UNLOCKING STATE PUNISHMENT CLAUSES

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ABSTRACT

The United States Supreme Court has applied the Eighth Amendment in two ways with respect to criminal sentencing. It uses the "evolving standards of decency" doctrine for capital and juvenile life without parole cases. And it uses the "gross disproportionality" test for all other non-capital cases. Almost every state has its own punishment clause, an analogue to the Eighth Amendment. The language in most of these punishment clauses is similar to the Eighth Amendment. The result is that many states have "lock-stepped" their interpretation of their state constitution to the Supreme Court's interpretation of the Eighth Amendment.

As scholars and jurists have long noted, lock-stepping state constitutional provisions with federal constitutional provisions constitutes a flawed and problematic interpretive approach. Lock-stepping substitutes the Supreme Court's interpretation of the Federal Constitution for the state court's reading of its own constitution. It disregards the will of state citizens in passing their own constitution, contravenes states' rights, and ignores important differences in the text, context, and history of state constitutional provisions. The Court also defers to states under principles of federalism, inviting them to protect otherwise underenforced rights, like the ones at issue here.

Some states have taken note and elected to interpret their state constitutions independently of the Federal Constitution. Even so, where state supreme courts say that their punishment clauses have separate meanings from the Eighth Amendment, their analysis largely mirrors aspects of one or both of the Court's two doctrines. So even states that

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explicitly do not lock-step with the Eighth Amendment nonetheless engage in a sort of analytical lock-stepping by relying largely on Eighth Amendment doctrines. The courts engage in such approaches despite a long and well-developed literature criticizing Eighth Amendment doctrines from many different directions.

The goal of this Article is to unlock these punishment clauses from Eighth Amendment doctrine. State punishment clauses have distinct meanings which may depart far from Eighth Amendment doctrine. And even if a state court chooses to stay within the confines of the principles of the Eighth Amendment doctrine, the application of these principles can arguably be quite different in the context of a state as opposed to an entire nation.

As such, this Article creates a taxonomy of possible interpretations of state punishment clauses. Specifically, it explores what the language of "cruel," "and," "unusual," and "punishment" might mean. This analysis gives rise to a number of doctrinal interpretations state courts might choose to adopt, particularly in light of the textual, contextual, and historical anomalies of their particular state.

Part I of the Article briefly describes the Court's application of the Eighth Amendment. Part II provides a brief survey of state punishment clauses. In Part III, the Article explains why lock-stepping is problematic. And in Part IV, the article "unlocks" state punishment clauses by providing a taxonomy of possible approaches state courts can adopt in reading and applying their state constitutions.

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INTRODUCTION

"When all the little ants are marching, red and black antennae waving, they all do it the same, they all do it the same way."

—Dave Matthews[1]

The United States Supreme Court has applied the Eighth Amendment to criminal sentences in two ways. It uses the "evolving standards of decency" doctrine for capital and juvenile life-without-parole cases.[2] And it uses the "gross disproportionality" test for all non-capital cases.[3]

Almost every state has its own punishment clause, an analogue to the Eighth Amendment.[4] The language in most of these punishment clauses is similar to the Eighth Amendment.[5] The result is that many states have "lock-stepped" their interpretation of the state constitution with the Supreme Court's interpretation of the Eighth Amendment.[6] This means that most state courts do not analyze their own state constitutions separately from the Federal Constitution, even though they are different provisions in different constitutions.[7]

1. DAVE MATTHEWS BAND, *Ants Marching*, *on* REMEMBER TWO THINGS (Bama Rags Recordings 1993).

2. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002); Roper v. Simmons, 543 U.S. 551, 560–64 (2005); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008); Graham v. Florida, 560 U.S. 48, 82 (2010).

3. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Lockyer v. Andrade, 538 U.S. 63, 72–73 (2003); Ewing v. California, 538 U.S. 11, 30–31 (2003); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1162–86 (2009) (acknowledging the Court's differential treatment of capital cases and non-capital cases).

4. Vermont is the only state that does not have a state constitutional punishment clause, although Connecticut's clause is only implicit. *See* VT. CONST. ch. II, § 39; CONN. CONST. art. I, §§ 8, 9; *see also* State v. Santiago, 122 A.3d 1, 73 (Conn. 2015).

5. *See* discussion *infra* Part II; *see also* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1213–40 (2020) (categorizing the various state punishment clauses).

6. *See* Berry, *supra* note 5, at 1213–40 (cataloging various state applications of their punishment clauses). For an excellent discussion on the concept of lock-stepping, see ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 165–67 (2d ed. 2023).

7. *See* Berry, *supra* note 5, at 1213–40.

As jurists[8] and scholars[9] have long noted, lock-stepping state constitutional provisions with federal constitutional provisions constitutes a flawed and problematic interpretive approach. Decisions concerning the scope of rights under the Federal Constitution should not be dispositive of the scope of rights under state constitutions.[10] State constitutional rights provisions reflect the democratic will of a state's citizens to adopt certain protections for its people.[11] If anything, state courts should presume that state constitutional rights are broader than federal constitutional rights, particularly where the Court has incorporated the right in question.[12]

Some states have taken note and elected to interpret their state constitutional punishment clauses independently of the Federal Constitution.[13] Even so, where state courts say that their punishment clauses have separate meanings from the Eighth Amendment, their analysis often mirrors aspects of one of the Court's two doctrines.[14] So even states that explicitly do not lock-step with the Eighth Amendment nonetheless engage in a sort of analytical lock-stepping by relying largely on Eighth Amendment doctrines.[15] The courts engage in such approaches despite a long and well-developed literature criticizing Eighth Amendment doctrines from many different directions.[16]

8. *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–77 (2018); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178–79 (1984); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

9. *See, e.g.*, WILLIAMS & FRIEDMAN, *supra* note 6, at 165–67; Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1888 (2022); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 791 (1992); Daniel B. Rodriguez, *State Constitutional Law Theory and its Prospects*, 28 N.M. L. REV. 271, 288–302 (1998).

10. WILLIAMS & FRIEDMAN, *supra* note 6, at 165; Brennan, *supra* note 8, at 502; *see also* State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983) (lock-stepping wrongly embraces "the non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions"); Dorothy P. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341, 414 (1985) ("The virtual piggybacking of the state clause onto the federal clause renders the former a parasite instead of an independent source of authority.").

11. Whether adopted by popular vote or constitutional convention, state constitutions reflect the will of the people of the state concerning the powers of the government they are establishing.

12. *See* Berry, *supra* note 5, at 1214; discussion *infra* Part III.A.

13. *See* Berry, *supra* note 5, at 1214; discussion *infra* Part II.B.

14. *See* Berry, *supra* note 5, at 1215–24; discussion *infra* Part II.B.

15. *See* Berry, *supra* note 5, at 1224–27; discussion *infra* Part II.B.

16. *See, e.g.*, John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 87–89 (2010); Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115, 127–138 (2023); Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U. L. REV. 255, 263 (2024); William W. Berry III, *Unusual Deference*, 70 FLA. L.

The goal of this Article is to unlock these punishment clauses from Eighth Amendment doctrine. State punishment clauses have distinct meanings which may depart far from Eighth Amendment doctrine. And even if a state court chooses to stay within the confines of the principles of the Eighth Amendment doctrine, the application of these principles can arguably be quite different in the context of a state as opposed to an entire nation.

As such, this Article creates a taxonomy of possible interpretations of state punishment clauses. Specifically, it explores what the language of "cruel," "and," "unusual," and "punishment" might mean. This analysis gives rise to a number of doctrinal interpretations state courts might choose to adopt, particularly in light of the textual, contextual, and historical anomalies of their particular state.[17]

Part I of the Article briefly describes the Court's application of the Eighth Amendment. Part II provides a brief survey of state punishment clauses. In Part III, the Article explains why lock-stepping is problematic. And in Part IV, the article "unlocks" state punishment clauses by providing a taxonomy of possible approaches state courts can adopt in reading and applying their state constitutions.

I. THE COURT'S APPLICATION OF THE EIGHTH AMENDMENT

Before explaining the ways in which a state court might think about interpreting its state punishment clause, it is helpful to provide a brief summary concerning the Supreme Court's interpretation of the "cruel and unusual punishments" clause of the Eighth Amendment. As

REV. 315, 322–42 (2018); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 412–18 (2009); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1105–56 (2006); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 58–65 (2008); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 480–502 (2005); JOHN HART ELY, DEMOCRACY AND DISTRUST 69 (1980); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328–29 (1986); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989).

17. *See generally* William W. Berry III, *Excavating Mississippi's Punishment Clause*, 94 MISS. L.J. 841 (2025); Ben Finholt, *Toward Mercy: Excessive Sentences and the Untapped Power of the North Carolina Constitution*, 16 ELON L. REV. 55 (2024); Maria E. Hawilo & Laura Nirider, *Past, Prologue, and Constitutional Limits on Criminal Penalties*, 114 J. CRIM. L. & CRIMINOLOGY 51 (2024); John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733 (2022); Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. PA. J. CONST. L. 201 (2023).

explained below, state courts needlessly default to the Court's doctrine in many cases,[18] despite its many flaws.[19]

In assessing which punishments violate the Eighth Amendment, the Court has used a "differentness" principle to divide cases into two categories.[20] "Different" cases are capital cases[21]—because the death penalty is unique in its severity and irrevocability[22]—and juvenile life-without-parole cases[23]—because juveniles are also "different."[24] All other cases are not "different."[25] The Court analyzes the constitutionality of "different" cases under the Eighth Amendment using its "evolving standards of decency" test[26] and analyzes all other cases under the Eighth Amendment using its "gross disproportionality" test.[27]

A. Evolving Standards of Decency

The evolving standards of decency test assesses the constitutionality of punishments in light of the Court's view that what constitutes a "cruel

18. *See* Berry, *supra* note 5, at 1213–40; discussion *infra* Part II.A.2.

19. *See* sources cited *supra* note 16; discussion *infra* Part III.B.

20. *See* Barkow, *supra* note 3, at 1147.

21. *See* Furman v. Georgia, 408 U.S. 238, 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan's concurrence in *Furman* as the originator of this line of argument); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and arguing that it requires additional procedural safeguards "when humans play at God").

22. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (explaining that because "death is not reversible," it is especially alarming that DNA evidence suggests that the convictions of numerous persons on death row are unreliable); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) (stating that "the death sentence is unique in its severity and in its irrevocability"), *overruled by* Hurst v. Florida, 577 U.S. 92 (2016); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) ("There is no question that death as a punishment is unique in its severity and irrevocability.").

23. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 567 U.S. 460, 465 (2012).

24. *Miller*, 567 U.S. at 481 (explaining that if death is different, "children are different too").

25. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 72 (2003); Ewing v. California, 538 U.S. 11, 20 (2003); Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("Our cases . . . have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.").

26. Atkins v. Virginia, 536 U.S. 304, 321 (2002); Roper v. Simmons, 543 U.S. 551, 560–64 (2005); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008).

27. *See, e.g.*, *Lockyer*, 538 U.S. at 72–73; *Ewing*, 538 U.S. at 21; *Harmelin* 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

and unusual punishment" evolves over time.[28] The first prong of the two-prong test examines objective indicia—the degree to which other jurisdictions allow and use the punishment in question.[29] These indicia include statutes that allow for the punishment in question,[30] jury outcomes,[31] and international opinion.[32]

The second prong of the evolving standards of decency test examines subjective indicia, specifically the degree to which one or more of the purposes of punishment justifies the punishment imposed.[33] This "bringing to bear" of the Court's judgment has focused on retribution and deterrence.[34]

Where the punishment in question does not meet either the subjective indicia or the objective indicia, it is a cruel and unusual punishment.[35] Under the evolving standards of decency doctrine, the Court has held the following categories of punishments unconstitutional: death penalty for the crimes of rape,[36] child rape,[37] and for some felony murders;[38] death penalty for juveniles[39] and intellectually disabled

28. *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion); Weems v. United States, 217 U.S. 349, 373 (1910). The original meaning of the Eighth Amendment also contemplates change over time. *See generally* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

29. *See, e.g.*, *Atkins*, 536 U.S. at 312–13; *Roper*, 543 U.S. at 560–64; *Kennedy*, 554 U.S. at 422–25.

30. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 595–96 (1977); *Atkins*, 536 U.S. at 312–13; *Roper*, 543 U.S. at 564–65. The direction of change is also relevant. *Roper*, 543 U.S. at 565–66.

31. *See, e.g.*, *Coker*, 433 U.S. at 596–97.

32. *See, e.g.*, *Roper*, 543 U.S. at 578. *See generally* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

33. *See, e.g.*, *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 571–72; *Kennedy*, 554 U.S. at 446–47.

34. *See, e.g.*, *Coker*, 433 U.S. at 600; *Atkins*, 536 U.S. at 319; *Roper*, 543 U.S. at 571; *Kennedy*, 554 U.S. at 441.

35. *See, e.g.*, *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 560–61. Interestingly, in all of the Court's categorical exception cases, both the objective and subjective criteria end up pointing in the same direction.

36. *Coker*, 433 U.S. at 600.

37. *Kennedy*, 554 U.S. at 446.

38. Enmund v. Florida, 458 U.S. 782, 801 (1982); Tison v. Arizona, 481 U.S. 137, 152–158 (1987). Under *Tison*, capital felony murders are constitutional where the defendant is a major participant in the crime and exhibits a reckless indifference to human life. *Tison*, 481 U.S. at 152-58

39. *Roper*, 543 U.S. at 578.

defendants;[40] juvenile life without parole (JLWOP) for non-homicide crimes;[41] and mandatory death[42] and JLWOP sentences.[43]

B. Gross Disproportionality

In non-"different" cases, the Court uses the "gross disproportionality" test.[44] In the Court's usage, gross disproportionality means that the sentence imposed is grossly excessive in light of the criminal actions of the defendant and the applicable purposes of punishments, including utilitarian purposes.[45]

In *Solem v. Helm*, the Court explained that the Eighth Amendment's gross disproportionality test required consideration of "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions."[46] The Court subsequently narrowed this test in *Harmelin v. Michigan*, emphasizing that the Eighth Amendment "does not require strict proportionality between crime and sentence," but instead bars only "grossly disproportionate" punishments.[47] Such a review "'[does] not mandate' comparative analysis 'within and between jurisdictions'"[48] but does require reviewing courts to grant "substantial deference to legislative determinations."[49]

Review of a claim under the gross disproportionality test is a death knell for the petitioner. Claims for relief under this doctrine almost always fail.[50]

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40. *Atkins*, 536 U.S. at 320–21; Hall v. Florida, 572 U.S. 701, 723–24 (2014); Moore v. Texas, 581 U.S. 1, 12 (2017).

41. Graham v. Florida, 560 U.S. 48, 82 (2010).

42. Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

43. Montgomery v. Louisiana, 577 U.S. 190, 207–09 (2016); Miller v. Alabama, 567 U.S. 460, 489 (2012).

44. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring); Lockyer v. Andrade, 538 U.S. 63, 72–73 (2003); Ewing v. California, 538 U.S. 11, 30–31 (2003); *see also* Barkow, *supra* note 3, at 1155–62.

45. *See Harmelin*, 501 U.S. at 998; Solem v. Helm, 463 U.S. 277, 290–92 (1983).

46. *Solem*, 463 U.S. at 292.

47. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). I have argued elsewhere that *Harmelin* was wrongly decided. *See* Berry, *supra* note 16, at 328–30.

48. *Ewing*, 538 U.S. at 23 (quoting *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring)).

49. *Harmelin*, 501 U.S. at 959.

50. *See Lockyer*, 538 U.S. at 77 (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); *Ewing*, 538 U.S. at 30–31 (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four

II. A BRIEF SURVEY OF STATE PUNISHMENT CLAUSES

All of the states except for Vermont have a punishment clause analogue to the Eighth Amendment in their respective state constitutions.[51] Nine states have identical language to the Eighth Amendment, barring "cruel and unusual punishments," without adding any additional requirements.[52] The other forty states have similar language in their state constitutions, with slight but important linguistic differences or other additions or deletions.[53]

A. States That Lockstep

To date, many states have employed a lock-step approach in applying their state constitutional punishment clauses.[54] This means that the analysis by the state courts of punishments under the state constitution is no different than the Supreme Court's reading of the Eighth Amendment.[55] Specifically, these courts use the gross disproportionality test from *Harmelin* and *Solem* in finding almost every punishment constitutional and do not recognize a meaningful difference between the Eighth Amendment and their state constitution's punishment clause.[56]

prior felony convictions); *Harmelin*, 501 U.S. at 996 (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–75 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (affirming mandatory life sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions); *see also* Barkow, *supra* note 3, at 1188–92 (explaining how the two-track system harms noncapital defendants). *But see Solem*, 463 U.S. at 303 (reversing by 5-4 vote a sentence of life without parole for presenting a no-account check for $100, where defendant had six prior felony convictions).

51. *See* Berry, *supra* note 5, at 1238. Vermont's constitution prohibits only the imposition of disproportionate fines. VT. CONST. ch. II, § 39. Connecticut's clause is implicit, but its courts have recognized it. *See* State v. Santiago, 122 A.3d 1, 29, 73 (Conn. 2015); CONN. CONST. art. I, §§ 8, 9.

52. These states are Colorado (COLO. CONST. art. II, § 20), Georgia (GA. CONST. art. I, § I, para. XVII), Idaho (IDAHO CONST. art. I, § 6), New York (N.Y. CONST. art I, § 5), Ohio (OHIO CONST. art. I, § 9), Tennessee (TENN. CONST. art. I, § 16), Utah (UTAH CONST. art. I, § 9), Virginia (VA. CONST. art. I, § 9), and Wisconsin (WIS. CONST. art. I, § 6). *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

53. *See* Berry, *supra* note 5, 1219–40.

54. *Id*.

55. *Id* at 1214.; WILLIAMS & FRIEDMAN, *supra* note 6, at 165.

56. *See generally* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1637–52 (2021) (highlighting the few cases where states have reversed non-capital punishments on state or federal constitutional punishment clause grounds).

1. Identical Language

Colorado,[57] Georgia,[58] Idaho,[59] New York,[60] Ohio,[61] Tennessee,[62] Utah,[63] Virginia,[64] and Wisconsin[65] all share identical language with the Eighth Amendment in their state constitutional punishment clauses and interpret them the same way the Court interprets the Eighth Amendment.[66]

2. Different Language

A second cohort of states interprets their state constitutional punishment clauses identically to the Eighth Amendment despite differences in language. The most subtle of these linguistic differences

57. COLO. CONST. art. II, § 20 ("[N]or cruel and unusual punishments inflicted."); *see* Close v. People, 48 P.3d 528, 538 (Colo. 2002) (en banc), *abrogated by* Wells-Yates v. People, 454 P.3d 191 (Colo. 2019).

58. GA. CONST. art. I, § I, para. XVII ("[N]or cruel and unusual punishments inflicted . . . ."); *see* Johnson v. State, 573 S.E.2d 362, 366 (Ga. 2002) (quoting Fleming v. Zant, 386 S.E.2d 339, 341 (Ga. 1989)).

59. IDAHO CONST. art. I, § 6 ("[N]or cruel and unusual punishments inflicted."); State v. Grazian, 164 P.3d 790, 797 (Idaho 2007), *abrogated on other grounds by* Verska v. Saint Alphonsus Reg'l Med. Ctr., 265 P.3d 502 (Idaho 2011).

60. N.Y. CONST. art. I, § 5 ("[N]or shall cruel and unusual punishments be inflicted . . . ."); *see* People v. Broadie, 332 N.E.2d 338, 346–47 (N.Y. 1975).

61. OHIO CONST. art. I, § 9 ("[N]or cruel and unusual punishments inflicted."); *see* McDougle v. Maxwell, 203 N.E.2d 334, 336–37 (Ohio 1964) (per curiam).

62. TENN. CONST. art. I, § 16 ("[N]or cruel and unusual punishments inflicted."); State v. Harris, 844 S.W.2d 601, 602–03 (Tenn. 1992). *But see* State v. Black, 815 S.W.2d 166, 188 (Tenn. 1991) (indicating that textual parallels between the Eighth Amendment and the state constitution do not foreclose a broader reading of the state constitution).

63. UTAH CONST. art. I, § 9 ("[N]or shall cruel and unusual punishments be inflicted."); State v. Lafferty, 20 P.3d 342, 366 (Utah 2001). Note that the Utah Constitution also bars treating prisoners with "unnecessary rigor." UTAH CONST. art. I, § 9.

64. VA. CONST. art. I, § 9 ("[N]or cruel and unusual punishments inflicted . . . ."); Dunaway v. Commonwealth, 663 S.E.2d 117, 132–33 (Va. Ct. App. 2008).

65. WIS. CONST. art. I, § 6 ("[N]or cruel and unusual punishments inflicted."); State v. Ninham, 797 N.W.2d 451, 464–65 (Wis. 2011).

66. *See* Berry, *supra* note 5, at 1215–18.

are in Arizona,[67] Iowa,[68] Missouri,[69] Nebraska,[70] and New Mexico,[71] states that bar cruel and unusual "punishment" instead of "punishments."[72] Florida also bars "cruel and unusual punishment," but its state constitution specifically requires an identical interpretation to the Eighth Amendment.[73]

Two states—Indiana[74] and Maine[75]—use identical language but add a proportionality requirement. Similarly, Montana uses identical language but imposes a separate dignity requirement.[76]

Several state constitutions use a disjunctive punishment clause. Arkansas,[77] Massachusetts,[78] Nevada,[79] North Dakota,[80] and Oklahoma[81] bar "cruel or unusual punishments," while Alabama,[82]

67. ARIZ. CONST. art. II, § 15 ("[N]or cruel and unusual punishment inflicted."); State v. Davis, 79 P.3d 64, 67–68 (Ariz. 2003) (en banc).

68. IOWA CONST. art. 1, § 17 ("[C]ruel and unusual punishment shall not be inflicted."); State v. Harrison, 914 N.W.2d 178, 188–91 (Iowa 2018).

69. MO. CONST. art. I, § 21 ("[N]or cruel and unusual punishment inflicted."); State v. Pribble, 285 S.W.3d 310, 313–14 (Mo. 2009) (en banc).

70. NEB. CONST. art. I, § 9 ("[N]or cruel and unusual punishment inflicted."); Doe v. Nebraska, 734 F. Supp.2d 882, 922 (D. Neb. 2010); State v. Trail, 981 N.W.2d 269, 298 (Neb. 2022).

71. N.M. CONST. art. II, § 13 ("[N]or cruel and unusual punishment inflicted."); State v. Gomez, 932 P.2d 1, 7 (N.M. 1997).

72. For an exploration of possible meanings relevant to the difference between singular and plural, *see* discussion *infra* Part IV.D.

73. FLA. CONST. art. I, § 17; Barwick v. State, 361 So.3d 785, 794 (Fla. 2023); *see infra* note 160.

74. IND. CONST. art. 1, § 16 ("Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012).

75. ME. CONST. art. I, § 9 ("[A]ll penalties and punishments shall be proportioned to the offense . . . nor cruel nor unusual punishments inflicted."); State v. Lopez, 184 A.3d 880, 885 (Me. 2018).

76. MONT. CONST. art. II, § 22 ("[O]r cruel and unusual punishments inflicted . . . ."); *id.* § 4 ("The dignity of the human being is inviolable."); Walker v. State, 68 P.3d 872, 883 (Mont. 2003).

77. ARK. CONST. art. II, § 9 ("[N]or shall cruel or unusual punishments be inflicted . . . ."); Bunch v. State, 43 S.W.3d 132, 138 (Ark. 2001).

78. MASS. CONST. pt. 1, art. XXVI ("[O]r inflict cruel or unusual punishments."); Commonwealth v. Alvarez, 596 N.E.2d 325, 330–31 (Mass. 1992).

79. NEV. CONST. art. I, § 6 ("[N]or shall cruel or unusual punishments be inflicted . . . ."); Marischal-Ochoa v. State, 550 P.3d 813, 823 (Nev. 2024) (en banc).

80. N.D. CONST. art. I, § 11 ("[N]or shall cruel or unusual punishments be inflicted."); State v. Kingen, 226 N.W. 505, 506 (N.D. 1929).

81. OKLA. CONST. art. II, § 9 ("[N]or cruel or unusual punishments inflicted."); Dodd v. State, 879 P.2d 822, 829 (Okla. Crim. App. 1994) (Chapel, J., concurring in part and dissenting in part).

82. ALA. CONST. art. I, § 15 ("[N]or cruel or unusual punishment inflicted."); *see also* Lane v. State, 66 So.3d 830, 831 (Ala. Crim. App. 2010) (per curiam) (addressing only the Eighth Amendment and not the Alabama Constitution in a state criminal case).

Hawaii,[83] Kansas,[84] Mississippi,[85] Texas,[86] and Wyoming[87] bar "cruel or unusual punishment."

Louisiana's constitution bars "cruel, excessive, or unusual punishment."[88] South Carolina's constitution also uses a disjunctive state punishment clause but adds a prohibition against corporal punishment.[89] And the disjunctive New Hampshire[90] provision adds a proportionality requirement in its case law.

The Delaware,[91] Pennsylvania,[92] and South Dakota[93] constitutions bar cruel punishments, but not unusual ones. Kentucky's constitution similarly bars only "cruel punishment."[94] Rhode Island's only bars cruel punishments but also adds a proportionality requirement.[95]

Maryland has two separate clauses, one that bars "cruel and unusual pains" by the legislature and one that bars "cruel or unusual punishment" by the courts.[96]

83. HAW. CONST. art. I, § 12 ("[N]or cruel or unusual punishment inflicted."); State v. Kido, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982).

84. KAN. CONST. BILL OF RTS., § 9 ("[N]or cruel or unusual punishment inflicted."); State v. Scott, 961 P.2d 667, 672–73 (Kan. 1998).

85. MISS. CONST. art. III, § 28 ("Cruel or unusual punishment shall not be inflicted . . . ."); Barnwell v. State, 567 So.2d 215, 222 (Miss. 1990) (en banc) (Prather, J., dissenting).

86. TEX. CONST. art. I, § 13 ("[N]or cruel or unusual punishment inflicted."); Reyes v. State, 557 S.W.3d 624, 631 (Tex. Crim. App. 2017).

87. WYO. CONST. art. I, § 14 ("[N]or shall cruel or unusual punishment be inflicted."); Tilley v. State, 912 P.2d 1140, 1143 (Wyo. 1996).

88. LA. CONST. art. I, § 20; State v. Smith, 839 So.2d 1, 4 (La. 2003).

89. S.C. CONST. art. I, § 15 ("[N]or shall cruel, nor corporal, nor unusual punishment be inflicted . . . ."); State v. Wilson, 413 S.E.2d 19, 27 (S.C. 1992).

90. N.H. CONST. pt. I, art. 33 ("[O]r inflict cruel or unusual punishments."); *id.* art. 18 ("All penalties ought to be proportioned to the nature of the offense."); State v. Carpentino, 85 A.3d 906, 916–17 (N.H. 2014).

91. DEL. CONST. art I, § 11 ("[N]or cruel punishments inflicted . . . ."); Burrell v. State, 207 A.3d 137, 146 (Del. 2019).

92. PA. CONST. art. I, § 13 ("[N]or cruel punishments inflicted."); Commonwealth v. Bonner, 135 A.3d 592, 597 n.18 (Pa. Super. Ct. 2016).

93. S.D. CONST. art. VI, § 23 ("[N]or cruel punishments inflicted."); State v. Chipps. 874 N.W.2d 475, 486–89 (S.D. 2016) (analyzing only the Eighth Amendment in a state criminal proceeding).

94. KY. CONST. BILL OF RTS. § 17 ("[N]or cruel punishment inflicted."); Howard v. Commonwealth, 496 S.W.3d 471, 477–78, 477 n.21 (Ky. 2016).

95. R.I. CONST. art. I, § 8 ("[N]or cruel punishments inflicted; and all punishments ought to be proportioned to the offense."); Alessio v. State, 924 A.2d 751, 755 (R.I. 2007).

96. MD. CONST. DECLARATION OF RTS., arts. 16, 25; Thompson v. Grindle, 688 A.2d 466, 470 n.5 (Md. Ct. Spec. App. 1997).

B. States that Apply their Own Interpretation

1. Identical Language

None of the states with identical language (and no additional provision) apply their own independent meaning (separate from the Eighth Amendment) to their state punishment clauses.[97]

2. Different Language

One group of states, with language in their state punishment clauses that differs from that of the Eighth Amendment, interpret their state constitutional punishment clauses independently of the Eighth Amendment. It is worth noting that many of these applications still rely on elements of the evolving standards of decency test and the gross disproportionality test.

Alaska uses identical language but adds the requirement that the punishment be based on one or more purposes of punishment.[98] As a result, Alaska uses its own constitutional test:

> Only those punishments which are cruel and unusual in the sense that they are inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process [and cruel and unusual punishment] clauses . . . .[99]

Alaska explicitly distinguishes its test from the Eighth Amendment[100] and has used it to strike down excessive sentences.[101]

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97. *See* Berry, *supra* note 5, at 1215–18. Virginia's clause predates the Eighth Amendment by fifteen years. VA. CONST. art. I, § 9. *See Virginia Constitutions*, LIBRARY OF VA., https://www.lva.virginia.gov/constitutions/ (last visited Sept. 24, 2025) (Virginia punishment clause ratified in 1776).

98. ALASKA CONST. art. I, § 12 ("[N]or cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation."); *see* Burnor v. State, 829 P.2d 837, 840 (Alaska Ct. App. 1992).

99. Green v. State, 390 P.2d 433, 435 (Alaska 1964); *see* Moore v. State, 262 P.3d 217, 222 (Alaska Ct. App. 2011); McNabb v. State, 860 P.2d 1294, 1298 (Alaska Ct. App. 1993) (as amended on reh'g in part).

100. Dancer v. State, 715 P.2d 1174, 1180 (Alaska Ct. App. 1986).

101. *See, e.g.*, Kelly v. State, 622 P.2d 432, 434, 440 (Alaska 1981); Wharton v. State, 590 P.2d 427, 428, 429 n.5, 431 (Alaska 1979); Hansen v. State, 582 P.2d 1041, 1045–46 (Alaska

North Carolina has also recently determined that its state constitution is broader than the Eighth Amendment with respect to JLWOP sentences.[102] It reads the "or" in its state punishment clause as creating a disjunctive provision that bars cruel punishments and also bars unusual ones.[103]

New Jersey uses language identical to the Eighth Amendment but adds a provision specifically making the death penalty constitutional in certain circumstances.[104] Under the New Jersey Constitution, courts apply a three-part hybrid test—a combination of the evolving standards of decency and gross disproportionality tests from the Supreme Court's Eighth Amendment jurisprudence.[105] New Jersey courts have typically upheld punishments against state constitutional challenges despite the presence of evolving standards in the analysis.[106]

Oregon uses identical language to the Eighth Amendment but also adds a proportionality requirement.[107] The two provisions—the proportionality and cruel and unusual punishment provisions—receive separate analysis, but in some cases, each can inform the respective

1978); Szeratics v. State, 572 P.2d 63, 67 (Alaska 1977); Black v. State, 569 P.2d 804, 805 (Alaska 1977); Huff v. State, 568 P.2d 1014, 1020 (Alaska 1977); Mattern v. State, 500 P.2d 228, 234–35 (Alaska 1972); Galaktionoff v. State, 486 P.2d 919, 922–25 (Alaska 1971); Yu v. State, 706 P.2d 348, 351 (Alaska Ct. App. 1985); Husted v. State, 629 P.2d 985, 987 & n.7 (Alaska Ct. App. 1981).

102. N.C. CONST. art. I, § 27 ("nor cruel or unusual punishments"); State v. Kelliher, 873 S.E.2d 366 (N.C. 2022).

103. *Kelliher*, 873 S.E.2d at 382.

104. N.J. CONST. art. I, para. 12 ("[C]ruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death . . . ."). New Jersey legislatively abolished the death penalty in 2007. *See New Jersey*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/new-jersey-1 [https://perma.cc/5HQV-X85Y] (last visited Sept. 24, 2025).

105. *See*, *e.g.*, State v. Johnson, 766 A.2d 1126, 1140 (N.J. 2001) ("We consider, first, whether the punishment conforms with contemporary standards of decency; second, whether the punishment is grossly disproportionate to the offense; and third, whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective."); State v. Maldonado, 645 A.2d 1165, 1175 (N.J. 1994).

106. *See*, *e.g.*, State v. Josephs, 803 A.2d 1074, 1130, 1132 (N.J. 2002) (death penalty); *Johnson*, 766 A.2d at 1128, 1140–41 (mandatory minimum sentences for violent crimes); State v. Des Marets, 455 A.2d 1074, 1075, 1084 (N.J. 1983) (mandatory minimum sentences for possession of a firearm without intent to use); State v. DeAngelis, 747 A.2d 289, 295 (N.J. Super. Ct. App. Div. 2000) (restitution order to the victim of fraud committed by defendant); State v. Oliver, 689 A.2d 876, 882–83 (N.J. Super. Ct. Law Div. 1996) (life in prison without parole after "three strikes" are accrued) *aff'd*, 720 A.2d 1001 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 745 A.2d 1165 (N.J. 2000).

107. OR. CONST. art. I, § 16 ("Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."); State v. Althouse, 375 P.3d 475, 484 (Or. 2016).

applications of the other.[108] The Oregon courts mirror the Supreme Court in applying their state punishment clause, requiring gross disproportionality for the punishment to be unconstitutional.[109]

For a sentence to be disproportionate under the state constitution, the sentence must "shock[] the moral sense" of reasonable people."[110] Three factors guide this analysis: "a comparison of the severity of the penalty and the gravity of the crime; a comparison of the penalties imposed for other, related crimes; and the criminal history of the defendant."[111] While Oregon courts have reversed a few cases under the state constitution,[112] such challenges are more often unsuccessful.[113]

Like Oregon, West Virginia adds a proportionality requirement but bars "cruel and unusual punishment," not "punishments."[114] West Virginia uses a two-part test under its state constitution. First, the court asks whether the sentence shocks the conscience and offends fundamental notions of human dignity, a subjective test much like the Eighth Amendment's gross disproportionality test.[115] For punishments surviving the subjective test, the courts apply an objective proportionality test examining "the nature of the offense[,] the legislative purpose behind the punishment[,] a comparison of the punishment with what would be inflicted in other jurisdictions[, and] a comparison of punishment with other related offenses within the same

108. *See* State v. Wheeler, 175 P.3d 438, 446 (Or. 2007); *see also Althouse*, 375 P.3d at 484 ("For the most part, this court has analyzed the requirement[s] . . . separately.").

109. *See*, *e.g.*, State v. Simonson, 259 P.3d 962, 965 (Or. Ct. App. 2011); State v. Ronniger, 492 P.2d 298, 304 (Or. Ct. App. 1971); State v. Hecket, 467 P.2d 122, 123 (Or. Ct. App. 1970).

110. *See*, *e.g.*, *Althouse*, 375 P.3d at 484; State v. Rogers, 836 P.2d 1308, 1323 (Or. 1992); State v. Padilla, 371 P.3d 1242, 1244 (Or. Ct. App. 2016) (first quoting OR. CONST. art. I, § 16; and then quoting State v. Camacho-Garcia, 341 P.3d 888, 890 (Or. Ct. App. 2014)); State v. Pardee, 215 P.3d 870, 872 (Or. Ct. App. 2009) (quoting *Wheeler*, 175 P.3d at 448).

111. State v. Rodriguez, 217 P.3d 659, 668 (Or. 2009) (en banc); *Padilla*, 371 P.3d at 1244 (quoting *Rodriguez*, 217 P.3d at 668).

112. *See, e.g.*, *Rodriguez*, 217 P.3d at 679; State v. Ryan, 396 P.3d 867, 879–80 (Or. 2017); State v. Davidson, 380 P.3d 963, 970, 974–75 (Or. 2016); State v. Carey-Martin, 430 P.3d 98, 117 (Or. Ct. App. 2018) (en banc).

113. *See, e.g.*, State v. Burgert, 423 P.3d 169, 170 (Or. Ct. App. 2018); State v. Horseman, 432 P.3d 258, 265 (Or. Ct. App. 2018); State v. Smith, 372 P.3d 549, 559 (Or. Ct. App. 2016); State v. Johnson, 260 P.3d 782, 786–87 (Or. Ct. App. 2011).

114. W. VA. CONST. art. III, § 5 ("[N]or cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence.").

115. *See, e.g.*, State v. Shafer, 789 S.E.2d 153, 159 (W. Va. 2015) (quoting State v. Cooper, 304 S.E.2d 851, 852 (W. Va. 1983)); State v. Mann, 518 S.E.2d 60, 71–72 (W. Va. 1999); *Cooper*, 304 S.E.2d at 857.

jurisdiction."[116] West Virginia has reversed a significant number of cases under its state constitutional proportionality principle,[117] but most punishments still survive its two-part test.[118]

California[119] and Minnesota[120] both use the disjunctive "cruel or unusual" punishments. This distinction "is 'purposeful and substantive rather than merely semantic,'"[121] thus construing the state constitution as separate[122] and broader than the Eighth Amendment.[123]

If a punishment, "although not cruel or unusual in its method . . . is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity," it violates the California Constitution.[124] To identify unconstitutional punishments, California courts examine, first, the nature of the offense and defendant's background, with particular regard to the degree of danger both present to society; second, the punishment for more serious offenses; and third, punishment for similar offenses in other jurisdictions.[125] To demonstrate a constitutional violation, a defendant only needs to establish one of the three criteria.[126] The crime, the

116. *See, e.g.*, Martin v. Leverette, 244 S.E.2d 39, 43 (W. Va. 1978) (citing Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973)); *Shafer*, 789 S.E.2d at 159; State v. Cook, 723 S.E.2d 388, 397 (W. Va. 2010); Wanstreet v. Bordenkircher, 276 S.E.2d 205, 210 (W. Va. 1981).

117. *See, e.g.*, State v. Kilmer, 808 S.E.2d 867, 870–71 (W. Va. 2017); State v. Wilson, No. 11-0432, 2012 WL 3031065, at *2 (W. Va. Mar. 12, 2012); State v. David D. W., 588 S.E.2d 156, 165–66 (W. Va. 2003); State v. Miller, 400 S.E.2d 897, 900–01 (W Va. 1990) (per curiam); *Wanstreet*, 276 S.E.2d at 214.

118. *See, e.g.*, State v. Blevins, 744 S.E.2d 245, 268–69 (W. Va. 2013); State v. Adams, 565 S.E.2d 353, 355–58 (W. Va. 2002) (per curiam); State v. King, 518 S.E.2d 663, 669–71 (W. Va. 1995).

119. CAL. CONST. art. 1, § 17 ("Cruel or unusual punishment may not be inflicted. . . ."); People v. Baker, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018).

120. MINN. CONST. art. I, § 5 ("[N]or cruel or unusual punishments inflicted."); State v. Ali, 855 N.W.2d 235, 258 (Minn. 2014); State v. Vang, 847 N.W.2d 248, 263 (Minn. 2014).

121. *Baker*, 229 Cal. Rptr. 3d at 442 (quoting People v. Carmony, 26 Cal. Rptr.3d 365, 378 (Cal. Ct. App. 2005)).

122. People v. Palafox, 179 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2014), *abrogated on other grounds by* People v. Botello, 259 Cal. Rptr. 3d. 93 (Cal. Ct. App. 2020).

123. People v. Smithey, 978 P.2d 1171, 1225 n.1 (Cal. 1999) (Mosk, J., concurring).

124. *In re* Lynch, 503 P.2d 921, 930 (Cal. 1972) (en banc); *see also* People v. Garcia, 213 Cal. Rptr. 3d 217, 224–25 (Cal. Ct. App. 2017) ("A punishment need not be disproportionate under all three [criteria] to violate the California Constitution.").

125. *See Lynch*, 503 P.2d at 930–32; *In re* Nuñez, 93 Cal. Rptr. 3d 242, 254 (Cal. Ct. App. 2009); People v. Em, 90 Cal. Rptr. 3d 264, 271 (Cal. Dist. Ct. App. 2009); *see also* People v. Dillon, 668 P.2d 697, 719–22, 726 n.38 (Cal. 1983) (en banc) (applying the first criterion, briefly discussing the second, and declining to invoke the third).

126. *Nuñez*, 93 Cal. Rptr. 3d at 254; *Dillon*, 668 P.2d at 726 n.38 ("The sole test remains, as quoted above, whether the conduct 'shocks the consciousness and offends fundamental notions of human dignity.'" (quoting *Lynch*, 213 Cal. Rptr. 3d at 424)).

defendant's criminal acts, and the defendant's relevant personal mitigating characteristics are all part of this inquiry.[127]

In determining whether a punishment violates the state constitution, the California courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.'"[128] Further, "cruel," as used in the California Constitution, means "causing physical pain or mental anguish of an inhumane or torturous nature."[129]

California courts, even though their approach is broader than the Eighth Amendment, nonetheless still rely on the idea of gross disproportionality,[130] including by using the concept to justify upholding draconian three strikes sentences.[131] As with most states, state constitutional punishment challenges are typically unsuccessful in the California courts.[132]

Like California, Minnesota courts find that the "or" requires two separate inquiries.[133] Using a proportionality test similar to the Eighth Amendment, Minnesota courts compare the gravity of the offense to the severity of the sentence to determine whether a punishment is "cruel."[134] Then, Minnesota courts consider whether a consensus exists among the states in assessing "unusualness" under the evolving standards of

127. *See, e.g.*, People v. Landry, 385 P.3d 327, 381–82 (Cal. 2016) (defendant's traumatic childhood considered); People v. Cage, 362 P.3d 376, 405–06 (Cal. 2015) (traumatic past); People v. Mendez, 114 Cal. Rptr. 3d 870, 884–85 (Cal. Ct. App. 2010) (nature of the crime and defendant being a juvenile).

128. People v. Watson, 214 Cal. Rptr. 3d 48, 56–57 (Cal. Ct. App. 2017) (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).

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

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

131. *See, e.g.*, People v. Mantanez, 119 Cal. Rptr. 2d 756, 762–64 (Cal. Ct. App. 2002).

132. People v. Carmony, 26 Cal. Rptr. 3d 365, 368 (Cal. Ct. App. 2005) ("It is a rare case that violates the prohibition against cruel and/or unusual punishment."); *see also Cage*, 362 P.3d at 405–06; People v. Cunningham, 352 P.3d 318, 364 (Cal. 2015); People v. Jackson, 319 P.3d 925, 961–62 (Cal. 2014); People v. Christensen, 177 Cal. Rptr. 3d 712, 732–33 (Cal. Ct. App. 2014); People v. Abundio, 165 Cal. Rptr. 3d 183, 190 (Cal. Ct. App. 2013). *But see* People v. Dillon, 668 P.2d 697, 727 (Cal. 1983) (en banc) (holding that, under the circumstances of the case, life imprisonment for first-degree felony murder was cruel and unusual).

133. *See* State v. Vang, 847 N.W.2d 248, 263 (Minn. 2014) (quoting State v. Juarez, 837 N.W.2d 473, 482 (Minn. 2013) ("To determine whether a particular sentence is cruel or unusual under the Minnesota Constitution, we 'separately examine whether the sentence is cruel and whether the sentence is unusual.'")).

134. *Id.*; *Juarez*, 837 N.W.2d at 482; *see* State v. McDaniel, 777 N.W.2d 739, 753 (Minn. 2010); State v. Gutierrez, 667 N.W.2d 426, 438 (Minn. 2003); State v. Pedersen, 679 N.W.2d 368, 377–78 (Minn. Ct. App. 2004).

decency.[135] Even so, defendants typically do not bring successful claims under the state constitutional punishment clause, despite the more robust two-part test.[136]

Michigan uses the disjunctive, singular "cruel or unusual punishment."[137] Like in California and Minnesota, the "or" in the Michigan Constitution makes the state punishment clause broader than the Eighth Amendment.[138] Michigan uses a two-part test: the Eighth Amendment's gross disproportionality test and an examination of the goal of rehabilitation as applied to the punishment.[139] Its approach incorporates the purposes of punishment, particularly rehabilitation, into its analysis, shadowing the Eighth Amendment. As such, while rejecting many challenges under its state punishment clause,[140]

135. *Vang*, 847 N.W.2d at 263 (quoting State v. Mitchell, 577 N.W.2d 481, 490 (Minn. 1998)); *Juarez*, 837 N.W.2d at 482.

136. *See, e.g.*, *Vang*, 847 N.W.2d at 263–64; *Juarez*, 837 N.W.2d at 482–83; State v. Crow, 730 N.W.2d 272, 281–82 (Minn. 2007); *Gutierrez*, 667 N.W.2d at 438; State v. Chambers, 589 N.W.2d 466, 480 (Minn. 1999); State v. Christie, 506 N.W.2d 293, 300 (Minn. 1993); McLaughlin v. State, 190 N.W.2d 867, 871–72 (Minn. 1971); State v. Dietz, 119 N.W.2d 833, 837 (Minn. 1963).

137. MICH. CONST. art. I, § 16 ("[C]ruel or unusual punishment shall not be inflicted . . . ."); People v. Benton, 817 N.W.2d 599, 607 (Mich. Ct. App. 2011).

138. *See Benton*, 817 N.W.2d at 607 (Mich. Ct. App. 2011) (quoting People v. Nunez, 619 N.W.2d 550, 554 n.2 (Mich. Ct. App. 2000)) ("If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution."); Carlton v. Department of Corrections, 546 N.W.2d 671, 678 (Mich. Ct. App. 1996) ("In an appropriate case, the Michigan Constitution's prohibition against 'cruel or unusual' punishment may be interpreted more broadly than the Eighth Amendment's prohibition . . . .").

139. *See* People v. Dipiazza, 778 N.W.2d 264, 273 (Mich. Ct. App. 2009) ("Determining whether a punishment is cruel or unusual requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation."); People v. Launsburry, 551 N.W.2d 460, 463 (Mich. Ct. App. 1996).

140. *See, e.g.*, People v. Fluker, 498 N.W.2d 431, 431–32 (Mich. 1993); People v. Stewart, 256 N.W.2d 31, 36–37 (Mich. 1977); People v. Burton, 240 N.W.2d 239, 241–42 (Mich. 1976); People v. Hall, 242 N.W.2d 377, 380 (Mich. 1976); People v. Powell, 750 N.W.2d 607, 610 (Mich. Ct. App. 2008) (per curiam); People v. Poole, 555 N.W.2d 485, 492 (Mich. Ct. App. 1996); People v. DiVietri, 520 N.W.2d 643, 644–645 (Mich. Ct. App. 1994) (per curiam); People v. Cortez, 346 N.W.2d 540, 548–49 (Mich. Ct. App. 1984); People v. Landis, 361 N.W.2d 748, 749 (Mich. Ct. App. 1984) (per curiam); People v. O'Donnell, 339 N.W.2d 540, 543–44 (Mich. Ct. App. 1983) (per curiam); People v. Korona, 326 N.W.2d 143, 145 (Mich. Ct. App. 1982) (per curiam); People v. Johnson, 321 N.W.2d 752, 755 (Mich. Ct. App. 1982) (per curiam); People v. Hamp, 312 N.W.2d 175, 181 (Mich. Ct. App. 1981); People v. Ross, 251 N.W.2d 268, 270 (Mich. Ct. App. 1977) (per curiam); People v. Gunn, 190 N.W.2d 793, 795 (Mich. Ct. App. 1971) (per curiam).

Michigan courts have found it possible for non-capital punishments to be cruel or unusual.[141]

Washington bars cruel, but not unusual, punishment.[142] As such, the Washington Constitution's Punishment Clause offers broader protections than the Eighth Amendment.[143]

In cases involving non-capital offenses, Washington uses a four-part test that contains elements of the Eighth Amendment's gross disproportionality test, meaning that defendants usually lose.[144] Washington's proportionality test examines the nature of the offense, the legislative purpose behind the statute, the punishment the defendant would have received in other jurisdictions, and the punishment meted out for other offenses in the same jurisdiction.[145]

The Washington Supreme Court has additionally imposed categorical bans on specific types of punishment based on its punishment clause. These include determinations that the death penalty[146] and JLWOP sentences violate the state constitution's punishment clause.[147]

Illinois does not bar cruel or unusual punishment per se but rather requires all punishments to be both retributive and rehabilitative[148] (relating to the seriousness of the offense as well as having the goal of restoring the offender to society).[149]

141. *See, e.g.*, People v. Taylor, Nos. 166428 and 166654, 2025 WL 1085247, at *16 (Mich. Apr. 10, 2025); People v. Parks, 987 N.W.2d 161, 183 (Mich. 2022) (en banc); People v. Lorentzen, 194 N.W.2d 827, 834 (Mich. 1972); *Dipiazza*, 778 N.W.2d at 273–74.

142. WASH. CONST. art. I, § 14 ("[N]or cruel punishment inflicted."); State v. Whitfield, 134 P.3d 1203, 1216 (Wash. 2014).

143. *Whitfield*, 134 P.3d at 1216; State v. Roberts, 14 P.3d 713, 733 (Wash. 2000) (en banc); State v. Ames, 950 P.2d 514, 517 n.8 (Wash. Ct. App. 1998).

144. *See, e.g.*, Wahleithner v. Thompson, 143 P.3d 321, 323, 326 (Wash. Ct. App. 2006); State v. Magers, 189 P.3d 126, 136 (Wash. 2008) (en banc); State v. Rivers, 921 P.2d 495, 502–03 (Wash. 1996) (en banc); State v. Thorne, 921 P.2d 514, 531–33 (Wash. 1996) (en banc), *abrogated on other grounds by* Blakely v. Washington, 542 U.S. 296 (2004); State v. Manussier, 921 P.2d 473, 485–86 (Wash. 1996) (en banc); State v. Grenning, 174 P.3d 706, 720 (Wash Ct. App. 2008), *aff'd*, 234 P.3d 169 (Wash. 2010); *Whitfield*, 134 P.3d at 1216–17; State v. Flores, 56 P.3d 622, 624–25 (Wash. Ct. App. 2002); State v. Gimarelli, 20 P.3d 430, 436 (Wash. Ct. App. 2001); *In re* Haynes, 996 P.2d 637, 643 (Wash. Ct. App. 2000); State v. Morin, 995 P.2d 113, 116–18 (Wash. Ct. App. 2000); *Ames*, 950 P.2d at 517–18.

145. *See* State v. Fain, 617 P.2d 720, 726 (Wash. 1980) (en banc) (reversing a grossly disproportionate sentence).

146. *See* State v. Gregory, 427 P.3d 621, 642 (Wash. 2018).

147. *See* State v. Bassett, 428 P.3d 343, 355 (Wash. 2018).

148. *See* People v. Pace, 44 N.E.3d 378, 404 (Ill. App. Ct. 2015).

149. ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."). *See generally* Hawilo & Nirider, *supra* note 17 (examining the history of Illinois's punishment clause and the requirement of a rehabilitative punishment purpose).

Illinois courts, in applying the state's punishment clause, focus both on giving deference to the legislature and limiting relief to cases that are so disproportionate as to shock the conscience of the community.[150] Thus, Illinois courts interpret their state constitution's Proportionate Penalties Clause consistent with the Supreme Court's application of the Eighth Amendment in non-capital, non-JLWOP cases.[151]

Illinois courts have found punishments to violate the Proportionate Penalties Clause on several occasions,[152] though Illinois does typically track with the national trend of upholding punishments.[153] One reason that Illinois courts might depart from the practices of the Supreme Court in these cases is the requirement for rehabilitation and the need to balance it with the goal of retribution.[154]

Finally, the Connecticut Constitution, as interpreted by Connecticut courts, bars cruel and unusual punishments even though there is not an explicit textual proscription against cruel and unusual punishments.[155]

150. *See* People v. Gonzales, 184 N.E.2d 833, 835 (Ill. 1962) (noting that the Illinois Supreme Court "has been reluctant to override the judgment of the General Assembly" unless the punishment shocks the moral conscience of the community); People v. Ybarra, 67 N.E.3d 404, 409 (Ill. App. Ct. 2016).

151. *See* People v. Zetterlund, 127 N.E.3d 21, 27 (Ill. App. Ct. 2018) (stating that the Illinois "proportionate penalties clause is coextensive with the Eighth Amendment's proportionality requirement."); *see also* People v. Boeckmann, 932 N.E.2d 998, 1007 (Ill. 2010) (applying Illinois's proportionate penalties clause to a revocation of a license for a DUI); *In re* A.C., 54 N.E.3d 952, 970 (Ill. App. Ct. 2016) (describing the application of Supreme Court Eighth Amendment jurisprudence in the context of a non-capital, non-JLWOP case); People v. Pollard, 54 N.E.3d 234, 249 (Ill. App. Ct. 2016).

152. *See, e.g.*, People v. Tetter, 121 N.E.3d 434, 450 (Ill. App. Ct. 2018) (holding that lifetime registration as a sex offender was grossly disproportionate); People v. Taylor, 25 N.E.3d 627, 633 (Ill. 2015) (retroactive sentencing enhancement); People v. House, 72 N.E.3d 357, 389 (Ill. App. Ct. 2015) (mandatory life sentence without considering mitigating factors or the goal of rehabilitation); People v. Lampkins, 26 N.E.3d 601, 604 (Ill. App. Ct. 2015) (fifteen-year enhancement for being armed with a firearm while committing aggravated criminal sexual assault) .

153. *See, e.g.*, People v. Hunter, 62 N.E.3d 246, 262 (Ill. App. Ct. 2016); *Pollard*, 54 N.E.3d at 251; *Pace*, 44 N.E.3d at 414, 418; *In re* Shermaine S., 25 N.E.3d 723, 731–32 (Ill. App. Ct. 2015); People v. Knox, 19 N.E.3d 1070, 1083 (Ill. App. Ct. 2014); People v. Smolley, 873 N.E.2d 8, 14 (Ill. App. Ct. 2007); People v. Moore, 797 N.E.2d 217, 230 (Ill. App. Ct. 2003); People v. Stork, 713 N.E.2d 187, 196 (Ill. App. Ct. 1999).

154. *See, e.g.*, *Pace*, 44 N.E.3d at 404–05 (quoting People v. Calhoun, 935 N.E.2d 663, 683 (Ill. App. Ct. 2010)) (explaining that the proportionate penalties clause "calls for the balancing of the retributive and rehabilitative purposes of punishment" and "[t]hat balancing, in turn, requires that the court engage in an inclusive, holistic consideration of 'all of the factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it.'"); *see* Hawilo & Nirider, *supra* note 17, at 84.

155. *See* CONN. CONST. art. I, §§ 8, 9; *see also* State v. Santiago, 122 A.3d 1, 29 (Conn. 2015) ("[W]e find little merit in the argument that the decision of the framers of the

The Connecticut Supreme Court has found that the constitutional text articulates due process protections that "prohibit governmental infliction of cruel and unusual punishments."[156]

The Connecticut Supreme Court has held that its constitutional prohibition is separate from the Eighth Amendment.[157] Until recently, the only applications of this doctrine related to the death penalty.[158] Indeed, the Connecticut Supreme Court held in 2015 that the death penalty, as an excessive punishment, violated the state constitution by failing to satisfy any legitimate penological purpose.[159]

III. WHY LOCK-STEPPING IS PROBLEMATIC

Lock-stepping is problematic because it rests on two faulty assumptions. First, state courts assume that state constitutional provisions with similar language to federal constitutional provisions have the same meaning.[160] Unless the state constitution specifically incorporates the federal constitutional provision,[161] state courts should presume that the state constitution has its own independent meaning.[162]

Connecticut Constitution not to include an express bar on cruel and unusual punishment somehow suggests that this liberty was uncherished.").

156. State v. Ross, 646 A.2d 1318, 1354 (Conn. 1994) (citing State v. Kreminski, 422 A.2d 294, 298 n.4 (Conn. 1979); State v. Kyles, 363 A.2d 97, 99–100 (Conn. 1975)).

157. *See Santiago*, 122 A.3d at 15.

158. *See, e.g.*, *Santiago*, 122 A.3d at 31–55 (applying evolving standards doctrine to the death penalty); State v. Reynolds, 836 A.2d 224, 286 (Conn. 2003); State v. Rizzo, 833 A.2d 363, 390–91 (Conn. 2003); State v. Ross, 646 A.2d 1318, 1354 (Conn. 1994). The two non-capital challenges under the state constitution related to the application of the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012). In those cases, the Connecticut appeals courts rejected claims that the juvenile mandatory minimum sentence of twenty-five years was the equivalent of a mandatory juvenile life without parole sentence. *See* State v. Hathaway, 172 A.3d 258, 259–60 (Conn. App. Ct. 2017); State v. Rivera, 172 A.3d 260, 280 (Conn. App. Ct. 2017).

159. *Santiago*, 122 A.3d at 73.

160. *See* Berry, *supra* note 5, at 1214.

161. Florida's punishment clause provides an excellent example of such an incorporation. It provides that:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, *shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution*.

FLA. CONST. art. I, § 17 (emphasis added).

162. *See* sources cited *supra* notes 8 and 9.

To that end, states should not use the Supreme Court's doctrine to define the meaning of their own constitutions. The shadow that the Court's interpretation casts over state constitutional law provisions is alarming. Whether the product of judicial laziness or undeveloped reasoning, such an approach deprives the state constitution of its own meaning. The second faulty assumption, then, is that the state constitutional analysis must follow or borrow from the federal constitutional analysis. The contrary is in fact true. The state constitutional analysis should be separate from and independent of the federal constitutional analysis. In other words, state supreme courts should not lock-step the interpretation of their state constitutions to the U.S. Supreme Court's interpretation of the Federal Constitution.

A. Why State Courts Should Not Lockstep

With respect to first principles, it is critical to remember that states adopt their constitutions independently from any federal actor, whether a legislator, executive, or judge. States engage in complicated processes to adopt their constitutions, engage in wholesale adoptions of new constitutions, and in many states, regularly amend their constitutions through referenda voted on by their citizens.[163] In short, state constitutional language is not an arbitrary copying of the Federal Constitution; rather, it is the exercise of the democratic will of the people.[164]

1. Democratic Norms

When states adopt or amend their constitutions, they engage in an extensive democratic process, whether by direct voter participation or through a representative convention.[165] These processes involve complex and engaged decision-making with respect to the text and conceptual nature of the constitutional provisions involved.[166] Unlike the Federal

163. *See* Constance Van Kley, *A Constitution Unique to Montana and Uniquely Montanan*, STATE CT. REP. (Jan. 2, 2025), https://statecourtreport.org/our-work/analysis-opinion/constitution-unique-montana-and-uniquely-montanan (original and new constitutional adoption); John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states (amendment process in each state); Erin Geiger Smith, Sarah Kessler & Zoe Merriman, *Voters Across the Country Amend Their Constitutions*, STATE CT. REP. (Nov. 8, 2024), https://statecourtreport.org/our-work/analysis-opinion/voters-across-country-amend-their-constitutions (referenda).

164. WILLIAMS & FRIEDMAN, *supra* note 6, at 44.

165. *Id.* at 44–45.

166. *Id.*

Constitution, state constitutions change often.[167] The average state constitution contains 115 amendments with citizens revising it five separate times.[168]

To assume that state constitutional text has the same meaning as the Federal Constitution absent specific textual guidance indicating such an intention interferes with the will of the people and disregards the intent of the drafters. Lock-stepping state constitutions to the Federal Constitution is the height of judicial activism. Lock-step analysis substitutes the federal meaning of the Federal Constitution for the text and meaning chosen by the citizens of the state through a democratic process.

As such, state supreme courts should presume that state constitutions have their own independent meaning. They should avoid lock-step analysis and instead fulfill their role as jurists by developing their own doctrine and meaning when interpreting the scope of individual rights that arise under state constitutions.

2. Pre-Incorporation History

Further, state courts should presume that state constitutional provisions accord greater rights than their federal counterparts unless the state constitutional text specifically provides otherwise.[169] It is important to remember that most courts interpreted the Federal Constitution to protect individual rights only against incursion by the *federal* government prior to the adoption of the Fourteenth Amendment after the Civil War.[170]

State constitutions, then, provided similar kinds of protections against incursions on individual rights by *state* actors. To assume that the deprivations that federal and state governments might engage in

167. *See* Smith et al., *supra* note 163; WILLIAMS & FRIEDMAN, *supra* note 6, at 47.

168. Kevin Frazier, *State Constitutional Conventions, Explained*, STATE CT. REP. (Aug. 6, 2024), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-conventions-explained.

169. See discussion *supra* Part II.B.2; WILLIAMS & FRIEDMAN, *supra* note 6, at 165–223 for examples of and discussion about states which interpret their state constitutions to afford broader protections than does the Eighth Amendment.

170. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) ("We are of opinion, that the[ ] Fifth Amendment to the Constitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."). *See generally* Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77 (2009) (discussing the history of and the debate surrounding incorporation); Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102 (2009) (discussing specific issues about the interpretation of the Fourteenth Amendment that slowed incorporation after the *Slaughter-House Cases*).

were identical such that the constitutional protections were identical seems to ignore the basic differences in the purposes and goals of state and federal governments.[171] If anything, given the long history of state governments infringing on individual rights to a greater degree than federal governments, one might assume that individuals need far greater protections from state and local governments operating directly in their communities.[172]

Certainly, with respect to criminal law and punishment, one might presume that the protections against cruel or unusual punishments from state courts would be much greater that the protections needed in federal courts. States have historically, and even currently, administered the vast majority of criminal sanctions.[173] The need, then, to receive protection from draconian state punishment remains a more urgent concern for most than the need to receive protection from draconian federal punishment.

At the very least, one should construe the rights arising under the Eighth Amendment and state punishment clauses as different. Historically, they were different, providing different protections against different governments.[174]

Even if the protections were the same, state courts should be determining the scope of individual rights protections from state governments. The Supreme Court does not make this determination. Indeed, state courts abdicate their constitutional role by reflexively adopting the Court's interpretation.

When the Court interprets the Federal Constitution, it is not speaking to the scope of the actions of state governments pursuant to the rights that citizens chose for themselves under their democratically adopted state constitutions. The Court is only defining federal rights, not

171. *See* sources cited *supra* note 17.

172. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2011) (describing the effects of state generated mass incarceration on marginalized communities).

173. *See* Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html. Indeed, the federalization of certain crimes, particularly drugs, has generated volumes of criticism. *See, e.g.*, Edwin Meese III, *The Dangerous Federalization of Crime*, HOOVER INST.: HOOVER DIG. (July 30, 1999), https://www.hoover.org/research/dangerous-federalization-crime; Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675–97 (1997); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996), https://scholarship.law.duke.edu/faculty_scholarship/1263.

174. *See* sources cited *supra* note 17.

state ones. And prior to incorporation, those rights were different rights with different sources.[175]

With the adoption of the Fourteenth Amendment and the Supreme Court's piecemeal incorporation of individual rights, most federal constitutional rights now apply to state governments, not just the federal government. The Court did not explicitly incorporate the Eighth Amendment against state governments until its 1962 decision in *Robinson v. California*.[176]

Even then, the application of the Eighth Amendment to the states does not speak to the scope of state punishment clauses. And if state courts read them as being the same, they eviscerate the very rights state citizens had selected democratically.

While it is worth noting that the people can amend state constitutions and also vote out judges in most states,[177] the individual rights in question are not ones that necessarily would generate a majority outrage if state courts did not recognize them. That is because the individual rights in question are counter-majoritarian in nature. The purpose of such rights is to accord protection *against* the majority. Particularly in an age of penal populism and mass incarceration, it is not likely that the people would fight for the rights of criminal defendants. And yet, that is exactly why such protections exist in state constitutions, and why state judges have an obligation to interpret and apply such provisions, not hide behind the Court's interpretation of analogous federal provisions.

3. Different Language

In addition to the democratic and federalism reasons that state courts should not lock-step the interpretations of their state constitutions, the plain text itself can provide a reason for state courts to interpret their constitutions independently. As textualists know, even small linguistic differences can communicate different meanings.[178]

175. Brennan, *supra* note 8, at 493.

176. 370 U.S. 660, 667 (1962). *Robinson* did not specifically acknowledge the incorporation of the Eighth Amendment and also did not place limits on the scope of criminal sentences. *Id.* at 668. Rather, it held that states could not criminalize status, such as drug addiction, but had to require an act (or omission) to find that a defendant had committed a crime. *Id.* at 662, 666.

177. *See* Dinan, *supra* note 163; Judicial Selection: An Interactive Map, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), https://www.brennancenter.org/judicial-selection-map.

178. *See* discussion *supra* part II.

With respect to the punishment clauses, there are a diversity of approaches.[179] Some are conjunctive, some are disjunctive.[180] Some only bar cruel punishments.[181] Some add other requirements, including dignity, proportionality, or the purposes of punishment.[182] And some bar "punishment" while others bar "punishments."[183]

A state court cannot just assume that their state's punishment clause means the same thing as the Eighth Amendment, particularly where there is some linguistic difference present. State courts have a responsibility to accord meaning to the text that their state adopted in its constitution, irrespective of the language of the Federal Constitution and the Supreme Court's interpretation of it.

4. Different History

Underscoring the differences in text are the different histories surrounding the adoption of the state punishment clauses.[184] Particularly for originalists—jurists and scholars who believe that constitutional meaning relates to historical meaning—the source of the constitutional text and language can provide evidence as to the proper interpretation of the state constitutional provision in question.[185]

With respect to the punishment clauses, each has a unique history. Many of these provisions predate the Eighth Amendment.[186] Also, many states have had multiple constitutions and adopted different forms of punishment clauses in their constitutions.[187] Failing to explore this history and instead opting to lock-step state punishment clauses to the Eighth Amendment is a way to accord an improper or erroneous meaning to the state constitution.

179. *See* discussion *supra* part II.
180. *See* discussion *supra* part II.
181. *See* discussion *supra* part II.
182. *See* discussion *supra* part II.
183. *See* discussion *supra* part II.
184. *See, e.g.*, sources cited *supra* note 17.
185. *See* Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation (last visited Sept. 24, 2025).
186. *General Information on State Constitutions (as of January 1, 2022)*, THE BOOK OF THE STATES, https://bookofthestates.org/tables/2022-1-3/ (last visited Sept. 24, 2025).
187. *See 50 Constitutions*, U. WISC. L. SCH.: STATE DEMOCRACY RSCH. INITIATIVE, https://50constitutions.org/ (last visited Sept. 24, 2025).

5. Federalism and the Under-Enforcement of State Rights

Another reason state courts should not lock-step is that the Court often applies principles of federalism in choosing not to expand individual rights under the Federal Constitution. This deference presupposes that states will choose the scope of individual rights in their state, allowing some states to choose broader rights than others. But if states simply lock-step, this deference is in vain. At the very least, lock-stepping undermines the very principles of federalism that undergird many individual constitutional rights.

In the Eighth Amendment context, the Court has consistently deferred to state punishment practices, opting not to interfere by imposing federal constitutional limits on punishment.[188] A recent example is the Court's decision in *Jones v. Mississippi*, where it declined to require states to make a factual finding of permanent incorrigibility prior to imposing JLWOP sentences.[189] The Court explained:

> [S]tate practices matter here because, as the Court explained in *Montgomery*, when "a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."[190]

Because the Court's rule limits the scope of federal rights in the name of deferring to state rights, state courts should do more than have state rights mirror the federal ones.

B. Why State Courts Should Not Lean on Eighth Amendment Principles

In addition to all of the problems with lock-stepping, the Court's Eighth Amendment doctrines themselves contain fundamental flaws that counsel against importing them into state constitutions. In other words, the Court's tests are inadequate ways of interpreting the language of cruel and unusual punishments.

188. *See* Berry, *supra* note 16, at 322–42.
189. 593 U.S. 98, 118–21 (2021).
190. *Id.* at 117 (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

1. Counter-Majoritarian Rights

The provisions in the Bill of Rights exist to protect the rights of individuals against government intervention. Under the Eighth Amendment, the government cannot impose "cruel and unusual punishments[.]"[191] In capital and JLWOP cases, the Court's test to determine the scope of this individual right to be free from cruel and unusual punishments is the evolving standards of decency doctrine.[192]

But the content of this minority right comes in part from the *majority* practice. The Court looks to the practices of state legislatures to determine the scope of the individual right.[193] To be clear, the Court determines the scope of the right of an individual to be free from the punishment practices of governments by looking to the prevailing punishment practices of those governments.[194] If all states chose to allow the drawing and quartering of individuals accused of parking violations, then the conduct would satisfy the objective portion of the evolving standards test and thus not be a cruel and unusual punishment, even though it clearly is one as a disproportionate imposition of a punishment involving torture.

It is thus an analytical mistake to look to the majority practice to determine the content of a minority (or counter-majoritarian) right. Perhaps the Court does this to determine what is "unusual" or otherwise establishes the evolving standard of conduct, but it does not provide adequate protection of the minority right against an overreach by the majority.[195]

191. U.S. CONST. amend. VIII.

192. *See* discussion *supra* Part I.A.

193. *See* discussion *supra* Part I.A; Atkins v. Virginia, 536 U.S. 304, 321; Roper v. Simmons, 543 U.S.551, 564; Kennedy v. Louisiana, 554 U.S. 407, 421.

194. *See* discussion *supra* Part I.A; *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 564; *Kennedy*, 554 U.S. at 421.

195. A perhaps better explanation of this doctrine is as a response to the backlash to the Court's decision in *Furman v. Georgia*, where most states passed new capital statutes in response to the Court finding the death penalty unconstitutional under the Eighth Amendment. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH L. REV. 1, 8, 10, 46 (2007) (describing the response of states to *Furman*); Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (per curiam). In other words, the Court is hesitant to acknowledge a counter-majoritarian right under the Eighth Amendment unless a majority of states have already approved that right. *See* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 108, 115 (2018).

2. Irrational Differentness Limits

A second fundamental flaw in the Court's Eighth Amendment doctrine relates to its use of the concept of differentness.[196] The Court accords heightened constitutional scrutiny to death penalty and JLWOP cases.[197] The death penalty is "different" because it is unique both in its severity and irrevocability.[198] Juveniles are also "different" because of their diminished culpability, at least with respect to LWOP sentences.[199] It seems reasonable to accord heightened review to these groups under the Eighth Amendment.

But the corollary of the "differentness" principle is that no other punishments or groups receive any real scrutiny under the Eighth Amendment.[200] The strong presumption under the Court's "gross disproportionality" test is that no non-capital, non-JLWOP punishments violate the Eighth Amendment.[201]

There is nothing to support the idea that non-capital, non-JLWOP sentences are always constitutional. This is particularly true in light of the disproportionality principle the Court uses in its cases. A number of its gross disproportionality cases are arguably incorrect in upholding disproportionate punishments.[202] But the Court's doctrine has unnecessarily foreclosed legitimate constitutional challenges to excessive non-capital, non-JLWOP punishments, particularly in LWOP cases.[203]

C. How State Courts Misapply Eighth Amendment Doctrine

When state courts do apply Eighth Amendment doctrine pursuant to their state constitutions, they often make a fundamental mistake when they apply the Court's tests. Under the objective prong of the evolving standards of decency test, the Eighth Amendment test requires the Court to engage in state counting to determine whether the states allow a particular punishment for a particular crime.[204]

When one moves the test from the Federal Constitution to a state constitution, the applicable input into the test becomes *counties*, not

196. *See* discussion *supra* Part I.A.
197. *See* discussion *supra* Part I.A.
198. *See* cases cited *supra* note 22.
199. Miller v. Alabama, 567 U.S. 460, 471, 481 (2012) (explaining that if death is different, "children are different too").
200. *See* Barkow, *supra* note 3, at 1146.
201. *See* cases cited *supra* note 50.
202. *See* cases cited *supra* note 50.
203. William W. Berry III, *Life-With-Hope Sentencing*, 76 OHIO ST. L.J. 1051, 1074 (2015).
204. *See* discussion *supra* Part I.A.

states.[205] If the Court decides what the national standard under the Eighth Amendment is by looking at the practices of states, state courts should decide what the state standard is under the state constitution by looking at the practices of its counties.[206] In other words, determining the evolving standards under a state constitution requires an inquiry that is intra-state, not inter-state.

IV. UNLOCKING STATE PUNISHMENT CLAUSES

Having explained why state courts should not lock-step their state punishment clauses to the Supreme Court's interpretation of the Eighth Amendment, the next step is to provide possible ways states can and should interpret their state constitutions. The analysis here largely focuses on the words in question—cruel, and, unusual, punishment—an approach the Court largely eschews under the Eighth Amendment.[207] The various meanings of these words give rise to a number of different possible applications. The idea in this Article is not to argue for one meaning, but rather to create a taxonomy of possible readings to equip state courts to choose the meanings that best fit their constitutions, recognizing that each state constitution has its own meaning.

To the extent that a judge believes that original meaning is relevant to contemporary meaning, they should look to the history and the context of the adoption of the state constitutional provision in question. In recent years, scholars have increasingly begun to examine the origin of state punishment clauses. Recent papers have examined Arizona,[208] Illinois,[209] North Carolina,[210] Michigan,[211] Mississippi,[212] and Pennsylvania,[213] among others. A cursory examination of recent law review articles indicates that, at least in several jurisdictions, the original meaning of state punishment clauses is meaningfully different than the Court's reading of the Eighth Amendment.[214]

205. *See* William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. 1, 20–23 (2020) (mapping out how this should look in practice).
206. *Id.*
207. *See* discussion *supra* Part I.
208. Mills & Sternstein, *supra* note 17, at 739–65.
209. Hawilo & Nirider, *supra* note 17, at 57–88.
210. Finholt, *supra* note 17, at 81–88.
211. David M. Shapiro & Molly Bernstein, *The Meaning of Life, In Michigan: Mercy from Life Sentences Under the State Constitution* 2–3 (Oct. 19, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4993230.
212. Berry, *supra* note 17, at 21–39.
213. Bendesky, *supra* note 17, at 205–08.
214. *See* sources cited *supra* notes 208–13.

A. Unlocking "And"

Before exploring what the word "cruel," the word "unusual," and the word "punishment" might mean in the text of state constitutions, it is instructive to examine the applicable conjunction, which could likewise inform the meaning.[215] There are certainly important linguistic differences in the state constitutional provisions, with some jurisdictions prohibiting only cruel punishments, some barring cruel "or" unusual punishments, and some barring cruel "and" unusual punishments.[216] For the first two categories, the conjunction does not create an interpretive question—if it is cruel or unusual, the court should engage in a separate analysis with respect to each noun.[217]

Where the conjunction in question is "and," there are at least five possible readings of the conjunction in "cruel and unusual" punishment. State courts should consider which reading best fits their state constitution.

215. Interestingly, the Supreme Court has never opined on the meaning of "and" under the Eighth Amendment's "cruel and unusual punishments" language. Many but not all scholars have read it conjunctively. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778–79 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1199–1200 (2006); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 120 (Gordon S. Wood et al. eds., new ed. 2018); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997); David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 PUB. AFFS. Q. 77, 79–85 (2002); Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual"*, 74 U. CIN. L. REV. 819, 831 (2006); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 614 (2010). *But see* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695, 720 (2016); HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 96–97 (1987); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 119 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 n.120 (2003); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 968–69 (2011); JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 180–81 (2012).

216. *See* discussion *supra* Part II.

217. *See* discussion *supra* Part II.B.2 (discussing examples of states that use this approach). If the language does not prohibit unusual punishments, then the question is simply whether the punishment is cruel.

1. Bars Punishments That Are Both Cruel and Unusual (And)

The first and perhaps simplest reading of the "and" in state punishment clauses is as a conjunctive conjunction. This would mean that the state constitution would only bar a punishment that is both cruel and also unusual. If a punishment was cruel but not unusual, it would be constitutional. Likewise, if a punishment was unusual but not cruel, it would also be constitutional.

The challenge of reading this provision conjunctively is that it allows states to impose cruel punishments. And unusual punishments. So long as they do not fall into both categories, punishments are constitutional even though they have a fundamental problem in their cruelty or unusualness. It does not follow that the authors of state constitutions meant unusualness to serve as a limit on barring cruel punishments or for cruelty to serve as a limit on barring unusual punishments.

Requiring a punishment to be both cruel and unusual to violate the state constitution also accords a level of deference to state legislatures that is unnecessary and unhelpful. States should not be imposing cruel punishments; they also should not be imposing unusual ones. Indeed, without clear legislative or constitutional history to the contrary, state courts should choose a less deferential reading of "and" in state punishment clauses.

2. Bars Cruel Punishments and Unusual Punishments (Or)

A second, perhaps more accurate reading of the conjunction "and" is as part of a "both . . . and" kind of construction. In other words, a bar against "cruel and unusual" punishments would independently bar both punishments that are cruel and punishments that are unusual. The effect, then, is that "cruel and unusual" state constitutional punishment clauses bar punishments if they are cruel *or* unusual.

This reading makes grammatical and practical sense. The "and" connotes the idea that both kinds of punishment—cruel and unusual—violate the state constitution. Practically, reading the two as separately required categories would legalize "cruel" punishments as long as they were not "unusual," as well as "unusual" punishments as long as they were not "cruel." It does not make sense that a constitutional convention seeking to protect individuals from cruel punishments would only want to do so if they were also unusual, and vice versa. Rather, the better reading is that both categories constitute kinds of punishments to prohibit, such that if a punishment falls in either category, the state courts should bar its use.

3. Bars "Cruel and Unusual" Punishments (Unitary Concept)

Cruel and unusual can also denote a unitary concept, such that "cruel and unusual" punishments are one idea, not separable into the two categories of cruel punishments and unusual punishments.[218] This singular idea is perhaps more expansive than a reading that separates the two nouns into two categories.

In applying the unitary reading, a court would find punishments to be "cruel and unusual," as opposed to assessing "cruel" and "unusual" separately. That inquiry would categorize punishments that fell under either category as "cruel and unusual." The advantage of such an approach would be that a court would not have to engage in a separate analysis of "cruel" punishments and "unusual" ones.

4. Bars "Unusually Cruel" Punishments (Hendiadys)

Another reading of conjunctive constitutional provisions is as a hendiadys.[219] This means that "cruel and unusual" means "unusually cruel."[220] As a result, the court is not asking whether the punishment is both cruel and unusual. Instead, the court examines whether the punishment is particularly cruel—a higher level of cruelty than merely a cruel punishment.

This approach can be useful in that it would provide a constitutional floor to keep state courts from aggressively striking down punishments. But judicially activist state courts have not been an issue. Rather, courts that blindly defer to their legislatures and give no effect to their state constitutions have been the problem.[221] So, one problem with the hendiadys reading would be state courts just using it as another form of the insurmountable gross disproportionality Eighth Amendment standard of the Court. A state court could read unusually cruel as providing a high standard for cruel and unusual punishments, meaning that almost no punishment would violate the state constitution. In other words, a court could read a punishment that is both a cruel punishment and an unusual punishment as nonetheless constitutional because it finds that it is not "unusually cruel."

218. *See* Stinneford, *supra* note 215, at 968–69.

219. Bray, *supra* note 215, at 695, 720 (defining "hendiadys" and its application to the Eighth Amendment).

220. *Id.*

221. *See* Ben Finholt & Kevin Bendesky, *The Neglected State Constitutional Protections Against Extreme Punishments*, STATE CT. REP. (July 21, 2023), https://statecourtreport.org/our-work/analysis-opinion/neglected-state-constitutional-protections-against-extreme-punishments.

5. Bars "Cruel/Unusual" Punishments (Synonyms)

A final reading of the "and" in the state constitutional cruel and unusual punishment clause reads the nouns "cruel" and "unusual" as synonyms.[222] The idea here is that all cruel punishments are unusual, and all unusual punishments are cruel.

If the words cruel and unusual are synonymous, then a punishment that is either cruel or unusual would violate a state constitutional provision that bars "cruel and unusual" punishments. Because cruel punishments are unusual punishments and vice versa, a punishment that is cruel is unconstitutional, as is a punishment that is unusual.

A state using this conjunctive reading of cruel and unusual as synonyms would then combine the options in Parts B, C, and D below to have a complete menu of possible ways that a punishment might violate the state constitution. The advantage of this synonymous reading of "and" is that it would provide state courts a more robust set of options to place limits on state legislatures imposing excessive punishments.

B. Unlocking "Cruel"

While the Supreme Court's Eighth Amendment doctrines eschew a textual approach, state courts should focus their interpretation of their state constitutional punishment clauses on the text of those clauses. And almost every state constitution bars "cruel" punishments.[223]

This taxonomy of "cruel" provides state judges with a number of possible readings of this word. Judges might choose all of these meanings, some of them, or even just one of them, depending on the relevant context of the state constitution,[224] and the applicability of the concept to the case at bar.

There are at least eight possible meanings of "cruel" in the texts of state constitutional punishment clauses: (1) torture, (2) excessive punishment, (3) impugning dignity, (4) vindictive retribution, (5) absolutely disproportionate, (6) relatively disproportionate, (7) non-individuating, and (8) inhumane and barbaric. While some of these concepts may overlap slightly, they articulate distinct ways of reading state constitutions. Below I provide an explanation of each reading and an applicable constitutional test derived from each conception of "cruel."

222. *See* JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 180–81 (2012).

223. *See* Berry, *supra* note 5, at 1213–40 (discussing state analogues to the Eighth Amendment).

224. This might include the history of the constitutional provision as well as the presence or absence of other provisions related to punishment.

1. Torture

A punishment may be cruel in the sense that it involves torture, defined as the infliction of severe pain and suffering.[225] It is not a stretch to find that state actors inflicting severe pain and suffering are imposing a cruel punishment.[226]

It is also important to note that the pain and suffering that constitutes torture can go beyond physical pain.[227] Psychological torture can in many ways be more severe than inflicting physical pain, and in any event, can be "cruel" in a number of circumstances.[228]

The applicable test a state court could adopt would ask whether the sentence imposes pain and suffering in such a way as to constitute a form of torture in light of the individualized circumstances of the defendant.[229]

One might think that states have long ago abandoned punishments in this sense of "cruel." A closer examination, however, suggests that a number of punishments currently used by states might fall under this definition of "cruel."

225. 18 U.S.C. § 2340.

226. Indeed, the Court has highlighted a number of punishments that would be cruel under the Eighth Amendment because of the pain and suffering they cause. *See* Bucklew v. Precythe, 587 U.S. 119, 131 (2019) (quoting JAMES A. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 140 (1833)) ("Many early commentators likewise described the Eighth Amendment as ruling out 'the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion.'"); JAMES A. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2nd ed. 1834); *see also* BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 186 (1832) (stating that the Eighth Amendment prohibits such "barbarous and cruel punishments" as "[b]reaking on the wheel, flaying alive, rending asunder with horses, . . . maiming, mutilating and scourging to death"). Justice Story even remarked that he thought the prohibition of cruel and unusual punishments likely "unnecessary" because no "free government" would ever authorize "atrocious" methods of execution like these. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1006, at 710 (abr. ed. 1833).

227. 18 U.S.C. § 2340.

228. The death row phenomenon is an example of this kind of torture. *See Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row (last visited Sept. 24, 2025). More than one jurist has found that an excessive length of time on death row is a cruel and unusual punishment under the Eighth Amendment. *See, e.g.*, Johnson v. Bredesen, 558 U. S. 1067, 1067 (2009) (Stevens, J., respecting denial of cert.); Glossip v. Gross, 576 U.S. 863, 923–38 (2015) (Breyer, J., dissenting); Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

229. This part of the test is important because different punishments might not land the same way on different people.

First, some capital punishment methods might constitute cruel punishments, particularly if administered in a way that inflicts severe pain and suffering. Nitrogen hypoxia executions, for instance, involve a form of torture by making the inmate breathe in nitrogen when the inmate can no longer hold his breath.[230] Lethal injection usually involves torture as it is akin to waterboarding, with autopsies showing the pulmonary edema.[231]

The death penalty also can constitute a form a psychological torture, at least in the way that many states administer it. States wait on average two decades from sentencing to execute inmates.[232] Scholars have documented the death row phenomenon of inmates losing their faculties as a result of living on death row for long periods of time, particularly in prisons that have harsh conditions of confinement.[233]

Beyond capital punishment, other punishments can also involve levels of pain and suffering such that they become cruel. Solitary confinement is an obvious example.[234] The psychological torture that

230. For an explanation of why this method of execution violates state constitutional law, see generally William W. Berry III, *State Constitutional Limits on Nitrogen Hypoxia*, 2025 ILL. L. REV. 1121 (2025).

231. *See* CORINNA BARRETT LAIN, SECRETS OF THE KILLING STATE, THE UNTOLD STORY OF LETHAL INJECTION 2 (2025) (describing Oklahoma's execution of Clayton Lockett, who "woke up in the midst of his own execution and tried to get up off the gurney.").

232. DEATH PENALTY INFO. CTR., *supra* note 228.

233. *See id.*

234. *See* CORR. LEADERS ASS'N & ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING BASED ON A NATIONWIDE SURVEY OF U.S. PRISON SYSTEMS 84 (2020), https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_2019.pdf. The report defines "restrictive housing" as "holding individuals in a cell for an average of twenty-two hours or more for fifteen days or more." *Id.* at 1; *see* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J.L. & POL'Y 325, 327–28 (2006); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 441–42 (2006); *see also* Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 240 (2020) (detailing the experience of being alone but with no privacy); HUM. RTS. IN TRAUMA MENTAL HEALTH LAB, STAN. U., MENTAL HEALTH CONSEQUENCES FOLLOWING RELEASE FROM LONG-TERM SOLITARY CONFINEMENT IN CALIFORNIA 7–13 (2017) (survey data about the psychological effects of solitary confinement); Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY & L. 350, 351–57 (2017) (comparing the effects of solitary confinement on adults versus that on children); Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, JAMA NETWORK OPEN (Oct. 4, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350 (those who spent time in solitary confinement significantly more likely to die within first year after release than control group).

solitary confinement imposes, particularly when imposed for any lengthy period of time, certainly rises to the level of "cruel" punishment.[235]

Life-without-parole sentences also likely fall into this category.[236] Condemning someone to die in a cage with no hope of ever leaving constitutes a form of psychological torture.[237] This also applies to sentences with lengths that extend beyond one's life expectancy, whether a seventy-five year sentence for a juvenile or a twenty-five year sentence for a senior citizen.[238]

2. Excessive Punishment

A second related, but different, reading of cruel relates to the idea of excessive punishment.[239] In a similar sense that a punishment could be cruel because it involves torture, a punishment could also be "cruel" because it is gratuitous or unnecessary.[240] This sense of "cruel" is not relative to anything; it applies to situations simply involving too much punishment.

The applicable test a state court could adopt would ask whether the sentence imposed is gratuitous or unnecessary.[241]

For some, the death penalty fits this definition of cruel.[242] No matter the conduct of the inmate, a decision to kill the person is gratuitous and unnecessary. This application of "cruel" finds that some other form of

235. *See* Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 219–20 (2019) ("The risk of undergoing brain damage due to extreme isolation is an excessive—and, therefore, extremely unbalanced—cost for any legitimate penological interest to allegedly justify it. . . . [N]o penological interest can counterbalance the damages that solitary confinement risks imposing on incarcerated people."). For an argument about how to challenge solitary confinement under state constitutions, see Alison Gordon, *Challenging Solitary Confinement Through State Constitutions*, 90 U. CIN. L. REV. 454, 500–03 (2021).

236. *See* Berry, *supra* note 203, at 1054; MARGARET E. LEIGEY, THE FORGOTTEN MEN: SERVING A LIFE WITHOUT PAROLE SENTENCE, at ix–x (2015).

237. *See* LEIGEY, *supra* note 236, at ix–x.

238. *See generally* ASHLEY NEILLIS, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES (2017), https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf (describing the worsening issue of imposing sentences so long that it is presumed that the incarcerated person will die in prison).

239. The most obvious of these are punishments long abandoned like the use of the rack, the thumbscrew, and other modes of torture. *See* O'Neil v. Vermont, 144 U.S. 323, 338–39, 340 (1892) (Field, J., dissenting) ("The whole inhibition [of the prohibition against cruel and unusual punishments] is against that which is excessive . . . .").

240. *See id.* at 339–40.

241. *Cf.* Ingraham v. Wright, 430 U.S. 651, 670 (1977) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)) (holding that "'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment").

242. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 332–33 (1972) (Marshall, J., concurring); *id.* at 286 (Brennan, J., concurring).

punishment would be satisfactory to address the conduct in question, making it unnecessary for the state to murder the inmate.[243]

Life-without-parole sentences also arguably meet this definition of "cruel."[244] Under no circumstances is an LWOP sentence necessary.[245] Leaving the possibility of parole does not mean that the state has to grant parole, but foreclosing the opportunity seems unnecessarily excessive and therefore cruel.[246] Part of the problem is making an ultimate decision—dying in prison—without collecting all of the relevant data.[247] Imposing a death in prison sentence at the time of the crime forecloses any possibility of rehabilitation or further mitigation developed over the time of the defendant's incarceration.[248]

3. Impugning Dignity

A third construction of "cruel" is the impugning of the dignity of the defendant. The Supreme Court has emphasized the connection of dignity to cruel and unusual punishments under the Eighth Amendment, suggesting that undignified punishment might be cruel for purposes of state constitutions.[249]

243. *See, e.g.*, *Furman* 408 U.S. at 332–33 (1972) (Marshall, J., concurring); *id.* at 286 (Brennan, J., concurring).

244. Some have argued that LWOP is worse than death. *E.g.*, Berry, *supra* note 203, at 1054; ROSS KLEINSTUBER ET AL., LIFE WITHOUT PAROLE: WORSE THAN DEATH? 69–92 (2022).

245. *See* Berry, *supra* note 203, at 1081–85 (proposing presumptive life sentences as an alternative to LWOP).

246. *Id.* at 1083.

247. *See id.*

248. *Id.* at 1079, 1083.

249. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring); Sellars v. Beto, 409 U.S. 968, 970 (1972) (Douglas, J., dissenting from denial of cert.); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Ingraham v. Wright, 430 U.S. 651, 684 n.1 (1977) (White, J., dissenting); Roberts v. Louisiana, 431 U.S. 633, 642–43 (1977) (Rehnquist, J., dissenting); Hutto v. Finney, 437 U.S. 678, 685 (1978); United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting); Rhodes v. Chapman, 452 U.S. 337, 361 (1981) (Brennan, J., concurring); Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting from denial of cert.); Spaziano v. Florida, 468 U.S. 447, 471 n.5 (1984) (Stevens, J., concurring in part and dissenting in part); Glass v. Louisiana, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of cert.); DeGarmo v. Texas, 474 U.S. 973, 973 (1985) (Brennan, J., dissenting from denial of cert.); Cabana v. Bullock, 474 U.S. 376, 397 (1986) (Blackmun, J., dissenting); Smith v. Murray, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting); Ford v. Wainwright, 477 U.S. 399, 406 (1986); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (plurality opinion); Wilson v. Seiter, 501 U.S. 294, 307 (1991) (White, J., concurring); Hudson v. McMillian, 503 U.S. 1, 11 (1992); Campbell v. Wood, 511 U.S. 1119, 1121 (1994) (Blackmun, J., dissenting from denial of cert.); Farmer v. Brennan, 511 U.S. 825, 852 (1994)

Dignity, while an amorphous phrase, connotes several ideas in the context of "cruel" punishments. First, a punishment can impugn an individual's dignity when its imposition dehumanizes the defendant, by treating them in a cold-hearted manner.[250] Second, a punishment designed to humiliate or shame the defendant might also be "cruel" in a similar sense in that it violates the dignity of the inmate.[251]

The applicable test a state court could adopt would ask whether the sentence imposed infringes upon the dignity of the defendant, including but not limited to humiliation and shaming.

It is not hyperbolic to find that the death penalty impugns the dignity of an inmate.[252] It communicates that the state no longer finds value in the life of the inmate.

LWOP sentences communicate a more subtle but equally important denigration.[253] A sentence to die in prison reveals a finding of irreparable corruption or a conclusion that one deserves such condemnation.[254] Finding that one's life has no value certainly does not accord with the concept of dignity.[255]

Shaming punishments, or punishments designed to humiliate, also might violate this reading of "cruel."[256] The level of shaming involved

(Blackmun, J., concurring); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002); Hope v. Pelzer, 536 U.S. 730, 738 (2002); Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring); Roper v. Simmons, 543 U.S. 551, 560 (2005); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008); Baze v. Rees, 553 U.S. 35, 57 (2008) (plurality opinion); Graham v. Florida, 560 U.S. 48, 58 (2010); Brown v. Plata, 563 U.S. 493, 510 (2011); Hall v. Florida, 572 U.S. 701, 708 (2014); Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting); Arthur v. Dunn, 580 U.S. 1141, 1154 (2017) (Sotomayor, J., dissenting from denial of cert.); Moore v. Texas, 581 U.S. 1, 12, 20 (2017); Zagorski v. Haslam, 586 U.S. 981, 983 (2018) (Sotomayor, J., dissenting from denial of cert.); Coonce v. United States, 142 S. Ct. 25, 31 (2021) (Sotomayor, J., dissenting from denial of cert.); *see also* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2140-44 (2016) (discussing the Court's reliance on dignity in the Eighth Amendment context).

250. *Furman*, 408 U.S. at 274 (Brennan, J., concurring).

251. *See id.* at 272–73.

252. *See id.* at 285–86.

253. Indeed, the consequences of capital and LWOP sentences are often the same. William W. Berry III, *Capital Trifurcation*, 12 TEX. A&M L. REV. 129, 132–33 (2024).

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

255. Ryan, *supra* note 249, at 2139–40.

256. Chad Flanders, *Shame and the Meanings of Punishment*, 55 CLEV. ST. L. REV. 609, 617 (2006). Professor Dan M. Kahan of Yale Law School, among others, has written extensively on shaming punishments. *See, e.g.*, Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 704–06 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384–85 (1997); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 617 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–49 (1996). *See generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME,

goes to the question of whether such punishments might be cruel. Some minor level of shaming might not cross the constitutional line, while other more extensive or humiliating shaming punishments might qualify as cruel under state constitutions.

4. Vindictive Retribution

The purpose of retribution can take several forms. One is "an eye for an eye," revenge based retribution, in which the goal is to get even or inflict the same damage on the person who committed the crime.[257] Another is just deserts retribution, punishing based on the culpability of the offender and the harm caused in an amount no more and no less than what one deserves.[258] The former is "cruel," the latter is not.

As Justice Marshall explained in his *Furman v. Georgia* concurrence, "the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."[259] Indeed, "[t]he 'cruel and unusual' language limits the avenues through which vengeance can be channeled."[260] Barring vengeance-based punishments through constitutional punishment clauses is "our insulation from our baser selves."[261] These protections exist to shield individuals against claims of the majority that morality requires vengeance in response to particularly offensive criminal acts.[262]

A state court could, for example, adopt a test that would ask whether the sentence imposed constitutes a form of revenge against the defendant by the state. Violations of this principle become particularly clear where no other purpose of punishment can justify its imposition.[263]

AND THE LAW (2004) (philosophical discussion of the role that shame and disgust play in the law); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998) (proposing that there is an educational rather than retributive purpose behind shame punishments); Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (on shaming punishments and retributivism); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1936 (1991) (psychological and anthropological analysis of shaming punishments); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCH. PUB. POL'Y & L. 645 (1997) (same).

257. "An eye for an eye" retribution has roots dating back to The Bible. *See Exodus* 21:23–27 (New King James version); *Leviticus* 24:17–22 (New King James version).

258. *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005) (philosophical discussion of the principles behind culpability).

259. Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

260. *Id.* at 345.

261. *Id.*

262. *Id.* at 344–45.

263. *See id.* at 344.

In practice, a number of uses of capital punishment constitute vengeance, regardless of whether one reaches Justice Marshall's conclusion that the death penalty is no more than a form of vengeance.[264] Felony murder cases, and other cases in which the defendant did not kill are clear examples of this kind of vengeance where the state chooses a death sentence because someone must pay for the homicide.[265]

But other punishments can constitute a form of vengeance as well. LWOP sentences, particularly in homicide cases, are an obvious example. This is particularly true in cases involving defendants with lower levels of culpability, such as juveniles or intellectually disabled offenders.[266] Solitary confinement could similarly constitute the expression of vengeance in certain circumstances.[267]

5. Absolutely Disproportionate

State courts could alternatively define "cruel" in their state punishment clauses in a way that relates to the purposes of punishment. A punishment that exceeds any of the purposes of punishment is, by definition, cruel.[268] That is because the punishment is disproportionate—more punishment than is necessary to satisfy the intended purpose. Absolute disproportionality refers to the sentence being disproportionate with respect to the intended purpose of punishment, irrespective of the punishment imposed upon other offenders.[269] It is important to note that this definition of cruel connects the sentence imposed to the conduct of the offender and the character of the offender, depending on which purpose of punishment the court is applying.

For instance, if just deserts retribution requires a sentence of ten years, a twenty-year sentence is cruel.[270] This means that the sentence

264. *See generally id.* at 359 ("There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.").

265. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 782 (1982); Tison v. Arizona, 481 U.S. 137, 141–43 (1987).

266. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding diminished culpability for intellectually disabled offenders); Roper v. Simmons, 543 U.S. 551, 571 (2005) (finding diminished culpability for juvenile offenders).

267. *See* sources cited *supra* notes 234–35.

268. *See* William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. BRIEF 61, 68–69 (2011); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005).

269. William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 90–93 (2011).

270. There is a case for capping all prison sentences at twenty years. *See* German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019, 7:30 AM) https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration; MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR

exceeds what the culpability of the offender and the harm caused demand.[271]

Similarly, a sentence in excess of what the state needs to deter others from committing the same crime would likewise be cruel. The conundrum here is that most significant criminal sentences do not provide much, if any, deterrence—particularly the death penalty.[272]

Perhaps the context in which states are most guilty of imposing disproportionately cruel punishments is where the punishments overestimate the dangerousness of the offender. The purpose of incapacitation becomes cruel when the punishment exceeds the time in which the offender is actually dangerous, a seemingly common sentencing practice.[273]

Finally, a sentence becomes cruel under the absolute proportionality reading of cruel when the punishment exceeds the amount of time to achieve rehabilitation.[274] Given that many prisons do not attempt rehabilitation, a closer look at many sentences might reveal that they exceed state constitutional limits.[275] To be sure, judges should visit prisons to better assess the degree to which the goal of rehabilitation requires the time of the sentence they are imposing.

The applicable test a state court could adopt for absolute proportionality cruelty would ask whether the sentence imposed is greater than necessary to achieve the purpose of just deserts, deterrence, incapacitation, or rehabilitation.

As discussed previously, capital and LWOP sentences can be examples of sentences that do not satisfy one or more of the purposes of punishment.[276] Other lesser sentences, however, may also fail in the

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ABOLISHING LIFE SENTENCES 145 (2018) ("Substantial evidence exists that a twenty-year maximum sentencing cap will produce better public safety outcomes than our current, record-breaking use of life imprisonment.").

271. *See* VON HIRSCH & ASHWORTH, *supra* note 258, at 12 ("[T]raditional retributive justifications disregard consequences and focus exclusively on notions of the deservedness of punishment.").

272. John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, BERKELEY ELEC. PRESS, Apr. 2006, at 1, 5, https://perma.cc/2B8H-LU34. *See generally* Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 753–54 (2005) (philosophical argument).

273. *Law Reviews: Predictions of Future Dangerousness Contribute to Arbitrary Sentencing Decisions*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/law-reviews-predictions-of-future-dangerousness-contribute-to-arbitrary-sentencing-decisions.

274. Ristroph, *supra* note 268, at 278.

275. *See* Etienne Benson, *Rehabilitate or Punish?*, 34 MONITOR ON PSYCH. 46 (2003) https://www.apa.org/monitor/julaug03/rehab (discussing how prisons today are much less likely than in the past to rehabilitate their inmates).

276. Berry, *supra* note 195, at 130–31, 147.

same way, as even short sentences may be cruel in light of the applicable purpose of punishment.

Another important concept to note is that a finding of cruelty can be in an individual case and does not necessarily have to give rise to a categorical rule.[277] In other words, an as-applied challenge might show that a particular punishment exceeds the sentence required for a particular defendant in light of his conduct and character.[278]

6. Relatively Disproportionate

While absolute disproportionality assesses the relationship between the sentence and the purposes of punishment, relative proportionality assesses the relationship between the punishments among similarly situated defendants.[279] Sentences are relatively disproportionate when they treat individuals who engaged in similar criminal conduct differently in terms of their punishments.

While some disparity in criminal sentencing is likely, significant disparity can rise to the level of unconstitutionally cruel under state constitutions. This can happen in one of two ways. If a particular criminal sentence is an outlier as compared to others with similar criminal conduct and character, that sentence can be unconstitutionally cruel, as applied, under the state constitution.

Also, a systemic application of punishments leading to distinctions based on improper factors is cruel. One way that unconstitutional cruelty can occur is when the imposition of a particular punishment is arbitrary or random. The Court found that Georgia's death penalty was cruel and unusual in *Furman* in part for this reason.[280] Similarly, when distinctions in punishment result from improper factors, it can also be cruel because it imposes a series of relatively disproportionate punishments. This can occur, for instance, when punishment disparities reflect racial discrimination or result from different geography.[281]

277. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding the death penalty under felony-murder rule unconstitutionally cruel in light of defendant's conduct but not establishing a categorial rule). *See generally* William W. Berry III, *The Evolving Standards, As Applied,* 74 FLA. L. REV. 775, 791, 794 (2022) (arguing for the adoption of heightened standards of Eighth Amendment review for individual, as-applied proportionality challenges in capital and JLWOP cases).

278. *See* Berry, *supra* note 277, at 783.

279. *See* Berry, *supra* note 269, at 90.

280. Furman v. Georgia, 408 U.S. 238, 256 (1972).

281. *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320 (2014) ("Across the distribution, Blacks receive sentences that are almost ten percent longer than those of comparable whites arrested for

Some states require their supreme courts to undergo comparative proportionality review in capital cases to ensure relative proportionality.[282] Most courts, however, do this review in an indefensible way because they ignore cases where the sentence was not a death sentence and treat cases with the same aggravating factors as similar where the factual situations at issue are wildly disparate.[283]

The applicable test a state court could adopt would ask whether the sentence imposed is excessive, random, or arbitrary in light of sentences imposed against similarly situated defendants.

The analysis here, as discussed, can either be individual or systemic. A punishment will be cruel under a state constitution because of relative disproportionality where the sentence is an outlier as compared to similar cases or where the sentence reflects systemic disparities.

7. Non-Individuating

Another sense in which a sentence can be cruel is where it is mandatory and does not consider the individual characteristics of the defendant and the individual criminal conduct at issue. The Court has adopted such a rule with respect to criminal defendants in capital[284] and JLWOP cases.[285]

The reason mandatory sentences might be cruel under state constitutions is that they prevent the court from considering the details of the crime it is sentencing and the character of the defendant. While a legislature ascribing a particular punishment in the abstract for a crime might make sense on paper, it is impossible for the legislature to consider the factual nuances that might mitigate a particular punishment. Courts are in a much better position to make such decisions because they can directly examine the evidence at issue. Relying on a blind guess by the legislature also creates separation of powers problems that might violate

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the same crimes."); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 230–46 (2012).

282. William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 698 (2012).

283. Walker v. Georgia, 555 U.S. 979, 983, 985 (2008) (Stevens J., dissenting from denial of cert.).

284. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital statute)*;* Lockett v. Ohio, 438 U.S. 586, 603–04 (1978) (finding that the proscription against mandatory sentences also required individual sentencing discretion in capital cases). *See generally* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019) (arguing for a broader application of the *Woodson-Lockett* principle).

285. Miller v. Alabama, 567 U.S. 460, 489 (2012) (barring mandatory JLWOP sentences); Montgomery v. Louisiana, 577 U.S. 190, 212–13 (2016) (applying the Court's decision in *Miller* retroactively).

state punishment clauses to the extent that they increase the likelihood of cruel punishment.

Mandatory sentences usurp the sentencing power of the courts and house that power in the legislature. The practical reality, however, is even worse. In the name of consistency in sentencing, legislatures adopt mandatory sentences, but that only reallocates the sentencing decision to the prosecutor.[286] Given the extensive menu of overlapping crimes in most states, prosecutors can choose the sentence where the sentence in question is mandatory.[287] And unlike judicial sentencing decisions made after a public hearing in which each side puts on evidence, a decision by a prosecutor to enter a plea bargain with the defendant and choose one sentence over another is hidden from the public.[288]

The applicable test a state court could adopt would ask whether the sentence imposed is mandatory or otherwise bars individualized consideration of the criminal conduct and the character of the offender.

This reading of cruel would apply to all mandatory sentences. Particularly troubling are mandatory LWOP sentences, which violate state constitutions for many of the same reasons that mandatory death and JLWOP sentences violate the Eighth Amendment.[289] Mandatory minimum sentences also can be cruel, particularly in the context of drug crimes, where they impose draconian sentences.

286. There is extensive literature concerning the power shift to prosecutors caused by mandatory sentences. *See generally* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591 (2005) (stating that mandatory minimum laws curtail judicial discretion and shift power to prosecutors); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 427 (2007) (discussing the "consequent displacement of discretion from judges to prosecutors" resulting from mandatory minimum laws); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 6 (2013) (explaining prosecutors' wide discretion to charge mandatory minimum offenses and stating that "restricting judicial discretion further empowers prosecutors, who tend to exercise that power in ways that perpetuate or worsen disparity"); William W. Berry III, *Mandatory Sentences as Strict Liability*, 81 WASH & LEE L. REV. 255 (2024) (arguing that mandatory sentences are a kind of strict liability).

287. *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*, SENT'G PROJECT (Feb. 14, 2024), https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/. Sometimes, this may only involve choosing the sentencing floor, in the case of mandatory minimum sentences.

288. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 FED. PROB. 9, 13 (1993).

289. *See generally* Berry, *supra* note 253 (arguing that LWOP and death sentences are practically equivalent); Berry, *supra* note 16 (arguing that the Court decided *Harmelin* incorrectly).

8. Inhumane and Barbaric

A final category of "cruel" punishment under state constitutions relates to punishments that are inhumane or barbaric. A number of punishments can rise to this level, but in a more modern era of punishment, it might refer to punishments previously abandoned and now invigorated.[290]

This category is similar in some ways to the ideas of torture and dignity. The ideas can overlap but are nonetheless distinct. The use of nitrogen hypoxia would certainly rise to the level of an inhumane or barbaric punishment, but so would the imposition of an LWOP sentence. To sentence someone to die in a cell without ever revisiting the decision, as discussed, seems both inhumane and barbaric.

Prison conditions, a form of punishment in their own right, also commonly rise to the level of inhumane and barbaric. An obvious example is the death row facility in Mississippi, which historically has not provided air conditioning despite brutal conditions each summer.[291]

The applicable test a state court could adopt would ask whether the sentence imposed is inhumane or barbaric in that it violates current societal standards of decency.

C. Unlocking "Unusual"

As with "cruel," there are a number of ways that state courts can read the word "unusual" in their state punishment clauses. These readings inform the potential scope of protections state constitutions provide criminal defendants.

1. Rare/Uncommon: Not Regularly Used

The first reading treats "unusual" punishments as rare ones. A punishment would then be unusual if the state does not regularly use it or it is otherwise uncommon because of a lack of use.[292]

290. *See generally* BAYARD, *supra* note 226, at 140 ("Many early commentators likewise described the Eighth Amendment as ruling out 'the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion.'")

291. Mina Corpuz, *A Year After Air Conditioning Came to Parchman, Most of Mississippi's Prisons are Still Without Relief from the Heat*, MISS. TODAY (July 20, 2023), https://mississippitoday.org/2023/07/20/state-inmates-lack-relief-from-dangerously-high-temperatures/.

292. *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (using this reading of unusual).

In a world of evolving standards, where governments become progressively less draconian over time, punishments that were formerly constitutional may become unconstitutional.[293] The idea here with particular punishments is that if the state does not use it, it loses it. In other words, if rarely used, a punishment can become "unusual."[294]

It is worth noting that this reading does not open the door to moving in the other direction—creating draconian punishments and making them usual by repeatedly imposing them.[295] The original meaning of the Eighth Amendment bars such cruel innovation,[296] and courts should read state constitutions in the same way.

In assessing whether a punishment is unusual, a state court could use the following test: whether the sentence imposed is rare. It is worth noting, though, that states do not impose punishments in the abstract, so the better test would relate the punishment to the crime and characteristics of the defendant. So, in applying the "rare" definition of unusual, the state court would ask whether the sentence imposed is rare for the crime/characteristics of the defendant in question.

In terms of current use of punishments, it is not hard to conclude that in many jurisdictions, the use of the death penalty is rare and therefore unusual.[297] Similarly, the increasingly rare use of juvenile LWOP

293. *See*, *e.g.*, Penry v. Lynaugh, 492 U.S. 302, 335 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

294. *Furman*, 408 U.S. at 313 (White, J., concurring). *See generally* Berry, *supra* note 195.

295. Andrew Johnson made this argument:

> Cruel or unusual punishment is not to be inflicted; but who is to decide what is cruel and what is unusual? The words have acquired a legal meaning by long use in the courts. Can it be expected that military officers will understand or follow a rule expressed in language so purely technical and not pertaining in the least degree to their profession? If not, then each officer may define cruelty according to his own temper, and if it is not usual *he will make it usual*.

President Andrew Johnson, Veto Message Regarding Rebel State Governments at the House of Representatives (March 2, 1867) (emphasis added) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/march-2-1867-veto-message-regarding-rebel-state-governments). *See generally* William W. Berry III, *Eighth Amendment Stare Decisis*, 98 S. CAL. L. REV. 255 (2024) (discussing the Court's unique treatment of precedent in the Eighth Amendment context).

296. Stinneford, *supra* note 28, at 1745–46.

297. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 26, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf; Berry, *supra* note 195, at 145.

sentences suggests that JLWOP would be unusual under state punishment clauses.[298]

2. Unprecedented/Cruel Innovation

A second, corollary idea to the limit on rare punishments is the idea that unusual punishments are punishments that are unprecedented in that they constitute cruel innovations. An unusual punishment, then, would be something new a state implements that is more cruel or draconian than the previous punishments it has used.

As noted above, this understanding of unusual—as a bar to cruel innovation—is consistent with the original meaning of the Eighth Amendment.[299] In addition to the historical evidence that supports this understanding, defining unusual as barring the imposition of harsher punishments makes sense as a way to frame a counter-majoritarian protection against legislative overreach. One can imagine the majority approving of a harsher punishment for a particularly distasteful crime or offender, invoking the very ideal the counter-majoritarian state punishment clause exists to protect.[300]

Another point worth noting is that this definition of unusual does not only apply to new punishments. Punishments that are cruel innovations at the time of adoption do not magically become "usual" with time or use.[301] Instead, courts should examine whether the punishment was a harsher innovation when introduced.

The test to assess whether a punishment is unusual under this definition would be asking whether the sentence imposed constitutes or constituted an unprecedented or cruel innovation at the time of adoption. In application, a court's approach here would be to simply examine the previous punishment practices of the state.

An obvious example of this kind of unusual punishment is the recent adoption of nitrogen hypoxia as a method of execution.[302] While lethal injection has its own problems, this innovation is an increasingly cruel

298. *States that Ban Life without Parole for Children*, CAMPAIGN FOR FAIR SENT'G OF YOUTH, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/ (last visited Sept. 24, 2025); Berry, *supra* note 195, at 143.

299. Stinneford, *supra* note 28, at 1746.

300. The *Black Mirror* episode *White Bear* captures this sentiment well. In the episode, the criminals' memories are wiped and they are forced to re-live a psychologically traumatic experience over and over again, for the enjoyment of a live audience. *Black Mirror: White Bear* (Netflix Feb. 18, 2013).

301. *See supra* note 296 and accompanying text.

302. *See* Alison Mollan, *Alabama Has Executed a Man with Nitrogen Gas Despite Jury's Life Verdict*, ACLU (Feb. 1, 2024), https://www.aclu.org/news/capital-punishment/alabama-has-executed-a-man-with-nitrogen-gas-despite-jurys-life-verdict.

way to execute an inmate. Requiring the inmate to hold his breath to avoid the suffocation by nitrogen gas and the struggle that ensues seems like, by all accounts, a cruel innovation.

LWOP sentences also could fall under this definition of unusual. The adoption of such sentences, mostly during the 1990s,[303] constituted a cruel innovation that was unprecedented at the time. Indeed, the volume of use of LWOP sentences in the United States remains unprecedented in the history of the world and remains rarely if ever used in other parts of the world.[304]

It is important to distinguish LWOP sentences from life-with-parole sentences. LWOP sentences make a final decision that one will die in state custody at the time of sentencing—they do not allow the opportunity to assess the sentence at a later date to determine whether a life sentence is still appropriate. In other words, barring LWOP sentences does not bar life sentences—it just allows the state to make a more measured sentencing decision extended over time. Such an approach is valuable because it allows the state to release individuals no longer deserving of incarceration and save resources while still incarcerating individuals that do not deserve release.

The adoption of mandatory LWOP sentences is a particularly apt example of unusual sentences under this definition of unusual. Not only do such sentences foreclose any later assessment of the appropriateness of a life sentence, but also such sentences never give the sentencer a voice in the sentence. Such sentences certainly are cruel innovations. And in many states, they are recent in their adoption in formerly capital cases as the only sentencing option.[305] When a state abolishes the death penalty and makes mandatory LWOP sentences the only option for certain homicide crimes, states implement a cruel sentencing innovation in such a way that it constitutes an unusual punishment.

3. Arbitrary

A third way a criminal sentence can be unusual relates to its arbitrary nature and lack of purpose. Where a state does not tether a criminal sentence to some legitimate purpose or justification, making it random or arbitrary, the sentence is unusual. An obvious example of this

303. *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 2, 2010), https://deathpenaltyinfo.org/stories/year-that-states-adopted-life-without-parole-lwop-sentencing.

304. Berry, *supra* note 253, at 163.

305. *See* Berry, *supra* note 253, at 151.

kind of sentence is the death penalty, which the Court found in *Furman* to be a punishment states imposed in a random and arbitrary manner.[306]

In applying this meaning of unusual, courts should ask whether the sentence imposed is arbitrary or purposeless. This assessment can involve examining whether the punishment imposed satisfies one or more purposes of punishment, but the inquiry is broader than that. If a state imposes a particular sentence in a random or arbitrary manner, the sentence is unusual.

While sentences could categorically be unusual under this definition of unusual, this definition has perhaps more purchase in as-applied challenges.[307] Courts can impose sentences that do not fully consider certain aspects of the criminal offense or certain characteristics of the defendant which should mitigate the sentence. As such, these sentences can be unusual under state constitutions because of their arbitrary imposition—that is, without due consideration of relevant facts that make the sentence an outlier.

Drug possession cases and other non-violent crimes are common examples of such arbitrary sentences. Felony murder sentences also are likely to be unusual in this way when the defendant in question did not commit the homicide.[308]

Finally, mandatory sentences of all kinds are likely to be unusual in this way. This is because they deny the court the opportunity to consider the relevant aspects of the crime in question and the relevant characteristics of the defendant. Instead, such sentences reallocate the sentencing decision to the prosecutor.[309] Prosecutor-driven sentencing under mandatory sentencing regimes is not only likely to give rise to unusual sentences in individual cases because such decisions occur in a black box environment with no public accountability, but also because sentencing schemes do not offer consistent frameworks providing a way to mitigate punishment.[310] In some cases, the statutory scheme will give rise to overlapping punishments for the same criminal conduct, giving the prosecutor the ability to choose between different mandatory

306. Furman v. Georgia, 408 U.S. 238, 256–57 (1972). The administration of the death penalty remains largely arbitrary. Glossip v. Gross, 576 U.S. 863, 915–24 (2015) (Breyer, J., dissenting).

307. *See, e.g.*, *Furman*, 408 U.S. at 257 (finding the death penalty unconstitutional as-applied). *See generally* Berry, *supra* note 277 (arguing for the adoption of heightened standards of Eighth Amendment review for individual as-applied proportionality challenges in capital and JLWOP cases).

308. Enmund v. Florida, 458 U.S. 782, 801 (1982).

309. *See* sources cited *supra* note 286.

310. *See* sources cited *supra* note 286.

sentences.[311] But in other cases, the prosecutor may have fewer choices, leading to an arbitrary or unusual sentence.[312]

4. Not Habitual

Another way a criminal sentence can be unusual is where it is not habitual. A sentence can be non-habitual with respect to the conduct in question or the characteristics of the defendant. A sentence can be non-habitual when it is outside the range of sentencing outcomes for particular conduct, such that it imposes a more severe punishment than others typically receive for that conduct. In assessing whether a punishment is habitual, states should first look to the practices of courts in other states to assess whether a punishment is unusual under the state constitution.

Under the Eighth Amendment, however, the Court has looked to international opinion in making similar assessments.[313] To that end, it is reasonable for state courts to examine the punishments for similar criminal conduct not only in other states, but also internationally.

It is important to note that sentences can be non-habitual based on the characteristics of the defendant as well. The most obvious characteristic would be juvenile defendants, but other characteristics may be relevant to the question of whether to mitigate sentences.[314]

To assess whether a punishment is unusual in the non-habitual sense, courts should ask whether the sentence imposed is not normal/regular for the crime/characteristic of the defendant in question. In practice, non-habitual sentences could include any sentence that is not common in light of the characteristics of the crime or of the defendant.

Importantly, this may require some comparative analysis to examine other cases in which a similar defendant committed a similar crime. While state constitutional punishment clauses clearly do not require pure consistency in sentencing, significant inconsistency such that a case is an outlier means that that punishment is probably unusual.

A related question concerns whether states should look more broadly in engaging in this kind of analysis. Most states are outliers with respect to the rest of the world concerning incarceration rates and sentence

311. *See* sources cited *supra* note 286.
312. *See* sources cited *supra* note 286.
313. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005).
314. *See* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1077–81 (2013) (exploring other categories of "differentness" including those with cognitive disabilities and mental illnesses, veterans, and the elderly).

lengths.[315] While a wholesale rejection of sentencing practices under state constitutions seems unlikely, this reading of unusual opens the door for state courts to more critically examine the sentencing practices of their states. Doing so has numerous benefits, especially economic ones. By decreasing unnecessary sentencing costs, states can both increase the compensation of actors in the criminal justice system, such as police officers and prosecutors, as well as reallocate such funds to other needs such as health care and education.

5. Remarkable

A final reading of "unusual" under state constitutions would be to find that unusual means "remarkable." Conceiving of unusual as remarkable means barring sentences that are noteworthy, significant, or otherwise beyond what is necessary given the circumstances. Remarkable sentences might occur where the sentence imposed constitutes some form of cruel punishment. In other words, this reading of unusual can incorporate one or more of the definitions of cruel discussed previously.

The test, then, for whether a sentence is unusual in the sense that it is remarkable would ask whether the sentence imposed is cruel because:

- it imposes or constitutes a form of torture;
- it is gratuitous or unnecessary;
- it infringes upon the dignity of the defendant;
- it constitutes a form of revenge against the defendant by the state;
- it imposes a sentence greater than necessary to achieve the purpose of just deserts, deterrence, incapacitation, or rehabilitation;
- it imposes a sentence that is excessive, random, or arbitrary in light of sentences imposed against similarly situated defendants;

315. Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), https://www.prisonpolicy.org/global/2024.html.

- it imposes a sentence that is mandatory or otherwise bars individualized consideration of the criminal conduct and the character of the offender; or

- it imposes a sentence that is inhumane or barbaric.

The idea here is that remarkable sentences imposed by the legislature face state constitutional limits. Nuanced wordplay finding such sentences to be cruel but not unusual undercuts the individual rights of the defendant under the state constitution. Instead, state courts should use the remarkability principle to engage in broad readings of the word "unusual" to curb the imposition of draconian punishments by state legislatures.

D. Unlocking "Punishment"

In the Court's analysis of the Eighth Amendment in its sentencing cases, it has given almost no attention to the word "punishment." And yet, the plain meaning of "punishment" suggests at least two different broader readings in the context of state punishment clauses.

First, "punishment" is a broader concept than "criminal sentence." When courts evaluate the constitutionality of punishments, they usually focus on the length of the criminal sentence. But the constitutional text says "punishments," not "sentences." As such, a court should, when considering the constitutionality of a punishment under the state constitution, assess all aspects of the punishment.

This means the court should consider the conditions of confinement. A criminal sentence to reside in sub-human conditions is different than one to reside in dorm-like conditions. The state constitution's punishment clause should provide some protection against such punishments.

One way for courts to engage in such analysis would be to use a sliding scale with respect to prison conditions and sentence length. The worse the conditions, the shorter the sentence the state constitution should allow. Scholars have documented the consequences of severe confinement conditions,[316] and the state constitution should place some limits on what the state can do in this context. In particular, the death row phenomenon and the consequences of solitary confinement demonstrate the need for judicial oversight and robust state punishment clauses.[317]

316. *See, e.g.*, sources cited *supra* note 234.
317. *See* discussion *supra* Part IV.B.1.

Also relevant should be the age and condition of the inmate. For particular individuals, certain types of incarceration constitute increased punishment.[318] The physical and emotional impact of incarceration is part of the punishment and thus relevant for constitutional purposes.

A second way that punishment is relevant for state constitutional punishment clause reasons relates to systemic issues. In certain jurisdictions, systemic issues may impede the fair administration of justice and demand constitutional scrutiny under state punishment clauses. *McCleskey v. Kemp*[319] provides a good example of this kind of problem. In *McCleskey*, expert evidence demonstrated racial bias in the administration of the death penalty in Georgia.[320] One reading of punishment under state punishment clauses could enable finding that the punishment in question—the systemic bias—violated the state constitution.

In addition to race, studies have demonstrated disparities in the administration of the death penalty based on geography.[321] Geography should generally not determine sentencing consequences, especially within a particular state. In other words, if one murders someone in a wealthier county, it should not increase one's chances of receiving the death penalty. This systemic reading of punishment would allow state courts to reach such disparities under state constitutional punishment clauses.

Finally, it is worth noting that some states use the singular "punishment" and other states use the plural "punishments" in their state constitutions. It is not clear what difference this might make, but it is possible for the variation to give rise to different readings under state constitutions. Perhaps "punishment" reflects a greater focus on categorical rules under the state punishment clause, while "punishments" reflects an increased level of inquiry into as-applied challenges. Further investigation into the original meaning of state constitutional punishment clauses also might provide added insight here.[322]

318. *See generally* Berry, note 314 (exploring other categories of "differentness" including those with cognitive disabilities and mental illnesses, veterans, and the elderly).

319. 481 U.S. 279 (1987).

320. *Id.* at 360–61 (Blackmun, J., dissenting). *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (discussing in depth the racial disparity data in the death penalty context).

321. *See* Smith, *supra* note 281, at 230–46; Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–11 (2010) (commenting that there is a geographic arbitrariness within death penalty states).

322. *See* sources cited *supra* note 17.

CONCLUSION

State courts have an obligation to take their state constitutions, and specifically, their state punishment clauses, seriously. This means choosing not to lock-step the meaning of state punishment clauses to the Eighth Amendment and instead developing independent meanings for their state punishment clauses. Lock-stepping is a form of judicial activism in which the court is substituting the Supreme Court's reading of the Eighth Amendment for the judgment of the people of the state who ratified the state constitution.

This article has sought to "unlock" the state punishment clauses by offering a menu of possible readings to state judges. Specifically, the article has developed a number of meanings for "and," "cruel," "unusual," and "punishment." These meanings allow state court judges to read their constitutions in a way that protects the individual rights of criminal defendants, prevents legislative overreach, and balances the need for incarceration against the costs of doing so.

Consistent with the growing scholarly literature concerning the meanings of state punishment clauses, lawyers and judges alike should endeavor to develop a thoughtful jurisprudence of state constitutional punishment clauses rather than lock-step their state punishment clauses to a broken Eighth Amendment jurisprudence.