions in some circumstances.[48] The Act also made some strides in improving certain prison conditions by, for example, prohibiting the use of solitary confinement for juveniles[49] and limiting the shackling of women delivering babies.[50] The divisions among Republicans on the topic of criminal justice have not disappeared, though, and former President Trump emphasized during his failed re-election bid that he was the "law and order" candidate.[51]

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42. *See* Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump ("The Koch brothers are major backers of the [First Step Act] and the conservative shift on criminal justice.").

43. *See* ACLU, PROMISING BEGINNINGS: BIPARTISAN CRIMINAL JUSTICE REFORM IN KEY STATES 5 (2012), https://www.aclu.org/report/promising-beginnings-bipartisan-criminal-justice-reform-key-states ("The current economic crisis has put the spotlight on the exorbitant costs of our penal system . . . . The convergence of societal and budgetary impacts of over-incarceration has carved out a window of opportunity for substantive reforms which prioritize efficiency and fairness over partisan politics.").

44. *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Mar. 14, 2021) (listing the United States as having an incarceration rate of 639 per 100,000 persons—or 0.639%—and El Salvador, the country with the next highest incarceration rate, as having a rate of 572 per 100,000 persons—or 0.572%); *see also Countries With the Most Prisoners per 100,000 Inhabitants, as of June 2020*, STATISTA (Dec. 1, 2020), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/ (listing the United States as having an incarceration rate of 655 per 100,000 persons and El Salvador as having an incarceration rate of 590 per 100,000 persons).

45. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

46. *See id.* § 401, 132 Stat. at 5220 (amending 21 U.S.C. § 841(b) to create more lenient sentences for drug offenses); Ames Grawert, *What is the First Step Act – And What's Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it (noting the expansion of a "safety valve" pursuant to which a judge may impose a sentence below the statutory minimum).

47. *See* First Step Act of 2018 § 404, 132 Stat. at 5222.

48. *See id.* § 603, 132 Stat. at 5239 (amending 18 U.S.C. § 3582 to expand compassionate release availability).

49. *See id.* § 613, 132 Stat. at 5347–49 (amending 18 U.S.C. § 5043(b)).

50. *See id.* § 301, 132 Stat. at 5217–20 (codified at 18 U.S.C. § 4322).

51. *See* Rascoe, *supra* note 39 ("There are three words never far from President Trump's lips this summer: 'law and order.'").

Considering these divergent views, even within parties, it is difficult to predict the exact future of individualization in sentencing under the Eighth Amendment. Supreme Court Justices are appointed for life terms to insulate them from politics, but politics undoubtedly plays a role in the direction of the Court's agenda and rulings.[52] Individualization may be a particularly useful constitutional concept around which to base sentencing reform, however. It is unique in that its policy implications and theoretical roots suggest that a broad spectrum of policymakers and policy influencers may find the value compelling.

III. THE POTENTIALLY BROAD APPEAL OF INDIVIDUALIZED SENTENCING

The Eighth Amendment value of individualized sentencing can potentially have broad appeal. A focus on individualization could be a gateway for more humane punishments. One might be concerned about the value's tension with the notion of equality in sentencing, but individualization need not focus on suspect classifications, and it does not have to involve *hyper*-individualization. Moreover, at least as a constitutional matter under the Eighth Amendment, the Court has emphasized the value of individualization more than uniformity. Beyond pushing sentences in a more humane direction, individualization may have appeal because of its religious roots. And it may become increasingly appealing as individualization in other walks of life continues to become more ordinary.

A. Sentencing Under Strengthened Individualization

If the Court continues expanding the doctrine of individualized sentencing under the Eighth Amendment, it could have some significant impacts on imposed punishments in the United States. A real focus on the importance of individualization could require a ban on mandatory sentences, as well as on mandatory minimum sentences.[53] Pushed further, heightened individualization in sentencing could take into account harsh prison conditions and perhaps serve as an impetus for prison condition reforms.

Mandatory sentences require judges to impose particular sentences on offenders based on the crimes they committed and, sometimes, on their criminal histories. The (in)famous *Harmelin* case—where a judge was required to impose a mandatory sentence of life without the possibility of parole on a first-time offender for drug possession—is a good example of this.[54] Such mandatory sentences prevent

52. *See* PETERSON & FIORINA, *supra* note 6, at 503; Casillas et al., *supra* note 6, at 86; Unah et al., *supra* note 6, at 295; Meghan J. Ryan, *Justice Scalia's Bottom-Up Approach to Shaping the Law*, 25 WM. & MARY BILL RTS. J. 297, 317 (2016) ("[T]he general public can have an effect on how constitutions and statutes are interpreted, and how the common law is shaped. There is evidence that the Court, at least to some extent, follows public opinion.").

53. *See* Ryan, *supra* note 32, at 2177–78 ("Mandatorily imposed punishments—made popular in the early half of the twentieth century—are also concerning if we take the Eighth Amendment dignity demand seriously.").

54. Harmelin v. Michigan, 501 U.S. 957, 961 (1991) (Scalia, J., opinion) ("Petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of

judges from considering many circumstances of the offense, and they prevent judges from considering the offender's unique characteristics.

Mandatory sentences also include "Three Strikes" laws, such as the federal Violent Crime Control and Law Enforcement Act of 1994,[55] which provides that, if an offender is convicted of a "serious violent felony" in federal court and has more than one previous conviction where at least one of those convictions is also a serious violent felony, then the judge must sentence the offender to life in prison.[56] Perhaps the most famous three-strikes law is California's—"a 1990s-era measure that made it mandatory for anyone convicted of three felonies to serve 25 years to life as long as two of the crimes were considered serious or violent."[57] This harsh law led to a twenty-five-years-to-life sentence for habitual offender Gary Ewing's crime of stealing about $1,200 worth of golf clubs.[58] Such mandatory sentences have significantly impacted U.S. incarceration figures, contributing to our status as the nation that incarcerates the highest percentage of its citizens.[59]

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parole."); *see supra* note 17 and accompanying text. The relevant statute was amended in 1996 and again in 2000 to remove the mandatory sentence. *See* 2000 Mich. Legis. Serv. 314 (West) (amending MICH. COMP. LAWS § 333.7401 (West 2017)); 1996 Mich. Legis. Serv. 249 (West) (same).

55. Pub. L. No. 103-322, 108 Stat. 1796.

56. *Id.* § 70001, 108 Stat. at 1982 (codified as amended at 18 U.S.C. § 3559). More precisely:

> [A] person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—
>
> (A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—
>
> (i) 2 or more serious violent felonies; or
>
> (ii) one or more serious violent felonies and one or more serious drug offenses; and
>
> (B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

18 U.S.C. § 3559(c)(1). Some criminal defendants have had success challenging this law on vagueness grounds. *See, e.g.*, United States v. Goodridge, 392 F. Supp. 3d 159, 173–74 (D. Mass. 2019) (finding that the definition of "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F)(ii) "is unconstitutionally vague because it 'denies fair notice to defendants and invites arbitrary enforcement by judges'" (quoting Johnson v. United States, 576 U.S. 591, 597 (2015))).

57. Maria Cramer, *Sentenced for Three Strikes, Then Freed. Now Comes a Pushback*, N.Y. TIMES (May 12, 2020), https://www.nytimes.com/2020/05/12/us/california-prison-three-strikes-law.html. This harsh law was softened somewhat in 2012. *See id.*

58. *See* Ewing v. California, 538 U.S. 11, 17–20 (2003). To be fair, Ewing had a long history of prior offenses. *See id.* at 18–19.

59. *See* Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 90–91 (2018) (noting that "incapacitation-inspired sentencing schemes that justify lengthy incarceratory sentences in the name of public safety, such as 'three strikes' laws and recidivist enhancement statutes, are beginning to fall out of favor because they have contributed to the rise of mass incarceration"); Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014) (explaining that "tough-on-crime [sentencing] laws . . . [like] mandatory minimum sentence laws . . . [and] three-strikes laws . . . because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment"); Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/ (explaining

Similar to mandatory sentences, mandatory minimum sentences require judges to impose sentences no more lenient than the relevant statute requires when the defendant has been convicted—usually by guilty plea—of a particular criminal offense.[60] In doing so, they deprive judges of the opportunity to tailor an offender's sentence to the crime he committed.[61] For example, a Florida judge was statutorily required to sentence Jomari DeLeon, a first-time offender, to fifteen years in prison for, over the course of twenty-four hours, selling forty-nine hydrocodone pills for less than $200 to a woman who was a police confidential informant.[62] The judge reluctantly imposed the sentence, saying:

> I am not enjoying today's sentencing. No one is. If I could give you less time, I would. . . . You did something phenomenally stupid, but you only did it those two times. Offered the opportunity to continue dealing drugs, you turned it down. So it does seem this is a one-time incident in your life . . . I do not feel that the 15 years is an appropriate sentence. However, all of my research indicated that it is the only legal sentence in this case and that I don't have any choice whatsoever.[63]

Numerous states have mandatory minimum sentencing laws, and just like mandatory sentences, they are an important contributor to mass incarceration.[64]

If the Court were to expand the Eighth Amendment requirement of individualized sentencing to additional cases, laws stripping judges from considering the particular circumstances of a crime or offender in these cases would be unconstitutional.[65] This could torpedo laws requiring mandatory sentences (including three-strikes laws) and mandatory minimum sentences. Such an expansion of Eighth Amendment protections could have a significant impact on prison populations,[66] furthering the bipartisan

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that mandatory sentences contributed to mass incarceration). For current statistics on incarceration rates in the United States, see *supra* note 44 and accompanying text.

60. *Mandatory Minimums and Sentencing Reform*, CRIM. JUST. POL'Y FOUND., https://www.cjpf.org/mandatory-minimums (last visited Mar. 14, 2021) ("Mandatory minimum sentencing laws force a judge to hand down a minimum prison sentence based on the charges a prosecutor brings against a defendant which result in a conviction – usually a guilty plea.").

61. *Id.* ("These laws take away from a judge the traditional and proper authority to account for the actual circumstances of the crime and the characteristics of the individual defendant when imposing a sentence.").

62. *See Jomari DeLeon: Pressured Into a Terrible Decision*, FAM. AGAINST MANDATORY MINIMUMS ("FAAM"), https://famm.org/stories/jomari-deleon-pressured-into-a-terrible-decision/ (last visited Mar. 14, 2021).

63. *Id.*

64. *See* Tonry, *supra* note 59, at 514; Badger, *supra* note 59; *Mandatory Minimums and Sentencing Reform*, *supra* note 60.

65. Because the Eighth Amendment targets punishments that are too harsh rather than too lenient, however, stripping judges of the power to raise sentences beyond statutory maxima should not raise Eighth Amendment concerns.

66. *See* U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 48 (July 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf (explaining that "[t]he federal [prison] population steadily increased

goal of decarceration.[67]

Pushing individualization even further, judges could consider the actual conditions of punishment in determining proper sentences. Judges generally determine proper sentences based on notions of retribution, deterrence, incapacitation, and rehabilitation.[68] But the actual conditions of punishment—such as confinement—vary depending on where the jurisdiction holds the offender. In *Brown v. Plata*, for example, the Supreme Court commented on the egregious conditions in California's prison system.[69] The prisons were significantly overcrowded, leading to numerous problems such as failure to provide sufficient medical care to inmates with mental illnesses. As the Court explained:

> Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth-sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had "no place to put him."[70]

In Texas, many prisons do not provide air conditioning for inmates, despite Texas's summer temperatures regularly reaching well beyond 100 degrees Fahrenheit.[71] Further, many prisons heavily rely on solitary confinement as a disciplinary measure despite studies establishing the severe negative impact the practice has on public health.[72] And, today, a novel coronavirus is spreading rapidly across U.S. prison populations, causing significantly higher infection and death rates in prisons than in the general population.[73] Perhaps judges should take into account such significant yet varying prison conditions—and other conditions of

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. . . from 71,608 on December 31, 1991 to a high of 217,815 as of December 31, 2012" and that "[t]he steady increase through 2012 was the result of several factors, including the scope and use of mandatory minimum penalties"); Lauren-Brooke Eisen, *Mandatory Minimum Sentences — Time to End Counterproductive Policy*, BRENNAN CTR. FOR JUST. (June 9, 2015), https://www.brennancenter.org/our-work/analysis-opinion/mandatory-minimum-sentences-time-end-counterproductive-policy ("One of the drivers of mass incarceration is mandatory minimum sentences.").

67. For a discussion of recent bipartisan efforts, see *supra* notes 43–50 and accompanying text.

68. *See, e.g.*, 18 U.S.C. § 3553(a) (referencing these purposes of punishment).

69. *See generally* 563 U.S. 493 (2011) ("This case arises from serious constitutional violations in California's prison system.").

70. *Id.* at 503–04 (internal citations omitted).

71. *See* Jolie McCullough, *A Judge Told Texas to Put Some Inmates in Air Conditioning. Lawyers Say Prison Officials Are Violating that Order.*, TEX. TRIB. (Sept. 5, 2019), https://www.texastribune.org/2019/09/05/texas-prison-air-conditioning-heat-contempt-motion/; Lauren McGaughy, *'It's Hell Living There': Texas Inmates Say They Are Battling COVID-19 in Prisons with No A/C*, DALL. MORNING NEWS (July 31, 2020), https://www.dallasnews.com/news/investigations/2020/07/31/the-heat-is-on-texas-inmates-say-they-are-battling-covid-19-in-prisons-with-no-ac/.

72. *See, e.g.*, Elena Blanco-Suarez, *The Effects of Solitary Confinement on the Brain*, PSYCH. TODAY (Feb. 27, 2019), https://www.psychologytoday.com/us/blog/brain-chemistry/201902/the-effects-solitary-confinement-the-brain.

73. *See* Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602–03 (2020) ("The COVID-19 case rate for prisoners was 5.5 times higher than the US population case rate of 587 per 100,000. The crude COVID-19

punishment—in determining the appropriate punishment in each case. These conditions are certainly relevant to the question of retribution, and they likely impact deterrence calculations as well as the effectiveness of rehabilitation. Moreover, if judges were to account for these factors in dispensing appropriate sentences, this would perhaps spur prison condition reforms. Requiring judges to consider these conditions when sentencing would push an Eighth Amendment individualization requirement further than it has been previously pushed,[74] but it is one possibility for the future—perhaps the long-term future—of Eighth Amendment jurisprudence.

B. The Equality Concern

Increased focus on individualization in sentencing under the Eighth Amendment has the potential to provide a more progressive punishment landscape by invalidating mandatory sentences and mandatory minimum sentences, and by potentially humanizing prison conditions. But one historic concern about focusing on individualization in sentencing is that it is often at odds with the value of uniformity—or equality—in sentencing.

A focus on the importance of equality is evident in today's political landscape. A deadly pandemic has killed more than 500,000 people in the United States,[75] and an outsized percentage of the deaths are people of color.[76] Fires have been blazing on the West Coast, further putting persons of color at risk.[77] And hundreds of thousands of people have been marching in the streets to protest police killings of

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death rate in prisons was 39 deaths per 100,000 prisoners, which was higher than the US population rate of 29 deaths per 100,000.").

74. An Eighth Amendment individualization requirement could be pushed even further than this. Sentencers could start considering particular offenders' probable individual reactions to punishments. For example, someone who is quite privileged—such as Martha Stewart—might actually suffer more under certain prison conditions than someone less privileged—such as a homeless woman. Pushing individualization this far and considering these different reactions to punishment could very well have undesirable effects, however. For further discussion of such a subjective approach to punishment, see Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 187, 199–216 (2009) (explaining that, "when they are given equal prison terms, more sensitive offenders receive harsher punishments than less sensitive offenders and that it is a mistake to believe that both kinds of offenders receive punishments proportional to their desert").

75. Pien Huang, *'A Loss To The Whole Society': U.S. COVID-19 Death Toll Reaches 500,000*, NPR (Feb. 22, 2021), https://www.npr.org/sections/health-shots/2021/02/22/969494791/a-loss-to-the-whole-society-u-s-covid-19-death-toll-reaches-500-000.

76. *See* CTRS. FOR DISEASE CONTROL, RISK FOR COVID-19 INFECTION, HOSPITALIZATION, AND DEATH BY RACE/ETHNICITY (updated Feb. 18, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html (stating that all racial groups other than Asian Americans are more than twice as likely as white Americans to die from the virus).

77. *See* April Ehrlich, *Wildfires Leave the Most Lasting Impacts on Minority Populations*, CTR. FOR HEALTH JOURNALISM (Mar. 29, 2019), https://www.centerforhealthjournalism.org/2019/03/13/wildfires-leave-most-lasting-impacts-minority-populations ("The fact that wildfires leave the most lasting impacts on vulnerable populations might seem obvious. . . . But most people aren't aware . . . of how wildfire disasters disproportionately affect people of color."); Marisa Peñaloza, *'It's A Bit Surreal': Oregon's Air Quality Suffers As Fires Complicate COVID-19 Fight*, NPR (Sept. 14, 2020), https://www.npr.org/2020/09/14/912701172/its-a-bit-surreal-oregon-fights-smoke-from-record-wildfires-during-a-pandemic (quoting a Portland, Oregon health

Black men and women.[78] In this milieu, racial discrimination and, more broadly, bias are of significant concern. Recent polling shows that 76% of Americans consider racism a significant problem in the United States—a figure that is up by about 25% in five years.[79] Further, about 65% of Americans support the recent Black Lives Matter protests in opposition to police shootings.[80] Intolerance for treating individuals differently because of factors like their skin color is at a fever pitch. From health care to policing, equality is important in all areas of life. And, of course, equality is important in criminal sentencing.

Concerns about such bias have been gradually shaping our criminal justice landscape for decades. The Federal Sentencing Guidelines, for example, were borne out of concerns that some defendants were being treated differently than similarly situated defendants.[81] In 1972, Judge Marvin Frankel related:

> One story concerns a casual anecdote over cocktails in a rare conversation among judges touching the subject of sentencing. Judge X, to designate him in a lawyerlike way, told of a defendant for whom the judge, after reading the presentence report, had decided tentatively upon a sentence of four years' imprisonment. At the sentencing hearing in the courtroom, after hearing counsel, Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the "kangaroo court" in which he'd been tried, and the legal establishment in general. Completing the story, Judge X said, "I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of four." None of the three judges listening to that (including me) tendered a whisper of dissent, let alone a scream of outrage. But think about it . . . a year in prison for speaking disrespectfully to a judge.[82]

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officer who related that "it's the same people who are at higher risk of complications from wildfire smoke and from COVID. We know many of them in the Portland area are Black, Indigenous or people of color").

78. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

79. MONMOUTH UNIV. POLL, NATIONAL: PROTESTORS' ANGER JUSTIFIED EVEN IF ACTIONS MAY NOT BE 6 (June 2, 2020), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_060220.pdf/.

80. Steven Long & Justin McCarthy, *Two in Three Americans Support Racial Justice Protests*, GALLUP (July 28, 2020), https://news.gallup.com/poll/316106/two-three-americans-support-racial-justice-protests.aspx.

81. *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) ("The federal sentencing guidelines, which have been in effect since November 1987, were designed to promote certainty, uniformity, and proportionality in sentencing."); *see also* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1086 (2012) [hereinafter Ryan, *Proximate Retribution*] (noting that "guidelines systems are generally touted as minimizing sentencing disparities among similarly situated offenders"); Meghan J. Ryan, *Secret Conviction Programs*, 77 WASH. & LEE L. REV. 269, 284 (2020) ("Aside from biases within the system, there is also the problem of other inequities, which is inherent in a system that generally relies on different decisionmakers in each case. This concern about lack of uniformity explains the rise of mandatory sentencing guidelines in this country (which were later found to be unconstitutional) and, to some extent, mandatory minimum sentences." (footnotes omitted)).

82. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 18 (1972).

Judge Frankel was one of the "catalyst[s]" behind the creation of the Federal Sentencing Guidelines,[83] so it is not surprising that his concern about uniformity in sentencing is the same concern that the Sentencing Commission laid out in the Guidelines. Indeed, even the first version of the Guidelines set forth the goal of "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders."[84]

Equality is, of course, also important under the Constitution. The Fourteenth Amendment provides that no state shall "deny to any person . . . the equal protection of the laws,"[85] and this requirement extends to sentencing practices. The Supreme Court has even gone so far as to temporarily strike down the death penalty because of concerns that it was being arbitrarily imposed.[86] Although the Justices could not agree on the particular reasoning as to why the death penalty was, at least in those cases, unconstitutional, most of the Justices referenced concerns related to discrimination or how rarely the punishment was imposed. Justice Stewart, for example, suggested that being sentenced to death was akin to being struck by lightning.[87] Justice Douglas pointed out that death sentences are "disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups."[88] And Justice Marshall similarly noted his concern that the death penalty was being imposed in a discriminatory way.[89] Post-*Furman*, however, there have not been many cases—at least under the Eighth Amendment—striking down punishments because of inequality. In fact, in *McCleskey v. Kemp*, the Court upheld the death penalty despite a detailed study showing that Black men who had killed white victims were more likely to be sentenced to death than Black men who had killed Black victims.[90] Not only did the Court reject the Eighth Amendment argument in the case, but it also rejected the Equal Protection

83. Robert R. Miller, *Diminished Capacity-Expanded Discretion: Section 5k2.13 of the Federal Sentencing Guidelines and the Demise of the "Non-Violent Offense,"* 46 VILL. L. REV. 679, 682 n.21 (2001); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 707 n.200 (2012) (noting that Frankel was "one of the architects of the Federal Sentencing Guidelines"); Ryan, *Proximate Retribution*, *supra* note 81, at 1070 n.105 ("Judge Frankel was a central figure in the fall of rehabilitation in the mid-1970s and the construction of the Federal Sentencing Guidelines.").

84. U.S. SENT'G GUIDELINES MANUAL § 1.A.3 (U.S. SENT'G COMM'N 1987).

85. U.S. CONST. amend. XIV.

86. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

87. *Id.* at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

88. *Id.* at 249–50 (Douglas, J., concurring) (quoting PRESIDENT'S COMM'N ON L. ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

89. *See id.* at 365–66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.").

90. 481 U.S. 279, 287 (1987) ("[T]he Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.").

argument.[91] Still, despite the lack of Supreme Court rulings in the area, equality, arbitrariness, or, perhaps more appropriately, "unusualness,"[92] remains a sentencing concern under the Constitution.

Despite its importance, uniformity in sentencing has always been a value that must be balanced against individualization. The Federal Sentencing Guidelines, in addition to focusing on uniformity in sentencing, are aimed at achieving "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity."[93] And the same balancing is central to the Eighth Amendment, where Supreme Court Justices have emphasized the constitutional importance of avoiding arbitrariness in sentencing[94] and have also emphasized the necessity of considering each offender and offense individually.[95] The tension between uniformity and individualization bubbles up both in legislation and in Eighth Amendment analyses.

Uniformity in sentencing is, of course, important, but individualization in sentencing is the more relevant concern under the Eighth Amendment.[96] Again, the Court has stressed the importance of individualized sentencing in its capital cases,[97] and it has also extended its constitutional concern for individualized sentencing to other circumstances, such as mandatory life-without-parole sentences as applied to juvenile offenders.[98] The equality concern, while important, has been accorded less of an Eighth Amendment focus.

The tension between uniformity and individualization does not mean that individualization may be based on race or other suspect classifications. Individualization simply means that facts matter in individual cases. When punishments are supposed to be proportionate to an offender's culpability under a theory of retribution, it matters whether that offender is intellectually disabled or whether he is a juvenile. It might also matter whether the offender had an abusive childhood, lacked sufficient education, or had numerous prior convictions. At the same time, these factors might be relevant to other purposes of punishment, such as deterrence. Indeed, the Supreme Court has explained that intellectually disabled and juvenile offenders are less deterrable.[99] Again, facts matter in determining the constitutionally appropriate sentence in a case.

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91. *See id.* at 291–99 (examining and "reject[ing] McCleskey's equal protection claims" because of a lack of purposeful discrimination by state actors in his particular case).

92. *See* U.S. CONST. amend. VIII.

93. U.S. SENT'G GUIDELINES MANUAL § 1.A.3 (U.S. SENT'G COMM'N 1987).

94. *See supra* notes 86–89 and accompanying text.

95. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion).

96. *See supra* Part I.

97. *See, e.g.*, *Woodson*, 428 U.S. at 305 (striking down mandatorily imposed capital punishment); *supra* Part I.

98. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *supra* Part I.

99. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."); Atkins v. Virginia, 536 U.S. 304, 319–20 (2002)

Still, there remains the risk that greater focus on individualization in sentencing could result in outcomes unpalatable to progressives. For example, in *Roper v. Simmons*—where the Court found that it was unconstitutional to execute juvenile offenders[100]—Justice O'Connor pointed out in dissent that, while "[a]dolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults," the Court had not offered any "evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case."[101] In cases already decided, though, it seems unlikely that the Court will upend the already existing Eighth Amendment categorical rules about unconstitutional punishments.[102] The Eighth Amendment is generally considered a "one-way ratchet,"[103] meaning that once a punishment reaches the status of unconstitutionality under the Eighth Amendment, there is no going back on that determination.[104] Moreover, perhaps the most referenced statement on Eighth Amendment jurisprudence is that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[105] This, too, suggests the difficulty of overturning categorical rules like the one in *Roper*. Still, today's current political climate has produced results never seen before, like the Senate refusing to vote on a duly nominated Supreme Court Justice in 2016.[106] Moreover, the Supreme Court is dominated by conservative Justices, with six out

("Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision' of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.").

100. *See* 543 U.S. 551.

101. *Id.* at 588 (O'Connor, J., dissenting).

102. *See generally* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 850–53 (2007) (discussing the binding nature of precedent through the doctrine of stare decisis). *But cf.* Evan Semones & Matthew Choi, *What You Need to Know About Amy Coney Barrett*, POLITICO (Sept. 19, 2020, 3:58 PM), https://www.politico.com/news/2020/09/19/amy-coney-barrett-what-you-need-to-know-418378 ("Barrett has stated that 'life begins at conception,' . . . . She also said that justices should not be strictly bound by Supreme Court precedents, a deference known as stare decisis, leaving open the possibility that she could vote to overturn Roe v. Wade if seated on the court.").

103. Ryan, *supra* note 102, at 870; *see also* Transcript of Oral Argument at 10, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2001/00-8452.pdf.

104. There is some disagreement, though, as to whether an unconstitutional status under the Eighth Amendment can be reached by current sentencing conditions—e.g., the rarity of the practice—or only by a Supreme Court declaration of unconstitutionality. This author has had opportunity to reflect on this tension when responding to comments on one of her articles. *See* Orin Kerr, Comment to *Turning Back to Electrocution—Reversing the Eighth Amendment Ratchet?*, CONCURRING OPINIONS (May 25, 2014), https://webarchive.loc.gov/all/20140608085442/http://www.concurringopinions.com/archives/2014/05/turning-back-to-electrocution-reversing-the-eighth-amendment-ratchet.html.

105. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); *see* Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (quoting *Trop*'s statement of this "established proposition").

106. *See* Mark Walsh, *Senate Hold on Merrick Garland Nomination Is Unprecedented, Almost*, ABA J. (May 1, 2016), https://www.abajournal.com/magazine/article/senate_hold_on_merrick_garland_nomination_is_unprecedented_almost.

of nine Justices nominated by Republican presidents (and three of those Justices nominated by President Trump).[107] Accordingly, there is certainly a possibility that the Court will overturn existing Eighth Amendment law despite the notion of progressive punishment embedded firmly in the Court's Eighth Amendment jurisprudence.[108] However, it seems that an increased emphasis on individualization in sentencing under the Eighth Amendment would overall shift punishment in a more humane direction.

C. An Aspect of Dignity

The Court is moving in a more conservative direction, but individualization in sentencing is a constitutional value that may have broad support. Eighth Amendment individualization is actually part of a larger concept—one that, at least theoretically, should appeal to religious conservatives. This overarching concept is dignity.[109] Over and over again, the Supreme Court's Eighth Amendment cases have focused on the constitutional importance of offender dignity. In the landmark 1958 case of *Trop v. Dulles*, a plurality of the Court explained that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[110] Over the past sixty years, the Court has continued to explain that offender dignity is the backdrop of the Eighth Amendment's prohibition on cruel and unusual punishments. In cases as varied as *Atkins v. Virginia* (striking down the execution of intellectually disabled persons),[111] *Hope v. Pelzer* (determining that handcuffing a prisoner to a hitching post under extreme conditions is an Eighth Amendment violation),[112] and *Kennedy v. Louisiana* (striking down the death penalty for the crime of child rape),[113] the Court has explained that it is constitutionally important to preserve human dignity in sentencing.[114]

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107. *See Current Members*, *supra* note 34.

108. Similarly, there is a risk that a conservative Court—and one more focused on originalism and perhaps with less respect for precedent—will completely disregard the dignity foundation of the Eighth Amendment. In fact, even before the confirmation of Justice Barrett, the Court had taken somewhat of an originalist turn in certain Eighth Amendment cases. *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment. In fact, death was the standard penalty for all serious crimes at the time of the founding. Nor did the later addition of the Eighth Amendment outlaw the practice." (citations and internal quotations omitted)).

109. *See generally* Ryan, *supra* note 32 (finding that "Eighth Amendment dignity means the individuality of an offender must be respected and punishment of an offender cannot be used simply to achieve some other end, even if it is societally beneficial").

110. 356 U.S. at 100.

111. 536 U.S. 304, 321 (2002).

112. 536 U.S. 730, 737 (2002).

113. 554 U.S. 407, 413 (2008).

114. *See id.* at 420 ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."); *Atkins*, 536 U.S. at 311 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . ." (quoting *Trop*, 356 U.S. at 100)); *Hope*, 536 U.S. at 738 ("The use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man.'" (internal alterations omitted) (quoting *Trop*, 356 U.S. at 100)); Ryan, *supra* note 32, at 2141 ("Since 1958, the Supreme Court has emphasized

The Court has not clearly defined the concept of dignity under the Amendment, but, at a minimum, the concept seems to require the "non-instrumentalization of human beings";[115] it requires viewing offenders as individual people.[116] Respecting human dignity in this way includes at least two components.[117] First, it requires proportionality in sentencing.[118] A defendant should not receive a punishment greater than he deserves.[119] Second, dignity requires that the punishment be humane.[120] Although the worst offenders may ordinarily be punished more harshly than milder offenders, even the worst of the worst offenders must be punished within the bounds of civilized society.[121] Some "punishments are simply too horrendous to impose on any offender."[122] Both of these facets of dignity—proportionality and humaneness[123]—focus on the individual. They refer to tailoring a punishment to a particular offender's desert[124] and ensuring that the punishment, because it is being imposed on a *human being*, does not go beyond the bounds of decency.

The proportionality component of dignity suggests that individualized sentencing is key. Proportionality is ordinarily thought of in terms of retribution—how much punishment an offender deserves for his crime.[125] Of course, desert is notoriously difficult to assess. Even if people were to agree about which crimes are worse than others—for example, that murder is a worse crime than robbery[126]—it is difficult to find consensus about what exact punishment any offender deserves.[127] This question is made even more difficult if one looks beyond the seriousness of the

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that the Eighth Amendment's prohibition on cruel and unusual punishments is focused on preserving the dignity of man.").

115. Ryan, *supra* note 32, at 2140.

116. *See id.* at 2144 ("Like the core of most definitions of dignity in other areas, the Court's explicit use of dignity in these cases highlights the importance of viewing individuals as ends rather than merely as means. In doing this, the Court emphasizes the importance of the offender as an individual human being.").

117. *See id.* at 2144–45. For a full explication of dignity under the Eighth Amendment, see generally *id.*

118. *Id.* at 2145.

119. *Id.* at 2144.

120. *Id.* at 2146.

121. *Id.*

122. *Id.*

123. In prior work, I have used the term "humanness" to describe this second facet of the Eighth Amendment dignity requirement. *Id.* ("The second facet of the Court's focus on individualism is humanness—recognizing that the offender is a *human being* and that certain punishments, like torture, are therefore prohibited no matter what crime the offender committed.").

124. Proportionality is also sometimes thought of in terms of other purposes of punishment, such as deterrence. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 575, 592 (2005).

125. *See id.* at 575 ("Anglo-American courts and scholars have usually (but as will be shown, not universally) applied the concept of proportionality only when discussing retributive sentencing principles."); Ryan, *supra* note 32, at 2145 n.103 ("This proportionality is most often thought of in terms of retribution.").

126. This is known as "ordinal ranking." *See* Ryan, *Proximate Retribution*, *supra* note 81, at 1064 (noting that "ordinal ranking" refers to the "relative . . . ranking of standard criminal offenses").

127. Such "cardinal ranking" of offenses is notoriously difficult. *See id.* ("[T]here seems to be little agreement as to the cardinal ranking—or the weighted sequencing—of [standard criminal] offenses.").

offense and also considers the conditions under which the crime was committed, the relevant motive for committing the crime, the offender's background, and the like. In some cases, the Court has addressed this difficult question of desert by looking at whether the punishment was imposed for any reason other than desert.[128] In the prison conditions context, for example, the Court's standard test examines the correction officer's motive for his actions, assessing whether the punishment imposed constituted a "gratuitous infliction of 'wanton and unnecessary' pain"[129] or whether the officer acted with "deliberate indifference to serious medical needs."[130] Still, a perfectly proportionate sentence remains difficult to assess, and it is nearly impossible to ensure proportionality when the sentence is mandatorily imposed or when a judge is forced to apply a mandatory minimum sentencing statute. Such mandatory punishments are antithetical to the proportionality goal that is undergirded by the Eighth Amendment's dignity demand.

Current sentencing practices also seem at odds with the Eighth Amendment requirement of humaneness in sentencing. This clash is especially apparent when examining current prison conditions. Today's prison conditions are, in many cases, appalling. The proliferating coronavirus, which has made prisons significant hotspots for the virus;[131] the lack of air conditioning, causing sweltering conditions in Texas prisons;[132] the use of solitary confinement, which neurobiologists have likened to "torture, with serious consequences for neurological health"[133]—all of these conditions are relatively common and have seemingly been normalized. But if one thinks of them in terms of respecting human dignity—a value required by the Eighth Amendment—they remain very much in question. Humaneness in sentencing requires something more.

Although the Court has not expounded on the exact meaning of dignity, again, the concept is central to Eighth Amendment doctrine.[134] And dignity has wide appeal. The concept of dignity has deep roots, and it gained significant popularity after World War II.[135] When United Nations Member States came together after the War to discuss the Universal Declaration of Human Rights, there was

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128. More precisely, courts examine whether conditions of punishment were imposed for reasons other than "punishment," where the punishment could be grounded in retribution, deterrence, incapacitation, rehabilitation, or other punishment goals.

129. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

130. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

131. *See* Madeleine Carlisle and Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020), https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/ (noting that "experts and epidemiologists predicted that incarcerated people would be particularly vulnerable . . . [a]nd many of the worst projections have since come true").

132. *See* McCullough, *supra* note 71; McGaughy, *supra* note 71.

133. Blanco-Suarez, *supra* note 72.

134. *See supra* notes 109–14 and accompanying text.

135. Ryan, *supra* note 32, at 2135–36 ("Although dignity has long been a matter of philosophical discussion, reliance on dignity in law, philosophy, and politics has become increasingly popular in the wake of World War II.").

disagreement as to what exactly the basis for the Declaration should be.[136] As Professor Martha Nussbaum has explained, "[t]he framers . . . were conscious of their profound religious and philosophical differences."[137] Yet, they were able to agree on the broad concept of dignity to ground the agreement.[138]

Today, dignity may be a meeting ground for a spectrum of ideologies as well. On the political left, dignity under the Eighth Amendment can translate into more progressive punishment practices, such as limiting extremely long sentences and improving conditions of confinement.[139] On the political right, Eighth Amendment dignity could potentially have appeal because of its religious roots.[140] According to Christian thought, people are created in the Image of God and therefore must be accorded human dignity.[141] Pursuant to this view, humans are special and thus deserve special treatment. Pope Francis recently emphasized in his encyclical letter *Fratelli Tutti* that "[a]ll Christians and people of good will" should not only recognize human dignity, but they should actively "work . . . for the abolition of the death penalty, legal or illegal, in all its forms, [and] also . . . work for the improvement of prison conditions, out of respect for the human dignity of persons deprived of their freedom."[142] At the same time, certain deeply held religious views—such as believing in an angry God who punishes people for sinning—are often associated with harsher views on punishment.[143] Religious persons are not monolithic in

136. *See* Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 360 (2008).

137. *Id.*

138. *See id.*

139. *See supra* Part II.

140. *See* Thomas B. Edsall, *In God We Divide*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/opinion/religion-democrats-republicans.html (stating that, "[t]he more religiously engaged a white voter is, the more likely he or she will be a Republican" but also explaining that "it's not that simple"—"[t]he deeper you go, the more complex it gets"); PEW RSCH. CTR., IMPORTANCE OF RELIGION IN ONE'S LIFE AMONG REPUBLICANS AND REPUBLICAN LEANERS, https://www.pewforum.org/religious-landscape-study/importance-of-religion-in-ones-life/among/party-affiliation/republican-lean-rep/ (last visited Mar. 14, 2021) (exhibiting the significance of religion to Republican voters). Certainly, the political right is not entirely composed of persons motivated by religion. A large swath of conservatives consider religion important to them, though, including in their determinations of right and wrong. *See* PEW RSCH. CTR., *supra*. In particular, white evangelical voters have become an important cohort of the Republican Party. *See* Jason Husser, *Why Trump Is Reliant on White Evangelicals*, BROOKINGS (Apr. 6, 2020), https://www.brookings.edu/blog/fixgov/2020/04/06/why-trump-is-reliant-on-white-evangelicals/ ("As demographics in the United States continue to shift, election analysts must understand the scale of evangelicals' role in the Republican coalition, especially in swing states. . . . [T]his electoral group is essential for any Republican coalition during the 2020 race to the White House.").

141. Ryan, *supra* note 32, at 2135 ("This understanding of dignity grew with time, and this understanding of a human being's specialness was often tied to humans being created in the image of God.").

142. Pope Francis, *Encyclical Letter* Fratelli Tutti *of the Holy Father Francis on Fraternity and Holy Friendship*, VATICAN NEWS (Oct. 3, 2020), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html.

143. *See* Christopher D. Bader, Scott A. Desmond, F. Carson Mencken & Byron R. Johnson, *Divine Justice: The Relationship Between Images of God and Attitudes Toward Criminal Justice*, 35 CRIM. JUST. REV. 90, 101 (2010) ("We find that judgmental and angry images of God are very consistent predictors of the desire to treat criminals more harshly . . . ."); Christopher Slobogin, *How Changes in American Culture Triggered Hyper-Incarceration: Variations on the Tazian View*, 58 HOW. L.J. 305, 324–25 (2015) (suggesting that "many

their beliefs, however, or in how those beliefs affect their views on punishment.[144] Considering the important place that human dignity holds in Christian faiths and the importance of religion—especially Christianity—to conservative politics,[145] emphasizing the importance of dignity in punishment might very well bolster the appeal of mandating individualized sentencing under the Eighth Amendment.[146]

D. Religion, Reform, and Rehabilitation

The notion of reform—perhaps more commonly thought of as rehabilitation[147]—should appeal to the religious right in the same way that dignity does. Rehabilitation has religious roots.[148] Various Bible verses extol repentance and rehabilitation,[149] and early notions of rehabilitation (more accurately referred to as "reform") focused on transforming a defendant's character through religious teachings, reflection, prayer, and hard labor.[150] Later, a "medical model" of rehabilitation developed, and prison officials sought to introduce various rehabilitation

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American Christians, especially those of the evangelical stripe, believe strongly in the concept of evil, the need to exact vengeance, and importance of expressing moral outrage at criminals," which leads them to support harsher punishments).

144. *See* Bader et al., *supra* note 143, at 91 (characterizing the "American religious landscape" as "very complex"); James D. Unnever & Francis T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RSCH. CRIME & DELINQUENCY 169, 191 (2006) (noting that "Christian fundamentalists are a diverse group who should not be easily stereotyped").

145. *See* Edsall, *supra* note 140; Husser, *supra* note 140; PEW RSCH. CTR., *supra* note 140.

146. *Cf.* Unnever & Cullen, *supra* note 144, at 175 ("The most consistent finding generated by the research on religion and support for the death penalty is that the more individuals identify with and practice their religion, the less likely they are to support 'get tough' crime-control policies."). Some research has suggested, though, that viewing God as loving is less likely to affect one's support of the death penalty than viewing God as angry. *See* Bader et al., *supra* note 143, at 101 (finding that, when controlling for "God's perceived level of judgment and God's level of anger," "neither belief in a loving God nor belief in an engaged God is consistently associated with support for capital punishment or the desire to treat criminals more harshly" and concluding "that belief in a God that can get angry at humans and is willing to judge them for their actions is the salient measure of God in predicting views about the punishment of criminals").

147. *See* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1262 (2013) ("Ordinarily, courts and scholars do not carefully identify what they mean by 'rehabilitation' and neglect to tease out the differences between definitions focusing on character reform and societal reintegration.").

148. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY & SOCIAL PURPOSE 4 (1981) ("The roots of the rehabilitative ideal lie deep in Western society. In the Old Testament emphasis on the correctional potential of punishment is explicit."); Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 269 (2015).

149. *See* ALLEN, *supra* note 148, at 4; Ryan, *supra* note 148, at 269 & n.16 ("The Bible recommends punishing children for the purpose of rehabilitating them . . . .").

150. *See* Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 RUTGERS L. REV. 699, 710 (1992) ("A penal theory ultimately developed which envisioned a correctional system functioning as one of punishment and custody combined with education, labor, and contemplation."); Ryan, *supra* note 148, at 272–73 ("To achieve this reformation, prison administrators required inmates to undergo religious instruction, solitary confinement, and hard labor."); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1039–40 (1991) ("Modeled on monastic prisons of the Middle Ages, the penitentiary used solitary confinement, religious instruction, and hard labor to facilitate repentance. . . . [D]evices that look unabashedly punitive, like hard labor, were believed to have the beneficial effect of aiding the transformation of the offender.").

programs into prisons.[151] This focus on rehabilitation was reflected in sentencing: most sentences were indeterminate in nature and allowed for individualized assessments of an offender's rehabilitative progress.[152] But, in many circumstances, the lofty goals of rehabilitation were not met, and, soon, mainstream thinking was that nothing worked.[153] For the most part, rehabilitation fell by the wayside, and retribution took hold as the primary purpose of punishment.[154]

A shift away from indeterminate sentencing followed, and individualization in sentencing was deemed less important.[155] One particular approach to rehabilitation has had staying power, though, and that is one grounded in religion.[156] Some prisons allow private religious organizations, such as the Prison Fellowship Academy, to come into prisons to help prisoners achieve rehabilitation through Christian teachings.[157] The effectiveness of such programs (as measured by recidivism rates) is disputed.[158] From the perspectives of prisons and religious persons, though, there may be additional appeal because such programs are generally funded by nonprofit groups rather than prisons,[159] and such programs may have evangelical effects even if they are ineffective at reducing recidivism.[160]

Despite retribution's prevalence in punishment today, rehabilitation has once again gained steam.[161] Legislatures and judges seem to be focusing more on

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151. *See* Ryan, *supra* note 148, at 275–76.

152. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 92 (1980).

153. Ryan, *supra* note 148, at 277–80.

154. *See id*. at 284–85.

155. *See id*. at 285.

156. *See id*. at 286 ("One type of rehabilitation that some proponents claim is unusually effective is the use of religion to achieve offender transformation.").

157. *See About*, PRISON FELLOWSHIP ACAD., https://www.prisonfellowship.org/about/academy/ (last visited Mar. 14, 2021).

158. *See* Ryan, *supra* note 148, at 287 & n.112 ("Some scholars have claimed that these religious prison programs are effective in reducing recidivism among offenders and thus achieving rehabilitation. The empirical evidence supporting this claim has been contested, however."); Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 ALA. L. REV. 43, 45 (2011) (explaining that "most of the empirical studies of the effectiveness of faith-based prisons have serious methodological problems" and concluding that "[t]hose few empirical studies that approach methodological validity either fail to show that faith-based prisons reduce recidivism or provide weak evidence in their favor").

159. *See* JANEEN BUCK WILLISON, DIANA BRAZZELL & KIDEUK KIM, URB. INST., FAITH-BASED CORRECTIONS & REENTRY PROGRAMS: ADVANCING A CONCEPTUAL FRAMEWORK FOR RESEARCH AND EVALUATION 25 (2010), https://www.ojp.gov/pdffiles1/nij/grants/234058.pdf (explaining that faith-based organizations rely heavily on volunteers and that they depend on a variety of funding sources—only a limited proportion of which is from government sources—for their relatively small budgets); James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 AVE MARIA L. REV. 341, 349 (2008) (noting that "FBOs are uniquely positioned to harness volunteer resources, which is particularly important today because fiscal restraints have required the cutting of prison pre-release and transitional housing resources" (internal quotations and citation omitted)).

160. *Cf*. WILLISON ET AL., *supra* note 159, at 29 (noting that "deepening personal spiritual commitment" was a top-ranked outcome for faith-based organizations).

161. Ryan, *supra* note 148, at 265 ("In the wake of rehabilitation's near death, it is surprising that rehabilitation is now reemerging as an important punishment goal. What was broadly condemned just forty years ago has suddenly found new life and has already been put into action by several vanguard legislatures.").

rehabilitation in considering punishment issues than they have in the recent past.[162] Further, the Court has recently highlighted the importance of rehabilitation in its Eighth Amendment analyses. Prior to this, the Court had never examined rehabilitation in the context of its independent judgment analysis under the Eighth Amendment categorical approach.[163] But in *Graham* and *Miller*, rehabilitation was key to the Court's determination that certain punishments were unconstitutional. For example, in striking down life-without-parole sentences for juvenile offenders, the *Graham* Court was troubled that "[t]he penalty forswears altogether the rehabilitative ideal."[164] It explained that "the State must . . . give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[165] The *Miller* Court had similar concerns, explaining that the mandatory imposition of life-without-parole sentences on juvenile offenders "disregards the possibility of rehabilitation even when the circumstances most suggest it."[166] Now, the Court did not delve into the meaning of rehabilitation—whether it was, for example, a question entangled with religion—but it did highlight that the opportunity for rehabilitation is exceedingly important, at least for children. And individualized assessments are key in supporting this goal of rehabilitation. Again, *Graham* and *Miller* offer the potential for expanding the constitutional requirement of individualized sentencing[167] by at least providing the correct rhetorical framework. Perhaps framing individualization as part of dignity and as part of the punishment goal of rehabilitation (or "reform") would be effective in persuading the Court to expand this Eighth Amendment requirement.

E. A Society of Heightened Individualization

Another reason that future interpretations of the Eighth Amendment might continue to expand the value of individualized sentencing is that individualization is becoming more normalized in our society. Facebook and Google target advertisements based on users' characteristics; there is a push for more individualized medicine; and even the criminal justice system is attempting to make more individualized assessments about, for example, bail by using computerized algorithms.[168] Indeed, rapidly accelerating science and technology are making more

162. *See id.* at 265, 291–95, 301–04.

163. *See id.* at 298 (stating that, in *Graham v. Florida*, "the Court, for the first time, focused its Eighth Amendment analysis on the theory of rehabilitation"); Ryan, *supra* note 20, at 132–35 (explaining that "the Court has traditionally focused on the justifications of retribution and deterrence in its Eighth Amendment jurisprudence" but that it took "small steps in recognizing additional justifications for punishment [like rehabilitation], [when] the *Kennedy* Court identified rehabilitation as one of '*three* principal rationales' for punishment" but, alas, "failed to examine the rehabilitation rationale for punishment" (emphasis in original)).

164. Graham v. Florida, 560 U.S. 48, 74 (2010).

165. *Id.* at 75.

166. Miller v. Alabama, 567 U.S. 460, 478 (2012).

167. *See supra* Part I.

168. Meghan J. Ryan, *Science and the Eighth Amendment*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 1, at 312.

individualized determinations possible in numerous sectors. And this could also have an impact on the Eighth Amendment. New data from fields ranging from psychology to neuroscience could better inform sentencers about the extent of particular defendants' culpability for committing their crimes, their deterrability, and even their potential for rehabilitation.[169] New data could also help inform questions about the pain punishments impose on particular individuals.[170] These are important pieces of existing Eighth Amendment analyses.[171] And the Court has, in fact, already relied on recent psychological and neuroscientific evidence in its Eighth Amendment cases to determine the constitutional appropriateness of some punishments. In *Roper*, *Graham*, and *Miller*, the Court pointed out that recent "developments in psychology and brain science . . . show fundamental differences between juvenile and adult minds,"[172] thus justifying a constitutional limit on juvenile punishments in some circumstances.[173]

The Court's turn to individualized scientific evidence in these cases is somewhat in tension with its categorical decisionmaking in much of its Eighth Amendment jurisprudence.[174] The Court's Eighth Amendment analyses and holdings have in large part been categorical in nature—for example, concluding that *no* insane persons,[175] *no* intellectually disabled persons,[176] and *no* juvenile offenders[177] may be

169. *Id.* at 303 ("New science can contribute to our understandings about when offenders are unable to perceive what is happening to them and why, the extent to which particular offenders are less culpable than others, how deterrable certain offenders are, and the effectiveness of rehabilitation efforts.").

170. *Id.* at 309 ("As with the characteristics of an offender, like his competency or culpability, science can potentially tell us something about the pain associated with particular punishments.").

171. *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 877 (2015) (stating that, to successfully challenge a method of execution, "prisoners must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain" (alterations in original) (internal quotations and citation omitted)); Roper v. Simmons, 543 U.S. 551, 571–72 (2005) (explaining that the culpability and deterrability of juvenile offenders is important in determining whether they may be constitutionally executed for their crimes); *see also* Ryan, *supra* note 20, at 101–12 (explaining the Court's examination of retribution and deterrence in its Punishments Clause jurisprudence); Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 554 (2012) ("[T]he Court draws on its own independent judgment to determine whether the objective indicia of contemporary values are consistent with its own views. Under this rubric, the Court often calls on its understanding of whether the punishment at issue serves the purposes of retribution and deterrence.").

172. Graham v. Florida, 560 U.S. 48, 68 (2010).

173. *See id.* at 82; Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012) ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."); *Roper*, 543 U.S. at 569 (referencing "scientific and sociological studies").

174. *See* Ryan, *supra* note 168, at 304–05.

175. Ford v. Wainwright, 477 U.S. 399, 401 (1986) ("For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.").

176. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that [executing intellectually disabled offenders] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citations omitted)).

177. *See Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

constitutionally executed. The tension between this categorical approach and reliance on individualized scientific evidence was laid bare in *Roper*, where the Court acknowledged: "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."[178] Still, the Court determined that "a line must be drawn."[179] Indeed, drawing a line despite the individualized nature of the scientific evidence was consistent with the Court's traditional categorical approach in this area. But, as the Court continues to rely on individualized scientific evidence in its Eighth Amendment analyses, this categorical approach may very well become increasingly dissatisfying.

The Court has already begun introducing greater nuance into its categorical approach in recent years, adding a layer of individualization. In cases such as *Hall v. Florida*, the Court has required states to take a closer look at how Eighth Amendment categorical rules apply in individual cases.[180] As background, one difficulty with the Court's traditional categorical approach is how to define terms like "insane" and "intellectually disabled." The Court has historically left it to the various jurisdictions to define such terms, but this clearly provides jurisdictions with the opportunity to circumvent certain constitutional limitations on punishment. A state could define "insane" so narrowly, for example, so as to not truly respect the Court's determination that it is unconstitutional to execute such persons. In recent years, though, the Court has curbed jurisdictions' power to circumvent these constitutional rules by limiting jurisdictions' ability to define these terms. In *Hall*, for example, the Court held unconstitutional the state's definition of "intellectually disabled" where it precluded a finding of intellectual disability if the offender's IQ was greater than seventy.[181] Instead, the Court found that, under the Eighth Amendment, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[182] Although the Court's incorporation of such individualization into its Eighth Amendment analyses is not a proclamation that individualized *sentencing* is constitutionally required, it does suggest that the Court indeed recognizes the importance of individualization, especially during a time when science and technology make individualization more possible than ever before.

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178. *Id.* at 574. Justice O'Connor made a similar point in *Roper*, *id.* at 588 (O'Connor, J., dissenting), and this article has already observed that placing a greater focus on individualization in sentencing could, *possibly*, lead the Court to overturn broadly sweeping Eighth Amendment protections like the prohibition on executing *all* juvenile offenders. *See supra* Section III.B.

179. *Roper*, 543 U.S. at 574 (majority opinion).

180. *See* 572 U.S. 701 (2014).

181. *See id.* at 711–12 (explaining that the Florida Supreme Court "has held that a person whose [IQ] test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited").

182. *Id.* at 723.

The Court's increased individualization of its categorical approach under the Eighth Amendment, paired with society's heightened conditioning to individualization and better tools to effectively implement it, provide a foundation for expanding the Eighth Amendment. The Court may take just one small step at a time in broadening the requirement of individualized sentencing under the Amendment, but it seems to be a real possibility. Of course, changing politics could very well affect the direction the Court takes under the Amendment, but, provided the right framing, there may be some hope for greater individualized sentencing even under a quite conservative Court.

CONCLUSION

Despite a conservative Court, there is hope for Eighth Amendment expansion in coming years to further progressive punishment practices. The Court's precedents in *Graham* and *Miller* provide a foundation on which to base increased individualized sentencing under the Amendment. These cases exhibit a new disregard of the old death-is-different doctrine and have expanded the constitutional requirement of individualized sentencing outside the capital context. It is difficult to predict the trajectory of individualized sentencing, especially considering recent division among conservatives about criminal justice reform, but individualized sentencing is a good candidate for bipartisan support. It would likely push sentencing and punishments in a more progressive direction. At the same time, its focus is on the importance of the individual—a value traditionally important to the religious right. Further, increased individualization in numerous areas has normalized individualization more broadly. Finally, through recent advances in science and technology, we have better tools than ever before to effectively implement individualization. This all suggests that, framed correctly, an enhanced constitutional requirement of individualized sentencing could be in our future.