# EIGHTH AMENDMENT
# CRUEL AND UNUSUAL PUNISHMENT

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## EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT

### Amdt8.1 Overview of Eighth Amendment, Cruel and Unusual Punishment

The Eighth Amendment prohibits certain types of punishment: excessive bail, excessive fines, and cruel and unusual punishments.[1] As discussed in more detail in the following essays, these prohibitions were intended to protect persons convicted of crimes from government abuses of power.[2] Viewed broadly, the Eighth Amendment responded to these historically grounded concerns about disproportionate or cruel punishments by attempting to ensure that punishment is "proportioned to both the offender and the offense."[3] What is excessive is also determined by reference to modern standards; the Supreme Court has suggested proportionality may evolve over time.[4] Out of the Eighth Amendment's three clauses, the bar on cruel and unusual punishment has been most frequently interpreted by the Supreme Court, likely in part due to inherent ambiguities in determining what qualifies as cruel or unusual.[5]

The Eighth Amendment generally applies in criminal proceedings, as the most common locus of government punishment, but the Supreme Court has held the Eighth Amendment's prohibition on excessive fines can apply in civil forfeiture proceedings, noting that the text of the amendment is not limited to "criminal" cases.[6] Instead, the Court said the relevant constitutional test is whether the government is imposing "punishment," focusing on the purpose of a sanction.[7] In addition, although the Eighth Amendment (like the rest of the Bill of Rights) was understood originally to apply only to the federal government, the Supreme Court has held its prohibitions were incorporated in the Fourteenth Amendment's Due Process Clause, making them applicable to states.[8]

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[1] Austin v. United States, 509 U.S. 602, 609 (1993) ("The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish."); Timbs v. Indiana, No. 17-1091, slip op. at 2 (U.S. Feb. 20, 2019) ("Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority.").

[2] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 666 (1977); Weems v. United States, 217 U.S. 349, 372–73 (1910).

[3] Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)) (internal quotation marks omitted). *See also, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions.").

[4] *Atkins*, 536 U.S. at 311–12.

[5] For example, one defender of the Constitution, responding to the claim that the initial document should have included a prohibition on cruel and unusual punishments, argued that the term "'cruel and unusual' surely would have been too vague to have been of any consequence, since [it] admit[s] of no clear and precise signification." James Iredell, Marcus, Answers to Mr. Mason's Objections to the New Constitution (1788), *reprinted in* 5 The Founders' Constitution 376 (Philip B. Kurland & Ralph Lerner eds., 1987).

[6] Austin v. United States, 509 U.S. 602, 607–08 (1993).

[7] *Id.* at 610.

[8] Timbs v. Indiana, No. 17-1091, slip op. at 2–3 (U.S. Feb. 20, 2019) (noting this history and holding the prohibition against excessive fines incorporated); Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (recognizing assumed incorporation of prohibition against excessive bail); Robinson v. California, 370 U.S. 660, 667 (1962) (recognizing application of prohibition on cruel and unusual punishment to states).

## Amdt8.2 Excessive Bail

### Amdt8.2.1 Historical Background on Excessive Bail

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[2] These two contrasting views of the "excessive bail" provision, expressed by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

The history of the bail controversy in England is crucial to understanding why the ambiguity exists.[4] The Statute of Westminster the First of 1275[5] set forth a detailed enumeration of those offenses that were bailable and those that were not, and, though supplemented by later statutes, it served for something like five and a half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.[8] The Petition cited the Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for habeas corpus could not be presented,[9] and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set

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[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that, in *Bell v. Wolfish,* 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Hugo Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." *Id.* at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Samuel Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 Annals of Congress 754 (1789).

[4] Still the best and most comprehensive treatment is Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965–89 (1965), *reprinted in* Caleb Foote, Studies on Bail 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

[6] 1 J. Stephen, A History of the Criminal Law of England 233–43 (1833). The statute is summarized at pages 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on habeas corpus to effectuation of the right to bail. *Id.* at 69.

[9] Jenkes' Case, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 Documents on Fundamental Human Rights 327–340 (Z. Chafee ed., 1951).

bail so high that it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by James Madison in the House of Representatives.[14]

Thus, in England, the right to bail generally was conferred by the basic 1275 statute, as supplemented; the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679; and protection against abridgement through the fixing of excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, Section 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought to curtail excessive bail without guaranteeing a right to bail, or whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States that had its origin in a provision of the Massachusetts Body of Liberties of 1641:[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

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[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. R. Doc. No. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 658 (2d ed. 1836).

[14] 1 Annals of Congress 438 (1789).

[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* I Documents on Fundamental Human Rights 79, 82 (Z. Chafee, ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania Constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. *Id.* at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 Journals of the Continental Congress 334 (1787), *reprinted in* 1 Stat. 52 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein . . . ." 1 Stat. 91 § 33 (1789).

## Amdt8.2.2 Modern Doctrine on Bail

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Bail, which is "basic to our system of law,"[1] is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[2] The issue of bail is only implicated when there is "a direct government restraint on personal liberty, be it in a criminal case or a civil deportation proceeding."[3] In *Stack v. Boyle*, the Supreme Court found a $50,000 bail to be excessive, given the defendants' limited financial resources and the lack of evidence that they were a flight risk.[4] The Court determined that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," and "[u]nless this right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning."[5]

In *United States v. Salerno*, the Court upheld the Bail Reform Act of 1984 provisions regarding preventative detention against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence.[6] The Court held that Congress did not violate the Excessive Bail Clause by restricting bail eligibility for "compelling interests" such as public safety, and observed that the Clause "says nothing about whether bail shall be available at all" in a particular situation.[7] The Court rejected "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[8] The Court explained that "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[9] The Court determined that "detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.[10]

The Court further explained in *Salerno* that if the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[11] To challenge bail as excessive,

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[1] Schilb v. Kuebel, 404 U.S. 357, 484 (1971).

[2] Stack v. Boyle, 342 U.S. 1, 5 (1951). The Court explained that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.*

[3] Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989) (explaining that the Bail Clause guards against the potential for governmental abuse).

[4] *Id.* at 6–7.

[5] *Id.* at 4–5.

[6] United States v. Salerno, 481 U.S. 739, 754–55 (1987).

[7] *Id.* at 752–53.

[8] 481 U.S. at 753.

[9] 481 U.S. at 754.

[10] 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals). *Id.*

[11] *Salerno*, 481 U.S. at 754.

the Court held that an individual must move for a reduction, and, if that motion is denied, appeal to the Court of Appeals, and, if unsuccessful, appeal to the Supreme Court Justice sitting for that circuit.[12] The Amendment is apparently inapplicable to postconviction release pending appeal, but the practice has apparently been to grant such releases.[13]

There is, however, no absolute right to bail in all cases.[14] In a civil case, the Court held that the prohibition against excessive bail does not compel the allowance of bail in deportation cases and that "the very language of the Amendment fails to say all arrests must be bailable."[15] Moreover, although the Court has not explicitly stated such, the Court has "assumed" that "the Eight Amendment's proscription of excessive bail . . . [applies] to the States through the Fourteenth Amendment."[16]

## Amdt8.3 Excessive Fines

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[1] Justice Lewis Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an "unusual" and "unprecedented" punishment proscribed by the Eighth Amendment.[2] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause,[3] thus obviating any necessity to develop the meaning of "excessive fines" in relation to ability to pay. The Court has held the clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[4] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[5] The Eighth Amendment itself, as were antecedents of the clause in the Virginia Declaration of Rights and in the

[12] *Boyle*, 342 U.S. at 6–7.

[13] Hudson v. Parker, 156 U.S. 277 (1895).

[14] *Id.* at 753.

[15] Carlson v. Landon, 342 U.S. 524, 544–46 (1952) (explaining that the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country" and "in criminal cases bail is not compulsory where the punishment may be death").

[16] Schilb v. Kuebel, 404 U.S. 357, 484 (1971); *see* Hall v. Florida, 572 U.S. 701, 707 (2014) ("The Eighth Amendment provides that 'excessive bail shall be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.' The Fourteenth Amendment applies those restrictions to the States."); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'"); *see also* Schall v. Martin, 467 U.S. 253 (1984) (upholding under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles).

[1] *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).

[2] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).

[3] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

[4] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

[5] *Id.* at 265.

English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[6] Therefore, while leaving open the issues of whether the clause has any applicability to civil penalties or to qui tam actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[7] The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.[8]

In 1998, however, the Court injected vitality into the strictures of the clause. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[9] In *United States v. Bajakajian*,[10] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture[11] in this particular case violated the Excessive Fines Cause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense."[12] In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[13]

## Amdt8.4 Punishment

### Amdt8.4.1 Historical Background on Cruel and Unusual Punishment

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

During congressional consideration of the Cruel and Unusual Punishments Clause one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient

[6] *Id.* at 266.

[7] *Id.* at 268.

[8] In *Austin v. United States,* 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the Clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[9] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[10] *Id.*.

[11] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. *Id.* at 328. The Court distinguished this from civil forfeiture, which, as an in rem proceeding against property, would generally not function as a punishment of the criminal defendant. *Id.* at 330–32.

[12] *Id.* at 334.

[13] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. *Id.* at 325–26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed; i.e., a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. *Id.* at 338.

mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."[1] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[2] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[3] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

### Amdt8.4.2 Evolving or Fixed Standard of Cruel and Unusual Punishment

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

At the end of the nineteenth century, the Supreme Court began to consider whether the standard for "cruel and unusual punishments" was fixed at the time of the framing of the Constitution or whether it was an evolving standard. In the 1878 case *Wilkerson v. Utah* and the 1890 case *In re Kemmler*, the Supreme Court weighed whether a punishment was "cruel and unusual" by examining whether the Framers would have considered the punishment or a sufficiently similar variant "cruel and unusual" in 1789.[1] In *Wilkerson*, however, the Court appeared to suggest that this standard necessarily reflected current norms, noting that while "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," it was "safe to affirm that punishments of torture," such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution."[2]

In the twentieth century, the Court began to consider the "cruel and unusual" standard more flexibly, focusing on societal standards, especially as they implicated the "wanton infliction of pain."[3] In 1910, in *Weems v. United States*,[4] the Court reasoned that the Framers had not merely intended to bar reinstituting procedures and techniques deemed unacceptable in 1789, but had intended to prevent "a coercive cruelty being exercised through other forms of

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[1] 1 Annals of Congress 754 (1789).

[2] *E.g.*, 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 111 (2d ed. 1836); 3 *id.* at 447–52.

[3] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839 (1969). Disproportionality, in any event, was used by the Court in *Weems v. United States,* 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (but see *Furman v. Georgia,* 408 U.S. 238, 276 n.20 (1972) (Brennan, J., concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in *Trop v. Dulles,* 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in *Harmelin v. Michigan,* 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[1] Wilkerson v. Utah, 99 U.S. 130 (1878); *In re Kemmler*, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). Chief Justice William Rehnquist subscribed to this view (*see, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (1976) (dissenting)), and the views of Justices Antonin Scalia and Clarence Thomas appear to be similar. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Antonin Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[2] *See Wilkerson*, 99 U.S. at 135–36.

[3] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion); *see also* Bucklew v. Precythe, No. 17-8151, slip op. at 11–12 (U.S. Apr. 1, 2019).

punishment." The *Weems* Court viewed the Eighth Amendment to be of an "expansive and vital character."[5] In the words of the plurality opinion in the 1958 decision, *Trop v. Dulles*, this meant that the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[6]

In the context of capital punishment, the Court has generally viewed the Eighth Amendment to prohibit punishments that "involve the unnecessary and wanton infliction of pain."[7] The Court has applied this standard to uphold the use of a firing squad[8] and electrocution.[9] In other cases, the Supreme Court held that various lethal injection protocols withstood scrutiny under the Eighth Amendment, finding that none of the challenged protocols presented a "substantial risk of serious harm" or an "objectively intolerable risk of harm."[10]

### Amdt8.4.3 Proportionality in Sentencing

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has also held that the Eighth Amendment's prohibition against "cruel and unusual punishments" applies to punishments that are disproportionate to the offense.[1] In 1892, Justice Stephen Field argued in dissent in *O'Neil v. Vermont*,[2] that, in addition to prohibiting punishments deemed barbarous and inhumane, the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In 1910, the Court appeared to adopt Justice Stephen Field's view in *Weems v. United States*,[3] striking down a sentence imposed in the Philippine Islands for the offense of falsifying public documents that included fifteen years' incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance. Comparing the sentence with those meted out for other offenses, the Court

[4] 217 U.S. 349 (1910).

[5] *Id.* at 376–77.

[6] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was later repeated, with the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[7] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion); *see also Bucklew*, No. 17-8151, slip op. at 11–12 (declaring that "the Eighth Amendment was understood to forbid . . . forms of punishment that intensified the sentence of death" by superadding "terror, pain, or disgrace") (internal citations and quotations omitted).

[8] *Wilkerson*, 99 U.S. at 137–38.

[9] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."); *see also* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[10] *See* Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion) (upholding Kentucky's use of a three-drug cocktail consisting of an anesthetic (sodium thiopental), a muscle relaxant, and an agent that induced cardiac arrest); *see also Bucklew*, No. 17-8151, slip op. at 22–25 (U.S. Apr. 1, 2019) (in an as-applied challenged, concluding that the petitioner's claims that the State of Missouri's execution protocol would result in severe pain rested on "speculation unsupported, if not affirmatively contradicted, by the evidence" before the lower court); Glossip v. Gross, 576 U.S. 863, 893 (2015) (upholding Oklahoma's use of a three-drug cocktail that utilized a sedative called midazolam in lieu of sodium thiopental).

[1] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983).

[2] 144 U.S. 323, 339–40 (1892).*See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[3] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines, which it interpreted as having the same meaning. *Id.* at 367.

concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[4]

The Court has distinguished death penalty cases from length of sentence cases, providing greater deference to state determinations in the latter. In *Rummel v. Estelle*,[5] the Court upheld a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. In its ruling, the Court reasoned that the unique quality of the death penalty rendered capital cases of limited value to cases concerning the length of a sentence.[6] The Court further distinguished *Weems* on the ground that the prison conditions and post-release denial of significant rights imposed under the particular Philippine penal code were of considerably greater concern than the length of the sentence. In order to avoid improper judicial interference with state penal systems, the Court reasoned that objective factors must inform Eighth Amendment judgments to the maximum extent possible.[7] But when a punishment is challenged based on its length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appears to be that states may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative discretion.[8] In dismissing the defendant's arguments to the contrary, the Court first noted that the nonviolent nature of the offense was not necessarily relevant to the crime's seriousness, and that determining what is a "small" amount of money, being subjective, was a legislative task. In any event, the Court opined that the state could focus on recidivism not the specific acts. Second, the Court ruled that comparing punishments imposed for the same offenses across jurisdictions was not helpful—differences and similarities being more subtle than gross—and, in any case, in a federal system, one jurisdiction would always be more severe than the rest. Third, the Court noted that comparing punishments imposed for other offenses in the same state ignored the recidivism aspect.[9]

The Court's deference to state determinations is not inviolate, however. The Court distinguished *Rummel* in *Solem v. Helm*,[10] stating unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[11] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[12] The Court, however, viewed Helm's sentence of life imprisonment without possibility of parole to be "far more severe than the life

[4] 217 U.S. at 381.

[5] 445 U.S. 263 (1980).

[6] *Id.* at 272.

[7] *Id.* at 272–75.

[8] In *Hutto v. Davis,* 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of forty years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

[9] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. *Id.* at 285, 295–303.

[10] 463 U.S. 277 (1983). The case, like *Rummel*, was decided by a 5-4 vote.

[11] *Id.* at 284, 288.

[12] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." *Id.* at 296–97.

sentence we considered in *Rummel v. Estelle*."[13] Rummel, the Court pointed out, "was likely to have been eligible for parole within twelve years of his initial confinement," whereas Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an ad hoc exercise of clemency.'"[14] The *Solem* Court also identified "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[15] Measured by these criteria, the Court concluded that Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnaping, and arson. In only one other state could Helm have received so harsh a sentence, and in no other state was it mandated.[16]

*Harmelin v. Michigan* [17] saw a closely divided Court hold that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. The Court limited its opinion to the mandatory nature of the penalty, rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[18] As to the length of sentence, three majority Justices—Anthony Kennedy, Sandra Day O'Connor, and David Souter—recognized a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[19]

Twelve years after *Harmelin*, in *Ewing v. California*,[20] the Court did not reach a consensus on a rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to a sentence of twenty-five years to life in prison for a repeat offender who had stolen three golf clubs valued at $399 apiece. A plurality of three Justices (Sandra Day O'Connor, Anthony Kennedy, and Chief Justice William Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the

[13] *Id.* at 297.

[14] *Id.* at 297, 303.

[15] *Id.* at 292.

[16] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, see Justice Lewis Powell's concurring opinion in *Bowers v. Hardwick,* 478 U.S. 186, 197 (1986).

[17] 501 U.S. 957 (1991).

[18] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." 501 U.S. at 994. The Court's opinion, written by Justice Antonin Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice William Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Antonin Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue and without reference to the crime for which it is imposed.*See id.* at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (*see id.* at 996 (Kennedy, O'Connor, and Souter, JJ., concurring); *id.* at 1009 (White, Blackmun, and Stevens, JJ., dissenting); *id.* at 1027 (Marshall, J., dissenting)), the fact that three of those Justices (Anthony Kennedy, Sandra Day O'Connor, and David Souter) joined Justice Antonin Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Antonin Scalia's general approach to proportionality.

[19] Because of the "serious nature" of the crime, the three-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Thurgood Marshall also expressed agreement on this and most other points, *id.* at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. *Id.* at 1018.

[20] 538 U.S. 11 (2003).

"rare case" of "gross disproportional[ity]."[21] The other two Justices voting in the majority were Justice Antonin Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[22] and Justice Clarence Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[23] The Court also rejected a habeas corpus challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[24] Justice Sandra Day O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[25]

### Amdt8.4.4 Proportionality and Juvenile Offenders

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court has distinguished the treatment of juvenile offenders in considering proportionality under the "cruel and unusual punishment" standard. In *Graham v. Florida*,[1] Justice Anthony Kennedy, writing for a five-Justice majority, declared that "[t]he concept of proportionality is central to the Eighth Amendment," in holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[2] Justice Anthony Kennedy characterized proportionality cases as falling within two general types. The first type comprises challenges to the length of actual sentences imposed as being grossly disproportionate, and such challenges are resolved under approaches taken in *Solem*, *Harmelin*, and similar cases. The second type comprises challenges to particular sentencing practices as being categorically impermissible, but categorical restrictions had theretofore been limited to imposing the death penalty on those with diminished capacity. In *Graham*, Justice Anthony Kennedy broke new ground and recognized a categorical restriction on life without parole for nonhomicide offenses by juveniles, citing considerations and applying analysis similar to those used in his juvenile capital punishment opinion in *Roper v. Simmons*.[3] In considering objective indicia of a national consensus on the sentence, the *Graham* opinion looked beyond statutory authorization—thirty-seven states and the District of Columbia permitted life without parole for some juvenile nonhomicide offenders—to actual imposition, which was rare outside Florida. Justice Anthony Kennedy also found support "in the fact that, in continuing to impose life without parole sentences on

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[21] *Id.* at 29–30.

[22] *Id.* at 31.

[23] *Id.* at 32. The four dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See Ewing*, 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[24] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive twnty-five-year-to-life sentences on a thirty-seven-year-old convicted of two petty thefts with a prior conviction.

[25] *Id.* at 72.

[1] 560 U.S. 48 (2010).

[2] *Id.* at 82. The opinion distinguished life without parole from a life sentence. An offender need not be guaranteed eventual release under the *Graham* holding, just a realistic opportunity for release based on conduct during confinement.

[3] *See* 543 U.S. 551 (2005). Concurring in the judgement in *Graham*, Chief Justice John Roberts resolved the case under a proportionality test, finding the majority's categorical restriction to be unwise and unnecessary in *Graham*'s circumstances. 560 U.S. 48 (2010) (Roberts, C.J., concurring).

juveniles who did not commit homicide, the United States adhere[d] to a sentencing practice rejected the world over."[4] After finding that a consensus had developed against the sentencing practice at issue, Justice Anthony Kennedy expressed an independent judgment that imposing life without parole on juveniles for nonhomicide offenses failed to serve legitimate penological goals adequately.[5] Factors in reaching this conclusion included the severity of the sentence, the relative culpability of juveniles, and the prospect for their rehabilitation.[6]

The concept of proportionality also drove Justice Elena Kagan's majority opinion in *Miller v. Alabama*, in which the Court held that the Eighth Amendment forbids any sentencing scheme that mandates life without parole for juveniles convicted of homicide.[7] The *Miller* Court's analysis began by recounting the factors, stated in *Roper* and *Graham*, that mark children as constitutionally different from adults for purposes of sentencing: Children have diminished capacities and greater prospects for reform.[8] In the Court's view, a process that mandates life imprisonment without parole for juvenile offenders is constitutionally flawed because it forecloses any consideration of the hallmark attributes of youth in meting out society's severest penalties.[9] Nevertheless, the majority concluded that those factors, even when coupled with the severity of a life without parole sentence, did not require a categorical bar on life without parole for juveniles in homicide cases.[10] Rather, the Court held that sentencers who consider an offender's youth and attendant characteristics may impose discretionary juvenile life without parole sentences in homicide cases.[11] Building on *Miller*, in *Montgomery v. Louisiana*, the Court held that *Miller*'s prohibition on mandatory life without parole sentences for juvenile offenders applied retroactively to convictions that were final before *Miller* was decided.[12] Justice Anthony Kennedy, joined by five other Justices, explained that *Miller* had prohibited life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[13]

After the foregoing decisions expanded Eighth Amendment protections for juvenile offenders, the Supreme Court declined to further extend those protections in *Jones v. Mississippi*.[14] In that case, a man convicted of murder as a juvenile argued that the Eighth Amendment, as interpreted in *Miller* and *Montgomery*, prohibits sentencing juvenile homicide offenders to life without parole unless they are found to be "permanently incorrigible."[15] Justice Brett Kavanaugh's majority opinion rejected that argument, holding that "a separate factual finding of permanent incorrigibility is not required" before a juvenile may be sentenced to life without parole.[16] Rather, a state sentencing scheme that gives the sentencer discretion

[4] *Graham*, 560 U.S. at 80.

[5] For a parallel discussion in *Roper*, see 543 U.S. 551, 568–75 (2005).

[6] In dissent, Justice Clarence Thomas, joined by Justice Antonin Scalia and, in part, by Justice Samuel Alito, questioned both the basis and the reach of the majority opinion. In addition to strongly objecting to adopting any categorical rule in a nonhomicide context, Justice Clarence Thomas pointedly criticized the conclusion that the legislative and judicial records established a consensus against imposing life without parole on juvenile offenders in nonhomicide cases. He also disparaged the majority's independent judgment on the morality and justice of the sentence as wrongfully pre-empting the political process. *Graham*, 560 U.S. 48 (Thomas, J., dissenting).

[7] 567 U.S. 460, 465 (2012).

[8] *Id.* at 471.

[9] *Id.* at 477.

[10] *Id.* at 479.

[11] *Id.* at 479–80.

[12] 577 U.S. 190, 205 (2016).

[13] *Id.* at 208–09.

[14] No. 18-1259, slip op. at 1–2 (U.S. Apr. 22, 2021).

[15] *Id.* at 1.

[16] *Id.* at 5.

whether to impose a life without parole sentence for a juvenile homicide offender "is both constitutionally necessary and constitutionally sufficient."[17]

### Amdt8.4.5 Limitation to Criminal Punishments

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court in *Ingraham v. Wright* explained that the Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that government can impose on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[1] These limitations, the Court thought, should not be extended outside the criminal process.[2]

### Amdt8.4.6 Drug and Alcohol Dependency

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Robinson v. California*[1] the Court set aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the state or had committed any act at all within the state's power to proscribe, and because addiction is an illness that—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act,[2] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct that he is unable to control, which would make it a holding of far-reaching importance.[3] In *Powell v. Texas*,[4] a majority of the Justices took the latter view of *Robinson*, but the result, because of one Justice's view of the facts, was a refusal to invalidate a conviction of

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[17] *Id.*

[1] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the Due Process Clause, if at all.

[2] *Id.* at 667–69.

[1] 370 U.S. 660 (1962).

[2] A different approach to essentially the same problem was taken in *Thompson v. Louisville,* 362 U.S. 199, 206 (1960), which set aside a conviction for loitering and disorderly conduct as being supported by "no evidence whatever." *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

[3] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, see *Lambert v. California,* 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976); Patterson v. New York, 432 U.S. 197, 202–05 (1977). In *Solem v. Helm,* 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case,

an alcoholic for public drunkenness. Whether either the Eighth Amendment or the Due Process Clauses will govern the requirement of the recognition of capacity defenses to criminal charges remains to be decided.

### Amdt8.4.7 Conditions of Confinement

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court stated in *Rhodes v. Chapman*, "It is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'"[1] The Court explained that "[c]onditions [in prison] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." According to the *Rhodes* Court, prison conditions, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities" and thus violate the Eighth Amendment. However "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[2] These general principles apply both to the treatment of individuals[3] and to the creation or maintenance of prison conditions that are inhumane to inmates generally.[4]

Ordinarily, the question of whether conditions of confinement are cruel and unusual involves both a subjective and an objective inquiry.[5] When conditions of confinement are not formally meted out as punishment by the statute or sentencing judge, such conditions cannot qualify as "cruel and unusual punishment" unless the prison officials who impose them

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the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[4] 392 U.S. 514 (1968). The plurality opinion by Justice Thurgood Marshall, joined by Justices Hugo Black and John Marshall Harlan and Chief Justice Earl Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, mens rea, insanity, mistake, justification, and duress. *Id.* at 532–37. Justice Byron White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice Byron White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. *Id.* at 548. Dissenting Justices Abe Fortas, William O. Douglas, William Brennan, and Potter Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. *Id.* at 554, 567.

[1] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

[2] 452 U.S. at 347. *See also* Overton v. Bazzetta, 539 U.S. 126, 137 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[3] *E.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment); Taylor v. Riojas, No. 19-1261, slip op. at 1 (U.S. Nov. 2, 2020) (per curiam) (four days' confinement in a cell "covered, nearly floor to ceiling, in massive amounts of feces" followed by two days in a "frigidly cold cell" where prisoner "was left to sleep naked in sewage" violated the Eighth Amendment) (internal quotes omitted). In *Erickson v. Pardus,* 551 U.S. 89 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences.

[4] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

[5] *E.g.*, *Rhodes*, 452 U.S.at 346–47.

possess a culpable, "wanton" state of mind.[6] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[7] in the context of emergency actions, such as actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind suffices to violate the Eighth Amendment.[8] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[9]

Beginning in 1970, federal courts found prisons or entire prison systems to violate the Cruel and Unusual Punishments Clause and imposed broad remedial orders to improve prison conditions and ameliorate prison life in more than two dozen states.[10] The Supreme Court upheld challenged portions of one of those decisions in *Hutto v. Finney*.[11] The issues before the Supreme Court in *Hutto* were limited to the appropriateness of the remedy; however, the Court expressed approval of the district court's Eighth Amendment analysis.[12] By contrast, in two subsequent cases, the Court rejected Eighth Amendment challenges to the practice of housing two inmates in the same cell.[13] Although the Court in each case reaffirmed the duty of the federal courts to protect prisoners' constitutional rights, it cautioned the courts to proceed with deference to the decisions of state legislatures and prison administrators.[14] Thus, concerns of federalism and judicial restraint apparently motivated the Court to limit federal remedies where the prevailing circumstances, given the resources states choose to devote to them,

[6] Wilson v. Seiter, 501 U.S. 294 (1991).

[7] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires the court to find that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994). In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 553 U.S. 35, 48–50 (2008) (emphasis added by the Court). This case is also discussed under Amdt8.4.9.10 Execution Methods.

[8] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[9] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate). *Accord* Wilkins v. Gaddy, 559 U.S. 34 (2010) (per curiam).

[10] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Brennan, J., concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

[11] 437 U.S. 678 (1978).

[12] *Id.* at 685–86 ("Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation 'is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.'") (quoting Finney v. Hutto, 410 F. Supp. 251, 275 (E.D. Ark. 1976)).

[13] Bell v. Wolfish, 441 U.S. 520, 530–36 (1979); Rhodes v. Chapman, 452 U.S. 337, 347–50 (1981).

[14] *Bell*, 441 U.S. at 562 ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. . . . This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute."); *see also Rhodes*, 452 U.S. at 351–52.

"cannot be said to be cruel and unusual under contemporary standards."[15] Subsequent cases indicate that such concerns are relevant to Eighth Amendment analysis but are not dispositive.[16]

Congress initially authorized litigation over prison conditions in 1980 in the Civil Rights of Institutionalized Persons Act,[17] but then in 1996 added restrictions through the Prison Litigation Reform Act.[18] The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that the automatic stay provision did not violate separation of powers principles.[19]

### Amdt8.4.8 Divestiture of Citizenship

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court has looked unfavorably on divestiture of citizenship as a punishment. In *Trop v. Dulles*, the Court held divestiture of the citizenship of a natural born citizen to be cruel and unusual punishment.[1] The Court viewed divestiture of citizenship as a penalty "more primitive than torture," because it entailed statelessness or "the total destruction of the individual's status in organized society."[2] The Court commented that: "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[3] The Court further reasoned that a punishment must be examined "in light of the basic prohibition against inhuman treatment," and that the Eighth Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards."[4]

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[15] *Rhodes*, 452 U.S. at 351–52; *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[16] *E.g.*, Helling v. McKinney, 509 U.S. 25, 35–37 (1993) (Holding that "[w]e cannot rule at this juncture that it will be impossible . . . to prove an Eighth Amendment violation based on exposure to ETS [environmental tobacco smoke]," and inquiry into whether prison authorities were deliberately indifferent to dangers posed by exposure to ETS "would be an appropriate vehicle to consider arguments regarding the realities of prison administration.").

[17] Pub. L. No. 96-247, 94 Stat. 349, 42 U.S.C. §§ 1997 et seq.

[18] Pub. L. No. 104-134, title VIII, 110 Stat. 1321-66–1321-77.

[19] Miller v. French, 530 U.S. 327 (2000). *See also* Porter v. Nussle, 534 U.S. 516 (2002) (applying the Act's requirement that prisoners exhaust administrative remedies).

[1] 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice William Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. *Id.* at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. *Id.* at 121, 124–27.

[2] *Id.* at 101.

[3] *Id.* at 99.

[4] *Id.* at 100, 101 n.32. The action of prison guards in handcuffing a prisoner to a hitching post for long periods of time violated basic human dignity and constituted "gratuitous infliction of 'wanton and unnecessary pain'" prohibited by the clause. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

## Amdt8.4.9 Death Penalty

### Amdt8.4.9.1 Overview of Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court's 1972 decision in *Furman v. Georgia*,[1] finding constitutional deficiencies in the manner in which the death penalty was applied, but not holding the death penalty unconstitutional per se, was a watershed in capital punishment jurisprudence. The ruling effectively constitutionalized capital sentencing law and involved federal courts in extensive review of capital sentences.[2]

Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review.[3] In *Furman* and the five 1976 cases that followed, in which the Court reviewed laws[4] that states had revised in response to *Furman*, the Court reaffirmed the constitutionality of capital punishment per se, but also opened up several avenues for constitutional review.

Since 1976, the Court has issued many decisions on applying and reconciling the principles it has identified for applying the death penalty. In particular, the Court has held that sentencing discretion must be limited to preventing courts from arbitrarily imposing the death penalty. Accordingly, the Court has established that courts should follow guidelines that narrow and define the category of death-eligible defendants. Jury discretion, however, must be preserved in order for jurors to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

### Amdt8.4.9.2 Early Doctrine on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Trop v. Dulles*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[1] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

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[1] 408 U.S. 238 (1972).

[2] *See* Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

[3] *See* McGautha v. California, 402 U.S. 183, 207 (1971) ("[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."). Justice William O. Douglas in his opinion in support of the *Furman* per curiam decision, observed, "We are now imprisoned in the *McGautha* holding . . . [that] [j]uries . . . have practically untrammeled [unguided] discretion to let an accused live or insist that he die." *Furman*, 408 U.S. at 248.

[4] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v, Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[1] 356 U.S. 86, 99 (1958).

Amdt8.4.9.2
Early Doctrine on Death Penalty

A series of cases testing the means by which the death penalty was imposed[2] culminated in what appeared to be a decisive rejection of the attack in *McGautha v. California*.[3]

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based.[4] This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

### Amdt8.4.9.3 Furman and Moratorium on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Furman v. Georgia*,[1] the Supreme Court held that the death penalty, at least as administered, violated the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in separate concurring opinions. Two Justices concluded that the death penalty was "cruel and unusual" per se because the imposition of capital punishment "does not comport with human dignity"[2] or because it is "morally unacceptable" and "excessive."[3] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better situated defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[4] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner[5] and so infrequently that it served no justifying end.[6]

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[2] In *Rudolph v. Alabama,* 375 U.S. 889 (1963), Justices Arthur Goldberg, William O. Douglas, and William Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment. The Court addressed exclusion of death-scrupled jurors in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). *Witherspoon* and subsequent cases explicating it are discussed under Amdt6.4.5.1 A Jury Selected from a Representative Cross-Section of the Community.

[3] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton v. Ohio*. McGautha raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the Due Process Clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; although bifurcated proceedings might be desirable, they were not required by due process.

[4] Ring v. Arizona, 536 U.S. 584 (2002). *See also* Hurst v. Florida, 136 S. Ct. 616, 619–20 (2016).

[1] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Potter Stewart and Byron White, who had voted with the majority in *McGautha v. California,* 402 U.S. 183 (1971).

[2] *Furman*, 408 U.S. at 257 (Brennan, J.).

[3] *Id.* at 314 (Marshall, J.).

[4] *Id.* at 240 (Douglas, J.).

[5] *Id.* at 306 (Stewart, J.).

[6] *Id.* at 310 (White, J.). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." *Id.* at 375 (Burger, C.J.), 405 (Blackmun, J.), 414 (Powell, J.), 465 (Rehnquist, C.J.). Each of the dissenters joined each of the opinions of the others.

## Amdt8.4.9.4 Gregg v. Georgia and Limits on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Because only two of the Justices in *Furman* thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.[1] Enactment of death penalty statutes by thirty-five states following *Furman* led to renewed litigation, but not to the elucidation one might expect from a series of opinions.[2] Instead, although the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[3] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not per se cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[4] Divisions among the Justices, however, made it difficult to ascertain the form that permissible statutory schemes may take.[5]

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[1] Collectors of judicial "put downs" of colleagues should note Justice William Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

[2] Justice Felix Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See, e.g.*, Chief Justice Warren Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice Byron White, *id.* at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, *id.* at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and *id.* at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[3] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder where defendant aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place). *Compare Enmund* with Tison v. Arizona, 481 U.S. 137 (1987) (death sentence upheld where defendants did not kill but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking statute, 49 U.S.C. § 46502, imposes the death penalty only when a death occurs during commission of the hijacking. By contrast, the treason statute, 18 U.S.C. § 2381, permits the death penalty in the absence of a death, and represents a situation in which great and fatal danger might be present. But the treason statute also constitutes a crime against the state, which may be significant. In *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

[4] Justices William Brennan and Thurgood Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, *Coker*, 433 U.S. at 600; *Lockett*, 438 U.S. at 619; *Enmund*, 458 U.S. at 801.

[5] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

Because the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[6] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing but approved other statutes specifying factors for jury consideration.[7]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. Although there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur that reenactment of capital punishment statutes by thirty-five states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity that can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Nor is the punishment of death disproportionate to the crime being punished, murder.[8]

Second, however, a different majority concluded that statutes *mandating* the imposition of death for crimes classified as first degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character

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[6] Thus, Justice William O. Douglas thought the penalty had been applied discriminatorily, *Furman*, 408 U.S. 238, Justice Potter Stewart thought it "wantonly and . . . freakishly imposed," *id.* at 310, and Justice Byron White thought it had been applied so infrequently that it served no justifying end. *Id.* at 313.

[7] The principal opinion was in *Gregg v. Georgia,* 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other states were similarly sustained, *Proffitt v. Florida,* 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and *Jurek v. Texas,* 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other states were invalidated, *Woodson v. North Carolina,* 428 U.S. 280 (1976), and *Roberts v. Louisiana,* 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

[8] *Gregg*, 428 U.S. at 168–87 (Stewart, Powell, and Stevens, JJ.); *Roberts*, 428 U.S. at 350–56 (White, Blackmun, Rehnquist, JJ., and Burger, C.J.). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice Byron White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice Byron White's *Furman* dissent and those of Chief Justice Warren Burger and Justice Blackmun show a rejection of proportionality analysis. Justices William Brennan and Thurgood Marshall dissented, reiterating their *Furman* views. *Gregg*, 428 U.S. at 227, 231.

and record of the . . . offender and the circumstances of the particular offense" that "the fundamental respect for humanity underlying the Eighth Amendment" requires in capital cases.[9]

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be structured so as to reduce arbitrariness and capriciousness as much as possible.[10] What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[11] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[12] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, be presented;[13] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was fairly imposed both in light of the facts of the individual case and by comparison with the penalties imposed in similar cases.[14] The Court later ruled, however, that proportionality review is not constitutionally required.[15] *Gregg*, *Proffitt*, and *Jurek* did not

[9] *Woodson*, 428 U.S. 280; *Roberts*, 428 U.S. 325. Justices Stewart, Lewis Powell, and John Paul Stevens composed the plurality, and Justices William Brennan and Thurgod Marshall concurred on the basis of their own views of the death penalty. *Id.* at 305, 306, 336.

[10] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg*, 428 U.S. at 169 n.15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[11] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important social function in maintaining the link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. *Gregg*, 428 U.S. at 190. Subsequently, however, the Court issued several opinions holding that the Sixth Amendment right to a jury trial is violated if a judge makes factual findings (for example, as to the existence of aggravating circumstances) upon which a death sentence is based. Hurst v. Florida, 136 S. Ct. 616, 619–20 (2016); Ring v. Arizona, 536 U.S. 584 (2002). Notably, one Justice in both cases would have found that the Eighth Amendment—not the Sixth Amendment—requires that "a jury, not a judge, make the decision to sentence a defendant to death." *Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment). *See also Hurst*, 136 S. Ct. at 619 (Breyer, J., concurring in the judgment).

[12] *Gregg*, 428 U.S. at 188–95. Justice Byron White seemed close to the plurality on the question of standards, *id.* at 207 (concurring), but while Chief Justice Warren Burger and Justice William Rehnquist joined the Byron White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. *Woodson*, 428 U.S. at 319–21 (dissenting). In *McGautha v. California,* 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the Due Process Clause. On the vitiation of *McGautha*, see *Gregg*, 428 U.S. at 195 n.47, and *Lockett v. Ohio,* 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding Self-Incrimination and Counsel Clauses applicable to psychiatric examination, at least when a doctor testifies about his conclusions with respect to future dangerousness).

[13] *Gregg*, 428 U.S. at 163, 190–92, 195 (plurality opinion). *McGautha*, 402 U.S. 183, had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in *Roberts,* 428 U.S. at 358, rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1224–25 (1984).

[14] *Gregg*, 428 U.S. at 195, 198 (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); *Jurek*, 428 U.S. at 276 (plurality).

[15] Pulley v. Harris, 465 U.S. 37 (1984).

require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[16]

### Amdt8.4.9.5 Applying the Death Penalty Fairly

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

One of the principal objections to imposition of the death penalty, voiced by Justice William O. Douglas in his concurring opinion in *Furman*, was that it was not being administered fairly—that the capital sentencing laws vesting "practically untrammeled discretion" in juries were being used as vehicles for racial discrimination, and that "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[1] This argument has not carried the day. Although the Court has acknowledged the possibility that the death penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[2]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp*[3] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions."[4] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (for example, by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. Although the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[5] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[6]

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[16] *Id.* at 50.

[1] 408 U.S. at 248, 257.

[2] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[3] 481 U.S. 279 (1987) (5-4 decision).

[4] *Id.* at 308.

[5] *Id.* at 339–40 (Brennan, J.), 345 (Blackmun, J.), 366 (Stevens, J.).

[6] *Id.* at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See also* United States v. Bass, 536 U.S. 862 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the government provide information on its decisions to seek the death penalty.

## Amdt8.4.9.6 Role of Jury and Consideration of Evidence

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In response to the Supreme Court's 1976 decisions on the death penalty,[1] most states narrowed sentencing authority discretion to impose the death penalty by enacting statutes spelling out "aggravating" circumstances and requiring that at least one such aggravating circumstance be found before the death penalty is imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer. Thus, in *Godfrey v. Georgia*, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[2] Similarly, in *Maynard v. Cartwright*, the Court held an "especially heinous, atrocious, or cruel" aggravating circumstance to be unconstitutionally vague.[3] The "especially heinous, cruel, or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[4]

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first degree murder of a police officer,[5] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[6] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when doing so would be justified by the evidence.[7] Because the jury had to choose between conviction or acquittal, the statute created

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[1] Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a statute providing for a bifurcated proceeding separating guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court); Proffitt v. Florida, 428 U.S. 242 (1976) (a statute generally similar to Georgia's, with the exception that the trial judge, rather than the jury, was directed to weigh statutory aggravating factors against statutory mitigating factors); Jurek v. Texas, 428 U.S. 262 (1976) (a statute construed as narrowing the death-eligible class of cases, and lumping mitigating factors into consideration of dangerousness); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating the death penalty for first degree murder).

[2] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[3] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988). *But see* Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[4] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*, Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness); Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[5] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant from the first *Roberts v. Louisiana* case, 428 U.S. 325 (1976).

[6] Sumner v. Shuman, 483 U.S. 66 (1987).

[7] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." *Id.* at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute

the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[8]

The overarching principle of *Furman v. Georgia*[9] and of the *Gregg v. Georgia* series of cases[10] was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime."[11] As such, discretion was channeled and rationalized. But, in *Lockett v. Ohio*,[12] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. The *Lockett* Court stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[13]

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of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first degree murder defendant, who received instruction on lesser included offense of second degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony murder, and not requiring jury agreement on which alternative had occurred.

[8] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

[9] 408 U.S. 238 (1972).

[10] Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a statute providing for a bifurcated proceeding separating guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court); Proffitt v. Florida, 428 U.S. 242 (1976) (a statute generally similar to Georgia's, with the exception that the trial judge, rather than the jury, was directed to weigh statutory aggravating factors against statutory mitigating factors); Jurek v. Texas, 428 U.S. 262 (1976) (a statute construed as narrowing the death-eligible class of cases, and lumping mitigating factors into consideration of dangerousness); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating the death penalty for first degree murder).

[11] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[12] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Warren Burger was joined by Justices Potter Stewart, Lewis Powell, and John Paul Stevens. Justices Harry Blackmun, Thurgood Marshall, and Byron White concurred in the result on separate and conflicting grounds. *Id.* at 613, 619, 621. Justice William Rehnquist dissented. *Id.* at 628.

[13] 438 U.S. at 604. Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

Similarly, in *Woodson v. North Carolina*, a three-Justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid because it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant."[14] *Lockett* and *Woodson* have since been endorsed by a Court majority.[15] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[16]

The Court has explained this apparent contradiction as recognizing that "individual culpability is not always measured by the category of crime committed,"[17] and an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused."[18] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restrictions on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of the defendant's circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty,"[19] while consideration of all mitigating evidence requires focus on "the character and record of the individual offender and the circumstances of the particular offense" consistent with "the fundamental respect for humanity underlying the Eighth Amendment."[20] As long as the

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[14] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first degree murder).

[15] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting *Lockett*); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Lewis Powell, William Brennan, Thurgood Marshall, John Paul Stevens, and Sandra Day O'Connor; Chief Justice Warren Burger and Justices Byron White, Harry Blackmun, and William Rehnquist dissented. The *Shuman* majority was composed of Justices Harry Blackmun, William Brennan, Thurgood Marshall, Lewis Powell, John Paul Stevens, and Sandra Day O'Connor; dissenting were Justices Byron White and Antonin Scalia and Chief Justice William Rehnquist. *Woodson* and the first *Roberts v. Louisiana* had earlier been followed in the second *Roberts v. Louisiana,* 431 U.S. 633 (1977), a per curiam opinion from which Chief Justice Warren Burger, and Justices Harry Blackmun, Byron White, and William Rehnquist dissented.

[16] Justice Byron White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Antonin Scalia voiced similar misgivings. "Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661, 662 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147 (1991).

[17] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Potter Stewart, Lewis Powell, and John Paul Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

[18] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

[19] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[20] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[21]

The Court has given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered.[22] States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court.[23] Also, the Court has constrained the use of federal habeas corpus to review state court judgments. As a result, the Court recognized a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.[24]

While maintaining the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[25] the Court has upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence.[26] In *Blystone v. Pennsylvania*, the Court stated: "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"[27]; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[28] The legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and

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[21] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[22] *See, e.g.*, Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[23] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[24] As such, the Court has opined that it is not the role of the Eighth Amendment to establish a special "federal code of evidence" governing "the admissibility of evidence at capital sentencing proceedings." *See* Romano v. Oklahoma, 512 U.S. 1, 11–12 (1994). Instead, the test for a constitutional violation attributable to evidence improperly admitted at a capital sentencing proceeding is whether the evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.* at 12. As a consequence, the Court found nothing constitutionally impermissible with a state having joint sentencing proceedings for two defendants whose underlying conviction arose from the same single chain of events. *See* Kansas v. Carr, 577 U.S. 108, 123 (2016) (rejecting the argument that joinder of two defendants was fundamentally unfair because evidence that one defendant unduly influenced another defendant's conduct may have "infected" the jury's decision making). Indeed, the Court approvingly noted that joint proceedings before a single jury for defendants that commit the same crimes are "not only permissible but are often preferable" in order to avoid the "wanto[n] and freakis[h]" imposition of the death sentence. *See id.* at 646 (citing Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)).

[25] *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that a sentencing jury must be permitted to consider the defendant's mitigating evidence concerning his intellectual disability and history of childhood abuse separately from its findings on the defendant's personal culpability, future dangerousness, and the reasonableness of the defendant's response to a victim's provocation.); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (holding that a sentencing jury must be permitted to consider the defendant's mitigating evidence concerning his intellectual disability and history of childhood abuse separately from its findings on the defendant's personal culpability, future dangerousness, and the reasonableness of the defendant's response to a victim's provocation); Brewer v. Quarterman, 550 U.S. 286 (2007) (same). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[26] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring in judgment).

[27] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[28] *Id.*

no mitigating circumstance,[29] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[30] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," because in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial."[31] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as it allows one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[32] Due process is also a consideration; if the state argues for the death penalty based on the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.[33]

One issue the Court had to consider was how a death sentence is impacted if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor to be weighed against mitigating factors in determining whether a defendant who is eligible for the death penalty should receive it) is found invalid. In *Brown v. Sanders*, the Court announced "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[34]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[35] or on a trial

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[29] *Id.*

[30] Boyde v. California, 494 U.S. 370 (1990). A court is not required to give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). In this vein, the Court has held that capital sentencing courts are not obliged to inform the jury affirmatively that mitigating circumstances lack the need for proof beyond a reasonable doubt. *See* Kansas v. Carr, 136 S. Ct. 633, 642–43 (2016) (noting that ambiguity in capital sentencing instructions gives rise to constitutional error only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 528 U.S. 225 (2000). Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance *of the crime* which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." Ayers v. Belmontes, 549 U.S. 7, 10, 15 (2006). This was because the jurors had heard "extensive forward-looking evidence," and it was improbable that they would believe themselves barred from considering it. *Id.* at 16.

[31] California v. Brown, 479 U.S. 538, 543 (1987).

[32] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990). *Compare* Smith v. Spisak, 558 U.S. 139, 143–49 (2010) (distinguishing jury instructions in *Mills* from instructions directing each juror to independently assess any mitigating factors before jury as a whole balanced the weight of mitigating evidence against each aggravating factor, with unanimity required before balance in favor of an aggravating factor may be found).

[33] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 136 S. Ct. 1818, 1820 (2016) (holding that the possibility of clemency and the potential for future "legislative reform" does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express an intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36, 40 (2001) (holding that an amended South Carolina law still runs afoul of *Simmons*).

[34] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." *Id.* at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." *Id.* Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." *Id.*

[35] Zant v. Stephens, 462 U.S. 862 (1983).

judge's consideration of improper aggravating circumstances.[36] In each case, the sentencing authority had found other aggravating circumstances justifying imposing capital punishment. For instance, in *Zant*, evidence relating to the invalid factor was nonetheless admissible on another basis.[37] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through reweighing the aggravating and mitigating evidence.[38] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand notwithstanding the presence of other aggravating factors.[39]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[40] The *Guzek* Court observed that although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[41] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [i.e., sentencing] at which, in principle, that matter is not at issue."[42]

The Court's focus on the character and culpability of the defendant led the Court, initially, to hold that the Eighth Amendment "prohibits a capital sentencing jury from considering victim impact evidence" that does not "relate directly to the circumstances of the crime."[43] Four years later, the Court largely overruled[44] these decisions, however, holding that the Eighth Amendment does allow the jury to consider "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[45] The Court reasoned that the admissibility of victim impact evidence was necessary to restore

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[36] Barclay v. Florida, 463 U.S. 939 (1983).

[37] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).

[38] *See* Clemons v. Mississippi, 494 U.S. 738, 741 (1990) (authorizing appellate reassessment of a death sentence on an improper aggravating circumstance); *see also* McKinney v. Arizona, 140 S. Ct. 702, 706–07 (2020) (extending *Clemons* review so that a reassessment could occur when a trial court improperly ignored a mitigating circumstance).

[39] Johnson v. Mississippi, 486 U.S. 578 (1988).

[40] 546 U.S. 517, 523 (2006).

[41] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

[42] 546 U.S. at 526.

[43] *See* Booth v. Maryland, 482 U.S. 496, 501–02 (1987); *see also* South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (concluding that *Booth* extended to a prosecutor's statements about a victim's personal qualities).

[44] The Court has refrained from overturning *Booth*'s holding that the admission of a victim's family members' characterizations and opinions about the "underlying crime, the defendant, and the appropriate sentence" violate the Eighth Amendment. *See* Bosse v. Oklahoma, 137 S. Ct. 1, 1 (2016) (per curiam). Instead, the Court has overruled *Booth*'s central holding that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *See* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991).

[45] *See Payne*, 501 U.S. at 817.

balance to capital sentencing. In the Court's view, exclusion of such evidence "unfairly weighted the scales in a capital trial" because there are no corresponding limits on "relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."[46]

### Amdt8.4.9.7 Cognitively Disabled and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright*[1] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who has a severe mental illness and that properly raised issues of the individual's mental health at the time of execution must be determined in a proceeding satisfying the minimum requirements of due process.[2] The *Ford* Court noted that execution of persons with severe mental illness had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continued to be so viewed.[3] And, although no states purported to permit the execution of persons with severe mental illness, Florida and some others left the determination to the Governor. Florida's procedures, the *Ford* Court held, violated due process because the decision was vested in the Governor without the defendant's having the opportunity to be heard, the Governor's decision being based on reports of three state-appointed psychiatrists.[4]

The Court in *Panetti v. Quarterman* clarified when a prisoner's current mental state can bar his execution under the *Ford* rule.[5] Relying on the understanding that the execution of a prisoner who cannot comprehend the reasons for his punishment offends both moral values and serves "no retributive purpose," the Court concluded that the operative test was whether a prisoner can "reach a rational understanding for the reason for his execution."[6] Under *Panetti*, if a prisoner's mental state is so distorted by mental illness that he cannot grasp the execution's "meaning and purpose" or the "link between [his] crime and its punishment," he

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[46] *Id.* at 822.

[1] 477 U.S. 399 (1986).

[2] There was an opinion of the Court only on the first issue: that the Eighth Amendment creates a right not to be executed while suffering severe mental illness. The Court's opinion did not attempt to define the mental illnesses that make a person ineligible for the death penalty. Justice Lewis Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422.

[3] *Id.* at 406–408.

[4] The Court had no opinion on the issue of procedural requirements. Justice Thurgood Marshall, joined by Justices William Brennan, Harry Blackmun, and John Paul Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Lewis Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." *Id.* at 427. Concurring Justice Sandra Day O'Connor, joined by Justice Byron White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, set forth the Court's holding.

[5] 551 U.S. 930 (2007).

[6] *Id.* at 957–58.

cannot be executed.[7] Furthermore, once a death row inmate has made "a substantial showing that his current mental state would bar his execution" due process entitles him to a hearing at which he may present "evidence and argument from the prisoner's counsel, including expert psychiatric evidence" in his support of his claim of incompetence and in rebuttal of any state-offered evidence.[8]

Twelve years after *Panetti*, the Court further clarified two aspects of the *Ford-Panetti* inquiry in *Madison v. Alabama*.[9] First, *Ford-Panetti* stands for the proposition, the Court declared, that a prisoner cannot be executed for a capital offense if his "'concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning or purpose' or the link between [his] crime and its punishment.'"[10] The Court explained that a prisoner challenging his execution on the ground of a mental disability cannot prevail "merely because he cannot remember committing his crime."[11] Instead, a prisoner's memory loss may be a factor in determining whether the prisoner has a rational understanding of the reason for his execution.[12] Second, the *Madison* Court concluded that while *Ford* and *Panetti* pertained to prisoners suffering from psychotic delusions, the logic of those opinions extended to a prisoner who suffered from dementia.[13]

In 1989, when first confronted with the issue of whether execution of the persons with intellectual disabilities is constitutional, the Court found "insufficient evidence of a national consensus" against executing such people.[14] In 2002, however, the Court determined in *Atkins v. Virginia*[15] that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against it.[16] In 1989, only two states and the Federal Government prohibited execution of persons with intellectual disabilities while allowing executions generally.[17] By 2002, an additional sixteen states had prohibited execution of persons with intellectual disabilities, and no states had reinstated the power.[18] But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[19] The Court's own evaluation of the issue reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—applies

[7] *Id.* at 957.

[8] *Id.* at 950.

[9] 139 S. Ct. 718 (2019).

[10] *Id.* at 723 (quoting *Panetti*, 551 U.S. at 958).

[11] *Id.* at 726–27.

[12] *Id.* at 727. In so holding, The Court noted that evidence that a prisoner has difficulty preserving any memories may contribute to a finding that the prisoner may not rationally understand the reasons doe his death sentence.

[13] *Panetti*'s "standard focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. Conversely, that standard has no interest in establish any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension." *Id.* at 728.

[14] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). Although unwilling to conclude that execution of a person with an intellectual disability is "categorically prohibited by the Eighth Amendment," *id.* at 335, the Court noted that, because of the requirement of individualized consideration of culpability, a defendant with such a disability is entitled to an instruction that the jury may consider and give mitigating effect to evidence of intellectual disability or a background of abuse. *Id.* at 328. *See also* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[15] 536 U.S. 304 (2002).

[16] 536 U.S. at 314, 316.

[17] 536 U.S. at 314.

[18] *Id.*

[19] 536 U.S. at 315.

with full force to offenders with intellectual disabilities.[20] "With respect to retribution—the interest in seeing that the offender gets his 'just desserts'—necessarily depends on the culpability of the offender."[21] Yet reduced intellectual capacity reduces culpability. Deterrence is premised on the ability of offenders to control their behavior. Yet reduced intellectual capacity makes it less likely that an offender will associate his conduct with prospect of the death penalty.[22]

Once again, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[23] In *Schriro v. Smith*, the Court again quoted this language, determining that the Ninth Circuit exceeded its authority in holding that Arizona courts were required to conduct a jury trial to resolve a defendant's claim that he was ineligible for the death penalty because of intellectual disability.[24] States, the Court added, are entitled to "adopt[ ] their own measures" for adjudicating claims of intellectual disability though "those measures might, in their application, be subject to constitutional challenge."[25]

In *Hall v. Florida*,[26] however, the Court limited the states' ability to define intellectual disability by invalidating Florida's "bright line" cutoff based on Intelligence Quotient (IQ) test scores. A Florida statute stated that anyone with an IQ above 70 was prohibited from offering additional evidence of mental disability and was thus subject to capital punishment.[27] The Court invalidated this rigid standard, observing that "[i]ntellectual disability is a condition, not a number."[28] The majority found that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature and may only be used as a factor of analysis in death penalty cases.[29] This reasoning was buttressed by a consensus of mental health professionals who concluded that an IQ test score should be read not as a single fixed number, but as a range.[30]

Building on *Hall*, in *Moore v. Texas* the Supreme Court rejected the standards used by Texas state courts to evaluate whether a death row inmate was intellectually disabled, concluding that the standards created an "unacceptable risk that persons with intellectual disability will be executed."[31] First, Justice Ruth Bader Ginsburg, on behalf of the Court, held that a Texas court's conclusion that a prisoner with an IQ score of 74 could be executed was "irreconcilable with *Hall*" because the state court had failed to consider standard errors that are inherent in assessing intellectual disability.[32] Second, the *Moore I* Court determined that Texas deviated from prevailing clinical standards respecting the assessment of a death row inmate's intellectual capabilities by (1) emphasizing the petitioner's perceived adaptive

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[20] 536 U.S. at 318.

[21] 536 U.S. at 319.

[22] 536 U.S. at 319–20. The Court also noted that reduced capacity both increases the risk of false confessions and reduces a defendant's ability to assist counsel in making a persuasive showing of mitigation.

[23] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).

[24] 546 U.S. 6, 7 (2005) (per curiam).

[25] 546 U.S. at 7.

[26] 572 U.S. 701 (2014).

[27] Cherry v. State, 959 So.2d 702, 712–13 (Fla. 2007) (per curiam) (construing Fla. Stat. § 921.137 (2013)).

[28] *Hall*, 572 U.S. at 701, 703

[29] *Id.*

[30] This range, referred to as a "standard error or measurement" or "SEM," is used by many states in evaluating the existence of intellectual disability. *Hall*, 572 U.S. 701, 723 (2014)

[31] 137 S. Ct. 1039, 1044 (2017) [hereinafter *Moore I*].

[32] *Id.* at 1049.

strengths and his behavior in prison;[33] (2) dismissing several traumatic experiences from the petitioner's past;[34] and (3) requiring the petitioner to show that his adaptive deficits were not due to a personality disorder or a mental health issue.[35] Third, the *Moore I* Court criticized the prevailing standard used in Texas courts for assessing intellectual disability in death penalty cases, which had favored the "'consensus of Texas citizens' on who 'should be exempted from the death penalty,'" with regard to those with "mild" intellectual disabilities in the state's capital system, concluding that those with even "mild" levels of intellectual disability could not be executed under *Atkins*.[36] Finally, *Moore* rejected the Texas courts' skepticism of professional standards for assessing intellectual disability, standards that the state courts had viewed as being "exceedingly subjective."[37] The Supreme Court instead held that "lay stereotypes" (and not established professional standards) on an individual's intellectual capabilities should "spark skepticism."[38] As a result, following *Hall* and *Moore*, while the states retain "some flexibility" in enforcing *Atkins*, the medical community's prevailing standards appear to "supply" a key constraint on the states in capital cases.[39]

### Amdt8.4.9.8 Minors and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age sixteen, but upheld other statutes authorizing capital punishment for crimes committed by sixteen- and seventeen-year-olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[1] Although four Justices favored a flat ruling that the Eighth Amendment barred the execution of anyone younger than sixteen at

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[33] *Id.* at 1050 ("[T]he medical community focuses the adaptive-functioning inquiry on adaptive deficits."); *see also id.* at 1050 ("Clinicians, however, caution against reliance on adaptive strengths developed in a controlled setting, as prison surely is.") (internal citations and quotations omitted).

[34] *Id.* at 1051 ("Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination.").

[35] *Id.* ("The existence of a personality disorder or mental-health issue, in short, is not evidence that a person does not also have intellectual disability.") (internal citations and quotations omitted).

[36] *Id.*. In so concluding, the Court noted that "[m]ild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and "States may not execute anyone in the *entire* category of intellectually disabled offenders." *Id.* (internal citations and quotations omitted).

[37] *See Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

[38] *See Moore I*, 137 S. Ct. at 1052.

[39] *Id.* at 1052–53. Two years after *Moore I*, the case returned to the High Court, where, in a per curiam opinion, the Court again reversed the Court of Criminal Appeals of Texas. *See* Moore v. Texas, 139 S. Ct. 666, 667 (2019) (per curiam) [hereinafter *Moore II*]. That court had concluded that the prisoner did not have an intellectual disability and was, therefore, eligible for the death penalty. *Id.* Finding that the lower court's opinion "repeat[ed] the analysis" the Supreme Court "previously found wanting" in its 2017 opinion, *Moore II* criticized the Texas court's (1) reliance on the petitioner's adaptive strengths in lieu of his adaptive deficits; (2) emphasis on the petitioner's adaptive improvements made in prison; (3) tendency to consider the petitioner's social behavior to be caused by "emotional problems," instead of his general mental abilities; and (4) continued reliance on the *Briseno* case the Court had previously criticized in *Moore I*. *Id.* at 670–72. Ultimately, the Court concluded that the record from the trial court demonstrated that the petitioner was "a person with intellectual disability," reversing the lower court's judgment and remanding the case. *Id.* at 672.

[1] Thompson v. Oklahoma, 487 U.S. 815 (1988).

the time of his offense, concurring Justice Sandra Day O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice Sandra Day O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky* held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age sixteen or seventeen. Like Oklahoma, neither Kentucky nor Missouri[2] directly specified a minimum age for the death penalty. To Justice Sandra Day O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on sixteen- or seventeen-year-old murderers, whereas there was such a consensus against execution of fifteen-year-olds.[3]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing persons with intellectual disabilities with what it saw as a lack of consensus regarding execution of juvenile offenders over age fifteen,[4] less than three years later the Court held that such a consensus had developed. The Court's decision in *Roper v. Simmons*[5] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age sixteen or seventeen when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, thirty states prohibited execution of juveniles: twelve that prohibited the death penalty altogether, and eighteen that excluded juveniles from its reach. This meant that twenty states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the ten years immediately preceding *Roper*. Although the pace of change was slower than had been the case with execution of persons with intellectual disabilities, the consistent direction of change toward abolition was deemed more important.[6]

As in *Atkins*, the Court in *Roper* relied on its "own independent judgment" in addition to its finding of consensus among the states.[7] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and

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[2] *Wilkins v. Missouri* was decided along with *Stanford*.

[3] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age fifteen, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (fifteen of thirty-seven states permitting capital punishment decline to impose it on sixteen-year-old offenders; twelve decline to impose it on seventeen-year-old offenders).

[4] 536 U.S. at 314, n.18.

[5] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Anthony Kennedy wrote the Court's opinion, and was joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Sandra Day O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Antonin Scalia, who was joined by Chief Justice William Rehnquist and Justice Clarence Thomas.

[6] Dissenting in *Roper*, Justice Sandra Day O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing sixteen- and seventeen-year-old offenders. 543 U.S. at 596.

[7] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Antonin Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394–96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing persons with intellectual disabilities.

ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[8] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed."[9] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[10]

The *Roper* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[11] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[12]

### Amdt8.4.9.9 Non-Homicide Offenses and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has considered whether, based on the nature of the underlying offense, imposing capital punishment may be inappropriate. In *Kennedy v. Louisiana*, the Court stated:

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'[1]

However, in a dissenting opinion, Justice Samuel Alito opined that the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'"[2]

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[8] 543 U.S. at 569, 570.

[9] 543 U.S. at 570.

[10] 543 U.S. at 572–573. Strongly disagreeing, Justice Sandra Day O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." *Id.* at 600.

[11] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," *id.* at 575).

[12] 543 U.S. at 577, 578. Citing as precedent Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317 n.21; Enmund v. Florida, 458 U.S. 782, 796–97, n.22 (1982), Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

[1] Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[2] 554 U.S. at 406 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

In *Coker v. Georgia*,[3] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy v. Louisiana*,[4] the Court held that this was true even when the rape victim was a child.[5] In *Coker*, the Court announced that the standard under the Eighth Amendment was that punishments are barred when they "are 'excessive' in relation to the crime committed."[6] The Court stated:

> Under *Gregg v. Georgia*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.[7]

Although the *Coker* Court thought that the death penalty for rape passed the first test ("it may measurably serve the legitimate ends of punishment"),[8] it found that it failed the second test (proportionality).[9] Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of the injury to the person and to the public."[10]

In *Kennedy v. Louisiana*, the Court concluded on the basis of the "teaching of [its] precedents" and the "evolving standards of decency," evidenced by legislative activity on the issue and the want of related executions, that the Eighth Amendment precludes the death penalty for a person who rapes a child.[11]

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[3] 433 U.S. 584 (1977). Justice Byron White's opinion was joined only by Justices Potter Stewart, Harry Blackmun, and John Paul Stevens. Justices William Brennan and Thurgood Marshall concurred on their view that the death penalty is per se invalid, *id.* at 600, and Justice Lewis Powell concurred on a more limited basis than Justice White's opinion. *Id.* at 601. Chief Justice Warren Burger and Justice William Rehnquist dissented. *Id.* at 604.

[4] 554 U.S. 407. Justice Anthony Kennedy's opinion was joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Samuel Alito filed a dissenting opinion, in which Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas joined.

[5] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons [where a victim's life is not taken]. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 554 U.S. at 437.

[6] Coker v. Georgia, 433 U.S. 584, 592 (1976).

[7] *Id.*

[8] 433 U.S. at 593 n.4.

[9] *Id.* at 597.

[10] *Id.* at 598.

[11] 554 U.S. 407, 438 (2008). The Court noted that since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." *Id.* at 440–41.

## Amdt8.4.9.10 Execution Methods

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Throughout the history of the United States, various methods of execution have been deployed by the states in carrying out the death penalty. In the early history of the Nation, hanging was the "nearly universal form of execution."[1] In the late nineteenth century and continuing into the twentieth century, the states began adopting electrocution as a substitute for hanging based on the "well-grounded belief that electrocution is less painful and more humane than hanging."[2] And by the late 1970s, following *Gregg*, states began adopting statutes allowing for execution by lethal injection, perceiving lethal injection to be a more humane alternative to electrocution or other popular pre-*Gregg* means of carrying out the death penalty, such as firing squads or gas chambers.[3] Today the overwhelming majority of the states that allow for the death penalty use lethal injection as the "exclusive or primary method of execution."[4]

Despite a national evolution over the past two hundred years with respect to the methods deployed in carrying out the death penalty, the choice to adopt arguably more humane means of capital punishment has not been the direct result of a decision from the Supreme Court. Citing public understandings from the time of the Framing, the Court has articulated some limits to the methods that can be employed in carrying out death sentences, such as those that "superadd" terror, pain, or disgrace to the penalty of death,[5] for example by torturing someone to death.[6]

Nonetheless, the Supreme Court has "never invalidated a State's chosen procedure" for carrying out the death penalty as a violation of the Eighth Amendment.[7] In 1878, the Court, relying on a long history of using firing squads in carrying out executions in military tribunals, held that the "punishment of shooting as a mode of executing the death penalty" did not constitute a cruel and unusual punishment.[8] Twelve years later, the Court upheld the use of the newly created electric chair, deferring to the judgment of the New York state legislature and finding that it was "plainly right" that electrocution was not "inhuman and barbarous."[9] Fifty-seven years later, a plurality of the Court concluded that it would not be "cruel and unusual" to execute a prisoner whose first execution failed due to a mechanical malfunction, as an "unforeseeable accident" did not amount to the "wanton infliction of pain" barred by the Eighth Amendment.[10]

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[1] Baze v. Rees, 553 U.S. 35, 41 (2008) (quoting Campbell v. Wood, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from the denial of certiorari)).

[2] *See* Malloy v. South Carolina, 237 U.S. 180, 185 (1915).

[3] *See Baze*, 553 U.S. at 42.

[4] *Id.*

[5] *See* Bucklew v. Precythe, No. 17–8151, slip op. at 9–10 (U.S. Apr. 1, 2019) (citing 4 W. Blackstone, Commentaries on the Laws of England 370 (1769)).

[6] *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879) (noting in dicta that certain forms of torture, such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution"); *see also Bucklew*, slip op. at 9–10 (similar).

[7] *See Baze*, 553 U.S. at 48 (plurality opinion).

[8] *See Wilkerson*, 99 U.S. at 134–35.

[9] *See In re* Kemmler, 136 U.S. 436, 447 (1890).

[10] *See* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion). Justice Felix Frankfurter concurred in judgment, providing the fifth vote for the Court's judgment. *Id.* at 466 (Frankfurter, J.,

The declaration in *Trop v. Dulles* that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[11] and the continued reliance on that declaration by a majority of the Court in several key Eighth Amendment cases[12] set the stage for potential "method of execution" challenges to the newest mode for the death penalty: lethal injection. Following several decisions clarifying the proper procedural mechanism to raise challenges to methods of execution,[13] the Court, in *Baze v. Rees*, rejected a method of execution challenge to Kentucky's lethal injection protocol, a three-drug protocol consisting of (1) an anesthetic that would render a prisoner unconscious; (2) a muscle relaxant; and (3) an agent that would induce cardiac arrest.[14] A plurality opinion, written by Chief Justice John Roberts and joined by Justices Anthony Kennedy and Samuel Alito, concluded that to constitute cruel and unusual punishment, a particular method for carrying out the death penalty must present a "substantial" or "objectively intolerable" risk of harm.[15] In so concluding, the plurality opinion rejected the view that a prisoner could succeed on an Eighth Amendment method of execution challenge by merely demonstrating that a "marginally" safer alternative existed, because such a standard would "embroil" the courts in ongoing scientific inquiries and force courts to second guess the informed choices of state legislatures respecting capital punishment.[16] As a result, the plurality reasoned that to address a "substantial risk of serious harm" effectively, the prisoner must propose an alternative method of execution that is feasible, can be readily implemented, and can significantly reduce a substantial risk of severe pain.[17] Given the "heavy burden" that the plurality placed on those pursuing an Eighth Amendment method of execution claim, the plurality upheld Kentucky's protocol in light of (1) the consensus of state lethal injection procedures; (2) the safeguards Kentucky put in place to protect against any risks of harm; and (3) the lack of any feasible, safer alternative to the three-drug protocol.[18] Four other Justices, for varying reasons, concurred in the judgment of the Court.[19]

Seven years later, in a seeming reprise of the *Baze* litigation, a majority of the Court in *Glossip v. Gross* formally adopted the *Baze* plurality's reasoning with respect to Eighth Amendment claims involving methods of execution, resulting in the rejection of a challenge to Oklahoma's three-drug lethal injection protocol.[20] Following *Baze*, anti-death penalty

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concurring). He grounded his decision on whether the Eighth Amendment had been incorporated against the states through the Fourteenth Amendment, ultimately concluding that Louisiana's choice of execution cannot be said to be "repugnant to the conscience of mankind." *Id.* at 471.

[11] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[12] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion).

[13] *See, e.g.*, Hill v. McDonough, 547 U.S. 573 (2006) (ruling that a challenge to the constitutionality of an execution method could be brought as a civil rights claim under 42 U.S.C. § 1983, rather than under the anti-delay provisions governing a habeas corpus petition).

[14] 553 U.S. 35, 44 (2008).

[15] *Id.* at 50.

[16] *Id.* at 51.

[17] *Id.* at 52.

[18] *Id.* at 53–61.

[19] Justice John Paul Stevens, while announcing his skepticism regarding the constitutionality of the death penalty as a whole, concluded that, based on existing precedent, the petitioners' evidence failed to prove a violation of the Eighth Amendment. *Id.* at 71–87 (Stevens, J., concurring). Justice Clarence Thomas, on behalf of himself and Justice Antonin Scalia, rejected the idea that the Court had the capacity to adjudicate claims involving methods of execution properly and instead argued that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. *Id.* at 94–107 (Thomas, J., concurring). Justice Stephen Breyer concluded that insufficient evidence in either the record or in available medical literature demonstrated that Kentucky's lethal injection method created significant risk of unnecessary suffering. *Id.* at 107–13 (Breyer, J., concurring).

[20] *See* 576 U.S. 863 (2015).

advocates successfully persuaded pharmaceutical companies to stop providing states with the anesthetic that constituted the first of the three drugs used in the protocol challenged in the 2008 case, resulting in several states, including Oklahoma, substituting a sedative called midazolam in the protocol.[21] In *Glossip*, the Court held that Oklahoma's use of midazolam in its execution protocol did not violate the Eighth Amendment, because the challengers had failed to present a known and available alternative to midazolam and did not adequately demonstrate that the drug was ineffective in rendering a prisoner insensate to pain.[22]

Four years after *Glossip*, the Court further clarified its method-of-execution jurisprudence in *Bucklew v. Precythe*.[23] In that case, a death row inmate challenged the State of Missouri's use of the drug pentobarbital in executions because, regardless of its effect on *other inmates*, the drug would result in him experiencing "severe pain" due to his "unusual medical condition."[24] The Court, in an opinion by Justice Neil Gorsuch, began by framing the *Baze-Glossip* test as fundamentally asking whether a state's chosen method of execution is one that "cruelly superadds pain to the death sentence" relative to an alternative method of execution.[25] With this framework in mind, the Court first rejected the petitioner's argument that *Baze* and *Glossip*, which involved facial challenges, did not govern his as-applied challenge.[26] Justice Neil Gorsuch reasoned that determining whether the state is cruelly "superadding" pain to a punishment necessarily requires comparing that method with a viable alternative, an inquiry that simply does not hinge on whether a death row inmate's challenge rests on facts unique to his particular medical condition.[27] In so concluding, the Court clarified that an inmate seeking to identify an alternative method of execution is not limited to choosing a method that the state *currently* authorizes and can instead point, for example, to a well-established protocol in another state.[28]

Applying the *Baze-Glossip* framework, the Court then rejected the petitioner's proposed alternative of using the lethal gas, nitrogen hypoxia, because (1) the proposal was insufficiently detailed to permit a finding that the state could carry out the execution easily

[21] *Id.* at 869–71.

[22] *Id.* at 881–93.

[23] 139 S. Ct. 1112 (2019).

[24] *Id.* at 1120. Specifically, the petitioner argued that the state's protocol would cause him severe pain because he suffered from a disease that causes vascular tumors, which could rupture upon being injected with the drug that Missouri used in its death penalty protocol. *Id.*

[25] *Id.* at 1125 (observing that *Baze* and *Glossip* "teach[ ]" that a prisoner must show a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.").

[26] *Id.* at 1126.

[27] *Id.* (concluding that the argument that the Constitution categorically forbids some particular methods of execution was foreclosed by *Baze* and *Glossip*, as well as the "original and historical understanding" of the Eighth Amendment, which rejected ancient and barbaric methods of execution only because, in comparison to alternatives available at the Founding, they went far beyond what was necessary to carry out a death sentence). In so concluding, the Court rejected the argument that the comparator in an as-applied challenge should be a typical execution. *Id.* at 1127. For the Court, this argument rested on the assumption that executions must be carried out painlessly, a standard the Court "has rejected time and time again." *Id*. Instead, to determine whether the state is cruelly "superadding" pain, *Bucklew* concluded that a death row inmate must show that the state had some other "feasible and readily available method" to carry out the execution that would have "significantly reduced a substantial risk of pain."*Id.* Justice Neil Gorsuch also saw other problems with the petitioner's distinction between an as-applied challenge and a facial challenge. Viewing this distinction as simply a question of the breadth of the remedy afforded the petitioner, the Court concluded that the meaning of the Constitution should not hinge on the particular remedy being sought. *Id.* at 1128. Moreover, the Court raised the concern that creating a distinction based on the nature of the petitioner's preferred remedy would result in "pleading games" over the labels a petitioner assigned to his complaint. *Id.*

[28] *Id.* at 1128.

and quickly;[29] (2) the proposed alternative was an "untried and untested" method of execution;[30] and (3) the underlying record showed that any risks created by pentobarbital and mitigated by nitrogen hypoxia were speculative in nature.[31]

As a result of *Baze*, *Glossip*, and *Bucklew*, it appears that only those modes of the death penalty that demonstrably result in substantial risks of harm for the prisoner relative to viable alternatives can be challenged as unconstitutional.[32] This standard appears to result in the political process (as opposed to the judicial process) being the primary means of making wholesale changes to a particular method of execution.[33]

[29] *Id.* at 1129.

[30] *Id.* at 1130.

[31] *Id.* at 1131–33 (noting (1) evidence in the record that the state was making accommodations to further reduce any risks to the petitioner and (2) insufficient evidence indicating that pentobarbital would create risks of severe pain and that nitrogen hypoxia would not carry the same risks).

[32] *Id.* at 1130.

[33] *Id.* at 1134 ("Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously."); *see also* Barr v. Lee, 140 S. Ct. 2590, 2590–94 (2020) (per curiam) (relying on *Bucklew*'s views on the proper role of the judiciary with respect to method-of-execution challenges to reject a challenge raised "hours before" execution concerning the safety of using pentobarbital to carry out the death penalty).