EIGHTH AMENDMENT PRESUMPTIONS
A CONSTITUTIONAL FRAMEWORK FOR CURBING MASS INCARCERATION

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ABSTRACT

The Supreme Court's conceptualization of the Eighth Amendment over the past decade has focused on narrow exceptions to the ability of the states to punish criminal offenders, excising particular punishments based on characteristics of the offender or crime. What is missing, however, is a set of broader guiding principles delineating the line between acceptable and impermissible punishments. The Court itself, in Kennedy v. Louisiana*, acknowledged as much, describing the case law as "still in search of a unifying principle." In light of this vacuum, this Article proposes a new approach to the application of the Eighth Amendment.*

The absence of regulation of excessive and disproportionate punishments by state legislatures over the past two decades has resulted in the largest prison population in the history of the human race. Instead of merely being a tool that removes a few types of offenses and offenders from the purview of state legislatures, the Eighth Amendment should also serve as a more robust guide to shape state and federal penal practices.

To that end, this Article argues for the development of a series of Eighth Amendment presumptions—guiding principles that would govern the punishment practices of legislatures without excluding them from the conversation. Currently, the Eighth Amendment serves to identify the constitutional "exceptions" to the "rules" promulgated by legislatures.

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This Article's approach would reverse that status quo, with the Court articulating general rules and legislatures then developing (and justifying through careful study) the exceptions to those rules. Indeed, a careful examination of the Court's Eighth Amendment cases suggests that this "presumptive" sentiment is already implicit in much of the thinking of the Court.

Part I of the Article briefly explains the shortcomings of the current evolving standards of decency doctrine and the doctrine's devastating consequences. Part II discusses the concept of presumptions, exploring how presumptions operate and demonstrating their virtues. The Article then argues in Part III for the reimagining of the Eighth Amendment as an Amendment of constitutional presumptions, combining elements from the Court's past cases with the needs arising from three decades of neglecting the decisions of legislatures. Finally, Part IV demonstrates how this conceptual framework would work in practice.

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INTRODUCTION

> *Systems are to be appreciated by their general effects, and not by particular exceptions.*
>
> —James Fenimore Cooper

The Supreme Court has revived the substantive limits of the Eighth Amendment's cruel and unusual punishment prohibition over the past decade, but only by taking small incremental steps.[1] Specifically, the Court has pinpointed narrow exceptions to states' punishment power, constitutionally excising particular punishments based on characteristics of the offender or crime. The Court, for instance, has held that the Eighth Amendment bans death sentences in cases not involving a homicide,[2] as well as the execution of minors[3] and intellectually disabled offenders.[4] Similarly, the Court has banned mandatory juvenile life-without-parole sentences ("JLWOP")[5] and JLWOP sentences in non-homicide cases.[6]

1. *See* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1066–69 (2013); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 212–13 (2012).
2. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).
3. Roper v. Simmons, 543 U.S. 551, 578 (2005).
4. Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)).
5. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
6. Graham v. Florida, 560 U.S. 48, 82 (2010).

What is missing, however, is a set of broader guiding principles delineating the boundary between acceptable and impermissible punishments. The Court itself, in *Kennedy v. Louisiana*, acknowledged as much, explaining, "The tension between general rules and case-specific circumstances has produced results not altogether satisfactory. . . . Our response . . . is still in search of a unifying principle . . . ."[7]

Conservatives on the Supreme Court bemoan the normative judgments of fellow justices as to which sentences constitute cruel and unusual punishments. As Justice Scalia explained, the Court's capital punishment jurisprudence is no more than "the *feelings* and *intuition* of a majority of the Justices . . . —'the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on th[e] Court.'"[8] The concern is that the Court's intervention usurps the power of state legislatures to decide whether to allow certain punishments.[9]

Perhaps in response to this criticism,[10] the more progressive members of the Court have been hesitant to apply the Eighth Amendment broadly,[11] instead using it only to address the discrete circumstances outlined previously.[12] Further, the Court relies on majoritarian state legislative practices—"objective indicia"—to justify its use of its subjective discretion as to which punishments are cruel and unusual as part of its analysis of the evolving standards of decency.[13] Because of this hesitancy and reliance on majoritarian trends, the Eighth Amendment has possessed only limited applicability for state and federal legislative decisions.[14]

This development is surprising in light of the Court's willingness to

7. *Kennedy*, 554 U.S. at 436–37.

8. *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).

9. Roper v. Simmons, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting); *Atkins*, 536 U.S. at 323–24 (Rehnquist, C.J., dissenting).

10. The criticism of the decision to abolish the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), and the response of state legislatures might also contribute to the Court's sensitivity with respect to making normative judgments concerning which punishments are cruel and unusual. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 63–64 (2007).

11. Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1042 (2013).

12. Berry, *supra* note 1, at 1066–69. *See also supra* text accompanying notes 2–4.

13. *See*, *e.g.*, Coker v. Georgia, 433 U.S. 584, 593–96 (1977) (indicating that the Court should look to state legislative practices and jury decisions to help determine the meaning of the Eighth Amendment). *See also Atkins*, 536 U.S. at 312 (defining the Court's approach as requiring an examination of "objective factors").

14. Berry, *supra* note 1, at 1064; Gertner, *supra* note 11, at 1041–42, 1052.

use similar constitutional provisions to regulate state legislation heavily. For example, the Fourth Amendment's search and seizure principles have been the subject of extensive judicial regulation.[15] Similarly, the Court has never been hesitant in articulating the scope and breadth of the First Amendment.[16] The Court's hesitancy to advance normative judgments in its application of the Eighth Amendment certainly seems inconsistent with its approach in other constitutional contexts.

Relying on majoritarian indicia is likewise uncommon in defining the scope of countermajoritarian rights.[17] The scope of other constitutional provisions rarely relies dispositively on majority legislative opinion. Indeed, many scholars have argued that a central purpose of judicial review with respect to the provisions of the Bill of Rights is to provide a countermajoritarian check on legislative overreaching.[18]

The Court's failure to offer a broad set of Eighth Amendment guiding principles has left, in essence, the authority of state legislatures and Congress unchecked in their use of punishment.[19] Federalists and populists may celebrate this judicial neglect,[20] but its consequences are stark.[21]

The United States leads the world in imprisonment.[22] Three decades of penal populism have created a system of mass incarceration never before seen in the history of the world.[23] Close to one out of every one hundred adults in the United States resides in prison.[24] While claiming only 5

15. *See generally* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION (2008) (examining the Fourth Amendment and its judicial interpretations); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th ed. 2004) (same).

16. *See*, *e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT 11–15 (2d ed. 2003); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1774–77 (2004).

17. *But see* Lain, *supra* note 10, at 64–73 (arguing the opposite).

18. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–21 (2d ed. 1986); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 173–76 (2002).

19. *See* Berry, *supra* note 1, at 1064.

20. *See* Frank O. Bowman, III, *Juvenile Lifers and Judicial Overreach: A Curmudgeonly Meditation on* Miller v. Alabama, 78 MO. L. REV. 1015, 1019 (2013) ("Considerations of federalism should make federal judges especially reluctant to second-guess the judgment of state legislatures in matters of state criminal justice policy.").

21. *See* Berry, *supra* note 1, at 1064–65; Gertner, *supra* note 11, at 1041–42.

22. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf.

23. CONNIE DE LA VEGA ET AL., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 17–18 (2012) [hereinafter CRUEL AND UNUSUAL], https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf.

24. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis et al. eds., 2014); Emily Badger, *The*

percent of the world's population, the United States houses 25 percent of the world's prison population.[25]

Even more serious is the life-without-parole ("LWOP") epidemic.[26] Federal and state governments have sentenced over 41,000 individuals to LWOP sentences.[27] By contrast, the other leading Western countries that allow such sentences (Australia, England, and the Netherlands) collectively have less than 150 people serving LWOP sentences.[28] The European Court of Human Rights even held in 2013 that LWOP sentences violate human rights.[29]

In light of these shortcomings and their unfortunate consequences, this Article proposes a new theoretical approach to the application of the Eighth Amendment. Instead of merely being a tool that only removes a few types of offenses and offenders from the purview of state legislatures, the Eighth Amendment should also serve as a more robust guide to shape state penal practices.

Meteoric, Costly, and Unprecedented Rise of Incarceration in America, WASH. POST: WONKBLOG (Apr. 30, 2014), https://www.washingtonpost.com/news/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america.

25. The United States has "5 percent of the world's population and 25 percent of the world's known prison population." *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearing Before the J. Econ. Comm.*, 110th Cong. 1 (2008) [hereinafter *Illegal Drugs*] (statement of Sen. Jim Webb, Member, J. Econ. Comm.) (commenting on the nation's prison population). Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system, and I choose to believe the latter." *Id.* at 1–2. *See also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?src=tp (comparing the prison population in the United States with those of other countries).

26. CRUEL AND UNUSUAL, *supra* note 23, at 21–25; William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. (forthcoming 2015).

27. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 3 (2009), http://www.sentencingproject.org/doc/publications/publications/inc_noexitsept2009.pdf; Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010), http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf. *See also* ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 11 (2013), https://www.aclu.org/files/assets/111213a-lwop-complete-report.pdf.

28. CRUEL AND UNUSUAL, *supra* note 23, at 25.

29. Vinter v. United Kingdom, App. Nos. 66069/10, 130/10, & 3896/10 Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-122664. A subsequent case, *Hutchinson v. United Kingdom*, addressed the same issue but reached the opposite conclusion. Hutchinson v. United Kingdom, App. No. 57592/08 Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-150778. The European Court of Human Rights held a Grand Chamber hearing on this case on October 21, 2015. Press Release, European Court of Human Rights, Grand Chamber Hearing Concerning Whole Life Orders (Oct. 21, 2015). The case is currently pending. *Id.*

To that end, this Article argues for the development of a series of Eighth Amendment presumptions—guiding principles that would govern the punishment practices of legislatures without excluding them from the conversation. Currently, the Eighth Amendment serves to identify the constitutional "exceptions" to the "rules" promulgated by legislatures. This Article's approach would reverse that status quo, with the Court articulating general rules and legislatures then developing (and justifying through careful study) the exceptions to those rules. Indeed, a careful examination of the Court's Eighth Amendment cases suggests that this "presumptive" sentiment is already implicit in much of the thinking of the Court.

Part I of the Article briefly explains the shortcomings of the current evolving standards of decency doctrine and the doctrine's devastating consequences. Part II discusses the concept of presumptions, exploring how presumptions operate and demonstrating their virtues. The Article then argues in Part III for the reimagining of the Eighth Amendment as an Amendment of constitutional presumptions, combining elements from the Court's past cases with the needs arising from three decades of neglecting the decisions of legislatures. Finally, Part IV demonstrates how this conceptual framework would work in practice.

I. THE PROBLEM

A. THE SHORTCOMINGS OF THE EVOLVING STANDARDS OF DECENCY DOCTRINE

Over the past four decades, the Court has largely abdicated its role of protecting an individual's right to be free of cruel and unusual punishments.[30] At the heart of this negligence is the Court's Eighth Amendment doctrine of evolving standards of decency.

The Court first articulated its evolving standards of decency doctrine in *Trop v. Dulles*.[31] Building on its decision a half century before in *Weems v. United States*,[32] the Court held that the meaning of "cruel and unusual" punishments was not static, but evolved over time, consistent with "the evolving standards of decency that mark the progress of a maturing society."[33]

30. Gertner, *supra* note 11, at 1041–44.
31. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).
32. Weems v. United States, 217 U.S. 349, 371–73 (1910).
33. *Trop*, 356 U.S. at 100–01.

Interestingly, the Court's view that the meaning of the Eighth Amendment would evolve over time seems consistent with its original meaning.[34] As John Stinneford has explained, the original meaning of the word "unusual" means contrary to long usage.[35] Thus, the Eighth Amendment's original meaning contemplates evolution over time, but only in the direction of less harsh punishments.[36]

The question, though, is what should provide the basis for determining the content of the evolving standards. The Supreme Court has looked to majoritarian standards to determine what punishments have become cruel and unusual.[37] Specifically, the Court has assessed the practices of juries and state legislatures to determine the scope of the Eighth Amendment.[38] In addition, the Court's "own judgment [is] brought to bear,"[39] applying its own subjective view concerning whether a punishment is cruel and unusual.[40] The subjective analysis has generally consisted of determining whether the punishment given satisfies the purposes of punishment.[41] When retributive and utilitarian purposes of punishment cannot justify the imposition of a particular punishment, the Court has held that the Eighth Amendment forbids its use.[42]

The objective approach has broadened as it has developed,[43] with the Court counting[44] the states that used a particular practice,[45] considering the trend of state legislatures,[46] and even looking to international norms.[47] The Court has also made clear that the standards of decency only move in one direction—toward restricting punishments "that are already on the way

34. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1743–45 (2008).

35. *Id.* at 1744–45.

36. *See id.* at 1745–46.

37. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

38. *Atkins*, 536 U.S. at 312–13. *See also* Gregg v. Georgia, 428 U.S. 153, 179–81 (1973).

39. Coker v. Georgia, 433 U.S. 584, 597 (1977).

40. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008); *Roper*, 543 U.S. at 560–61 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *Atkins*, 536 U.S. at 311–12; *Coker*, 433 U.S. at 597.

41. *See Coker*, 433 U.S. at 592.

42. *Roper*, 543 U.S. at 570–75, 578. *See also Atkins*, 536 U.S. at 321.

43. Corinna Barrett Lain, *Lessons Learned from the Evolution of "Evolving Standards*,*"* 4 CHARLESTON L. REV. 661, 666–71 (2010).

44. In *Atkins*, the majority and dissenting opinions counted states that had abolished the death penalty differently in trying to assess the "majority rule." *See Atkins*, 536 U.S. at 321–22 (Rehnquist, C.J., dissenting).

45. *Id.* at 314–15.

46. *Roper*, 543 U.S. at 565–66.

47. *Id.* at 575–77.

out."[48] Nonetheless, the Court's test reveals its hesitancy to broaden the reach of the Eighth Amendment. Its subjective determinations have always been consistent with its objective analysis.[49] It certainly appears as if the objective standards, which seem to evolve to fit the subjective instincts of the Court, serve as a shield to legitimize the Court's injection of its own subjective determination as to whether a punishment is cruel and unusual.[50]

But the consequence of this approach has been the underutilization of the Eighth Amendment in both depth and breadth. For over two decades, the Court did not address whether any substantive punishments were cruel and unusual, instead focusing on procedural limitations, with respect to the use of capital punishment, so as to avoid arbitrary outcomes.[51] Even in the past decade, in which the Court has decided five significant Eighth Amendment cases, the Court has only banned a few specific types of capital and JLWOP sentences.[52]

Part of this lack of usage relates to the Court's decision to base the evolving standards of decency test on national legislative consensus.[53] This majoritarian approach is odd, particularly given the Court's more common role of enforcing the provisions of the Bill of Rights as a means to protect individual liberties against legislative overreach.[54] Typically, these individual rights are countermajoritarian, existing to protect the individual's right to remain free from tyranny of the majority.[55]

The scope of the Eighth Amendment thus remains narrow because the Court defers to the majority to determine the scope of its

48. Stinneford, *supra* note 34, at 1755. *See also id.* at n.87 (discussing how the Court's opinion in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), suggests that the evolving standards of decency doctrine would "provide little protection against new forms of penal cruelty, so long as they are popular").

49. *See, e.g.*, *Kennedy*, 554 U.S. at 421; *Roper*, 543 U.S. at 560–61; *Atkins*, 536 U.S. at 311–12; Coker v. Georgia, 433 U.S. 584, 592 (1977).

50. Scalia has suggested as much in his dissenting opinions. *See, e.g.*, *Roper*, 543 U.S. at 608 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 348 (Scalia, J., dissenting).

51. Justice Blackmun was particularly sanguine about the futility of this enterprise. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death."). *See also* Robert J. Smith, *Forgetting* Furman, 100 IOWA L. REV. 1149, 1202–06 (2015) (arguing for a procedural framework, which would fit within the Court's existing Eighth Amendment jurisprudence, that effectively abolishes the use of capital punishment).

52. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (banning mandatory juvenile LWOP sentences); Graham v. Florida, 560 U.S. 48, 82 (2010) (banning LWOP sentences for juvenile offenders in non-homicide crimes); *Kennedy*, 554 U.S. at 413 (banning the death penalty for non-homicide crimes); *Roper*, 543 U.S. at 574 (banning the death penalty for juvenile offenders); *Atkins*, 536 U.S. at 321 (banning the death penalty for mentally retarded offenders).

53. *See* cases cited *supra* note 37.

54. *See* BICKEL, *supra* note 18, at 47–48, 88–89.

55. *See* Friedman, *supra* note 18, at 160.

countermajoritarian rights. The only prohibited punishments under the Eighth Amendment, then, are those punishments that a majority of legislatures has already decided to abandon.

The central function of the Eighth Amendment, as the Court applies it under the evolving standards of decency doctrine, is to promote consistency among legislatures, rather than protect individuals against legislative overreach by the majority. This approach prioritizes the majority over the individual, such that the individual's constitutional rights disappear.

Indeed, the existence of a national consensus does not absolve the Court of its duty to consider whether a punishment violates the Eighth Amendment. Rather, the Court should assess whether, and to what degree, the consensus violates the rights of individual offenders.

Another way to think of it is that the Court's majoritarian application of the evolving standards of decency doctrine eliminates unusual punishments (underutilized ones) but allows for cruel punishments, so long as a majority of states use them.[56] But the text of the Eighth Amendment prohibits cruel *and* unusual punishments, not just unusual ones.[57]

Even worse, the Court's habit of deferring to majority practices with respect to the Eighth Amendment has served to subsume the Court's views to those of state and federal legislatures.[58] As indicated above, the Court has only proscribed a handful of punishments—the death penalty in non-homicide cases (including rape and child rape), the death penalty for juvenile and mentally retarded offenders, mandatory death sentences, mandatory JLWOP sentences, and JLWOP sentences in non-homicide cases—under the Eighth Amendment.[59]

This, likewise, is odd. By contrast, the justices exhibit no hesitancy in applying their own views under the Fourth Amendment concerning what constitutes a "reasonable" search.[60] The same is true for the First Amendment.[61]

The decision to hide behind majoritarian practices has further yielded a mantra that supports this sentiment of legislative deference. As the Court

56. Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 591–94 (2010).

57. *Id.* at 605.

58. *See* McCleskey v. Kemp, 481 U.S. 279, 300–02 (1984); Furman v. Georgia, 408 U.S. 238, 407–11 (1972) (Blackmun, J., dissenting).

59. *See* cases cited *supra* note 52.

60. CLANCY, *supra* note 15, at 468.

61. *See* FARBER, *supra* note 16, at 11–13 (discussing First Amendment doctrinal developments).

has explained, "death is different," meaning that capital cases are unique in their severity and finality.[62] As a result, the Court has refused to apply the Eighth Amendment in any meaningful way in non-capital cases.[63] The one exception is with cases involving juvenile offenders, because apparently juveniles are also different.[64]

With disciplined and conscientious state legislatures, this judicial deference might not be significant.[65] In an age of penal populism, however, the consequences are dire.[66] As the next section explains, the American criminal justice system has an unprecedented mass incarceration crisis.[67]

B. THE PENAL POPULISM CRISIS

The unwillingness of the Supreme Court to regulate the punishment practices of state legislatures over the past four decades has given rise to a mass imprisonment crisis in the United States. Specifically, the Court has completely ignored non-capital cases involving adults under the evolving standards of decency doctrine. This has resulted in the proliferation of both excessive, disproportionate sentences and LWOP sentences.

1. The Proliferation of Excessive Sentences

It is no secret that the United States suffers from a crisis of mass imprisonment.[68] As noted above, nearly one in every one hundred adults in America resides in prison.[69] And one in three African-American men will spend time in prison if current trends continue.[70]

62. Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument). *See also Furman*, 408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118–19 (2004) (discussing the Court's death-is-different jurisprudence).

63. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009) (acknowledging the Court's different treatment of capital cases); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death*,*"* 34 OHIO N.U. L. REV. 861, 868–69, 876 (2008).

64. Miller v. Alabama*,* 132 S. Ct. 2455, 2470 (2012) ("[If] 'death is different,' children are different, too.").

65. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 9 (2001); NAT'L RESEARCH COUNCIL, *supra* note 24, at 2.

66. GARLAND, *supra* note 65, at 13; CRUEL AND UNUSUAL, *supra* note 23, at 15.

67. WALMSLEY, *supra,* note 22, at 1.

68. *See* CRUEL AND UNUSUAL, *supra* note 23, at 17; NAT'L RESEARCH COUNCIL, *supra* note 24, at 2; WALMSLEY, *supra,* note 22, at 1; *Illegal Drugs*, *supra* note 25, at 1.

69. *See* NAT'L RESEARCH COUNCIL, *supra* note 24, at 2.

70. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF

The costs have become so burdensome that many state legislatures are discussing ways to streamline the criminal justice system.[71] To date, the negative political consequences have impeded significant reform.[72]

At the heart of this crisis are excessive sentences, in many cases, for non-violent crimes.[73] Federal and state statutes that impose mandatory sentences contribute to this problem,[74] as do recidivist premiums in sentences for repeat offenders.[75] Likewise, sentencing guidelines have promoted excessive sentences for decades.[76]

These policies have been part and parcel of the penal populism movement, including the war on drugs, over the past three decades.[77] Politicians of both parties run on "tough on crime" platforms, playing on the electorate's fear of crime.[78] The policies that result from such campaigns are both reactionary and incoherent, resulting in widespread over-punishment for crime.[79] This is particularly true with punishments for non-violent drug offenders. Without a doubt, the scope of mass imprisonment in the United States—both in terms of number of prisoners and length of sentences—far exceeds anything any country has ever done in the history of the world.[80]

Clearly, state legislatures lack the incentive or the political will to engage in meaningful criminal justice reform, particularly with respect to

COLORBLINDNESS 9 (2012); Oliver Roeder, *The Imprisoner's Dilemma*, FIVETHIRTYEIGHT (Feb. 12, 2015, 12:01 AM), http://fivethirtyeight.com/features/the-imprisoners-dilemma.

71. *See* NGA CTR. FOR BEST PRACTICES, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM 1 (2011); Reid Wilson, *Tough Texas Gets Results by Going Softer on Crime*, WASH. POST: GOVBEAT (Nov. 27, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/11/27/tough-texas-gets-results-by-going-softer-on-crime.

72. Reform efforts are still ongoing. *See*, *e.g.*, *Can and Should the US Sentencing Commission Try Quickly to Help Everyone Take Stock of the SCRA 2015?*, SENT'G L. & POL'Y (Oct. 1, 2015, 4:02 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/can-and-should-the-us-sentencing-commission-try-quickly-to-help-everyone-take-stock-of-the-scra-2015.html.

73. *See* CRUEL AND UNUSUAL, *supra* note 23, at 33 (discussing California's three-strikes laws, which often lead to sentences that are "grossly disproportionate to the actual crime committed").

74. *See generally* Michael Tonry, *The Mostly Unintended Consequences of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65 (2009).

75. Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 618–20, 640 (1987).

76. Indeed, prior to the Court's decisions in *Booker v. United States*, 543 U.S. 220 (2005), and *Blakeley v. Washington*, 542 U.S. 296 (2004), many of these guideline ranges were mandatory. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 633–34, 639–50 (2008).

77. ALEXANDER, *supra* note 70, at 87–89. *See also* CRUEL AND UNUSUAL, *supra* note 23, at 44.

78. GARLAND, *supra* note 65, at 131.

79. *See id.* at 98, 102.

80. ALEXANDER, *supra* note 70, at 7–8. *See also* CRUEL AND UNUSUAL, *supra* note 23, at 15.

more serious offenders.[81] A robust Eighth Amendment, with presumptive guiding principles, could certainly help legislatures recalibrate and move away from excessive imprisonment.

2. The Proliferation of LWOP

On an individual level, the LWOP epidemic is as troubling as the mass imprisonment problem. Indeed, despite the Court's focus on the death penalty, life without parole may be, in some ways, the most serious punishment of all.[82]

An LWOP sentence, which can also be thought of as a "civil death,"[83] removes all hope for life outside of prison for the criminal offender.[84] It is a communication from society that one is irredeemable, given that one either deserves death in custody or has no hope for change.[85] This permanent banishment means that the offender must simply wait to die.[86]

The psychological suffering that often accompanies LWOP sentences is not surprising.[87] The absence of external human contact, both physical and emotional, weighs heavily on many offenders. In some cases, such isolation even causes permanent psychological damage.[88] This is

81. GARLAND, *supra* note 65, at 134–35.

82. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 69 (Richard Bellamy ed., Richard Davies trans., Cambridge University Press 1995) (1764) (arguing that LWOP sentences are harsher than the death penalty); John Stuart Mill, *Speech in Favor of Capital Punishment* (Apr. 21 1868), http://ethics.sandiego.edu/books/Mill/Punishment. *See also* Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1107–09 (2013) (discussing Beccaria's and Mill's views about the death penalty and life without parole).

83. Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 5 (2010).

84. Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989).

85. Graham v. Florida, 560 U.S. 48, 74 (2010) ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.").

86. *See* Catherine Appleton & Bent Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 611 (2007) (quoting Personal Communication of Rod Morgan, Professor of Criminal Justice, Univ. of Bristol (Oct. 4, 2005)) ("[Life without parole] removes any prospect of reward for change and is therefore fundamentally inhumane. If society is going to announce baldly that we don't care what you do, we don't care what programmes you engage in, you're never going to be released, it's the equivalent of providing a death sentence.").

87. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.143 (1998) (citing cases in which inmates preferred death sentences to terms of life in prison). *See also* Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855–61 (1987).

88. Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole: America's Other Death Penalty*, 88 PRISON J. 328, 336 (2008).

particularly true when LWOP offenders spend significant amounts of time in solitary confinement.[89]

For some, an LWOP sentence is worse than a death sentence, as death sentences at least mark an anticipated end to suffering.[90] The large number of "volunteers" for executions—death row inmates who waive their appeals in order to accelerate their execution date—supports the notion that life in prison is worse than death.[91]

Even worse, the use of LWOP by the United States is unprecedented.[92] Without a doubt, it is a growing epidemic, with the number of LWOP sentences rising from 12,453 in 1992 to over 49,000 in 2012.[93] And many of the individuals serving LWOP sentences did not commit violent crimes.[94]

As with many problems in our legal system, the LWOP epidemic resulted from a confluence of different events.[95] It certainly is not the product of any intentional or thoughtful legislative design.

Three factors are primarily responsible. First, beginning in the mid-1970s, the war on drugs and the rise of penal populism began a trend that resulted in the adoption of harsher sentences, including LWOP sentences.[96] As a result, many states adopted LWOP as a sentencing option in the 1990s.[97]

89. *See*, *e.g.*, Andrew Cohen, *Half a Life in Solitary: How Colorado Made a Young Man Insane*, ATLANTIC (Nov. 13, 2013), http://www.theatlantic.com/national/archive/2013/11/half-a-life-in-solitary-how-colorado-made-a-young-man-insane/281306.

90. *See* Mary Pat Treuthart et al., *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 SEATTLE U. L. REV. 241, 268–69 (2002).

91. Indeed, a remarkable 143 prisoners—about 11% of the executions carried out between 1976 through the end of 2008—have abandoned their appeals and volunteered for execution. Meredith Martin Roundtree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295, 295 (2014).

92. *See* Nicole Flatlow, *One in Nine U.S. Prisoners Are Serving Life Sentences, Report Finds*, THINKPROGRESS (Sept. 19, 2013, 2:38 PM), http://thinkprogress.org/justice/2013/09/19/2645781/prisoners-serving-life-sentences.

93. ACLU, *supra* note 27, at 11.

94. *Id.* at 22.

95. *See* ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE OF LIFE SENTENCES IN AMERICA 3–4, 15–16 (2013), http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (discussing the rise in LWOP sentences); Flatlow, *supra* note 92; Mark Riggs, *The Dramatic Rise of Life Without Parole, in 3 Charts*, CITYLAB (Sept. 18, 2013), http://www.citylab.com/politics/2013/09/1-9-american-prisoners-has-been-sentenced-die-behind-bars/6944.

96. NELLIS, *supra* note 95, at 3–4. *See also* ACLU, *supra* note 27, at 11.

97. *See* Thomas Davidson, *Years That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug 2, 2010), http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing.

As part of this move to harsher punishments, some states—and the federal government—have also adopted mandatory LWOP sentences.[98] A majority of states—twenty-seven—use mandatory LWOP sentences for one or more crimes.[99]

Second, the truth-in-sentencing movement contributed to the increase in LWOP sentences.[100] Specifically, the perception that offenders served significantly less time than the length of their sentences because of lenient parole boards resulted in many states abolishing or restricting parole.[101] Life sentences, which inherently incorporate the possibility of release through parole, effectively became LWOP sentences in those states that abolished parole, leading to a boom in LWOP sentences.[102]

Third, the adoption of LWOP sentences in the 1990s resulted in its juxtaposition with the death penalty as a logical alternative in many cases.[103] Because LWOP sentences did not result in executions, states in many cases made this sentence the only alternative sentencing option for offenders convicted of capital crimes.[104]

In light of this recent proliferation, there does not seem to be any impediment to the continued expansion of LWOP sentencing. As with excessive sentences, the Eighth Amendment may provide the only bulwark against this continuing practice.

II. CONSTITUTIONAL INTERPRETATION AND PRESUMPTIONS

To understand how the proposed theory of presumptions should work, it is first instructive to explore the relationship of the Court with the legislature, in light of the large shadow of the Constitution. Specifically, the value of a presumption-based approach to the Eighth Amendment arises

98. *See* NELLIS, *supra* note 95, at 16 ("Life without parole is [now] a mandatory sentence upon conviction under three strikes laws in 13 states and the federal government.").

99. Nellis, *supra* note 27, at 28.

100. *See* PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 1 (Jan. 1999), http://bjs.gov/content/pub/pdf/tssp.pdf ("First enacted in 1984, [truth-in-sentencing] laws require offenders to serve a substantial portion of their prison sentence. Parole eligibility and good-time credits are restricted or eliminated.").

101. *See* TIMOTHY A. HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990–2000, at 2–3 (Oct. 2001), http://www.bjs.gov/content/pub/pdf/tsp00.pdf.

102. *See* WILLIAM J. SABOL ET AL., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 22–23 (2002). *Cf.* Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 78 (1999) (discussing how truth-in-sentencing legislation has had the effect of increasing the amount of time offenders spend in prison).

103. *See* Steiker & Steiker, *supra* note 62, at 397.

104. *See* CRUEL AND UNUSUAL, *supra* note 23, at 21–23.

from the inherent finality in making pinpointed determinations of the meaning of a constitutional provision.

A. THE FINALITY OF CONSTITUTIONAL INTERPRETATION

After the Court decided in *Marbury v. Madison* that it would serve as the final arbiter of the meaning of the Constitution, the decisions of the Supreme Court attained a level of finality.[105] When the Court interprets a constitutional provision to have a particular meaning, Congress and the executive branch cannot overrule that interpretation absent an amendment to the constitutional provision itself.

By contrast, the interpretation of a statute by the Supreme Court does not foreclose a congressional response. If Congress does not like the manner in which the Court interprets a statute, it can rewrite the statute.

In the latter situation, the consequence of the Court's interaction with the statute allows it to have a "conversation" with Congress. The Court attempts to divine the meaning of the text, and Congress can correct the Court if it does not like the Court's reading of the statute's language and intent.

In the former situation, the Court forecloses the ability of Congress to legislate in a particular way with its interpretation of the Constitution, barring further action by Congress short of a constitutional amendment.

In its jurisprudence, the Court has recognized the finality of its interpretation of the Constitution and has consequently adopted canons of interpretation that address whether a statute violates the Constitution.

Generally, the Court's canons counsel against interpreting a statute in a way that would implicate the Constitution. This "constitutional avoidance" doctrine advocates reading an ambiguously drafted statute in such a way as to avoid the constitutional question, if possible, so as to preserve the statute from constitutional invalidity.[106]

In the academic literature, one justification for this approach is the idea that the Court interpreting the Constitution in such a way as to strike down a statute results in an "activist" decision by the Court. This explanation, however, falls short because the act of interpreting the statute

105. *See* Marbury v. Madison, 5 U.S. 137, 178–80 (1803) (establishing the principle of judicial review and the role of the Court as the primary arbiter of the meaning of the Constitution).

106. William W. Berry III, *Criminal Constitutional Avoidance*, 104 J. CRIM. L. & CRIMINOLOGY 105, 110–11 (2014) (citing Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring in the judgment of an equally divided court)).

to avoid the constitutional issue constitutes an "activist" decision in its own right, particularly when the decision to do so amounts to a rewriting of the statute.[107]

A better explanation is that the decision to avoid the constitutional question will accord undervalued constitutional rights a voice. Specifically, the canon of constitutional avoidance leaves the scope of such rights undefined, allowing them broader impact. In other words, not defining the scope of such constitutional provisions gives them a penumbral value—a range of protection against congressional acts that approach the edge of permissibility under the Constitution.[108] The consequence of this avoidance doctrine is to give broad guidance as to the scope of a constitutional provision to Congress without specifically defining it. If Congress chooses to legislate to the edge of the scope of a particular provision, then the Court will have to address the exact reach of the constitutional limit, but the Court will forgo such a determination for which Congress has not clearly attempted to legislate to the boundary.

As explained below, the use of presumptions in the context of the Eighth Amendment can have a similar effect—giving state legislatures general guiding principles with respect to the scope of permissible punishments without delineating the limits. In short, this Article advocates for using presumptions as a sort of penumbral tool—a way to guide and regulate state punishment practices while allowing for a "conversation" between the Court and the legislatures.

B. HOW PRESUMPTIONS OPERATE

Presumptions play an important role in law. The most well-known presumption is the presumption of innocence, under which the Court presumes that an accused individual is innocent of the alleged crime until the State proves otherwise.[109]

107. *See id.* at 120–21. *Cf.* Skilling v. United States, 561 U.S. 358, 423 (2010) (Scalia, J., concurring).

108. A penumbra is a partial shadow between regions of complete darkness and complete illumination, as in an eclipse. In legal terms, a penumbra refers to implied powers that emanate from a specific rule, thus extending the meaning of the rule into its periphery. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

109. This is, of course, provided only as a theoretical example, as the presumption of innocence in practice is often a bad example of how presumptions ought to work, as juror interviews demonstrate that juries often presume guilt, despite the instructions of the court to presume otherwise.

Indeed, this is how most presumptions work. The presumption articulates a rule, but not one that is ironclad.[110] Instead, the rule serves as a starting point and allows for rebutting of the rule as the result of factual circumstances.[111] Rebutting a rule results in the creation of an exception to the rule, a situation in which the rule—while still the desired outcome in most situations—does not apply.[112]

Another way to think of a presumption is as a thumb on a scale. In other words, if all things are equal, the presumed direction will provide the outcome.[113] This understanding of presumptions operates similarly to the "rule-exception" paradigm described above, indicating a leaning or tendency in a particular direction.[114]

Doctrinally, the Court has applied presumptions in the constitutional context, particularly with respect to due process and equal protection.[115] In these situations, the Court describes the presumption in terms of "scrutiny."[116] Applying strict scrutiny to a statute creates a presumption that the statute is unconstitutional, barring facts and circumstances that articulate a compelling interest sufficient to overcome the presumption.[117] Likewise, rational basis scrutiny creates a presumption that the statute in question is constitutional, barring facts and circumstances demonstrating the absence of a rational basis for the law.[118]

Scholars have cast doubt on the efficacy of the three-tiered scrutiny approach.[119] In particular, some have suggested that tiers deprive the Court

110. Edmund Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 913–14 (1931).

111. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1335 (1979).

112. *See* JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE 330, 336–37 (1898); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307, 312–13 (1920); Charles T. McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291, 298 (1927); Morgan, *supra* note 110, at 920.

113. *See* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 172 (1969).

114. *See id.*; Bohlen, *supra* note 112, at 316–17.

115. *See* Ashford & Risinger, *supra* note 113, at 165–66; Gary J. Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATH. U. L. REV. 217, 222–26 (1975).

116. *See* Scott H. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 693–95 (1977); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 272 (1975).

117. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793, 802 (2006) (citing United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938)).

118. *Id.* at 798–99.

119. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV.

of a more serious analysis of the virtues or shortcomings of a statutory provision.[120]

The proposed model of Eighth Amendment presumptions here goes beyond the levels of scrutiny model and suggests factual prerequisites as the basis for rebutting the presumption. Instead of a certain punishment triggering a certain level of scrutiny, the presumptions articulated below require states to establish certain facts in order to overcome the presumption against certain practices.

C. THE VIRTUE OF PRESUMPTIONS

The central virtue of a presumption is that it allows a rule to guide decision-making while allowing the flexibility to address an unusual or unforeseen scenario, particularly when application of the rule would generate an unjust outcome. A presumptive rule in effect circumvents the problem of hard cases making bad law because the hard cases would then become exceptions and not harm the presumption itself.[121]

This approach is particularly valuable with constitutional rules, for the Court's decision as to the meaning of a provision is conclusive, regardless of any subsequent congressional response. As *Marbury* indicates, the Court is the final arbiter of the meaning of the Constitution.[122] Thus, if the Court decides that a constitutional provision forbids a particular legislative action, this decision is final, subject only to change by constitutional amendment or by the Court itself.[123] Such Court decisions often result in bitter dissents when justices have normative disagreements with the majority.[124]

In the Eighth Amendment context, the Court's application of the evolving standards of decency has done exactly this, isolating particular punishments as forbidden, but failing to articulate any broader guidance to

297, 307–11 (1997); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1322 (2000).

120. *See, e.g.*, Bhagwat, *supra* note 119, at 308–09.

121. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 192–93 (1988).

122. Marbury v. Madison, 5 U.S. 137, 178–80 (1803).

123. Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 12 (1985). *See also* Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 501 (1982).

124. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551, 588 (2005) (Connor, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting); Roe v. Wade, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting).

the legislatures.[125] The risk, then, is that the Court's decisions become over and underinclusive as to the scope of cruel and unusual punishments.[126]

If the Court chooses, however, to articulate a presumptive rule interpreting a constitutional provision, it would create the opportunity for a dialogue with the legislature.[127] The Court's constitutional rule draws a presumptive line that can shape legislative decision-making.[128] Such a rule can signal to the legislature the reach of the forbidden area without specifically defining it.[129] As a result, the legislature can choose whether it wants to legislate up to the constitutional line, and risk a permanent decision limiting its power, or alternatively, legislate away from the presumptive line, knowing it will not risk unconstitutionality.[130]

This approach also allows the Court to make decisions concerning the constitutional limits of the legislature's power without creating bad rules that will have broad applicability.[131] Rather, articulating a presumptive rule allows the Court to decide individual cases as exceptions when needed, without sacrificing the meaning of the broader constitutional rule.[132]

Given, then, the virtue of presumptive rules, their application to the Eighth Amendment is a logical one, as explored below. Certainly, adding presumptive rules would not require abandoning the Court's recent evolving standards of decency cases. Rather, a set of presumptive rules concerning what constitutes impermissible cruel and unusual punishments would provide guidance to state legislatures and Congress without denying the opportunity for institutional conversation. The next section explores where such presumptions might come from and proposes a broad framework of presumptions.

III. EIGHTH AMENDMENT PRESUMPTIONS

If, as indicated, presumptions can serve a valuable role in reshaping the application of the Eighth Amendment, one must begin by identifying

125. William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 71–74 (2011).

126. *See id.* at 71.

127. This has, of course, occurred before in a variety of contexts. *See*, *e.g.*, WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 195 (2014); Daan Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 33–35 (1980); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1232, 1244–45, 1268 (1998).

128. *See* Berry, *supra* note 106, at 127–28.

129. *Id.*

130. *See id.* at 115.

131. *See id.* at 126–28.

132. *See id.* at 132.

which presumptions ought to apply. The Court's Eighth Amendment cases provide a logical starting point, as many of the ideas that make the most sense as the basis for presumptions are implicit in their reasoning. Thus, the search for Eighth Amendment presumptions should begin by identifying these jurisprudentially embedded presumptions.

Before examining how Eighth Amendment presumptions might operate, it is important to remember the language that the presumptions would enforce. The text of the Eighth Amendment, of course, prohibits "cruel and unusual punishments."[133] The question, then, is what one ought to presume about the kinds and natures of punishments that, as a general rule, constitute cruel punishments and/or unusual punishments.[134]

Indeed, the Court's approach in *Miller v. Alabama*, the most recent categorical exclusion case, provides support for the use of presumptions under the Eighth Amendment. Although still applying its "evolving standards of decency" approach in theory, the Court's opinion eschewed the jurisdiction-counting approach that it had used in many prior cases, instead focusing on the purpose of punishment justifications for mandatory JLWOP sentences.[135] In other words, the Court gave short shrift to the objective indicia of the evolving standards and instead focused on its subjective analysis of mandatory JLWOP sentences.

In its dicta, the Court indicated that, while it was not foreclosing all JLWOP sentences, such sentences were disfavored and might violate the Eighth Amendment, stating "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[136] While adopting a categorical Eighth Amendment exclusion of mandatory JLWOP sentences, the Court likewise signaled that JLWOP sentences themselves in many other cases might violate the Eighth Amendment. This is particularly true in light of the Court's concerns related to mandatory JLWOP sentences, including the capacity for rehabilitation of the offender and the offender's presumed reduced culpability.[137]

A close examination of some of the Court's other Eighth Amendment cases demonstrates the presence of similar sentiments—judicial dicta that

133. U.S. CONST. amend. VIII.

134. The phrase "cruel and unusual" can give rise to multiple meanings. *See*, *e.g.*, Berry, *supra* note 1, at 1057–58; Ryan, *supra* note 56, at 600–05, 615–19.

135. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); Berry, *supra* note 1, at 1069, 1073–74.

136. *Miller*, 132 S. Ct. at 2469.

137. *See id.* at 2490 (Alito, J., dissenting).

indicates, albeit subtly, that the Eighth Amendment limit extends beyond the holdings in the cases. As explained below, formalizing such signals as rebuttable presumptions could serve to shape state and federal punishment practices and curb mass incarceration.

A. IDENTIFYING JURISPRUDENTIALLY EMBEDDED PRESUMPTIONS

1. The Bloody Assizes, the English Bill of Rights, and Judge Jeffreys

In *Furman v. Georgia*, Justice Marshall's concurring opinion explains that the origin of the prohibition of cruel and unusual punishments in the Eighth Amendment was the English Bill of Rights.[138] Specifically, the arbitrary justice distributed by Judge Jeffreys[139] during the Bloody Assizes in the seventeenth century included gruesome punishments—drawing and quartering, dismemberment, burning at the stake, public flogging[140]—that later generations believed to be excessive and inappropriate.[141]

Whether the cruel and unusual punishment clause really germinated from these events or not,[142] it is clear that the Supreme Court presumed that such punishments were cruel and unusual ones that were forbidden by the Eighth Amendment.[143] Specifically, torture and brutal forms of the death penalty seem implicitly, if not explicitly, presumed off limits.[144]

2. *Weems*, *Trop*, and the Presumption Against Disproportionate Sentences

In addition to torture, the next presumption implicit in the Supreme Court's Eighth Amendment cases is the presumption against "disproportionate" sentences.[145] In *Weems*, the Court struck down a sentence of fifteen years of hard labor in prison for the offense of falsifying documents.[146] Similarly, in *Trop*, the Court held that a sentence of loss of

138. Furman v. Georgia, 408 U.S. 238, 316–17 (1972) (Marshall, J., concurring) (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 848 (1969)). *But see* Stinneford, *supra* note 34, at 1748–49.

139. Jeffreys was known as the "Hanging Judge," and he had a propensity for mercilessly administering a cruel brand of justice. H.B. IRVING, THE LIFE OF JUDGE JEFFREYS 258–59 (1906).

140. Granucci, *supra* note 138, at 853–54.

141. *Furman*, 408 U.S. at 316 (Marshall, J., concurring).

142. *See* Stinneford, *supra* note 34, at 1764–65.

143. *See Furman*, 408 U.S. 238 (discussing "cruel and unusual punishments" within the meaning of the Eighth Amendment and finding that the imposition and carrying out of the death penalty in three cases was cruel and unusual punishment, violating the Eighth and Fourteenth Amendments).

144. *See id.* at 264 (Brennan, J., concurring).

145. Berry, *supra* note 125, at 107–08.

146. Weems v. United States, 217 U.S. 349, 380–82 (1910).

citizenship as a consequence for wartime desertion was disproportionate and thus a cruel and unusual punishment.[147]

While it remains unclear what makes a particular sentence disproportionate,[148] the presumption remains that if a punishment does not proportionally fit the crime, the sentence is excessive and thus impermissible.[149] The Court's later cases have limited the scope of this doctrine predominately to capital cases,[150] but this principle remains a vital one. Indeed, one way of understanding what makes a particular punishment "cruel" is its relationship to the criminal behavior of the offender.[151]

3. *Furman* and the Presumption Against the Death Penalty

In addition to torture and disproportionate punishments, the Supreme Court has articulated, at least implicitly, a presumption against the use of capital punishment. The decisions of the justices voting in the majority in *Furman v. Georgia*, which abolished the death penalty as an as-applied violation of the Eighth Amendment, reflect this sentiment.[152]

The Court expressed this idea as "death-is-different"—that the death penalty's uniqueness in its finality and irrevocability made it, at the very least, a disfavored punishment.[153] While this death-is-different principle evolved to serve as a basis for according capital cases higher scrutiny than other criminal cases,[154] the central idea of *Furman* was that states should

147. Trop v. Dulles, 356 U.S. 86, 114 (1958).

148. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 574 (2005).

149. Berry, *supra* note 125, at 89. *See, e.g.*, *id.* at 90 n.89.

150. The Court has historically refused to extend the doctrine to non-capital cases, even for situations in which the sentence seems particularly excessive. *See, e.g.*, Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, in which the defendant had four prior felony convictions); Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, in which the defendant had three prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994, 996 (1991) (affirming LWOP sentence for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming life-with-parole sentence for felony theft of $120.75 by false pretenses, in which the defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279–84 (1983) (reversing LWOP sentence for presenting a "no account" check for $100, in which the defendant had six prior felony convictions).

151. *See* Berry, *supra* note 125, at 108.

152. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (discussing this presumption); William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441 (2011) (same).

153. *See* sources cited *supra* note 62.

154. *See* sources cited *supra* note 63.

not impose the death penalty for ordinary murders, but only use it for the "worst of the worst," if at all.[155]

The holding in *Furman*, in many ways, was a presumptive one. The Court's prohibition against the death penalty ended up not being final. Rather, states revised their statutes to narrow the criteria for receiving the death penalty in order to comply with, but effectively negate, *Furman*.[156]

More specifically, the presumption in *Furman* was a presumption against using the death penalty in a random or arbitrary manner. Four years later, in a series of cases decided on the same day, including *Gregg v. Georgia*, the Court held that state statutes could overcome the *Furman* presumption against capital sentences.[157] In other words, the Court clarified that states could meet the constitutional concerns raised in *Furman*, given that the *Furman* decision counseled mainly against using the death penalty without adequate safeguards to ensure that its imposition was not arbitrary.[158]

4. *Graham* and the Presumption Against JLWOP

The Court articulated a similar presumption against LWOP sentences imposed on juvenile offenders[159] in *Graham v. Florida*. Like death, the Court has explained, "children are different."[160] As a result, the Court has held that JLWOP sentences should receive more robust Eighth Amendment review than other non-capital cases.[161]

In prohibiting the imposition of mandatory JLWOP and JLWOP in non-homicide cases, the Court implicitly indicated that JLWOP sentences should be rare, reserved for narrow situations, and even then, only thoughtfully imposed. The Court has emphasized the disfavored nature of such sentences by focusing on the possibility of rehabilitation for such young offenders.[162]

155. *See Furman*, 408 U.S. at 293–95 (Brennan, J., concurring).

156. Lain, *supra* note 10, at 47–48.

157. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976).

158. *See id.* at 195, 199.

159. Juvenile offenders are individuals who committed the crime at issue prior to turning eighteen. *See* Graham v. Florida, 560 U.S. 48, 74–75 (2010).

160. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

161. *See, e.g.*, *id.* at 2463–65; *Graham*, 560 U.S. at 76–79.

162. *Miller*, 132 S. Ct. at 2468 ("[M]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. . . . [T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.").

B. DEFINING EIGHTH AMENDMENT PRESUMPTIONS

Having unearthed elements of presumptions, both explicit and implicit, in the Court's Eighth Amendment cases, this section articulates these ideas as a broader set of presumptive principles.

1. The Death Penalty

The first, and most obvious, presumption should be a presumption against the use of the death penalty. Under such a presumption, death sentences would be cruel and unusual punishments unless states could articulate a specific justification for executing a particular offender. In some senses, such a presumption was the goal of *Furman*, as described above.

The *Furman* experiment has clearly failed,[163] given its insufficient narrowing of offenders eligible for the death penalty. The group remains broad, with prosecutors enjoying wide discretion in determining whether to pursue the death penalty at trial.

Each of the so-called safeguards adopted by states in response to *Furman* has proven illusory. The list of aggravating circumstances adopted by most states are collectively so broad that almost any homicide can qualify for the death penalty, making the promise of narrowing the class of death-eligible offenders an unrealized one.[164] Similarly, research demonstrates that the presentation of mitigating evidence has had almost no effect on sentencing outcomes.[165]

The other primary safeguard for addressing the disparity in jury sentencing outcomes[166]—comparative proportionality review—remains nonexistent in most jurisdictions.[167] This review requires states to compare the case on appeal to other prior cases to ensure that the jury's decision is comparatively proportionate to other jury sentences in capital cases.[168]

163. Three justices have since repudiated the death penalty as a result. Berry, *supra* note 152, at 442–43. Further, in his dissent in *Glossip v. Gross*, decided in 2015, Justice Breyer offered a litany of shortcomings with the current use of the death penalty, suggesting that the Court should revisit its constitutionality. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting).

164. William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 701–02 (2012).

165. Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 280–84 (2011).

166. *See* William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L.J. 67 (2015) (demonstrating this disparity in Ohio).

167. Berry, *supra* note 164, at 706–09. *See also* State v. Pruitt, 415 S.W.3d 180, 215 (Tenn. 2013).

168. Berry, *supra* note 164, at 710–11.

States, however, often restrict comparison of death sentences to other death sentences, ignoring the potentially similar cases in which juries chose not to impose the death penalty.[169] Even worse, state supreme courts rely on aggravating factors as proxies for similarity, affirming cases because they were "similar" to cases that are qualitatively different in fundamental ways.[170]

Two other realities support the presumption against the use of capital punishment. First, the development of DNA evidence and the increasing number of offenders who are receiving habeas corpus reviews of their death sentences have revealed a large number of innocent offenders.[171] Since 1973, states have exonerated over 150 innocent death row inmates.[172] In Illinois, then-Governor George Ryan imposed a moratorium on the use of the death penalty after thirteen death row inmates were exonerated over the course of his term.[173]

In addition to this innocence crisis, studies have demonstrated the wild proliferation of error in capital cases. James Liebman's studies have indicated an error rate of 68%, meaning that appellate courts have reversed capital cases based on error in over two-thirds of cases.[174] This includes both substantive and procedural errors.[175] As with innocence, the high rate of error in capital cases supports a presumption against the use of the death penalty.

2. JLWOP

As with the death penalty, the Court should interpret the Eighth Amendment to presumptively prohibit JLWOP sentences. As the Court explained in *Miller* and *Graham*, the physical and emotional immaturity

169. *Id.* at 706–08.

170. *See id.* at 704–05.

171. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 222 (2011); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 598, 611–12 (2005).

172. *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last updated Oct. 12, 2015).

173. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois,* N.Y. TIMES (Jan. 12, 2003), http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html; George Ryan, Governor of Ill., Speech at Northwestern University College of Law: In Ryan's Words: "I Must Act" (Jan. 11, 2003), http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html.

174. Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 216–17 (2004).

175. *See id.* at 218.

makes juveniles, on the whole, less culpable than adults for their criminal actions.[176] The Court also emphasized, as part of its "juveniles are different" mantra, that juvenile offenders possess a greater chance for rehabilitation.[177] This is because their identities are less developed, and there is more time to change for juveniles than adults.[178]

In addition, most JLWOP sentences are not the product of clear legislative intent. Rather, most JLWOP sentences are simply the unfortunate byproduct of the abolition of parole. A quick glance at the statistics in JLWOP cases demonstrates this fact.[179] For example, Florida houses a large number of offenders serving JLWOP sentences, and it only began imposing such sentences after the abolition of parole in that state.[180]

Finally, the purposes of punishment do not support JLWOP sentences in most, if not all, cases. From a "just deserts" perspective, it is difficult to argue that the conduct of a juvenile offender warrants a JLWOP sentence in the vast majority of cases. JWLOP sentences do not satisfy utilitarian purposes of punishment—rehabilitation, deterrence, and incapacitation. From a utilitarian perspective, imposition of a JLWOP sentence constitutes a determination that the offender is irredeemable and has no hope to ever rejoin society. To conclude that a juvenile offender can never change or will forever be dangerous seems shortsighted in most cases.

To be clear, the problem here is not imposing a life sentence; it is the determination to never revisit that sentence. JLWOP sentences, much like LWOP sentences, foreclose the opportunity to reexamine the sentence years later to determine whether it should continue for the duration of the offender's life.

3. Adult LWOP

As described above, LWOP sentences are in many ways as severe as death sentences. In the eyes of much of the world, such sentences violate the human rights of the offenders.[181] Like juveniles, adult offenders similarly do not deserve a life banishment that courts or parole boards will

176. Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012); Graham v. Florida, 560 U.S. 48, 74 (2010).

177. *Miller*, 132 S. Ct. at 2468–69; *Graham*, 560 U.S. at 74–75.

178. *Graham*, 560 U.S. at 78–79.

179. *See* CRUEL AND UNUSUAL, *supra* note 23, at 57–61.

180. *See* NELLIS, *supra* note 95, at 3–4; NELLIS & KING, *supra* note 27, at 16–17. *Cf.* HUGHES ET AL., *supra* note 101, at 2 (reporting that Florida abolished parole eligibility for certain offenses in 1995).

181. CRUEL AND UNUSUAL, *supra* note 23, at 23–25; Berry, *supra* note 26. *See also supra* note 29 and accompanying text (discussing how LWOP sentences have been held to violate human rights).

never reconsider. As a result, the Eighth Amendment should presumptively disfavor such sentences for adults, not just juveniles.

All of the rationales for restricting JLWOP sentences apply to adults as well, with the exception of age. Even then, the age difference between adults who receive LWOP and juveniles who receive JLWOP is often not that significant, as many who receive LWOP are in their early twenties.[182] In addition, the brain science that the Court cited to support its idea that "juveniles are different" indicates that the brain does not reach full development until age twenty-five.[183] For many adult LWOP offenders, then, the same mitigating factors of diminished culpability and ability to change also apply.

Even if JLWOP and LWOP offenders constitute distinct and separate groups, the means by which states impose LWOP sentences demonstrate why this needs judicial oversight.

To be sure, the decision that an adult receive a LWOP sentence is a weighty one—it is, after all, a type of death sentence. And yet, the care with which courts make such decisions pales in comparison to capital cases. One group of LWOP offenders receives such sentences as the mandatory consequence of committing multiple criminal offenses. Typically such offenders are non-violent drug offenders or victims of the state's three-strikes laws. [184] Even more devastating than the disproportionality between such punishments and their corresponding criminal offenses is the denial of the opportunity to plead for one's life at sentencing.[185] The mandatory nature of many LWOP sentences thus doubly dehumanizes criminal offenders.

A similar category of offenders receives LWOP sentences as a result of a state's decision to abolish parole. Such sentences, as initially contemplated, provided the opportunity for parole and rehabilitation.[186] Now the same crimes receive a far different sentence—death in the custody of the state with no hope for release.

Finally, offenders charged with capital crimes who do not receive the death penalty constitute a final major group of LWOP sentences. The

182. *See* Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 559 (1983).

183. M. Brent Donnellan et al., *Cognitive Abilities in Adolescent-Limited and Life-Course-Persistent Criminal Offenders*, 109 J. ABNORMAL PSYCHOL. 396, 398 (2000).

184. *See* ACLU, *supra* note 27, at 25.

185. *See* William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON. L. REV. 259, 260 (2015).

186. *See* HUGHES ET AL., *supra* note 101, at 1–3.

problem in these cases is that the jury or judge sentencing the offender will carefully consider whether death is the appropriate sentence, but will not accord the same consideration to LWOP sentences. The underlying assumption is that the offender should be relieved not to have a death sentence, which ignores the nature of the LWOP sentence, as it is its own kind of death sentence. The shadow of the death penalty, for all practical purposes, will likely foreclose a serious discussion as to whether a life sentence with or without parole is an appropriate sentence for an individual who does not receive the death penalty. And in some jurisdictions, LWOP sentences are not even available as sentencing options for capital cases.[187]

4. Mandatory Minimum Sentences

Mandatory minimum sentences, often a reaction to penal populism, also create significant problems. Such sentences often result in over-punishment, with the lack of discretion afforded to courts, creating bad outcomes. Even sentencing disparity problems pale in comparison to forced excessive punishment that inevitably results from a lack of consideration of the individual mitigating circumstances in a given case.

Thus, an Eighth Amendment presumption against mandatory minimum sentences would curb the harsh, unforeseen consequences of such statutes, while still allowing the courts to impose stringent punishments when necessary.

The Supreme Court's decisions in *Miller*, *Lockett*, and *Woodson* all speak to this issue.[188] In those cases, the Court emphasized the importance of giving individualized consideration to the relevant characteristics of the offense and the offender at sentencing because the cases involved the possibility of a death sentence or a JLWOP sentence.[189]

For purposes of mandatory minimum sentences, however, the same concept applies. By their very nature, mandatory minimum sentences preclude the court from considering whether, in a particular case, the mandatory minimum sentence would be excessive (so as to be "cruel") or an anomaly given the circumstances (so as to be "unusual").

Legislators often argue that mandatory minimum sentences help ensure consistency in sentencing and preclude judges from being too

187. *See* Nellis, *supra* note 27, at 27–28.

188. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460–63 (2012); Lockett v. Ohio, 438 U.S. 586, 602–04 (1978); Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976); Berry, *supra* note 125, at 81–84.

189. *See* sources cited *supra* note 188.

lenient with sentencing. Adopting a presumption against mandatory minimums would require a legislature to demonstrate that consistency is unlikely without the mandatory minimum, that judges have a history of being lenient with such sentences, and that the gains of consistency in sentencing outweigh the costs of unjust results in individual cases in which the mandatory minimum creates excessive or anomalous sentences.

5. Non-violent Crime Sentences Over Ten Years

An astoundingly high percentage of the prison population has committed non-violent crimes.[190] Two interrelated factors remain primarily responsible for this phenomenon. First, the harsh sentences imposed for drug crimes as part of the thirty-year "War on Drugs" has helped create a large population of non-violent offenders in prison.[191] The breadth of this effort has ensnared a wide range of drug users and traffickers on both the federal and state levels.[192]

Second, the recidivist premium for multiple offenders, both by the federal government and the states, significantly lengthens the prison term for many non-violent offenders.[193] The federal sentencing guidelines, even in their advisory capacity, create a framework for large enhancements for repeat offenders.[194] And states have adopted a wide range of similar provisions, ranging from three-strikes laws to habitual offender statutes.[195]

It is particularly troublesome that such excessive sentences are often for those simply possessing drugs, usually to feed an addiction that the offender has diminished capacity to fight. The cost of imprisoning such individuals for lengthy prison sentences clearly does not achieve a positive outcome for society or the individual.[196]

As a result, the presumption for non-violent offenses in this context should be against sentences longer than ten years in duration, even for

190. *See, e.g.*, CRUEL AND UNUSUAL, *supra* note 23, at 33 (reporting that in California, "most third strike convictions," which come with a sentence of twenty-five years to life, are for non-violent felonies).

191. *See* ALEXANDER, *supra* note 70, at 6–9; MARC MAUER, RACE TO INCARCERATE 32 (1999).

192. *See* ALEXANDER, *supra* note 70, at 6–9.

193. *See* GARLAND, *supra* note 65, at 12–14.

194. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–998 (1988)). *See also* Berry, *supra* note 76, at 639–43.

195. *See* ALEXANDER, *supra* note 70, at 55–56, 90; MAUER, *supra* note 191, at 32; FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 17–20 (2001). *Cf.* Ashley Nellis, *Tinkering With Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 457 (2013).

196. *See* ALEXANDER, *supra* note 70, at 87–91.

repeat offenders. Adopting such a presumption would help curb the tendency for state and federal governments to incarcerate large numbers of non-violent offenders for lengthy periods of time.

6. Disproportionate Sentences

Finally, the court should create a presumption against disproportionate (that is, excessive) sentences. The question becomes, however, what constitutes an excessive sentence. The Court's categorical exceptions should serve as a starting point, with sentences that approach the categorical exclusion being presumptively disfavored. For instance, a death sentence for an eighteen-year-old offender, approaching the ban against death sentences for eighteen-year-olds, would be presumptively disfavored as a sentence that had the likelihood of being disproportionate.

In addition, this presumption should apply to non-capital cases as well as death sentences, despite the Court's "death-is-different" jurisprudence. The Court's holdings in *Trop* and *Weems*, which predate the Court's "gross disproportionality" cases, suggest that there is a role for the Court to play in prohibiting excessive non-capital sentences.[197] Absent the Court finding additional categorical exclusions under the Eighth Amendment that apply to non-capital cases, the Court could develop a series of presumptions to guide legislatures in possible constitutional limits for non-capital cases.

Developing such presumptions in this context would help the Court to engage with state punishment practices, rather than continue to abdicate its regulatory role. One particularly fruitful area might be the line between felony and misdemeanor offenses. Creating a series of presumptions to define what offenses should receive a prison sentence could certainly help curb the mass incarceration problem at a lower, but still important, level.

IV. EIGHTH AMENDMENT PRESUMPTIONS, AS APPLIED

A. AN OVERVIEW OF THE FRAMEWORK

Having identified six categories of sentences that the Court should presumptively disfavor in certain contexts—capital sentences, JLWOP sentences, LWOP sentences, mandatory minimum sentences, non-violent sentences over ten years, and disproportionate sentences—the question now becomes how the presumptions should operate in practice.

197. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Weems v. United States, 217 U.S. 349, 380–82 (1910). *See also* Berry, *supra* note 1, at 1081–83; Berry, *supra* note 125, at 111–12.

It is possible that, over time, the Court will conclude that one or more of the six categories ought to be categorically prohibited. Several former members of the Court have reached that conclusion with respect to the death penalty.[198] Likewise, some on the current court, as indicated, are sympathetic to the abolition of JLWOP sentences.[199] Further, to the extent that the Court continues to look to international norms, the European Court of Human Rights recently held that LWOP sentences violate human rights.[200]

For now, though, the Court should still create strong rebuttable presumptions against any of the six kinds of sentences. The type of presumption here would be consistent with the concept of strict scrutiny in the due process and equal protection contexts, but instead of requiring a generalized compelling governmental interest with narrow tailoring, the question would be whether the specific statute sufficiently decreases the likelihood that such a sentence would be a cruel and unusual punishment.

As explained above, the concept of a presumption as used herein is that of a rule—the general rule prohibits the imposition of death sentences, JLWOP sentences, LWOP sentences, mandatory minimum sentences, non-violent offender sentences over ten years, and disproportionate sentences. For each category, then, the state legislatures' articulated justification would have to be significant enough to warrant a narrow exception to the rule. Some initial thoughts as to how this might work for each of the categories follows.

B. GUIDELINES AS TO POSSIBLE EXCEPTIONS TO THE PRESUMPTIVE RULES

1. Death Penalty

As explained above, the current post-*Furman* framework is fraught with errors and problems, and the safeguards used by the states are insufficient to achieve any level of consistency or fairness. In light of the described shortcomings, any solution must contain both substantive and procedural elements.

The substantive narrowing of cases eligible for the death penalty needs to go far beyond the broad, vague, and generalized categories of

198. *See* Berry, *supra* note 152, at 461–92. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 231–41 (1976) (Brennan, J., dissenting) (arguing that the death penalty should be constitutionally invalidated). *See also* Glossip v. Gross, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting) (discussing how the dissenting justices, including Justices Breyer and Ginsburg, have now reached similar conclusions).

199. Miller v. Alabama, 132 S. Ct. 2455, 2460–63 (2012).

200. *See supra* note 29 and accompanying text.

aggravating factors. In essence, the death penalty, if it is to be available at all, should only apply to the "worst of the worst." States should find some method by which to isolate such cases—serial killers with multiple victims, murders involving severe torture, terrorists, murders involving brutal sexual violence, murders involving young children—to be sure that the rare case in which a defendant receives the death penalty is unusually heinous.

Second, the imposition of the death penalty ought to require a heightened level of proof with respect to guilt. Some assurance of accuracy—DNA evidence, video evidence, confession, and eyewitness testimony together that is consistent with forensic evidence—must be attained prior to the imposition of a death sentence. The history of error in such cases coupled with the number of innocent offenders discovered on death row makes such a determination necessary.

Third, the procedures during the trial and at sentencing must be without error, even if deemed harmless. Again, the probability of convicting the wrong individual or depriving the offender of a fair trial and sentencing hearing is so high that some additional assurances of accuracy must be demonstrated. Likewise, evidence of racial discrimination, like that provided in *McCleskey v. Kemp*, would serve to prevent rebuttal of the presumption against the death penalty.[201] If there are systemic flaws in the administration of capital punishment, a state's attempt to impose it should be presumed to violate the Eighth Amendment. Along the same lines, issues with the process of execution itself, such as the recent lethal injection crisis, would likewise impede the state's ability to rebut the presumption against the death penalty. The possibility of constitutional problems, by itself, would caution the Court against allowing the death penalty in a given case, in much the same way that it would not avoid the constitutional question in a non-criminal case.

2. JLWOP and LWOP

The bar for rebutting the presumption against JLWOP and LWOP sentences would be equally high to that of the death penalty. Again, the state would have to show that the case is the rare one that deserves such a sentence, and it would need to create a process to separate the few "worst of the worst" offenders from the vast majority of other offenders. Per the Court's "kids are different" jurisprudence, the states should face an even higher substantive bar for juveniles—limiting JLWOP to "once in a decade" kind of epically brutal crimes.

201. McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

Likewise, the state would have to provide adequate assurances of the procedural requisites needed to impose such sentences. In particular, the state would need to demonstrate that its sentencing process allowed for thorough consideration of the individual characteristics of the crime and the offender, as well as any mitigating evidence offered by the offender. This process would also specifically provide the offender the opportunity to argue for the mercy of the Court—to plead for his life.

3. Mandatory Minimum Sentences

To rebut the presumption against mandatory minimum sentences, states would need to demonstrate why such sentences were mandatory. Statistical evidence of wide sentencing disparity and excessive judicial leniency would be prerequisites to such a claim. Rather than the adoption of mandatory minimum sentences being a pro forma imposition of penal populist sentiments, this approach would require a more studied and careful process of justification prior to adopting any such sentences.

In addition, the length of the mandatory minimum sentence would also play a role in the degree to which a state statute could overcome the presumption against such sentences. Mandatory minimum sentences in excess of five years would be strongly disfavored and unlikely to pass constitutional muster without clear and convincing evidence that such sentences were the only way to achieve consistency and accuracy in sentencing.

The other question that state statutes would need to answer would be the degree to which the value of having a mandatory minimum sentence in a particular context would outweigh the costs of increased incarceration. The risk of injustice in cases that do not directly fit the ideas contemplated by legislatures in adopting mandatory minimum sentences must also be considered.

4. Non-violent Offenders with Sentences over Ten Years

For non-violent offenders, the presumption against sentences longer than ten years would be equally as strong as the other categories. The state would need to make a case that, among non-violent offenders, a particular offender was among the "worst of the worst" or in some way behaved comparably to a violent offender.

The key point in this analysis is that recidivism alone would not be sufficient to rebut this presumption. Imposing high recidivist premiums imposes a second punishment for each additional offense, giving the first

offense an exponential hold over the offender. Instead, states would need to demonstrate that the nature of the non-violent crime is so egregious that it warrants a sentence longer than a decade. It is highly unlikely that any drug crime would satisfy this standard.

5. Disproportionate Sentences

As explained above, the standard for disproportionate sentences, at least in capital cases, could derive from the Court's categorical exceptions to the death penalty—juvenile offenders, intellectually disabled offenders, offenders in non-homicide crimes, and offenders who did not play a major role in felony murder crimes. The presumption would be that cases that approached these prohibitions would be presumptively unconstitutional. The states would need to demonstrate that the offender or offense was significantly dissimilar to the categorical exception so as not to fall within its penumbra.

The Court could draw penumbral lines in this context to help with the implementation of some of these categories. For instance, death sentences for offenders under age twenty might be presumptively unconstitutional. A similar process could occur for JLWOP cases.

For non-capital cases, this approach would be more difficult, unless the case had similar facts to *Solem*, *Trop*, or *Weems*.[202] Even so, the Court could develop a common law of presumptions over time, to address situations in which excessive sentences were likely to occur. A survey of current state punitive practices might yield some examples from which the Court could draw.

Indeed, with all of these categories, a common law could develop with respect to the Eighth Amendment presumptions. As with the Fourth Amendment, for which the Court's decisions serve to guide the actions and policies of state police forces,[203] adopting a series of Eighth Amendment presumptions could guide state legislatures and Congress without entirely eliminating any category of punishment, at least initially.

This process would provide greater accountability to state legislatures, as well as free them from some of the pressures of penal populism. The imposition of constitutional guidance—and when needed, controls—would enable the Court to protect the rights of offenders against the tyranny of

202. Solem v. Helm, 463 U.S. 277 (1983); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

203. *See* sources cited *supra* note 15.

majoritarian legislatures. In short, it would provide needed accountability to legislators with respect to the imposition of punishments.

CONCLUSION

In sum, the presumption-based approach advocated herein turns the current model of the Eighth Amendment upside-down, and it allows the Court to regulate the punishment practices of state and federal governments in an efficient but powerful way. The Court's prior cases articulate Eighth Amendment exceptions to the criminal punishments imposed by state and federal governments. By contrast, under this approach, the Court's interpretation of the Eighth Amendment provides presumptive rules to which state and federal governments can articulate exceptions. Instead of the Court simply justifying the presence of constitutional exceptions, this approach delineates presumptively prohibited categories of punishment but allows governments the opportunity to dialogue with the Court and demonstrate why the Court should allow a particular exception to a given generalized presumption.

As indicated, aspects of many of these presumptions already exist, in some form, within the Court's Eighth Amendment cases. Further, such an approach would shift the role of the Court from constitutional policeman to constitutional policymaker. It would help curtail the legislative overreaching that has occurred over the past three decades and which has led to a mass incarceration crisis never before seen in the history of the world.

The Court has arguably taken a baby step in this direction in its decision in *Miller v. Alabama*. Query whether the Court will embrace its constitutional role and facilitate the process of ending mass incarceration in the United States.