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Individualized Sentencing

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Abstract

In Woodson v. North Carolina*, the Supreme Court proscribed the use of mandatory death sentences. One year later, in* Lockett v. Ohio*, the Court expanded this principle to hold that defendants in capital cases were entitled to "individualized sentencing determinations." The Court's reasoning in both cases centered on the seriousness of the death penalty. Because the death penalty is "different" in its seriousness and irrevocability, the Court required the sentencing court, whether judge or jury, to assess the individualized characteristics of the offender and the offense before imposing a sentence.*

In 2012, the Court expanded this Eighth Amendment concept to juvenile life-without-parole sentences in Miller v. Alabama*. Specifically, the Court held that juvenile offenders also were unique—in their capacity for rehabilitation and their diminished culpability—such that they too deserved individualized sentencing determinations. The seriousness of the sentence in question, life without parole, also factored into the Court's decision to extend the individualized sentencing requirement to juvenile life without parole cases.*

Felony convictions, however, are serious too. The current consequences for a felony conviction in most states result in dehumanizing effects that extend far beyond release including loss of right to vote, state surveillance, and loss of the right to own a firearm, not to mention social stigma. As such, this Article argues for an extension of the Court's Eighth Amendment individualized sentencing principle to all felony cases. Doing so would require the Court to overrule its prior decisions, including Harmelin v.

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Michigan*, but the Court's opinion in* Miller *hints at a willingness to do just that.*

While initially valuable in ensuring that capital cases received heightened scrutiny, the unintentional consequence of the Court's differentness principle is that non-capital cases have received almost no constitutional scrutiny. The individualized sentencing determination requirement provides one simple way to begin to remedy this shortcoming.

Adopting this doctrinal extension would have three major consequences: (1) it would provide each defendant his day in court in the face of serious, lifelong deprivations; (2) it would eliminate draconian mandatory sentencing practices; and (3) it would shift the sentencing determination away from prosecutors back to judges.

Part I of the Article describes the evolution of the individualized sentencing doctrine. Part II exposes the unintended consequences of the differentness concept, and unearths the theoretical principles behind individualized sentencing. In Part III, the Article argues for the expansion of the current doctrine and explains why the current roadblocks are not insurmountable. Part IV then explores the consequences of broadening the application of the individualized sentencing doctrine for defendants, legislators, and judges alike.

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I. Introduction

> Discipline "makes"'individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. It is not a triumphant power . . . it is a modest, suspicious power, which functions as a calculated, but permanent economy.[1]

The Eighth Amendment proscribes "cruel and unusual" punishments.[2] For all practical purposes, the Supreme Court's application of this provision has simply meant that the Eighth Amendment bars only cruel and unusual capital punishments,[3]

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1. MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 170 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

2. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted.").

3. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (finding a state statute that required the death penalty for persons convicted of first-degree murder violated the Eighth amendment); Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (finding that a mandatory death penalty statute violated the Eighth

broadened recently to include cruel and unusual punishments against juvenile offenders.[4] Under the Eighth Amendment, state and federal governments may not execute intellectually disabled offenders[5] or juvenile offenders,[6] nor execute offenders for the crimes of rape[7] or child rape.[8] Similarly, state and federal governments may not impose juvenile life-without-parole sentences for non-homicide crimes.[9]

In addition to these categorical limitations, the Supreme Court has placed an Eighth Amendment prohibition on the implementation of mandatory death sentences[10] and mandatory juvenile life-without-parole sentences.[11] Unlike limits based on the kind of offender (juvenile, intellectually disabled)[12] or the kind of the crime (rape, child rape),[13] this limit focuses on the kind of sentence—a mandatory one.[14]

Amendment).

4. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (banning life without parole sentences for juvenile offenders in non-homicide crimes); Miller v. Alabama, 567 U.S. 460, 489 (2012) (banning mandatory juvenile life-without-parole sentences).

5. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (explaining that executing mentally disabled persons would not advance the deterrent or retributive purposes of punishment).

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

7. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[D]eath is indeed a disproportionate penalty for the crime of raping an adult woman.").

8. *See* Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) ("[T]he death penalty is not a proportional punishment for the rape of a child.").

9. *See Graham*, 560 U.S. at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.").

10. *See Woodson*, 428 U.S. at 305 (finding a state statute that required the death penalty for persons convicted of first-degree murder violated the Eighth Amendment); *Roberts*, 428 U.S. at 335 (1976) (finding that a mandatory death penalty statute violated the Eighth Amendment).

11. *See Miller*, 567 U.S. at 489 ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole . . . the mandatory sentencing schemes before us violate this principle of proportionality . . . .").

12. *See supra* notes 5–6.

13. *See supra* notes 7–8.

14. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("North

On their face, mandatory sentences serve to ensure that judges and juries do not undermine the will of the legislature by requiring the imposition of a particular sentence for a particular crime.[15] In practice, though, statutes with mandatory sentences essentially delegate the sentencing decision from judge or jury to the prosecutor.[16] But as explored below, the Eighth Amendment

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Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments . . . ."); *see also* Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[T]he mandatory sentencing schemes before us violate this principle of proportionality . . . .").

15. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 199–200 (1993) (highlighting "real and important policy objectives" of legislatures such as fighting violent crime and drug dealing in adopting mandatory sentences).

16. *See* Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 243 (1992) ("[M]andatory penalty laws shift power from judges to prosecutors . . . ."); *see also* LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 3 (1994) (describing an instance during the author's time as a trial judge in which the prosecutor demanded a five year sentence, the judge denied the harsh sentence for being unconstitutional, and the appellate court remanded to the judge to impose the sentence); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1965 (1992) ("[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining."); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 314 (2004) ("Since the power to determine the charge of conviction rests exclusively with the prosecution or the eighty-five percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution."); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 FED. PROB. 9, 9 (1993) (noting concerns about prosecutors interfering with "the judicial role of making individualized sentencing judgments" when mandatory minimums are involved); Schulhofer, *supra* note 15, at 202 (discussing how prosecutors use mandatory minimums to induce defendant cooperation). There is extensive literature criticizing the use of mandatory sentences, including as part of the War on Drugs. *See also* JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 124–29 (1997) (discussing the consequences and costs of applying mandatory minimums to drug dealers); Joan Petersilia & Peter W. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 J. CRIM. L. & CRIMINOLOGY 604, 615 (1978) (finding that mandatory minimum sentences can reduce crime, but they will also increase prison populations). For a discussion on public opinion and mandatory sentences, see generally Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

limits on the use of mandatory sentences are not simply the products of institutional choices.[17] Rather, the rights of the individual criminal defendant, particularly in the light of serious deprivations, inform and substantiate the Eighth Amendment limitations on mandatory sentences.[18]

It was in *Woodson v. North Carolina*[19] that the Supreme Court proscribed the use of mandatory death sentences.[20] One year later, in *Lockett v. Ohio*,[21] the Court expanded this principle to hold that defendants in capital cases were entitled to "individualized sentencing determinations."[22] The Court's reasoning in both cases centered on the seriousness of the death penalty.[23] Because the death penalty is "different" in its seriousness and irrevocability,[24]

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17. *See* discussion *infra* Part II.B (discussing how the Eighth Amendment and the differentness concept require individualized sentencing in certain instances). Note that the academic literature has also widely documented the most common effect of adopting mandatory sentences: shifting power from the judge and jury to the prosecutor. *See supra* note 16; *see also* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 592 (2005) (stating that mandatory minimum laws curtail judicial discretion and shift power to prosecutors); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME DELINQ. 427, 427 (2007) (discussing the "consequent displacement of discretion from judges to prosecutors" resulting from mandatory minimum laws); Sonja B. Starr & M.M. Rehavi, *Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 6 (2013) (explaining prosecutors' wide discretion to charge mandatory minimum offenses and stating that "restricting judicial discretion further empowers prosecutors, who tend to exercise that power in ways that perpetuate or worsen disparity").

18. *See* discussion *infra* Part II.B.

19. 428 U.S. 280 (1976).

20. *Id.* at 305 (finding a state statute that required the death penalty for persons convicted of first-degree murder violated the Eighth amendment).

21. 438 U.S. 586 (1978).

22. *Id.* at 608.

23. *See id.* at 604–05 (stating that the death is qualitatively and profoundly different from other penalties); *see also Woodson*, 428 U.S. at 287 (distinguishing the penalty of death as "unique and irreversible").

24. *See* Furman v. Georgia, 408 U.S. 238, 290 (1972) (discussing the consequences of human fallibility in inflicting the death penalty, where "the finality of death precludes relief"). Justice Brennan's concurrence in this case is apparently the origin of the Court's "death is different" capital jurisprudence. *See id.* at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts:*

the Court required the sentencing court, whether judge or jury,[25] to assess the individualized characteristics of the offender and the offense before imposing a sentence.[26]

In 2012, the Court expanded[27] this Eighth Amendment concept to juvenile life-without-parole sentences in *Miller v. Alabama*.[28] Specifically, the Court held that juvenile offenders also were unique—in their capacity for rehabilitation and their diminished culpability—such that they too deserved individualized sentencing determinations.[29] The seriousness of the

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Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death is different jurisprudence and requesting additional procedural safeguards "when humans play at God").

25. States have generally abolished judicial sentencing in capital cases after *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing after* Hurst, 66 UCLA L. REV. (forthcoming 2019) (manuscript at 22, 46) (explaining that many statutes adopted sentencing systems that limited judicial authority and discretion or expanded the right to the jury findings) (on file with the Washington and Lee Law Review).

26. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("[A]n individualized decision is essential in capital cases."); *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); Roberts v. Louisiana, 428 U.S. 325, 333–34 (1976) (criticizing a Louisiana law for its lack of meaningful opportunity to consider mitigating factors presented by circumstances of a crime or attributes of an offender).

27. Prior to *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), many had argued that the differentness concept had created two completely different sentencing systems—capital and non-capital. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (describing the "two-track approach" to sentencing); *see also* Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death"*, 34 OHIO N.U. L. REV. 861, 861 (2008) (distinguishing between capital and non-capital sentencing systems).

28. *See* 567 U.S. 460, 489 (2012) (explaining that the statutory requirement that juveniles receive lifetime incarceration with possibility of parole violates the Eighth Amendment).

29. *See id.* at 478 (stating that the mandatory sentencing scheme disregards juveniles' diminished culpability and the possibility of rehabilitation "even when

sentence in question, life-without-parole, also factored into the Court's decision to extend the individualized sentencing requirement to juvenile life-without-parole cases.[30]

Felony convictions, however, are serious too.[31] Currently, felony convictions[32] in most states result in dehumanizing effects that extend far beyond release, including loss of right to vote,[33] government surveillance,[34] loss of possession and use of a

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the circumstances most suggest it").

30. *See id.* at 489 (requiring individualized sentencing before imposing "the harshest possible penalty for juveniles").

31. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 490 (2010) (discussing the consequences of a felony conviction, including "exclusion from public or gover nment-assisted housing, employment-related legal barriers, ineligibility for public benefits, and felon disenfranchisement"); *see also* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 10 (1996) ("Upon release, incarcerated offenders often encounter barriers to successful reintegration involving stigma, loss of job opportunities, friendships, familiar relationships, and denial of legal and civil rights." (citations omitted)).

32. There is extensive literature on the growing problem of collateral consequences to felony convictions. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 673–74 (2008) (noting that collateral consequences have "greatly expanded in recent years" and "now apply to relatively minor criminal convictions, and even to certain noncriminal convictions"); *see also* Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008) ("[P]eople convicted of felonies and some misdemeanors in U.S. courts face a number of penalties, restriction, and disabilities . . . ."); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494–96 (2005) (discussing the collateral consequences a felony conviction can have on an offender's family); Pinard, *supra* note 31, at 461 (stating that collateral consequences affect offenders, their families, and their communities).

33. See Pinard, supra note 31, at 490 (naming felon disenfranchisement, or the exclusion from the right to vote, as a consequence of a conviction); see also Ryan S. King, Expanding the Vote: State Felony Dis enfranchisement Reform, 1997–2008, Sentencing Project (Sept. 1 2008), https://www.sentencing projectorg/publications/expanding-the-vote-state-felony-disenfranchisement-reform-1997-2008/ (last visited Mar. 20, 2018) (providing an overview of the various state disenfranchisement laws) (on file with the Washington and Lee Law Review).

34. *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 214 (2013) (naming

firearm,[35] housing consequences,[36] employment consequences,[37] and public benefits,[38] not to mention social stigma.[39] The

surveillance services as a step in the Alabama Board of Pardon and Paroles' mission of rehabilitation). *But see* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 974 (2013) (discussing Sir Joshua Jebb of England's view that "surveillance would make released prisoners second-class citizens and undermine their reintegration").

35. *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (2008).

36. *See* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 566–69 (2005) (explaining how public housing agencies' broad guidelines and policies detrimentally affect people with criminal histories); *see also* Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 37, 43–46 (Marc Mauer & Meda Chesney-Lind eds., 2002) (providing an overview of the federal housing laws relating to individuals with criminal records).

37. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 112 (2006) (stating that men released from prison earn less and are employed less than those who have not been incarcerated); Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 23 (2005) (explaining the effects of online background checks' increased availability and the legal barrier of convicts working in various fields). For an overview of federally imposed employment restrictions, see *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*, AM. BAR ASS'N COMM'N ON EFFECTIVE CRIM. SANCTIONS (Jan. 2009), https://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf. For an overview of employment-related restrictions imposed by states, see *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records*, LEGAL ACTION CTR. (2004), http://216.243.167.66/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf. Although slightly outdated at this point, the report provides some idea of the variance among the states.

38. *See* Pinard, *supra* note 31, at 494 ("[S]ince 1996, federal law has denied welfare benefits assistance (cash assistance and food stamps) to individuals convicted of felony drug offenses."). For instance, felony drug offenders can lose welfare benefits. *See* 21 U.S.C. § 862a (2012) (denying assistance and benefits to individuals convicted of felony drug offenses). States can opt out of this law, and some have. *See id.* § 862a(d)(1)(A) ("A State may . . . exempt any or all individuals domiciled in the State . . . ."); *see also Smart on Crime: Recommendations for the Next Administration and Congress*, CONST. PROJECT (Nov. 5, 2008), https://constitutionproject.org/wp-content/uploads/2012/10/62.pdf (proposing legislative changes to eliminate the lifetime ban of felons on the Temporary Assistance for Needy Families program and food stamp eligibility).

39. *See* Ted Chiricos et al., *The Labeling of Convicted Felons and its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007) (explaining the effects labeling can have on a person's identity and conventional life); Laura M. Grossi, *Sexual Offenders, Violent Offenders, and Community Reentry: Challenges*

consequences typically continue on long after an offender has served his or her sentence,[40] and warrant closer constitutional scrutiny.[41]

As such, this Article argues for an extension of the Court's Eighth Amendment sentencing principle to all felony cases.[42] Doing so would require the Court to overrule its prior decisions,[43]

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and Treatment Considerations, 34 AGGRESSION & VIOLENT BEHAV. 59, 59 (2017) (highlighting the unique social challenges sex offenders face upon release, including denied participation in various community events and programs).

40. *See* Carey, *supra* note 36, at 545 n.1 (explaining that many public housing authorities employ one-strike rules to deny housing to people with any blemish on their criminal record); *see also ABA Standards for Criminal Justice Third Edition: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, AM. BAR ASS'N (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf (describing various types of long-lasting collateral consequences); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 258 (2004) (noting various collateral consequences that make it "virtually impossible for [offenders] to pursue legitimate means of survival").

41. *See* Pinard, *supra* note 31, at 462 (advocating for a comparative examination of collateral consequences to interpret certain constitutional issues).

42. *See infra* Part III. Others have advocated taking lesser steps in this direction in the context of juvenile offenders but not adults. *See* Lindsey E. Krause, *One Size Does Not Fit All: The Need for a Complete Abolition of Mandatory Minimum Sentences for Juveniles in Response to* Roper*,* Graham*, and* Miller, 33 L. & INEQ. 481, 483–84 (2015) (advocating to completely abolish mandatory minimums for juveniles); *see also* Alex Dutton, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller*'s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & CIV. RTS. L. Rev. 173, 173 (2013) (encouraging legal advocates to challenge all juvenile mandatory minimums through *Miller*'s analysis).

43. The Court has certainly not hesitated to overrule its recent precedents in the Eighth Amendment context. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming the death penalty for juveniles), *abrogated by* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (refusing to conclude that the Eighth Amendment precluded execution of mentally disabled defendants), *abrogated by* Atkins v. Virginia, 536 U.S. 305, 380 (2002) (explaining that executing mentally disabled persons would not advance the deterrent or retributive purposes of punishment); *see also* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 848 (2007) ("In recent years, the Supreme Court has steadily chipped away at the constitutionality of the death penalty.").

including *Harmelin v. Michigan*,[44] but the Court's opinion in *Miller* hints at a willingness to do just that.[45]

While initially valuable in ensuring that capital cases received heightened scrutiny, the unintentional consequence[46] of the Court's differentness principle is that non-capital cases have received almost no constitutional scrutiny.[47] The individualized sentencing determination requirement provides one simple way to begin to remedy this shortcoming.[48]

As explained below, the individualized sentencing determination would not only require the elimination of mandatory sentences, but also require the consideration of

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44. 501 U.S. 957, 961, 994, 996 (1991) (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); *see also* Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions).

45. *See* Miller v. Alabama, 567 U.S. 460 (2012) (broadening the individualized sentencing doctrine to juveniles charged with offenses that carry impose lifetime incarceration without parole).

46. Criminal law scholar Christopher Slobogin has previously discussed the dangerousness of the differentness principle with respect to juvenile offenders. *See generally* Annual Meeting, American Association of Law Schools, Criminal Law Panel, in San Diego, Ca. (Jan. 2018).

47. Indeed, the Court has seldom held that a non-capital, non-juvenile life without parole sentence violated the Eighth Amendment. This is true even where the sentence seems particularly excessive. *See* Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); *see also* Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994, 996 (1991) (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming mandatory life sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279–84 (1983) (reversing sentence of life-without-parole for presenting a no account check for $100, where defendant had six prior felony convictions); Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding that removal of citizenship is an unconstitutional punishment for desertion); Weems v. United States, 217 U.S. 349, 366 (1910) (holding the punishment of *cadena temporal* (hard labor) unconstitutional in light of the offense committed).

48. *See infra* Part III.

individualized mitigating circumstances for each offender.[49] Failure to provide this process would violate the Eighth Amendment.[50]

Adopting this doctrinal extension would have three major consequences: (1) it would provide each defendant his day in court in the face of serious, lifelong deprivations, (2) it would eliminate draconian mandatory sentencing practices, and (3) it would shift the sentencing determination away from prosecutors back to judges.[51]

Part I of the Article describes the evolution of the individualized sentencing doctrine. Part II exposes the unintended consequences of the differentness concept and unearths the theoretical principles behind individualized sentencing. In Part III, the Article argues for the expansion of the current doctrine and explains why the current roadblocks are not insurmountable. Part IV then explores the consequences of broadening the application of the individualized sentencing doctrine, for defendants, legislators, and judges alike.

II. The Genesis and Evolution of Individualized Sentencing

Historically, sentencing practices in the United States involved the imposition of indeterminate sentences in both state and federal courts.[52] Under such sentences, the state would impose an open-ended sentence, with a parole board determining when release was appropriate.[53]

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49. *See infra* Part III.

50. *See infra* Part III.

51. *See infra* Part IV.

52. *See* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 92 (1980) ("The history of the indeterminate sentence and parole can be traced back to the first years of the prison, and even further into the history of criminal justice."); Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9 (1925) (explaining that the United States employs indeterminate sentencing, commonly understood as imposing sentences with maximum limits); Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 694 (2010) (discussing the creation of the complex indeterminate sentencing scheme that began in the nineteenth century).

53. *See* Gertner, *supra* note 52, at 696 (explaining that parole authorities

In the 1970s, though, issues of consistency in sentencing and a growing crime rate resulted in the start of a move from indeterminate to determinate sentences.[54] As part of this shift, the purposes of punishment began to shift, at least implicitly, from a focus on rehabilitation to approaches favoring retribution and incapacitation.[55]

Part of this policy shift was a growing adoption of mandatory minimum sentences.[56] This shift from penal welfarism to penal populism, though, was not the first attempt to move in the direction of mandatory sentences.[57]

In the death penalty context, many states imposed mandatory death sentences for conviction of any felony—including murder, rape, arson, and robbery—a practice dating from the time of the adoption of the Constitution.[58] Indeed, the common law practice

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had the most power over sentences because they determined when a defendant's conduct merited release). For an extensive discussion of this model of penal welfarism and the later shift to penal populism, see generally DAVID GARLAND, THE CULTURE OF CONTROL (2001).

54. *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 72–73 (2014) ("Principally from 1975 to the mid-1980s, the reform movement aimed primarily to make sentencing procedures fairer and sentencing outcomes more predictable and consistent."); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 87 (1973) ("[T]he power given to a single parole agency may be expected to mitigate the disparities in sentencing caused by the unregulated vagaries of individual judges.").

55. *See* GARLAND, *supra* note 53, at 14 ("[T]he ruling assumption now is that 'prison works'—not as a mechanism of reform or rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution.").

56. *See id.* at 136 (explaining that many recent politicized policies, such as mandatory sentences, are designed to further incapacitation and having offenders "taken out of circulation").

57. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 269 (2002) (explaining that to combat unpredictable jury impositions of the death penalty, many states significantly narrowed jury discretion or created mandatory death sentences for certain crimes); *see also* HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 45–47 (rev. ed. 1967) (explaining offenses that carried a mandatory death sentence as of 1967).

58. *See* BANNER, *supra* note 57, at 269 (discussing how North Carolina imposed mandatory death sentences on those convicted of first degree murder or aggravated rape); *see also* BEDAU, *supra* note 57, at 47 (noting additional crimes that carried mandatory death sentences in some states, such as treason, perjury in a capital case where an execution results, train wrecking that causes death,

made death the exclusive and mandatory sentence for these kinds of offenses.[59]

Juries, however, often elected not to convict murderers rather than impose automatic death sentences.[60] The initial response of states to such jury nullification was to reduce the number of capital offenses, with jurisdictions eventually limiting mandatory death sentences to first-degree murders, which consisted of willful, deliberate, and premeditated killings.[61] These reforms, however, proved inadequate, as even separating murder into degrees did not resolve the difficult *mens rea* problems of assessing deliberateness, willfulness, and premeditation.[62]

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assault on a prison guard, attempt to kill the President, spying in wartime, and destruction of vital property in wartime).

59. *See* BEDAU, *supra* note 57, at 5–6, 15 (discussing the earliest capital offenses and the Crown's mandate that the colonies impose a harsh penal code). In England, over 200 offenses warranted death in the late 18th century. *See id.* at 1–2 ("One estimate put the number of capital crimes at 223 as late as 1819."); R. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 1–2 (1919). The colonies, by contrast, had significantly fewer. *See id.* at 2–3 (explaining that most New England colonies made twelve offenses capital); *see also* Frank E. Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10 (1952) ("The English colonies in this country had from ten to eighteen capital offenses.").

60. *See* BEDAU, *supra* note 57, at 27 (explaining jury discretion); *see also* Woodson v. North Carolina, 428 U.S. 280, 290 (1976) (discussing the "not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences"); Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32, 32 (1974) ("The death penalty, many observers claimed, made securing convictions more difficult and often resulted in the acquittal of obviously guilty defendants.").

61. *See Woodson*, 428 U.S. at 290 (explaining that many states followed Pennsylvania's practice of confining mandatory death sentences to only murder in the first degree convictions); *see also* BEDAU, *supra* note 57, at 24 (explaining the intent to give the jury an opportunity to exclude less culpable offenders from the death penalty by creating varying degrees of murder); David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 AM. HIST. REV. 23, 26–27 (1957) (discussing Pennsylvania's unique system to diminish death sentences).

62. *See Woodson,* 428 U.S. at 290–91 (explaining how the systems failed in part due to the "amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation . . . ."); *see also* McGautha v. California, 402 U.S. 183, 199 (1971) ("[J]urors on occasion took the law into their own hands in cases which were 'willful, deliberate, and premeditated' . . . but which nevertheless were clearly inappropriate for the death penalty."), *judgment vacated by* Crampton v. Ohio, 408 U.S. 941, 941–42 (1972); Andres v. United

With juries continuing to nullify murders on a regular basis, states began to grant juries sentencing discretion in capital cases as an alternative to mandatory death sentences.[63] The first states to adopt such an approach were Tennessee in 1838, Alabama in 1841, and Louisiana in 1846.[64] By the turn of the century, twenty-three states and the federal government had conditioned death sentences on jury or judge sentencing determinations, and fourteen additional states followed suit by 1920.[65] By 1963, all states and territories using the death penalty in the United States had opted for a discretionary sentencing approach and abandoned mandatory death sentences.[66] In part because the movement of states was away from mandatory death sentences, states never challenged the constitutionality of such legislative practices. It was not until the late 1970s, when a few states attempted to revive such practices, that the Supreme Court addressed the constitutional question.[67]

States, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring) (discussing the movement against capital punishments and juries efforts to save guilty defendants from death); REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949–1953, Cmd. 8932, §§ 27–29 (1953).

63. *See* WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 7 (1974) ("Further discretion in the application of the death penalty was provided by statutes that permitted the jury to decide whether convicted first degree offenders deserved death or an alternative punishment, usually life imprisonment."); *Woodson*, 428 U.S. at 291–92 (stating that Tennessee, Alabama, and Louisiana were the first states to allow discretionary death penalty in 1838, 1841, and 1846 respectively); BEDAU, *supra* note 57, at 27–28 (explaining jury discretion).

64. *See* BOWERS, *supra* note 63, at 7 ("[T]he first state to make all crimes . . . optionally punished by death was Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846.").

65. *See* BOWERS, *supra* note 63, at 8 (providing a table of when and which states made capital punishment discretionary for murder).

66. *See Woodson*, 428 U.S. at 291–92 (explaining that all but eight states had adopted discretionary jury sentencing by the end of World War II and that the remaining jurisdictions followed by 1963); *see also* BOWERS, *supra* note 63, at 7–9 (discussing the state systems that moved from mandatory to discretionary death sentences).

67. *See Woodson*, 428 U.S. at 305 (concluding that death sentences imposed under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion) (concluding that death sentences imposed under Louisiana's mandatory death sentence statute violated the Eighth and Fourteenth Amendments).

A. Capital Individualized Sentencing

The Eighth Amendment concept of individualized sentencing originated with the Supreme Court's death penalty cases of the 1970s. In *McGautha v. California*,[68] the Supreme Court considered whether the lack of jury guidance in capital cases violated the procedural due process requirements of the Fourteenth Amendment.[69] Specifically, the constitutional concern related to the absence of guidance provided to juries in capital cases.[70] The Court addressed challenges to both the California and the Ohio capital systems in *McGautha*.[71]

In California, the procedural due process challenge related to the absence of any guidance or direction for the jury in determining whether a first-degree murder warranted a death sentence.[72] The jury had a sentencing range of no jail time to a death sentence, and the court offered no parameters for making that decision.[73]

Perhaps even worse than California, Ohio's capital scheme employed a unitary trial for capital cases, meaning that guilt and sentencing determinations were made during a single jury deliberation.[74] This type of system forced the defendant to decide whether to fight the issue of guilt and abandon sentencing arguments or take the opposite approach.[75]

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68. 402 U.S. 183 (1971).

69. *See id.* at 221 (determining that the challenged procedures were consistent with those used in most capital trials in the country and did not violate petitioner's constitutional rights), *judgment vacated by* Crampton v. Ohio, 408 U.S. 941 (1972).

70. *See id.* at 196 (discussing the claim that "the absence of standards to guide the jury's discretion on the punishment issue" was unconstitutional).

71. *See id.* at 185 (outlining how one petitioner had been convicted of first-degree murder and sentenced to death in a California court, the other in an Ohio court).

72. *See id.* at 196 ("[P]etitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.").

73. *See id.* at 190 (instructing the jury that they had absolute discretion to determine McGautha's penalty).

74. *See id.* at 185 ("In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict.").

75. *See id.* at 209–10 (discussing a previous Supreme Court case that

The Supreme Court rejected both challenges in a narrow 5–4 decision.[76] The Court's reasoning related to the role of the jury in capital cases, finding that nothing in the Constitution prohibited delegating the sentencing determination to the "untrammeled discretion" of the jury.[77] Having documented the long history of jury nullification in capital cases where states imposed mandatory sentencing procedures, the Court found that allocating wide discretion to the jury was vastly preferable.[78] In particular, the Court was concerned that placing limits upon capital sentencing determinations might inhibit the jury from considering facts that could or should influence the outcome.[79] The Court explained:

> States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.[80]

While applying the Fourteenth Amendment, this language reflects the concern with ensuring consideration of all relevant evidence by the capital jury that the Court later adopted with

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addressed the issue of the same jury trying both punishment and guilt).

76. *See id.* at 221 ("We have determined that these procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair."). The bifurcation also related to the privilege of self-incrimination, which the Court found was not compromised by the Ohio approach. *See id.* at 217 ("We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.").

77. *Id.* at 207.

78. *See id.* at 208 (discussing how seriously jurors will take the responsibility of imposing the death penalty).

79. *See id.* (maintaining that listing the factors a juror could take into consideration would be a never-ending task).

80. *Id.*

respect to the Eighth Amendment.[81] Indeed, the Court's fear that legislative rules could unfairly undermine the constitutionality of capital sentencing processes became a reality as discussed below in *Lockett v. Ohio*.[82]

The Court essentially reversed the substance of its decision in *McGautha* one year later in *Furman v. Georgia*,[83] where the Court held that the death penalty, as applied, violated the Eighth Amendment.[84] Using the Eighth Amendment instead of the Fourteenth, the Court's per curiam opinion simply stated that, as currently used, the death penalty was a cruel and unusual punishment.[85]

Part of the concern of some of the concurring opinions related to the absence of guidance for jury determinations in capital cases—essentially the same concern raised in *McGautha*.[86] The justices though found these issues to be worse than previously

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81. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (identifying constitutional shortcomings of North Carolina's mandatory death sentence statute because the jury was not able to judge the "character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[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 . . . .").

82. *See Lockett*, 438 U.S. at 604 (highlighting that the death penalty is qualitatively different from other sentences, requiring discretion by juries).

83. 408 U.S. 238 (1972).

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

85. *See id.* (holding that the sentences violated the Eighth and Fourteenth Amendments).

86. *See id.* at 248 (Douglas, J., concurring) ("[T]he seeds of the present cases are in *McGautha*. Juries . . . have practically untrammeled discretion to let an accused live or insist that he die."); *id.* at 309 (Stewart, J., concurring) (calling the defendant's sentence "unusual" because juries inconsistently impose death sentence); *id.* at 314 (White, J., concurring) ("[L]egislative judgment . . . loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and . . . [the jury] may refuse to impose the death penalty no matter what the circumstances of the crime."); *id.* at 298 (Brennan, J., concurring) (explaining that "virtually all death sentences today are discretionarily imposed").

understood.[87] Justice Potter Stewart famously likened receiving the death penalty to being "struck by lightning,"[88] and several other justices found its imposition to essentially be arbitrary or random.[89] Again, the culprit for this wide disparity in outcomes is related to the use of juries to sentence offenders convicted of death-eligible crimes and the complete lack of direction offered to jurors in such cases.[90]

In the aftermath of *Furman*, the states worked quickly to amend their capital statutes in hopes of re-establishing the death penalty.[91] States adopted a wide range of approaches in an attempt to assuage the concerns of the five-Justice majority in *Furman* and to comply with the newly discovered requirements of the Eighth Amendment.[92]

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87. *Compare supra* note 86 and accompanying text (discussing the complete lack of consistency in death penalty sentences), *with McGautha*, 402 U.S. at 221 ("The ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is indeed illustrated by the discriminating verdict of the jury in McGautha's case . . . .").

88. *See Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

89. *See id.* at 242 (Douglas, J., concurring) ("[T]he Eighth Amendment . . . was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."); *id.* at 277 (Brennan, J., concurring) ("The more significant function of the [cruel and unusual] Clause, therefore, is to protect against the danger of their arbitrary infliction.").

90. *See id.* at 242 (Douglas, J., concurring) ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."); *id.* at 295 (Brennan, J., concurring) ("For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision.").

91. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 48 (2007) ("By *Furman*'s one-year anniversary, twenty states had restored the death penalty—and by 1976, that number had grown to thirty-five.").

92. *See id.* at 57 (pointing out that states adopted mandatory death penalties "only because they thought they had to in order to get around *Furman*"); *see also* LEE EPSTEIN & JOSEPH F. KOBYLKA, SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 58 (1992) (explaining that California reacted to *Furman* by amending their state constitution in order to re-instate the death

Georgia and other states adopted a system of aggravating and mitigating circumstances designed to narrow the class of offenders eligible for the death penalty.[93] Some of these states also adopted comparative proportionality review as an additional safeguard, providing a process by which the state supreme court would review each death sentence to minimize the inconsistency in sentencing outcomes by reversing outlier cases.[94]

Other states, like North Carolina and Louisiana, decided to eliminate jury sentencing discretion altogether by adopting a mandatory death penalty statute.[95] In these jurisdictions, offenders of first-degree murder automatically received a death sentence.[96]

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penalty).

93. *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976) ("While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled."); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980) (studying arbitrariness and discrimination in Florida, Georgia, Texas, and Ohio). Texas adopted its own approach that based death sentences on the aggravating concepts of (1) intentional murder, (2) future dangerousness, and (3) lack of provocation. *See* Jurek v. Texas, 428 U.S. 262, 268 (1976) (outlining Texas' adoption of a new capital-sentencing procedure). The Supreme Court upheld this approach under the Eighth Amendment. *See id.* at 276 ("We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments.").

94. *See Gregg*, 428 U.S. at 203 ("[T]he Supreme Court of Georgia . . . reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes."). For a discussion of how this principle has failed to achieve its intended purpose, see William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 718 (2012) ("Were states to adopt a more rigorous form of appellate review for death sentences, they could achieve several important goals and improve their adjudication of capital cases.").

95. *See* Woodson v. North Carolina, 428 U.S. 280, 286–87 (1976) ("North Carolina, unlike Florida, Georgia, and Texas, has thus responded to the *Furman* decision by making death the mandatory sentence for all persons convicted of first-degree murder."); Roberts v. Louisiana, 428 U.S. 325, 331 (1976) ("Louisiana, like North Carolina, has responded to *Furman* by replacing discretionary jury sentencing in capital cases with mandatory death sentences.").

96. *See supra* note 95 (discussing the adoption of mandatory death penalty statutes).

Finally, other states delegated the final sentencing decision to the judge.[97] In some cases, judges had the power to reject or override jury verdicts in capital cases.[98]

At the end of the Court's term in the spring of 1976, the Court reviewed these new approaches under the Eighth Amendment.[99] The Court upheld the Georgia approach of using aggravating and mitigating circumstances.[100] The three-Justice plurality seemed convinced that this approach would narrow the class of offenders eligible for the death penalty.[101] The opinion also affirmed the required weighing of aggravating and circumstances by the jury as

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97. Several states, including Alabama, Delaware, Nebraska, Montana, and Florida, adopted this approach after *Furman*. *See* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. (forthcoming 2019). Alabama and Florida used judicial override systems that allowed judges to override jury decisions not to impose the death penalty, approaches that received much criticism. *See, e.g.*, Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1411 (1984) ("The trial judge is responsible for imposing the final life or death sentence and is not constrained by either the jury recommendation or vote.").

98. Judges can no longer make such override decisions in light of recent Supreme Court decisions holding judicial factfinding in capital cases unconstitutional under the Sixth Amendment. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) ("Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."); Hurst v. Florida, 136 S. Ct. 616, 624 (2016) ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."); *see also* Carol Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1486 (2002) (discussing the effect of judicial overrides); Hessick & Berry, *supra* note 97.

99. *See Gregg*, 428 U.S. at 207 (affirming Georgia's statutory approach as Constitutional); *Woodson*, 428 U.S. at 305 (striking down North Carolina's statutory approach as unconstitutional); *Roberts*, 428 U.S. at 336 (striking down Louisiana's statutory approach as unconstitutional); *Jurek*, 428 U.S. at 276 (affirming Texas' statutory approach as Constitutional); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (affirming Florida's statutory approach as Constitutional).

100. *See Gregg*, 428 U.S. at 207 ("[W]e hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.").

101. *See id.* at 196–97 ("Georgia did act . . . to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.").

sufficient enough to eliminate random and arbitrary jury sentencing outcomes.[102]

By contrast, the Court rejected both the mandatory capital sentencing schemes of North Carolina[103] (in *Woodson v. North Carolina*) and Louisiana (in *Roberts v. Louisiana*).[104] In *Woodson*, the North Carolina statute at issue imposed a mandatory death sentence for first-degree murder.[105] The statute defined first-degree murder as including premeditated murder, felony murder, as well as certain kinds of killings including poisoning, lying in wait, starving, and torture.[106]

The *Woodson* court held that mandatory death sentences violated the Eighth Amendment.[107] Drawing on both *McGautha* and one of the dissenting opinions in *Furman*,[108] the Court first

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102. *See id.* at 206 ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."). The presence of comparative proportionality review also helped address the concerns of the Justices with respect to potential disparities in jury sentencing outcomes. *Id.* at 203 (stating that "the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty . . . .").

103. *See Woodson*, 428 U.S. at 305 ("For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.").

104. *See Roberts*, 428 U.S. at 336 ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

105. *Woodson*, 428 U.S. at 286. The complete language of the statute was as follows:

> Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

106. *Id.*

107. *Id.*

108. Chief Justice Berger's opinion explained as follows: "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the

reasoned that mandatory death sentences were inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[109] This was because states had largely abandoned the practice of mandatory death sentences, and the only reason that North Carolina adopted its statute was to satisfy the Court's decision in *Furman*.[110] In other words, mandatory death sentences were unusual punishments.[111]

Second, the Court explained that North Carolina's statute did not solve the problem of unbridled jury discretion raised in *Furman*; it merely "papered over" the issue by adopting a mandatory death sentence for first-degree murders.[112] From the Court's perspective, allowing juries to determine guilt under a mandatory death statute made jury nullification likely, which created the same kind of arbitrary and random outcomes that result from jury sentencing in capital cases.[113]

The third constitutional shortcoming of North Carolina's statute forms the basis for the doctrine that is the focus of this Article—individualized sentencing.[114] The Court explained this shortcoming as the "failure to allow the particularized consideration of relevant aspects of the character and record of

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American abhorrence of 'the common law rule imposing a mandatory death sentence on all convicted murderers.'" Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting).

109. Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

110. *See id.* at 298–99 ("The fact that some States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.").

111. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 113 (2011) ("As he indicated in *Furman*, Justice White believed that the constitutional flaw of the then-existing death penalty statutes was not randomness, but underutilization. To him, what made a particular death sentence cruel and unusual was the rarity of similar cases receiving the same sentence.").

112. *Woodson*, 428 U.S. at 302.

113. *See id.* at 302–03 (stating that a mandatory death penalty statute "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death").

114. *See id.* at 303–05 (finding that individualized sentencing is required under the constitution when inflicting the penalty of death).

each convicted defendant before the imposition upon him of a sentence of death."[115] This means that, at least in the capital context, the Eighth Amendment requires states to use a process that accords "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[116]

What made the lack of individualized consideration so objectionable to the Court in *Woodson* was its consequence—the mandatory death penalty results in the execution of the criminal offender.[117] As the Court emphasized, the North Carolina mandatory death penalty statute treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[118]

The Court concluded by limiting the constitutional scope of its Eighth Amendment individualized sentencing approach to capital cases, even while acknowledging that such an approach constituted "enlightened policy."[119] To be clear, the Court in *Woodson* opined that the "fundamental respect for humanity underlying the Eighth Amendment" made individualized sentencing a "constitutionally indispensable part of the process of inflicting the penalty of death."[120]

In *Roberts v. Louisiana*, decided the same day as *Woodson*, the Court likewise barred the use of mandatory death sentences in holding that Louisiana's statute[121] violated the Eighth

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115. *Id.* at 303.

116. *Id.* at 304.

117. *See id.* at 305 ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

118. *Id.* at 304.

119. *Id.*

120. *Id.*

121. LA. REV. STAT. ANN. 14:30 (1974). The statute provided:

> First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great

Amendment.[122] The Louisiana mandatory death penalty statute was narrower than the North Carolina statute in two ways—it limited the kinds of murder that counted as first-degree murder[123] and it provided more guidance to the jury about lesser-included offenses.[124]

> bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) When the offender has a specific intent to kill, or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> For the purposes of Paragraph (2) herein, the term peace officer shall be defined any include any constable, sheriff, deputy sheriff, local or state policeman, game warden federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death.

122. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

123. *Id.* at 332. The Louisiana statute had only five categories of homicide that constituted first degree murder:

> [K]illing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence.

Id. Unlike North Carolina, the Louisiana statute did not have broad categories of felony murder or premeditated murder in its definition of first-degree murder. *Id.* at 332 (discussing the narrowness of the Louisiana statute's first-degree murder definition as compared to the North Carolina statute).

124. *See id.* at 332 (requiring judges to instruct juries on lesser crimes); *see also* LA. CODE CRIM. PROC. ANN., §§ art. 809, 814 (Supp. 1975) (listing responsive verdicts that the judge should instruct to the jury); State v. Cooley,257 So. 2d 400, 401 (1972) (discussing how "manslaughter was made a lesser included offense to

Nonetheless, the Court found that the differences were not material.[125] Mandatory capital statutes, even if narrow, still violate the Eighth Amendment.[126] The Court explained,

> [t]he futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in alike legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[127]

In reaffirming its decision in *Woodson*, the Court emphasized that Louisiana's statute did not eliminate the "constitutional vice" of mandatory death statutes: the "lack of focus on the circumstances of the particular offense and the character and propensities of the offender."[128]

The Court expanded the individualized sentencing doctrine two years later in *Lockett v. Ohio*.[129] The issue in *Lockett* was whether Ohio's statute violated the rule from *Woodson* by restricting mitigating evidence at capital sentencing.[130] Specifically, the Ohio capital statute limited mitigation at sentencing to situations where (1) the victim induced the offense, (2) the offense was committed under duress or coercion, or (3) the offense was the product of mental deficiencies.[131] By limiting the

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the charge of murder").

125. *See Roberts*, 428 U.S. at 332 ("That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance.").

126. *See id.* ("The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute.").

127. *Id.* at 333 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

128. *Id.*

129. *See* 438 U.S. 586, 606 (1978) ("The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.").

130. *Id.* at 589. The facts of *Lockett* were particularly egregious. Sandra Lockett received a death sentence for agreeing to serve as the getaway driver for a robbery. *Id.* at 589–94. She had no reason to believe that the other offenders would kill, no intent to kill, and took no part in the actual killing. *Id.*

131. *Id.* at 593–94; OHIO REV. CODE ANN. §§ 2929.03–2929.04(B) (1975).

available mitigating evidence, the statute essentially made an aggravated murder conviction a mandatory death sentence for offenders who did not exhibit the statutorily enumerated kinds of mitigating evidence.[132]

The Court held that the Ohio statute violated the Eighth Amendment.[133] It cited its prior finding from *Woodson* that the Eighth Amendment required assessment of "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[134] This concept, the Court emphasized, comes from "the fundamental respect for humanity underlying the Eighth Amendment."[135]

The statute's shortcoming was the limitation it placed on mitigating factors at sentencing.[136] It limited the consideration of mitigation evidence only to the enumerated mitigating factors and did not allow the court to consider other mitigating factors.[137]

The Court explained that the sentencing judge having "'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . .'"[138] Under the Eighth Amendment, this included all relevant mitigating evidence.[139]

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132. *See Lockett*, 438 U.S. at 594 ("[T]he judge said that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty. He then sentenced Lockett to death.").

133. *See id.* at 604 (stating that the Eighth and Fourteenth amendments require that the sentencer be allowed to consider all mitigating factors proffered by the defendant in "all but the rarest" capital cases).

134. *Id.* at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

135. *Id.* at 604 (quoting *Woodson*, 428 U.S. at 304).

136. *See id.* at 606 ("The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.").

137. *See id.* at 608–09 ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."). It was not the listing of the factors per se, but the limitation on using non-listed factors that created the constitutional problem. *Id.*

138. *Id.* at 603 (quoting Williams v. New York, 337 U.S. 241, 247–48 (1949)).

139. *See id.* at 607–09 ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.").

In deciding *Lockett*, the Court again emphasized its differentness principle, concluding that the nature of the death penalty made the individualized sentencing protection important in a way that did not extend to non-capital cases.[140] The Court focused on the variety of post-trial techniques available to modify the imposition of the sentence in non-capital cases, such as parole, probation, and work furloughs, that in its mind, minimized the comparative seriousness of non-capital sentences.[141]

The Court again applied the *Woodson-Lockett* individualized sentencing rule in *Eddings v. Oklahoma*.[142] In *Eddings*, the trial judge considered the relevant aggravating evidence at sentencing,[143] but refused to consider the defendant's mitigating evidence, aside from his youth.[144] Specifically, Eddings had attempted to put on evidence of his family history of abuse as well as his severe psychological and emotional disorders.[145]

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140. *See id.* at 605 ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").

141. *See id.* ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

142. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.").

143. *See id.* at 108–09 ("At the conclusion of all the evidence, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt."). Eddings had murdered a police officer, which certainly made the death penalty a more likely punishment. *Id.* at 105–06.

144. *See id.* at 108 ("Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: 'I have given very serious consideration to the youth of the Defendant when this particular crime was committed.'"). Eddings was age 16 at the time of the crime. *Id.* at 105. Death sentences would later be prohibited for juvenile offenders under the Eighth Amendment. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

145. *Eddings*, 455 U.S. at 109–10. In rejecting this evidence on appeal, the Oklahoma Court of Criminal Appeals explained:

> Eddings also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe

In assessing the decision by the trial judge to exclude mitigating evidence at sentencing, the Court held that the Eighth Amendment barred Eddings' death sentence.[146] The Court explained, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."[147] It further found that, in light of the age of the defendant (age 16), evidence of Eddings' childhood was very relevant.[148] The Court concluded, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."[149]

In *Smith v. Texas*,[150] the Texas trial court gave a nullification instruction with respect to mitigating evidence in a death sentencing proceeding.[151] The instruction limited the court's consideration of mitigation evidence to the nullification of the two "special issue" aggravating factors under the Texas statute: (1) whether the offender committed the murder deliberately; and (2) whether the offender constituted a future danger to society such that he would kill again.[152] In other words, the mitigating evidence could only be considered to the degree to which it bore on

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> psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.

Eddings v. Oklahoma, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980).

146. *See Eddings*, 455 U.S. at 113 ("We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.").

147. *Id.* at 113–14.

148. *See id.* at 115–16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

149. *Id.* at 115.

150. 543 U.S. 37 (2004).

151. *Id.* at 37.

152. *Id.* at 39.

the required determinations of deliberateness or dangerousness. Smith's mitigating evidence dealt with his intellectual disabilities, including a low IQ, as well as his family background.[153]

The Court applied *Lockett* and held that the nullification instruction violated the Eighth Amendment.[154] Specifically, the Court explained, "the key . . . is that the jury be able to 'consider and *give effect to* [a defendant's mitigation] evidence in imposing [a] sentence.'"[155]

By contrast, the Court later explained that the individualized sentencing consideration requirement under the Eighth Amendment does not bear on the weighing process of aggravating and mitigating factors in the case of *Kansas v. Marsh*.[156] In *Marsh*, the Court upheld Kansas' sentencing process that instructed the jury to choose death unless the mitigating evidence outweighed the aggravating evidence.[157] Because the procedure allowed for the full and complete consideration of mitigating evidence, it did not violate the principle adopted in *Woodson* and *Lockett*.[158]

Finally, it is worth noting that the *Woodson-Lockett* principle may, in some senses, conflict with the general principle established by *Furman* of requiring limits on discretion to minimize random and arbitrary sentences.[159] The individualized sentencing principle

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153. *See id.* at 41 (noting that the defendant had a total I.Q. of 75, his father was a drug addict regularly involved with gang violence, and that defendant was only nineteen when he committed the crime).

154. *Id.* at 48–49.

155. *Id.* at 46 (quoting Penry v. Johnson, 532 U.S. 782, 797 (2001)).

156. *See* Kansas v. Marsh, 548 U.S. 163, 171 (2006) ("[W]hile the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence.").

157. *See id.* at 173 ("Kansas' death penalty statute, consistent with the Constitution, 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.").

158. *See id.* at 175 ("[O]ur precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here.").

159. *See* Walton v. Arizona, 497 U.S. 639, 656–74 (1990) (Scalia, J., concurring) ("[T]he *Lockett* rule represents a sheer 'about-face' from *Furman,* an outright negation of the principle of guided discretion that brought us down the

requires consideration of all relevant evidence; the *Furman* principle requires some level of consistency in decision-making.[160] Proportionality review, however, provides one answer to this doctrinal conundrum.[161] State supreme courts can remedy arbitrary or random outcomes by excluding outlier cases, while still allowing juries to consider mitigating evidence.[162] Another way of understanding this idea relates to the degree to which two cases are in fact similar such that a disparate sentencing outcome would constitute disparity.[163] Using broad categories of similarity, like aggravating factors in capital cases or some crimes more generally, may not really capture fundamental differences that ought to bear on the sentencing outcome.[164]

B. Juvenile Individualized Sentencing

In 2010, the United States Supreme Court opened the door to applying the Eighth Amendment in a more robust way to non-capital cases.[165] Specifically, the Court decided *Graham v.*

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path of regulating capital sentencing procedure in the first place.").

160. *See id.* (noting the fundamental tension between the two requirements and the difficulties faced by many states trying to rectify the two standards).

161. *See* Berry, *supra* note 111, at 74 ("[P]roportionality unites the two competing lines of cases by conceptualizing the Eighth Amendment to require that states meet both the demands of relative proportionality . . . and absolute proportionality—which incorporates the need for case-specific review . . . .").

162. *See id.* at 96 ("Whatever consistency is lost by allowing juries to consider specific facts in individual sentencing determinations is recaptured by the appellate court reviewing the case for relative proportionality, thereby protecting against any outlier death verdicts.").

163. *See* Berry, *supra* note 94, at 712 ("The model proposed here advocates using the purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—as the tool for defining similarity. In other words, similar cases would be those that achieve the same punitive goal.").

164. *See id.* at 702 ("An examination of the effect of aggravating factors on a statutory sentencing scheme demonstrates that the purported safeguard created by the factors is currently inadequate to achieve its intended purpose.").

165. *See* Barkow, *supra* note 27, at 1145 (noting the longstanding discrepancy between the Supreme Court's robust review of capital cases and the substantially less intensive review of non-capital cases); William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1109 (2010) (arguing that the *Graham* decision did not diminish the "differentness" of death cases, but rather opened the door for reexamining certain non-capital cases, such as life

Florida,[166] where it proscribed life without parole sentences for juvenile offenders in non-homicide crimes.[167] This decision broadened the concept of differentness to juvenile life without parole.[168] Two years later, in *Miller v. Alabama*, the Court applied the *Graham* decision to mandatory juvenile life without parole sentences, broadening the individualized sentencing doctrine that originated in *Woodson* and *Lockett*.[169]

At the time of *Miller*, a number of states imposed mandatory life without parole sentences for juvenile offenders.[170] In many cases, these sentencing schemes were not the original legislative design.[171] Two major developments shaped the rise of juvenile life

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without parole).

166. 560 U.S. 48 (2010).

167. *See id.* at 79 ("The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.").

168. *Id.* at 75 ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society."). At the time the Court decided *Graham*, it was unclear whether the decision meant that life without parole sentences were different or juvenile offenders were different. The Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012) pointed to the latter. *Accord* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1055 (2013) (arguing that the *Miller* decision provides a "roadmap" for broadening the power of the eighth amendment); Berry, *supra* note 165, at 1109 (arguing that life without parole sentences are also "different" from other sentences in the same way that the death sentence is different.).

169. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

170. *See* William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 336 (2014) (discussing *Miller* and providing context).

171. *See* William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentencing with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1055 (2015) ("As with many problems in our legal system, the LWOP epidemic resulted from a confluence of different events. It certainly is not the product of any intentional or thoughtful legislative design.").

without parole sentences—the abolition of parole[172] and the abolition of the juvenile death penalty.[173]

In the 1970s, many states began abolishing parole, particularly for more serious crimes like murder.[174] This "truth in sentencing" movement eschewed the concept of rehabilitation in favor of retribution and incapacitation.[175] The penal populism movement sought not to reform the offender, but instead protect society from the offender.[176] Many crimes that previously carried life with parole sentences thus became life without parole sentences because parole was no longer an option.[177] This meant that sentences that were formerly fifteen years in length, as a practical matter, essentially became life sentences.[178]

Then, in 2005, the Supreme Court held that juvenile death sentences violated the Eighth Amendment in *Roper v. Simmons*.[179]

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172. *See, e.g.*, Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419, 419 (1994) ("The federal abolition of parole and the imposition of mandatory minimum sentences have provided the government with a 'heavier hammer' to wield in prosecutions, but with uncertain results.").

173. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

174. *See* Crouch, *supra* note 172, at 419 (noting the movement by states to abolish parole and the potential resulting impacts).

175. Crouch, *supra* note 172, at 423 ("Much of the impulse driving parole abolition and truth-in-sentencing is, rightly, the public demand that those who break the law be held accountable for their actions."); GARLAND, *supra* note 53,

176. GARLAND, *supra* note 53; *see generally* JOHN PRATT, PENAL POPULISM (2007).

177. *See* Berry, *supra* note 171, at 1060 ("By 2000, sixteen states had abolished discretionary parole for all crimes.").

178. *See id.* ("Prior to the move towards penal populism, a life sentence often meant that an offender served between fifteen and twenty years with the possibility of parole after that time. By abolishing parole, states turned these sentences into LWOP sentences."); Crouch, *supra* note 172, at 421 ("[I]t is certain that defendants who are convicted or accept plea agreements will serve more time than before because there is no parole. The abolition of parole guarantees that prisoners will serve their entire sentences without early release for considerations such as good behavior or overcrowding.").

179. *Roper*, 543 U.S. at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude,

The effect of this decision was to commute juvenile death sentences to juvenile life without parole sentences.[180] It also made juvenile life without parole sentences the most severe sentence in juvenile murder cases, moving some possible death sentences to life without parole sentences.[181]

In *Miller*, the Court considered whether mandatory juvenile life without parole sentences violated the Eighth Amendment.[182] Relying on the *Woodson-Lockett* concept of individualized sentencing[183] and the *Roper-Graham* idea that juveniles are different,[184] the Court held that the Eighth Amendment requires a sentencing determination by a judge or jury before sentencing a juvenile offender to life without parole.[185]

With respect to the concept of individualized sentencing, the Court was particularly concerned that mandatory juvenile life without parole sentences "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and

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the age at which the line for death eligibility ought to rest.").

180. *See* Hilary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1083–84 (2006) ("Today, children are not only transferred to and prosecuted in the adult system more readily than before the 1990s, but also are sentenced to its penultimate penalty—life without the possibility of parole.").

181. It also raised the question concerning whether the Court should do the same for juvenile accomplices. *See* Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life without Parole?*, 87 OR. L. REV. 29, 30–31 (2008) (arguing that the current Supreme Court jurisprudence provides inadequate guidance to lower courts sentencing nonkiller juveniles convicted of murder).

182. Miller v. Alabama, 567 U.S. 460, 479 (2013) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

183. *See* discussion *supra* Part I.A (discussing how the Supreme Court has expanded interpretations of the Eighth Amendment to prohibit mandatory death sentences and statutory preclusion of mitigatory factors).

184. *See Miller*, 567 U.S. at 471 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'").

185. See *id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

circumstances attendant to it."[186] The consideration of such characteristics was paramount precisely because the mandatory sentence would not allow the Court to take into account what often amounts to clear and significant differences between adult and juvenile offenders.[187]

Two years after *Miller*, the Court revisited this issue in *Montgomery v. Louisiana*[188] in which it considered whether the decision in *Miller* applied retroactively.[189] Under the Court's retroactivity doctrine, the core question was whether the holding in *Miller*, which proscribed the imposition of mandatory juvenile life without parole sentences, constituted a substantive rule or a procedural rule.[190] Under *Teague v. Lane*,[191] new substantive rules of constitutional law apply retroactively, which new procedural rules generally do not.[192]

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186. *Id.* at 476.

187. *See id.* (describing youth as a time of immaturity and irresponsibility, but that these "signature qualities" are all "transient"). As the Court stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Id. at 477–78.

188. 136 S. Ct. 718 (2016).

189. *See id.* at 725 ("In the wake of Miller, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided.").

190. *See id.* at 732 (contrasting procedural rules, which regulate only "the manner of determining the defendant's culpability," with substantive rules that forbid "criminal punishment of certain primary conduct").

191. 489 U.S. 288 (1989).

192. *See id.* at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). For an argument concerning how the Court should improve its doctrine, see William W. Berry III,

The Court held that the *Miller* rule was substantive for retroactivity purposes, and applied to pre-*Miller* juvenile life without parole sentences.[193] Importantly, the Court gave guidance on when a judge should sentence a juvenile offender to life without parole.[194] The Court explained:

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[195]

The importance of this decision for the *Woodson-Lockett* doctrine rests in the requirement that a sentencer give full and fair consideration to mitigating evidence.[196] As the Court held, this is a substantive consideration. It requires more than a court simply allowing the offender to present mitigating evidence; it requires a court to actively consider such evidence.[197] The Court explained as follows: "*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life

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Normative Retroactivity, 19 U. PA. J. CONST. L. 485, 491 (2017) (arguing that retroactivity "should relate directly to the normative impact of the new rule on previous guilt and sentencing determinations").

193. *See Montgomery*, 136 S. Ct. at 736 (2016) (giving the substantive rule retroactive effect and applying the rule to juvenile offenders).

194. *See id.* at 733 (displaying concern for mandatory life without parole sentences for juveniles).

195. *Id.* at 733–34 (internal citations omitted).

196. *See id.* at 734 (requiring the sentencing court to take the juvenile offender's age into consideration before delivering a sentence); Berry, *supra* note 192, at 513–14 (discussing the problem of desire for finality trumping the desire for fairness in criminal proceedings).

197. *See Montgomery*, 136 S. Ct. at 734–36 (requiring courts to consider factors such as the defendant's youth and other characteristics before sentencing).

without parole collapse in light of 'the distinctive attributes of youth.'"[198]

That then is the virtue of individualized consideration—to assess whether, in light of the evidence, a punishment remains justified with respect to the offender in the case.[199] While a punishment might seem to fit a crime in the abstract, it may not always do so in practice.[200] As such, sentencing courts must consider aggravating and mitigating evidence in determining the appropriate sentence for an offender.[201]

The Court has made it clear that these principles apply to capital cases and juvenile life without parole cases.[202] The remainder of the Article makes the case for extending this doctrine to all felony offenses.[203] To understand the basis for shifting and expanding the doctrine, though, it is necessary to explore the theoretical underpinnings of individualized sentencing under the Eighth Amendment.[204]

III. Theoretical Underpinnings of Individualized Sentencing

Emerging from the Court's cases, there are two important theoretical underpinnings to the concept of individualized

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198. *Id.* at 734.

199. *See id.* at 736 (noting that the Court's decision does not require resentencing the offenders, only reconsidering them for parole).

200. *See* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (recognizing the importance of individualized sentencing in the criminal justice system).

201. *See id.* at 608 (discussing the constitutional requirement of considering mitigating factors in a capital case).

202. *See id.* ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors); *Montgomery*, 136 S. Ct. at 736–37 (acknowledging that juvenile offenders sentenced to life in prison must be given the opportunity to prove they should receive parole).

203. *See* Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 MICH. J.L. REFORM 645, 675 (2014) (noting that judges do not favor mandatory minimums because of the lack of individualized sentencing).

204. *See* Nishi Kumar, Note, *Cruel, Unusual, and Completely Backwards: An Argument for Retroactive Application of the Eighth Amendment*, 90 N.Y.U. L. REV. 1331, 1346–47 (2015) (discussing the concepts of proportionality and "evolving standards of decency" underlying the Eighth Amendment).

sentencing: offender uniqueness and punishment differentness.[205] These two principles shadow the Court's current limits on this concept under the Eighth Amendment.[206]

A. Offender Uniqueness

Much of the impetus behind individualized sentencing under the Eighth Amendment rests in the idea that individual offenders are, in certain and important ways, unique.[207] A mandatory sentence cannot capture this uniqueness because the crime itself does not fully define the appropriate punishment.[208]

The unique nature of the offender stems both from the crime itself and the personal characteristics of the offender.[209] To be sure, preferring one purpose of punishment to another might give guidance in this context, but the Supreme Court, Congress, and the states have refused to do so.[210] For instance, if the Court and/or

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205. *See* Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines*, 104 YALE L.J. 933, 935 (1995) (noting that the movement towards probation was based on the acknowledgment that each offender was unique).

206. *See* Emily W. Anderson, Note, *"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1505 (2015) (noting that not requiring courts to impose the federal sentencing guidelines allows them to individualize sentences based on the offender's characteristics and the nature of the crime).

207. *See* discussion *supra* Part I (discussing the shift in jurisprudence to considering the individual characteristics of a criminal offender when selecting the appropriate sentence).

208. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."); *Lockett*, 438 U.S. at 602–03 ("[W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is . . . 'essential [to the] selection of an appropriate sentence.'").

209. *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 277 (2005) (discussing the importance of the conduct of the offense and the characteristics of the offender in sentencing decision making).

210. *See* William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and its Progeny*, 40 CONN. L. REV. 631, 661 (2008) (addressing the issue caused by failing to apply a primary purpose when

a legislature decided that just deserts retribution served as the only applicable purpose of punishment, the assessment of the offender at sentencing would extend only to the offender's culpability in committing the crime and the extent of harm caused by the criminal act.[211] The personal characteristics of the offender would be irrelevant unless they bore on the culpability of the offender.[212]

By contrast, a focus on one or more utilitarian purposes of punishment might make the personal characteristics of the offender the focus of the relevant inquiry.[213] If rehabilitation were the goal, the sentencing question would hinge on a determination of the time needed to rehabilitate in light of the defendant's personal circumstances.[214] Similarly, if the applicable goal were incapacitation, the sentencing question would relate to the future dangerousness of the offender.[215] Likewise, if deterrence were the goal, the length of time needed to adequately deter others from committing the same crime would guide the analysis.[216]

In light of the mix of retributive and utilitarian purposes of punishment, a number of concepts become relevant in considering

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sentencing criminal defendants).

211. *See* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) ("The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibleness . . . of the actor's conduct.").

212. *See id.* ("[H]ow severely a person is punished should depend on the degree of blameworthiness of his conduct.").

213. *See* PHILIP PETTIT & JOHN BRAITHWAITE, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 52–53 (1992) (focusing on the idea that utilitarianism's approach to maximizing societal happiness is unworkable because it is too individualized); Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 77 (2005) (defining a range of morally permissible punishments gives judges the flexibility to consider other factors in determining sentencing).

214. *See* PETTIT & BRAITHWAITE, *supra* note 213, at 46 (disagreeing with a rehabilitation approach to punishment but acknowledging that it requires consideration of individual characteristics).

215. *See* Frase, *supra* note 213, at 70–71 ("Judges are given very broad discretion to assess the degree of risk posed by the offender, diagnose the causes of that risk, assess whether those causes can effectively and safely be treated without incarceration").

216. *See id.* at 71 (noting that deterrence requires the sentencing judge to assess the individual's probability of reoffending and mandating a punishment to mitigate that risk).

the unique nature of each offender.[217] At its core, this assessment weighs all relevant aggravating and mitigating circumstances to determine the appropriate punishment for the individual.[218]

The idea here is that each individual offender is unique and, as such, the sentencer should assess the offender's specific circumstances.[219] This assessment can begin with the crime itself.[220] Every murder is not the same. Every rape is not the same. Every robbery is not the same. In each case, there may be characteristics of the crime committed that call for increasing the punishment because of their aggravating nature or alternatively, decreasing the punishment because of their mitigating nature.[221]

The federal sentencing guidelines attempt to encapsulate as many of these kinds of factors, mostly aggravating and some mitigating, into their advisory guidelines.[222] While not perfect, the federal guidelines attempt to chronicle and account for every relevant aggravating and mitigating factor.[223] States with

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217. *See* RICHARD S. FRASE, JUST SENTENCING 35 (2012) (discussing the modification of state sentencing systems to broaden judges' discretion to make sentence adjustments based on the needs and risks of the offenders).

218. *See Woodson*, 428 U.S. at 304 ("Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (emphasizing the need to treat the defendant with a higher degree of uniqueness in capital cases); Miller v. Alabama, 567 U.S. 460, 479 (2012) (noting that the trial court should have considered the defendant's mental health issues and abusive family situation before sentencing him to life without parole).

219. *See Woodson*, 428 U.S. at 304 (emphasizing the need to consider both the offense and the character and propensities of the offender when sentencing).

220. *See Miller*, 567 U.S. at 475–75 (discussing the need for consideration of the circumstances of the offense in determining culpability of the actor).

221. *See Lockett*, 438 U.S. at 608 ("The limited range of mitigating circumstances which may be considered by the sentence under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments."); *Miller*, 567 U.S. at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalties for juveniles.").

222. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 11–12 (1988) ("The Commission's system . . . looks to the offense *charged* to secure the 'base offense level.' It then modifies that level in light of several 'real' aggravating or mitigating factors, . . . several 'real' general adjustments . . . and several 'real' characteristics of the offender, related to past record.").

223. *See* Frank O. Bowman III, *The Failure of the Federal Sentencing*

guideline systems have attempted similar approaches, although certainly not attempting to be as factually exhaustive.[224]

Even with a sentencing commission's best efforts, it may not capture certain relevant factual nuances of a particular crime that may demand aggravation or mitigation.[225] That is why consideration of such evidence by a sentencing judge or jury becomes so important in many criminal cases.[226] The uniqueness of the crime committed and the circumstances by which the offender acted thus is often not captured in the context of the definition of the crime under the statute, even with additional factors added by sentencing guidelines.[227]

The problem lies in the broad scope of the categories of crimes adopted.[228] As discussed above, states have had difficulty defining, for instance, which crimes actually fall within the category of first-degree murder.[229] Even limiting the scope of the category to premeditated murders does not solve the problem in light of the difficulty of applying the concept of premeditation to the crime.[230]

Guidelines: A Structural Analysis, 105 COLUM. L. REV. 1315, 1347 (2005) (noting that the listed aggravating factors pertain to the offense while the sentencer is restricted from considering certain offender-related mitigating factors).

224. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1201–02 (2005) (discussing the variations in how state sentencing guidelines account for aggravating and mitigating factors).

225. *See id.* at 1199 (discussing the different approaches of state sentencing guidelines, including if the guidelines consider aggravated and mitigated sentences); Breyer, *supra* note 222, at 11–13 (noting that there is disagreement over whether the federal sentencing guidelines should have included more or fewer mitigating and aggravating factors associated with each offense).

226. *See* Bowman, *supra* note 223, at 1333–34 (arguing that the federal sentencing guidelines have strayed too far from the judicial discretion which judges should be able to exercise in sentencing individuals).

227. *See id.* at 1326, 1333 (criticizing the sentencing guidelines' restrictions on judicial discretion in imposing sentences).

228. *See* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 17–18 (1987) (listing crimes that are very broad in scope and advocating to narrow these crimes into subcategories).

229. *See* Woodson v. North Carolina, 428 U.S. 280, 291 (1976) ("[A]morphous nature of the controlling concepts of willfulness, deliberateness, and premeditation."); Frase, *supra* note 224, at 1191 (noting that state sentencing guidelines vary in many ways, including in their scope of coverage).

230. *See* McGautha v. California, 402 U.S. 183, 199 (1971) (acknowledging that the legislative reform which changed first degree murder to include only

A category like felony murder makes it even worse—a wide variety of factual circumstances can exist under this category, many of which exhibit widely different levels of offender intent and culpability.[231] As such, these categories do not really successfully group similar cases.[232] Instead, they put the same label on different crimes that merit different levels of punishment.[233] Without a judge or jury examining the case, the category can create sentencing outcomes that are disproportionate.[234]

In many jurisdictions, there are no guidelines.[235] The broad and overlapping nature of criminal statutes in this context merely exacerbates the problem.[236] In such jurisdictions, the need for some

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those killings that were "willful, deliberate, and premeditated" was as unworkable as the concept of "malice aforethought"), *vacated*, Crampton v. Ohio, 408 U.S. 941 (1977).

231. *See Woodson*, 428 U.S. at 291 (discussing "the inadequacy of distinguishing between murderers solely on the basis of legislative criteria" and states' decision to shift to discretionary death penalty statutes); Enmund v. Florida, 458 U.S. 782, 796 (1982) (noting that a person can be convicted of felony murder even though he did not kill, attempt to kill, or intend to kill the victim making the death penalty is an inappropriate punishment for this category of defendant); Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1145 (2017) ("Felony murder liability often does not require proof of a culpable mental state with respect to the victim's death.").

232. *See* Binder et al., *supra* note 231, at 1147 ("[Felony murder] involves the same harm as other murder (death), but less culpability with respect to that harm (negligence rather than gross recklessness or intent). Nevertheless, it imposes a similarly severe penalty."); Sara Taylor, Comment, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1865 (2012) ("[M]otive and intent . . . are also relevant at the sentencing stage to differentiate between different grades of culpability with a particular offense.").

233. *See* Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 343 (1992) ("A conclusion that a defendant is guilty, even of aggravated murder, does little to clarify the level of retribution that is warranted.").

234. *See* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 520 (2005) (arguing that judges and juries are the appropriate entities to weigh the malleable factors which determine proportionate sentences).

235. *See* Frase, *supra* note 224, at 1191 (analyzing the sentencing guidelines of eighteen states and the District of Columbia).

236. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("[V]irtually all scholarship in this field . . . consistently argues that existing criminal liability rules are too broad and ought to be narrowed."); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS

level of individualized consideration becomes paramount, as the categories of crime are insufficient to account for aggravating and mitigating facts that would indicate the need for a more serious or less serious punishment.[237]

In light of the clear need for judicial or juridical inquiry into the uniqueness of the individual offender, it is worth examining what such an approach might look like in practice.[238] At the very least, it warrants examination of both the offender and his criminal acts.[239]

With respect to culpability, the sentencing body should evaluate the degree to which the offender is culpable for the crime.[240] Certainly, this evaluation is part of the definition of the crime itself, with mens rea determining the level of offense in most cases.[241] But the concept of culpability goes beyond mere intent; it instead encapsulates a broader notion of fault, guilt, and blameworthiness.[242] The core question becomes how blameworthy is the individual for the criminal conduct at issue.[243]

OF THE CRIMINAL LAW 4–5 (2008) (examining data on the high rates of punishment and incarceration in the United States).

237. *See* Frase, *supra* note 224, at 1204 (noting that some state sentencing reforms have included individualized risk assessments for certain offenses).

238. *See id.* at 1333 (examining the history of the Federal Sentencing Commission trying to find a balance between judicial discretion and uniformity in sentences).

239. What may or may not be relevant might hinge upon the adopted purpose of punishment, but the states and federal government have not to date chosen to pursue one purpose over the others. *See* Berry, *supra* note 210, at 661 (noting that the central flaw in the criminal sentencing system is the "failure to adopt a primary principle by which to sentence criminal defendants"); Frase, *supra* note 217, at 9 (discussing the widely recognized sentencing principles and their conflict with each other).

240. *See* VON HIRSCH & ASHWORTH, *supra* note 211, at 20 (addressing the requirement that the sanction imposed reflect the offender's degree of blameworthiness).

241. *See* Leslie Sebba, *Is Mens Rea a Component of Perceived Offense Seriousness?*, 71 J. CRIM. L. & CRIMINOLOGY 124, 126–27 (1980) (discussing the different levels of mens rea requirements in common law offenses).

242. *See* Richard G. Singer, *The Resurgence of* Mens Rea*: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 404–05 (1989) ("[T]he predicate for all criminal liability is blameworthiness; it is the social stigma which a finding of guilt carries that distinguishes the criminal from all other sanctions.").

243. *See id.* at 405 (arguing that blameworthiness is a necessary

Part of this analysis may include mitigating evidence related to the personal character of the offender.[244] Courts may find victims of abuse, for example, less culpable for criminal conduct than non-victims.[245] Likewise, youthful offenders might deserve some mitigation based on their lack of maturity.[246] Other aspects

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determination in criminal law because social stigma is attached to a finding of blameworthiness).

244. *See, e.g.*, Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 201–02 (2016) (discussing state sentencing statutes and practices that consider the character of the defendant and his likelihood to recidivate).

245. *See* Katherine I. Puzone, *A Proposal to Allow the Presentation of Mitigation in Juvenile Court so that Juvenile Charges May Be Expunged in Appropriate Cases*, 36 PACE L. REV. 558, 563 (2016) ("In many juvenile cases, abuse and mental illness are mitigating in the sense that they provide and explanation for the conduct rather than a legal excuse."). This idea is not without controversy and has been the subject of multiple social science inquiries. *See, e.g.*, Michelle E. Barnett, Stanley L. Brodsky & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 762 (2004) (finding that presenting evidence that the defendant suffered severe abuse as a child was more likely to lead to the recommendation of a life sentence rather than a death sentence compared to cases where no mitigating evidence was presented); Carolyn Smith & Terence P. Thornberry, *The Relationship Between Childhood Maltreatment and Adolescent Involvement in Delinquency*, 33 CRIMINOLOGY 451, 470 (1995) (finding "childhood maltreatment is a significant risk factor for adolescent delinquency"); Michelle E. Barnett, Stanley L. Brodsky & J. Randall Price, *Differential Impact of Mitigating Evidence in Capital Case Sentencing*, 7 J. FORENSIC PSYCHOL. PRAC. 39 (2008); Margaret C. Stevenson, Bette L. Bottoms & Shari S.S. Diamond, *Jurors' Discussions of a Defendant's History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations*, 16 PSYCHOL., PUB. POL'Y, & L. 1, 1 (2010) (discussing that in sentencing, jurors can consider factors they would not have been able to consider when convicting the defendant, like the defendant's history of child abuse); Craig Haney, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 562–63 (1995) ("[P]ersons accused and convicted of capital murder are very often the victims of poverty, and they have frequently been physically abused and chronically neglected as children.").

246. Neuroscience increasingly supports this notion. *See, e.g.*, Sara B. Johnson, Robert B. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009) ("[A]dolescent brain immaturity has been used to make the case that teens should be considered less culpable for crimes they commit."); Laurence Steinburg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161 (2010) (finding the ages of fourteen to seventeen to be a period of "heightened vulnerability to risky behavior"). There may be limits, though, to its efficacy in juvenile justice.

of the personal background of the offender may also weigh in his favor, to the extent that they bear on the culpability of the offender.[247]

Similarly, the mental condition of the offender may also bear on the question of culpability.[248] Intellectually disabled offenders, for example, often bear less culpability than ordinary offenders particularly where their ability to comprehend the consequences of their actions or control their impulses becomes diminished.[249]

In addition to the concept of culpability, the companion concept of remorse also can play a part in the assessment of the uniqueness of the offender.[250] Jurors and judges alike may be inclined to decrease a criminal sentence where an individual offender exhibits remorse with respect to their criminal conduct.[251] While usually not diminishing the assessment of culpability, a

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See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 93 (2009) (arguing that developmental science studies will have a fairly modest effect on juvenile justice because "courts tend to regard even scientifically sound claims as legally irrelevant" and because scientific conclusions about youth as a class are "unhelpful in making highly individualized determinations").

247. *See* Robinson, *supra* note 228, at 26–27 (advocating for the deration of other factors, like the defendant's genuine remorse, along with traditional factors to determine sentencing).

248. *See* Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 832 (1977) (noting court decisions that a defendant's abnormal mental condition can be admitted to bear on the *mens rea* requirement of the charge).

249. Indeed, the Supreme Court has barred executions for intellectually disabled offenders. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("We are not persuaded the execution of mentally retarded criminals will measurable advance the deterrent or the retributive purpose of the death penalty."); Hall v. Florida, 572 U.S. 701, 708 1992 (2014) ("No legitimate penological purpose is served by executing a person with intellectual disability."); Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017) ("States have some flexibility but not 'unfettered discretion' in enforcing *Atkins'* holding.").

250. *See* Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 815 (2012) (finding the offender's true remorse to be a mitigating factor according to respondents of the study).

251. *See, e.g.*, Richard L. Lippke, *Response to Tudor: Remorse-Based Sentence Reductions in Theory and Practice*, 2 CRIM. L. & PHIL. 259, 267 (2008) (discussing that some state officials may consider genuine remorse enough to reduce a sentence).

show of remorse indicates that some rehabilitation may have taken place or, at the very least, the offender has contemplated the consequences of his or her actions.[252]

Having explored the ways in which offenders might be unique, one can start to understand the purpose for the Court's use of this idea as part of its doctrine under the Eighth Amendment.[253] The core concept relates to the importance of assessing the unique characteristics of the offender and his or her conduct.[254]

B. Punishment Differentness

In addition to the concept of unique offenders, the question of differentness permeates the Court's application of its individualized sentencing construct under the Eighth Amendment.[255] This principle allocates the use of the individualized sentencing determinations, constitutionally requiring such determinations in capital cases, and more recently in juvenile life without parole cases.[256]

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252. *See id.* at 260 ("[T]he remorseful will do more than emotionally suffer in recognition of their misconduct; they will also seek to apologize, make amends or provide compensation, and resolve not to repeat the misconduct.").

253. *See* Robinson, *supra* note 228, at 26 (arguing for a sentencing system that provides for genuine judicial discretion rather than pre-determined lists or grids).

254. *See* Anderson, *supra* note 206, at 1508 (noting that the Supreme Court declared mandatory sentencing guidelines unconstitutional because they lacked individualized tailoring to the defendant).

255. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (finding North Carolina's death penalty statute unconstitutional, in part, because it did not allow for consideration of the particular characteristics of the offender); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (finding Ohio's death penalty statute unconstitutional because of the limited range of mitigating characteristics considered during sentences); Miller v. Alabama, 567 U.S. 460, 471 (2012) (considering that a defendant's youth may make them less deserving of punishment than an adult).

256. *See Woodson*, 428 U.S. at 304 (emphasizing that the decision to impose the ultimate punishment of death cannot be made without consideration of an individual's character); *Lockett*, 438 U.S. at 608 (arguing that the Ohio death penalty statute allowing consideration of only three mitigating factors violated the Eighth Amendment); *Miller*, 567 U.S. at 489 (arguing that the imposition of a sentence of life without parole on a juvenile without consideration of mitigating factors violates the principle of proportionality).

As indicated above, the concept of differentness originated in the Court's death penalty cases, with the Court adopting and reiterating the idea that "death is different."[257] The Court has identified death as different because it is the most severe punishment possible.[258] It also has found death to be different because the death penalty, unlike other punishments, is irrevocable.[259] Where one can release a wrongly convicted offender, such correction is impossible once the state has executed the offender.[260]

For almost forty years, the Court drew a bright line based on differentness in its cases, separating capital from non-capital cases.[261] In capital cases, the Court applied a much higher level of procedural scrutiny under the Eighth Amendment to assess the imposition of death sentences, with no similar scrutiny or analog in non-capital cases.[262] In addition, the Court applied its evolving standards of decency doctrine to make substantive determinations about the scope of the Eighth Amendment.[263] These included, as

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257. *See supra* note 24 and accompanying text (discussing the origin of death-is-different jurisprudence).

258. *See Woodson*, 428 U.S. at 303–04 ("[D]eath is a punishment different from all other sanctions in kind rather than degree."). Some might argue that life without parole is a worse outcome. *See* Berry, *supra* note 171, at 1054 (arguing that some see the death penalty as an anticipated end to suffering as opposed to life without parole). The large number of volunteers—death row inmates who waive their appeals and ask to be executed may substantiate this view. *See* Amy Smith, *Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 238 (2008) (calling this a "widely-recognized practice of volunteering for execution").

259. *See supra* note 24 and accompanying text (discussing Justice Brennan's opinion in *Furman* as the origin of the Court's "death is different" capital jurisprudence).

260. *See supra* note 24 and accompanying text (discussing the origin of the idea that death is a wholly different kind of punishment for offenders).

261. *See* Graham v. Florida, 560 U.S. 48, 60–61 (2010) (noting that the Court has ruled that individuals convicted of nonhomicide crimes cannot be subject to the death penalty); Barkow, *supra* note 27, at 1146 (emphasizing that capital cases are treated differently than noncapital cases).

262. *See* Barkow, *supra* note 27, at 1146 (noting that courts take great care in ensuring a capital case sentence was not arbitrary and capricious but have done "virtually nothing" in noncapital cases to ensure the sentence is reasonable).

263. *See id.* at 1179 (arguing that evolving standards of decency may suggest treating capital and noncapital cases alike under the Eighth Amendment).

discussed above, establishing categorical limitations under the Constitution related to the imposition of the death penalty for certain crimes and certain types of offenders.[264]

In non-capital cases, by contrast, the Court has not applied its evolving standards of decency doctrine, with one exception as explained below.[265] Instead, the Court has adopted a test of gross disproportionality in non-capital cases to assess whether particular criminal sentences contravene the Eighth Amendment.[266] In all of these cases but one, the Court has found the sentences imposed to be proportionate and thus acceptable under the Eighth Amendment.[267]

Indeed, the Court has seldom held that a non-capital, non-juvenile life without parole sentence violated the Eighth Amendment.[268] This is true even where the sentence seems particularly excessive. For instance, in *Rummel v. Estelle*,[269] the Court affirmed a life-with-parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions.[270] Similarly, in *Hutto v. Davis*,[271] the Court upheld two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana.[272] In both

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264. *See id.* at 1166 (discussing Justice Brennan's argument that these evolving standards of society weigh against imposing the death penalty).

265. *See Graham*, 560 U.S. at 58 (acknowledging evolving standards of decency and finding that life without parole for juveniles violates the Eighth Amendment).

266. *See* Barkow, *supra* note 27, at 1156–57 (noting that reviewing courts, as a threshold matter, must find the punishment grossly disproportionate to the crime, before engaging in further review).

267. *Id.*

268. On some level this is ironic given that the Court's first two significant applications of the Eighth Amendment were in noncapital cases. *See* Weems v. United States, 217 U.S. 349, 366 (1910) (holding the punishment of *cadena temporal* (hard labor) unconstitutional in light of the offense committed); Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding removal of citizenship an unconstitutional punishment for desertion).

269. 445 U.S. 263 (1980).

270. *See id.* at 265–66 ("In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain $80 worth of goods or services. . . . In 1969 the State of Texas charged Rummel with passing a forged check in the amount of $28.36 . . . .").

271. 454 U.S. 370 (1982) (per curiam).

272. *See id.* at 374 (noting that "'successful challenges to the proportionality

cases, the Court emphasized the principle of gross disproportionality as the standard for applying the Eighth Amendment to non-capital cases.[273]

In *Solem v. Helm*,[274] the Court appeared to find the possibility that some excessive noncapital sentences might violate the Eighth Amendment.[275] In *Solem*, the Court reversed a sentence of life-without parole for presenting a no account check for $100, where defendant had six prior felony convictions.[276] But the Court emphasized that *Solem* was an outlier soon after in *Harmelin v. Michigan*,[277] a 5–4 decision. *Harmelin* affirmed a sentence of life-without-parole for first offense of possessing 672 grams of cocaine.[278] Importantly, the Court in *Harmelin* rejected the application of the individualized sentencing to noncapital offenses:

> Petitioner's "required mitigation" claim, like his proportionality claim, does find support in our death penalty jurisprudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate"—whether or not the sentence is "grossly disproportionate."[279]

Dicta in *Harmelin* further indicated that the Eighth Amendment really did not apply to noncapital cases except in the most extreme circumstances.[280]

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of particular sentences' should be 'exceedingly rare'").

273. *See Rummel*, 445 U.S. at 265–66 (1980) (affirming punishment of life imprisonment and rejecting petitioner's argument that such punishment was "grossly disproportionate" to his crimes); *Hutto*, 454 U.S. at 370–72 (1982) (per curiam) (affirming forty-year sentence and dismissing Davis's habeas petition).

274. 463 U.S. 277, 279–84 (1983).

275. *See id.* at 284 ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

276. *Id.* at 279.

277. 501 U.S. 957, 961, 994, 996 (1991). Indeed, the Court in *Harmelin* backtracked, explaining that "[i]t should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law." *Id.* at 965.

278. *Id.*

279. *Id.* at 995.

280. *See id.* at 994–95 ("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."). Justices Scalia and Rehnquist went

Two later cases reaffirmed the limited scope of the Eighth Amendment in noncapital cases, this time in the context of three strikes sentencing laws designed to enhance punishments for recidivists.[281] In *Lockyer v. Andrade*,[282] the Court affirmed on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions.[283] Similarly, in *Ewing v. California*,[284] the Court affirmed a sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions.[285]

The Court has blurred the capital/non-capital line of differentness more recently in two cases, *Graham v. Florida*[286] and *Miller v. Alabama*.[287] In these cases, the Court found that a second kind of differentness existed under the Eighth Amendment: juvenile offenders.[288] Because "children are different too," the Court created similar categorical limitations on the imposition of juvenile life without parole sentences.[289] In *Graham*, the Court

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further, arguing that the Eighth Amendment did not contain any proportionality guarantee. *Id.* at 965 ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

281. *See* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case."); Ewing v. California, 538 U.S. 11, 30 (2003) ("Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'").

282. 538 U.S. 63 (2003).

283. *See id.* at 77 (holding that California's application of its statute was not unreasonable).

284. 538 U.S. 11 (2003).

285. *See id.* at 30 ("Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

286. 560 U.S. 48 (2010).

287. *See id.* at 82 (prohibiting the imposition of a life sentence without parole for minors who did not commit homicide).

288. *See* Miller v. Alabama, 567 U.S. 460, 465 ("The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole.").

289. *See id.* at 489 (holding mandatory-sentencing schemes requiring lifetime sentences without parole for all children convicted of homicide violative of the Eighth Amendment).

barred the imposition of life without parole in non-homicide cases.[290] As discussed above, the Court in *Miller* barred mandatory juvenile life without parole sentences.[291]

It is also worth noting that the Court made clear that *Harmelin* did not foreclose this expansion of the individualized sentencing concept beyond capital cases to non-capital (at least juvenile life without parole) cases.[292] It distinguished *Miller* from *Harmelin* based on the differentness of juvenile offenders.[293]

The move to embrace a second kind of differentness raises interesting questions about the notion of differentness itself.[294] With respect to death, the "different" category is a kind of punishment.[295] By contrast, the "different" category with respect to juveniles relates to a type of offender.[296] It is not clear what this distinction might mean for the future of the Court's Eighth Amendment jurisprudence.

One possible implication might be that death is more different, being a punishment, than juveniles, being a type of offender, and thus merits greater scrutiny and broader Eighth Amendment

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290. *See Graham*, 560 U.S. at 74 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.").

291. See s*upra* note 289 and accompanying text (differentiating juveniles from other offenders). The Court subsequently found that this determination was substantive, not procedural, and as such, applied retroactively. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) ("The Court now holds that Miller announced a substantive rule of constitutional law. . . . Giving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole.").

292. *See Miller*, 567 U.S. at 482 (2012) (acknowledging that individualized sentencing is appropriate for children, as in noncapital cases).

293. *Id.* at 481 ("*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. . . . So if (as *Harmelin* recognized) 'death is different,' children are different too.").

294. *See* Berry, *supra* note 171, at 1056 (exploring the "differentness" of sentencing juveniles in two contexts: first, the offenders are unique, and second, life without parole is a unique punishment).

295. *Id.* at 1070 ("While some have argued that LWOP is a harsher sentence, the Court has recognized on many occasions that the death penalty is the most severe punishment available.").

296. *See id.* at 1073 (noting the distinct differences between adult and juvenile offenders).

limits than juvenile life without parole.[297] Another implication could be a willingness to examine other types of punishments as different, such as life without parole, or other categories of offenders as different, such as elderly offenders or veterans.[298]

The real shortcoming of the differentness doctrine is that it has had the unfortunate secondary consequence of lowering the scrutiny given to non-capital cases (at least non-juvenile life without parole cases).[299] The idea that capital cases require more constitutional scrutiny and as a result, more categorical limitations, does not justify the corollary conclusion that non-capital cases deserve less scrutiny.[300]

Prior to *Furman*, the Court struck down two non-capital sentences, in the *Weems*[301] and *Trop*[302] cases, on the basis that those sentences were disproportionate. After the Court established that death was different, however, it largely refused to engage in similar analysis, raising the bar to an almost impossible to meet standard of gross disproportionality.[303]

The effect of differentness has moved in two directions—raising the scrutiny for different punishments while lowering the scrutiny for non-different or "ordinary"

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297. *See id.* at 1074 ("The idea is that, for juveniles, juvenile LWOP is essentially a death sentence and, as a result, such sentences should receive the same Eighth Amendment protections as the death penalty.").

298. See *id.* at 1080 (examining other potential groups that could be different under the Eighth Amendment).

299. Slobogin, *supra* note 46 and accompanying text (noting an unintentional consequence of the Court's differentness principle is that non-capital cases have received almost no constitutional scrutiny).

300. *See* William W. Berry III, *Procedural Proportionality*, 22 GEO. MASON L. REV. 259, 271 (2015) ("In practice, the distinction between capital sentences and other death-in-custody sentences is often non-existent, with the vast majority of death row inmates dying of natural causes in prison, just like those serving LWOP sentences.").

301. *See* Weems v. United States, 217 U.S. 349, 366 (1910) (holding the punishment of *cadena temporal* (hard labor) unconstitutional in light of the offense committed).

302. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding removal of citizenship an unconstitutional punishment for desertion).

303. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

punishments.[304] The second effect has done more to deprive the Eighth Amendment of its power and protect the interests of individuals against overreaching state punishment than the enhanced differentness scrutiny has done to protect offenders from cruel and unusual punishments in capital and JLWOP cases.

Just because the Court finds that the Eighth Amendment categorically prohibits certain kinds of capital cases does not mean that non-capital punishments are always constitutional under the Eighth Amendment.[305] The lack of scrutiny and wide deference given to states in administering punishments is a testament to the need for constitutional oversight to eliminate the imposition of cruel and unusual punishments.[306]

The differentness principle thus should not operate in two directions. It should raise constitutional scrutiny in "different" cases, but it should not serve to simultaneously remove the application of the Eighth Amendment in non-capital cases.

Because criminal offenders are unique, and the Eighth Amendment applies to all criminal punishments, not just different ones, it should require individualized sentencing in all felony cases, not just death and juvenile life without parole cases. The next section advances this argument.

IV. Expanding Individualized Sentencing to All Felonies

In light of the Court's holdings in its individualized sentencing cases, this Article argues for an expansion of these principles to all felony cases. Specifically, the seriousness of the deprivations warrants individualized consideration.

In practice, this would mean that the Eighth Amendment would bar all mandatory sentences, including collateral

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304. *Id.* at 1002 (contrasting the severity of the crime committed in *Solem* and the crime committed in the instant case).

305. *See* Barkow, *supra* note 27, at 1145 ("The Court will scrutinize whether the death sentence is proportionate to the crime and the defendant, and it has frequently exempted certain crimes and certain offenders from a capital sentence to avoid an unconstitutionally excessive punishment. The Court does not insist on any of these requirements in noncapital cases.").

306. *See generally* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018).

consequences in criminal cases imposed by statutory sections outside of the crime at issue.

Under the Court's current doctrine, states cannot impose mandatory death sentences[307] or mandatory juvenile life-without-parole sentences.[308] Doing so violates the Eighth Amendment because it denies the offender full consideration of the individualized circumstances of his crime and his character, including all relevant aggravating and mitigating evidence.[309]

The differentness principle—for the death penalty and juveniles—has limited the application of the individualized sentencing constitutional requirement, even though the consequences of felony convictions themselves are quite serious. Framed in the language of the Court, death and juvenile life without parole sentences are both a kind of death sentence. But in the same way, a felony conviction and its many consequences can also have lifelong consequences, and essentially mandate the death of one's "non-felony" self. It follows, then, that the Eighth Amendment requirement should flow to all serious consequences of criminal behavior.

Note that the individualized sentencing requirement does not foreclose the imposition of a particular sentence. *Woodson* and *Lockett* do not proscribe death sentences;[310] they simply require careful consideration of relevant information prior to imposition of a death sentence. *Miller* and *Montgomery* do not proscribe the imposition of juvenile life without parole sentences;[311] they simply require careful consideration of relevant information prior to imposition of a juvenile life without parole sentence.

A. The Case for Individualized Sentencing in All Felony Cases

The Court's individualized sentencing decisions emphasize the importance of having individualized sentencing consideration in large part because of what is at stake in the sentencing hearing.

307. *Supra* note 10 and accompanying text.
308. *Supra* note 11 and accompanying text.
309. *Supra* notes 10–11 and accompanying text.
310. *Supra* notes 20–22 and accompanying text.
311. *Supra* note 291 and accompanying text.

The capital cases, *Woodson* and *Lockett*, highlight the "differentness" of the death penalty as a basis for individualized sentencing determinations.[312] If the state is seeking to kill someone as a punishment, the thinking goes, the sentencer should have a complete opportunity to examine all of the relevant evidence prior to making such a weighty decision.

And in *Miller*, the Court similarly found that, at least for juvenile offenders, the seriousness of a life without parole sentence—a death in custody outcome—required individualized sentencing consideration.[313] If the state is determining that an offender will be placed in prison and will never leave, the determination ought to include consideration of all relevant aggravating and mitigating evidence, and not flow automatically from the type of crime committed.

1. The Seriousness of the Deprivation

Modern felony convictions, while not approaching or mandating physical death, generate an emotional stigma and a series of collateral consequences that are likely to continue throughout an offender's life.[314] Indeed, receiving a felony conviction has the practical effect of changing the offender's life forever, in a largely irrevocable way.

While it is true that receiving a verdict of guilt or entering a plea of guilt may make an offender guilty of a felony, it does not follow that all felons should receive uniform consequences for their crimes.[315] In fact, sentencing procedures, even in cases where mandatory minimum sentencing statutes apply, still determine the length of incarceration, at the very minimum. Sentencing hearings can also determine other details of punishment, beginning with the kind of facility in which the state shall

312. *Supra* notes 20–22 and accompanying text.

313. *Supra* notes 287–89 and accompanying text.

314. *See infra* note 326 and accompanying text (noting that a felony conviction can affect an individual's right to vote, hold public office, and serve on a jury).

315. *See* Miller v. Alabama, 567 U.S. 460, 482 (2012) (acknowledging that individualized sentencing is appropriate for children, as in noncapital cases).

incarcerate the offender, the location of the facility, and the date when the sentence is to commence.

With respect to these determinations, individualized sentencing considerations should apply. Mandatory outcomes in this context should violate the Eighth Amendment because they are life-altering decisions. Incarceration of any kind is a serious deprivation, such that a court should carefully consider its appropriateness in light of relevant aggravating and mitigating evidence. And if a court deems incarceration appropriate, the length of the sentence should not be an automatic product of the criminal offense; instead, it should likewise be the product of careful deliberation that weighs both aggravating and mitigating evidence.

This is not to say that sentencing guidelines violate the Eighth Amendment.[316] Providing guideline ranges for particular crimes to promote consistency in sentencing outcomes is fine, as long as such guidelines are advisory and allow for flexibility in engaging in individualized sentencing determinations.[317] Requiring mandatory minimum sentences, to the extent one extends the individualized sentencing principle to all felony offenses, would deny a criminal offender the ability to use mitigating evidence to lower the sentence. This is the principle that the Court rejected with respect to the death penalty in *Lockett*.[318]

To be sure, individualized sentencing does occur in many felony cases, but the inquiry lacks the same level of rigor that a capital sentencing procedure possesses. This is largely based on

316. After *United States v. Booker*, 543 U.S. 220, 245 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), however, mandatory sentencing guidelines do violate the Sixth Amendment because they serve to reallocate elements of a crime to criminal sentencing. *See* Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (holding unconstitutional a state hate crime statute which authorized an increase in maximum prison sentence based on judge's finding by preponderance of evidence that defendant acted with purpose to intimidate victim based on particular characteristics of victim).

317. *See Booker*, 543 U.S. at 245 (finding the provision of the federal sentencing statute that makes the Guidelines mandatory unconstitutional and modifying the statute to make the Guidelines advisor). "[The modified statute] requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.* (internal citations omitted).

318. *Supra* note 22 and accompanying text.

the tradition that has emerged from the differentness principle described above in Part II.

Where this matters is in determining the length of the appropriate sentence. The United States incarcerates its criminal offenders at lengths and in volumes never before seen in the history of the world.[319] The life without parole epidemic is particularly egregious. No other country in the world houses more than a few hundred inmates serving life without parole sentences.[320] The U.S., by contrast, has over 2,500 inmates sentenced to die in prison.[321]

Juvenile life without parole is another example. The United States is the only country in the world that permits the imposition of juvenile life without parole sentences.[322] After *Montgomery*, the Court made clear that such sentences were disfavored; some states, however, persist in regularly imposing such sentences, and electing to simply reimpose the juvenile life without parole sentences mandatorily imposed but then reversed by *Miller* and *Montgomery*.

Even with respect to other crimes, the United States imposes excessive sentences compared to most other Western countries. Drug cases provide another example of this over-punishment

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319. *See Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Mar. 20, 2018) (showing the United States leading the world with over 600 individuals incarcerated per 100,000 compared to the next closest country, Rwanda, at a little over 400 individuals per 100,000) (on file with the Washington and Lee Law Review).

320. The European Court of Human Rights has held, in at least one case, that such sentences violate human rights. *See* Vinter & Others v. United Kingdom, Eur. Ct. H.R. (2013) ("[I]n the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period . . . ."); Ocalan v. Turkey, Eur. Ct. H.R. (2014) (holding that a life sentence without the possibility of conditional release violated the European Convention on Human Rights). *But see* Hutchinson v. United Kingdom, Eur. Ct. H.R. (2017) ("The Court concludes that the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention.").

321. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf.

322. *See Miller*, 567 U.S. at 479 ("We therefore hold that *the Eighth Amendment forbids a sentencing scheme that mandates life in prison* without possibility of parole for juvenile offenders." (emphasis added)).

phenomenon, but this is true across the board—the punishments are harsher in the United States on both a state and federal level.[323] Promoting a more robust application of individualized sentencing principles, particularly mitigation evidence, might help to soften some of the criminal punishments imposed and help bring the United States more into line with the punishment practices of the rest of the world.

In addition to mandatory minimum sentences, another place where mandatory sentence limits are imposed are through recidivist premiums. Three strikes laws are perhaps the most well-known of these mandatory requirements, but other recidivist premiums exist in both state and federal statutes. The idea is that the offender who repeats criminal conduct requires a greater punishment because they somehow knew better. A more legitimate rationale lies in the idea that the first punishment is a discounted sentence, and, as such, repeat offenders lose the right to enjoy this mitigation for second or third offenses. A more accurate understanding, however, is that the offender is simply being double punished for the first offense, which raises double jeopardy questions.

At the very least, an extended individualized sentencing regime would proscribe the mandatory imposition of recidivist premiums. Arguably, though, an individualized sentencing approach would diminish or even exclude recidivist premiums altogether. To the extent that the prior offense somehow makes one more culpable during the second offense (or offers a basis to discount mitigating evidence), such evidence in theory might be relevant, but a more accurate sentencing would occur where courts do not consider such evidence with respect to the second offense.

A second set of consequences—many of them collateral—often apply uniformly to all offenders within a jurisdiction, irrespective of whether those consequences are appropriate for the particular offender. These consequences can be far ranging in many different

323. *See* Berry, *supra* note 168, at 1060 (questioning whether society's "view of proportionate punishment has evolved over time to conclude that LWOP sentences are excessive for certain crimes, particularly non-violent, victimless crimes," such as drug offenses).

areas of life and continue after the offender has completed his incarceration.[324]

For instance, offenders may be ineligible for public benefits. These may include the right to possess a drivers' license, live in public housing, or receive welfare benefits.[325]

A citizen may lose certain privileges of civil status, including the right to serve on a jury, hold office, and perhaps most importantly, the right to vote.[326] Offenders typically also lose the right to own and carry firearms.[327] Indeed, violating this rule can constitute its own separate criminal offense.[328]

Some collateral consequences can also flow from particular offenses. Certain offenders, particularly sex offenders may face registration requirements.[329] Such disclosure requirements may impede the ability to live in certain neighborhoods and communities.[330]

Courts that have considered this issue have generally cabined such consequences as separate from the "punishment" imposed by the court at sentencing. This may be in part because a centralized uniform institution does not impose such consequences; a wide variety of institutions and administrative agencies may impose the collateral consequences. Further, there is not a uniform or collective set of statutes that impose these consequences; they extend across a number of federal, state, and local government statutes, ordinances, and regulations.

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324. *Infra* note 326 and accompanying text.

325. *See, e.g.*, Gabriel Chin, *Collateral Consequences of Criminal Convictions*, 18 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 1, 2 (2017) ("A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver-s license."); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1118 (2013) (examining the informal collateral consequences associated with criminal convictions, such as social stigma).

326. *See, e.g.*, Chin, *supra* note 325, at 2 ("Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office . . . ."); Logan, *supra* note 325, at 1107 ("A criminal conviction often serves as a de facto informal basis for job denial, augmenting occupational bars . . . .").

327. *Id.* at 3.

328. *Id.*

329. *See id.* ("Persons convicted of sex offenses often must register, may be excluded from living in particular areas, and are subject to post-incarceration civil commitment.").

330. *Id.*

Under this thinking, courts have generally held that the consequences do not count as punishments for purposes of the Constitution, and thus cannot constitute cruel and unusual punishments.[331] The Supreme Court, however, has not considered this issue. This is unsurprising given its long-held view that the Eighth Amendment really only has relevance for capital cases.

Nonetheless, it seems disconnected from reality to suggest that these consequences are not punishments. Prohibiting a person from voting, owning a weapon, or receiving public benefits punishes them in a significant and tangible way.

It is one thing for society to choose to impose such criminal sanctions on offenders after careful thought and deliberation in light of the offender and his criminal acts. It is something quite different to broadly assume that everyone that commits a particular crime categorically must be banned from a certain behavior or denied a certain right—often for an extended period of time. These consequences should be what judges are considering at sentencing, and what parole boards are considering at parole hearings.

These consequences often operate in the shadows, but significantly affect the ability of criminal offenders to rejoin society in a productive and positive way. These consequences operate to punish offenders continually in many circumstances. In certain cases, these additional punishments can even promote recidivism.[332]

The lack of centralized consideration of these deprivations as a collective package of punishments for offenders obscures the reality of the imposition of government power on its citizens. As such, the punishments do not adequately reflect the purposes of punishment with respect to the individual offender, and instead reflect a haphazard and often inexplicable set of limitations placed on the criminal offender.

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331. *Id.* at 2 ("[C]ollateral consequences, the most significant part of the criminal justice system for many people, have generally not been considered punishment, and therefore are not subject to provisions of the Constitution regulating criminal proceedings.").

332. *Id.* at 5 (questioning whether collateral consequences "frustrate public safety by denying some [convicted persons] a reasonable opportunity to lead law-abiding lives and not recidivate").

Indeed, this approach to tagging offenders with a wide array of collateral consequences does not seem to advance the cause of society with respect to justice or safety. Rather, it impedes the reconnection of offenders to society and essentially creates a second class of citizens, regarded by the general public as a group to be avoided.

The sentencing of criminal offenders would be much more justifiable, accurate, and sensible if the punishments imposed were clearly identified at sentencing, and considered carefully with respect to the offender, particularly in light of the criminal conduct of the offender, the character of the offender, and other relevant aggravating and mitigating evidence.

2. The Dignity of Offenders

Individualized sentencing likewise accords criminal offenders dignity in being able to receive a full evaluation of their criminal conduct as well as relevant aggravating and mitigating evidence prior to being sentenced. The offender has the opportunity to present evidence explaining, justifying, or otherwise contextualizing the criminal behavior at issue. This mitigating evidence can relate to the crime itself or to the criminal offender himself.

Focusing carefully on the factual circumstances of the crime is critical to determining an accurate sentence. While some defendants may elect not to testify at trial, the ability of the defendant to speak to what happened at sentencing and provide his own version of the events in question is crucial to the court developing a complete understanding of the crime at issue.

The characteristics of the offender often may bear on the appropriate punishment as well at sentencing. This is particularly true in American jurisdictions that predominately allow for all four main purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—play a role in the sentencing process. Certainly, the mental health of the offender bears on the sentencing outcome, but so might other factors in the defendant's past that bear on the defendant's culpability, capacity for rehabilitation, or dangerousness.

It is important to recognize the reach of the constitutional doctrine developed in *Woodson* and *Lockett*.[333] It does not mandate that the sentencer give any particular amount of weight to aggravating or mitigating evidence. Rather, it simply requires the sentencer to consider such evidence in determining the appropriate sentence.[334]

But denying the offender consideration of such evidence, particularly mitigating evidence, strikes at the dignity of the offender. The idea here is that failing to consider one's evidence in making a sentencing decision has a dehumanizing effect on the offender. Presuming that violating a statute mandates a particular result fails to account for the person of the offender.

This Eighth Amendment principle of dignity derives from its early cases—*Weems v. United States* and *Trop v. Dulles*. As the Court in *Dulles* explained, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[335]

3. The Meaning of Individualized Sentencing Consideration

Individualized sentencing consideration does not mean that offenders receive lesser sentences. To the contrary, it means that a court will consider all of the relevant aggravating and mitigating circumstances in their case. This approach allows a court to achieve a level of accuracy in sentencing that mandatory statutes cannot.

Statutes suffer from several problems in this context. First, it is almost impossible to define crimes in such a way as to both cover the correct conduct and sort the conduct appropriately. To be sure, it is difficult to define a crime in such a way that criminalizes all of the conduct that it should but does not criminalize innocuous conduct. Statutes suffer from both over-inclusive and

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333. *Supra* notes 20–22 and accompanying text.

334. *See* Lockett v. Ohio, 438 U.S. 586, 606 (requiring individualized consideration of mitigating factors in capital cases).

335. Trop v. Dulles, 356 U.S. 86, 100 (1958). *See* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2131 (examining the sentencing limitations put in place by the Eighth Amendment, as well as its requirement of dignity in the punishment of convicted criminals).

under-inclusive problems in this sense. The wide variety of conduct that might fall under a given statute also means that two offenders convicted of the same crime might deserve vastly different sentences. This is obviously true with felony murder, as mentioned, but also can be true even with simple crimes.

Likewise, the proliferation of criminal statutes that has resulted from two decades of penal populism means that the same conduct can violate a number of criminal statutes. The idea that statutes can appropriately sort offenders and successfully dictate a particular sentence or range of punishment thus seems to be inaccurate at best, futile at worst.

Mandatory minimum statutes similarly assume that violators all deserve a minimum level of punishment, ignoring the possibility that mitigating circumstances in a given case might make such a sentence excessive. It is worth noting, in a world where 98% or more of the cases result in plea bargains,[336] that the practical effect of mandatory minimums is not to ensure that the offender receives a minimum sentence for the conduct in question. Rather, it simply migrates the sentencing decision to the prosecutor who can choose to "sentence" the offender however he or she chooses by deciding which crime to charge the offender with in the plea.

Individualized sentencing restores this role of sentencing to the judge or, in capital cases, the jury. In addition to increasing fairness in sentencing by having a neutral party determine the sentence, as opposed to the prosecutor who represents the government, restoring sentencing to judges increases transparency in sentencing. Sentencing hearings contain transcripts, a record of evidence, and a basis for appeal if the hearing contains improper bias or error.

Prosecutorial decision making, by contrast, occurs in a black box of secrecy. Prosecutors enjoy a complete lack of accountability for their decisions with respect to pleas, and for the ways in which

336. *See Criminal Cases—Summary Findings*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=23 (last visited Mar. 20, 2018) (noting that 95% of convictions worldwide in 2006 were the result of a guilty plea) (on file with the Washington and Lee Law Review).

they use mandatory sentences as a tool to convince offenders to plead guilty and, in doing so, set the sentence for the offender.

The concern with plea bargains relates to the possibility, and even likelihood, that some offenders will plead guilty to crimes they did not commit. The risk of going to trial, and the subsequent trial penalty that often occurs at sentencing, both dissuade criminal defendants from rejecting plea offers, even when they are innocent. Prosecutors can offer a lesser sentence for deciding to plead guilty to a lesser offense than the potential sentence an offender might face if the offender went to trial being charged with the more serious offense.

Studies also show that trials have the effect, in some cases, of increasing the sentence an offender receives at sentencing, beyond what a plea bargain might have offered for the same offense.[337] This trial premium, in essence, punishes offenders for forcing the prosecutor and the judge to go through the time and energy required at trial.

Perhaps more troubling though is the idea that the opposing side in the trial—the prosecutor—gets to determine the sentencing outcome instead of the presumably neutral judge. Prosecutors should try cases, seek convictions, and zealously represent the interests of the state in punishing criminal offenders. But the prosecutor should not get to choose the punishment. A neutral third party, be it judge or jury, should have the sole power and authority to determine the criminal sentence.

B. Roadblocks to Expansion

The development of the Court's doctrine as explained above has created several doctrinal roadblocks to the expansion of the concept of individualized sentencing beyond the death penalty and juvenile life without parole. Even so, these precedents are not airtight. If anything, the development of the Court's doctrine, both in its willingness to abandon principles of *stare decisis* under the

337. *See* BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING RESEARCH SUMMARY (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (finding that "[t]hose who go to trial rather than accept a plea are more likely to receive harsher sentences").

Eighth Amendment and in its slow broadening of the idea of differentness, suggests that growth of individualized sentencing concepts is certainly possible.[338]

1. Non-capital Bright-line (Differentness)

As explained above, the Court for many years drew a bright-line distinction between non-capital and capital cases with respect to individualized sentencing.[339] With the exception of *Solem v. Helm*, the Court consistently applied the Eighth Amendment individualizes sentencing principle exclusively to capital cases, and more recently juvenile life without parole cases.[340] The Court has repeatedly rejected broadening the concept of individualized sentencing to noncapital cases involving adult offenders. As the Court explained in *Harmelin*, "But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases and see no basis for extending it further."[341]

It is not that the Court rejects the broad applicability of this principle. In *Woodson* and *Lockett*, it indicated as much, referring to individualized sentencing as sound policy.[342] The Court's historical view has been one of limited application of the Eighth Amendment, though, and as such, the Court has approached constitutionalizing the individualized sentencing concept beyond the death penalty with hesitancy.

To be clear, the Court would have to overrule its prior cases to make such an expansion. Nonetheless, such an obstacle is not insurmountable. First, the Court's decision to expand the concept of individualized sentencing to juvenile offenders in *Miller* and *Montgomery* demonstrates a lack of rigidity with respect to the formerly bright-line "death is different" distinction.[343]

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338. With a less conservative Supreme Court, such a development might even be termed probable.

339. Barkow, *supra* note 27 and accompanying text.

340. *Supra* note 276 and accompanying text.

341. *Harmelin*, 501 U.S. at 996.

342. *Supra* notes 20–22 and accompanying text.

343. *Supra* notes 291–92 and accompanying text.

A reorientation of the Court toward felony offenders would be necessary, but that is what has happened in recent years with juvenile offenders. Indeed, one can trace the development of this sentiment from *Roper* (2005) to *Graham* (2011) and *Miller* (2013).[344]

The renewed focus on the mass incarceration problem in the United States could serve as an educational starting point for the Court to consider the real consequences of felony convictions. Certainly, as discussed above, the effects of such sentences can, in many cases, continue throughout the life of the offender, and as such, warrant careful consideration at sentencing as opposed to the imposition of mandatory, legislatively required outcomes.

State legislatures have, in recent years, considered some reforms in this vein, at least with respect to lowering the sentences for low-level crimes or converting some felonies to misdemeanors.[345] As the Court has explained, individualized sentencing consideration is a sound public policy.[346] Using the Constitution to impose such a limit, however, would accelerate reforms and ensure a level of continuity with respect to criminal sentencing procedures.

The differentness line, now breached by juvenile life without parole, is no longer sacrosanct. The values underlying the application of individualized sentencing to the death penalty and juvenile life without parole also apply to felony convictions. Particularly when one includes the collateral consequences, a felony conviction warrants the same kind of sentencing scrutiny that capital cases do, including a careful assessment of aggravating and mitigating evidence. What before was a bright line has now been muddied, and thus, opens the door for

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344. *Supra* notes 286–90 and accompanying text.

345. *See The Effects of Changing Felony Theft Thresholds*, PEW (Apr. 12, 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/04/the-effects-of-changing-felony-theft-thresholds (last visited Mar. 20, 2019) ("Since 2000, at least 37 states have raised their felony theft thresholds, or the value of stolen money or goods above which prosecutors may charge theft offenses as felonies, rather than misdemeanors.") (on file with the Washington and Lee Law Review).

346. *Supra* notes 20–22 and accompanying text (discussing the Court's decisions in *Woodson v. North Carolina* and *Lockett v. Ohio*).

reconsidering the location of the line, and perhaps the need for the line itself.

2. Deference to States

Aside from the precedents that impede the adoption of a constitutional requirement for individualized sentencing, the Court's approach with respect to the Eighth Amendment also makes immediate adoption unlikely. While the Court's approach with respect to other constitutional provisions—the First Amendment and the Fourth Amendment in particular—has been to decide a number of cases to delineate the scope of the constitutional right, its approach with respect to the Eighth Amendment has been largely to defer to states.[347]

The dissenters in *Furman* provide an example of this.[348] Both Justice Blackmun and Justice Powell indicated that they would vote against the death penalty if they were legislators, but viewed applying the Eighth Amendment as outside the scope of their judicial review power.[349] Further contributing to this hesitancy might have been the backlash to the decision in *Furman*, with most states passing new statutes in response to the Court's determination that the death penalty, as applied, violated the Eighth Amendment.[350]

The judicial hesitancy has continued for decades. Three justices appointed by Republican presidents—Blackmun, Powell, and Stevens—all concluded that the death penalty was impossible

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347. *See generally* Berry, *supra* note 306.

348. Furman v. Georgia, 408 U.S. 238, 375 (1972).

349. *See id.* at 406 (Blackmun, J., dissenting) ("Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments."); *see also id.* at 418 (Powell, J., dissenting) ("In terms of the constitutional role of this Court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct.").

350. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 47 (2007) ("Within a day of the [*Furman*] decision, legislators in five states had announced their intent to enact new death penalty legislation and seventeen congressmen had joined in sponsoring a constitutional amendment to reinstate the death penalty.").

to apply fairly and therefore was unconstitutional.[351] None of the justices, however, chose to really do anything about this while they were on the Court. Stevens[352] and Powell[353] expressed their anti-death penalty sentiments in retirement, while Blackmun waited until his final term on the Court to reach his conclusion.[354]

Currently, both Justice Breyer and Justice Ginsburg have expressed similar reservations.[355] In *Glossip v. Gross*, Justice Breyer's dissenting opinion, joined by Justice Ginsburg, catalogued all of the many problems with the death penalty and its arbitrary, unfair, and discriminatory application in the United States.[356]

Despite all of the Court's many concerns with the death penalty, the Court has been hesitant to use the Eighth Amendment to limit its imposition. Since 2002, the Court has identified several categorical limitations to the application of the death penalty.[357] It has held that the Eighth Amendment proscribes death sentences

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351. William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 441 (2011) ("In recent years, three Supreme Court Justices, Powell, Blackmun, and Stevens, have all called for the abolition of the death penalty, repudiating their prior approval of the use of capital punishment.").

352. *Id.* at 443 (answering whether he would change his vote in any prior case affirmatively, saying "[y]es. I have come to think that capital punishment should be abolished").

353. *Id.* ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'").

354. *Id.* ("[W]eeks before he retired from the Supreme Court in 1994, Justice Blackmun dissented to the denial of certiorari in *Callins v. Collins*, and in doing so, wrote: . . . The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative.').

355. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) (suggesting, in a dissent joined by Justice Ginsburg, that the death penalty suffers from "fundamental constitutional defects").

356. *See id.* at 2756 (listing "(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose").

357. *See supra* Part I (providing an overview of Supreme Court decisions limiting the application of the death penalty).

for juvenile offenders,[358] for intellectually disabled offenders,[359] and in child rape cases.[360] As discussed above, it has also placed limitations on juvenile life without parole sentences, barring such sentences when imposed in a non-homicide case[361] or as a mandatory sentence.[362]

But these decisions have only provided a few categorical carve-outs; they have not robustly applied the Eighth Amendment to capital cases or juvenile life without parole cases, much less other non-capital punishments.[363] Even the majoritarian nature of the evolving standards of decency test that the Court uses has not convinced the Court to intervene when states impose excessive punishments.[364] The counter-majoritarian difficulty, the idea that five justices can undermine the will of the people by constitutionalizing a particular punishment in a particular situation, might ordinarily provide some occasion for choosing to defer to state punishment practices.[365] Here, however, the constitutional test first analyzes the majoritarian practices of the

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

359. *See* Atkins v. Virginia, 536 U.S. 304, 320 (2002) (citation and internal quotation marks omitted) ("Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive.").

360. *See* Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (reasoning that "the [death] penalty must be reserved for the worst of crimes . . . for crimes that take the life of the victim").

361. *See* Graham v. Florida, 560 U.S. 48, 74 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.").

362. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) (reasoning that mandatory life sentences for juveniles run counter to the need for individualized sentencing).

363. *See* Berry, *supra* note 306, at 317 (analyzing several major Eighth Amendment decisions that reflect the Court's failure to use the Eighth Amendment as a safeguard against excessive, arbitrary, or discriminatory criminal punishments).

364. *See* William W. Berry III, *Evolved Standards, Evolving Justices?*, 96 WASH. U. L. REV. 104, 110 (2018) (arguing that while "society's standards have evolved . . . the Court's cases have not").

365. *See id.* at 114–16 (discussing the various degrees of deference the Court provides to state practices).

state legislatures.[366] Thus, the majority practice imposes a limit upon the scope of the Eighth Amendment, even though the provision is in theory counter-majoritarian in nature.[367] As such, the Court should not feel any restraint in broadening the scope of the Eighth Amendment to limit outlier punishment practices.[368]

Instead, the Court has chosen to defer to the states and their punishment practices, despite evidence that states often impose cruel and unusual punishments.[369] The mass incarceration problem in the United States is in part attributable to the number of excessive sentences that states impose.[370]

These occur on all ends of the punishment spectrum. The life without parole epidemic in the United States continues, with over 50,000 inmates serving such sentences, many of who never had individualized sentencing consideration.[371] The few other countries that impose such a sentence in the world all have several hundred prisoners at most serving such sentences.[372] On the bottom end of the spectrum, states continue to convert misdemeanors into felonies, imposing relatively excessive punishments for minor crimes.[373] While there has been some reform in recent years in this area, states still have an excess of criminal statutes[374] and receive

366. *See id.* at 119 (asserting that the Court never fails to first examine majority trends before applying the evolving standards of decency doctrine).

367. *See id.* at 115 ("[N]one of these three majoritarian approaches create any meaningful counter-majoritarian difficulty. There is no concern about the justices overruling the practices of the states *because* they are only striking down minority jurisdictions.").

368. *See id.* at 116 ("If the Court continues to use a majoritarian standard, the counter-majoritarian difficulty ceases to be an impediment in applying the Eighth Amendment to minority (and disproportionate) punishment practices.").

369. *See* Berry, *supra* note 306, at 319–42 (surveying the deference shown by the Court to the states on questions of mandatory sentences, absolute and comparative proportionality, and racial discrimination).

370. *See id.* at 345 (suggesting that the Court "should consider claims of disproportionality in sentencing under the Eighth Amendment").

371. *See* Berry, *supra* note 168, at 1055 ("[T]he number of LWOP sentences tripl[ed] from 12,453 in 1992 to over 41,000 [in 2015].").

372. *See id.* at 1076 ("The nations with the next highest number of LWOP sentences . . . collectively have less than 150 offenders serving LWOP sentences.").

373. *See supra* note 47 (giving examples of excessive punishments).

374. *See* HUSAK, *supra* note 236, at 9–10 (2008) (describing the difficulty in

no scrutiny with respect to the proportionality of the punishments they impose for a particular crime.[375]

The Supreme Court's habit of refusing to apply the Eighth Amendment to non-capital cases, particular those with excessive and disproportionate sentences, needs to change in order for felony offenders to enjoy individualized sentencing and full consideration of the relevant aggravating and mitigating circumstances in their cases. While judges do consider such evidence in some cases,[376] implementing a constitutional requirement for such consideration would create uniformity in sentencing and restrict excessive prosecutorial power to sentence.

3. Sentencing Disparities

Another possible critique of extending the constitutional right to individualized sentencing in a broad way as this Article proposes relates to the likelihood of sentencing disparities. In light of the consideration at sentencing, different sentencers might allocate different weight to aggravating or mitigating evidence, and as such create disparate outcomes.

This objection does not provide a real reason for denying offenders individualized sentencing consideration. First, most cases will involve a judge as a sentencer, not a jury.[377] As such, there will at least be a modicum of consistency, in theory, within particular courts. Part of the concern with jury sentencing is that it is a "one-off"—jurors do not sentence case after case and thus have no barometer for determining what might be appropriate in

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quantifying the vast number of criminal statutes in U.S. jurisdictions).

375. *See* Stuntz, *supra* note 236, at 507 (2001) (describing the extreme breadth of American criminal law); HUSAK, *supra* note 236, at 28 (2008) (describing a "relative lack of protest about . . . violations of proportionality").

376. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 207 (1976) (finding constitutional a Georgia statute that permits juries to consider aggravating and mitigating circumstances).

377. *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) (commenting that only a handful of states allow juries to make the sentencing decision, and that judges determine noncapital sentences in the federal courts).

their case.[378] Judges, by contrast, have the advantage of sentencing a series of cases, and can judge accordingly. Likewise, a major part of the role, in theory, of the judge in a criminal case is to determine the punishment.

Further, to the extent that states have concerns about disparity, legislatures can promulgate advisory guidelines to help shape the decision-making of judges. While the Sixth Amendment prohibits mandatory guidelines,[379] a series of flexible guidelines that allows for individualized sentencing consideration in the scope of a broader punishment scheme does not deprive the state of its power to guide criminal sentencing. Such an approach, though, also allows sentencing determinations to take into account the aggravating and mitigating evidence in the case of the offender, instead of imposing an automatic sentence.

Equally important, keeping mandatory sentences does not ensure consistency in outcomes. Rather, it simply moves the discretion to the prosecutor's office.[380] Sentencing outcomes might appear to be more consistent, but those outcomes neglect the wide variation that occurs through the exercise of prosecutorial discretion, including whether to charge a case at all, and under what provision to charge the offender.[381] Where there are mandatory sentences, the outcome becomes predictable. As such, the prosecutor has the power to essentially decide the sentence. Without mandatory sentences, the judge (or sometimes jury) maintains the power to sentence the offender in light of the aggravating and mitigating evidence proved at trial.

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378. *See id.* at 987 (discussing the extent to which sentencing by judges is more uniform than sentencing by juries).

379. *See supra* note 316 and accompanying text (describing the effects of *Booker* and *Apprendi* on mandatory guidelines).

380. *See supra* note 17 and accompanying text (gathering sources discussing prosecutorial discretion in the context of mandatory minimums).

381. *See, e.g.*, David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591 (2005) (documenting how prosecutors may use their discretion to circumvent mandatory minimums in certain circumstances); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 427 (2007) (presenting various considerations affecting prosecutors' decisions to pursue mandatory minimums).

4. Costs

The cost increase of eliminating mandatory sentences would be de minimis. Even when defendants plead guilty, the court must hold some sort of sentencing hearing to impose the sentence.[382] Allowing individualized consideration in all felony cases might make hearings longer and more involved, but not in such a significant way, in most cases, to drastically alter the time spent. This is in large part because of the number of cases that end in plea bargains in the first place.[383]

Even if the proposed approach increased criminal justice costs, such an approach would be worth it. The idea that the criminal justice system should deny offenders due process in order to save money contradicts the approach of most states and the protections offered by the Constitution in criminal cases.

Further, imposing more accurate and offender-tailored offenses has a strong possibility of decreasing recidivism.[384] An offender whose dignity is considered and who has a full and fair opportunity at sentencing to provide evidence may be more open to rehabilitation than an offender who simply receives a mandatory sentence and is unable to offer mitigating evidence.[385]

Other possible savings might occur because sentences on the whole could be expected to be shorter.[386] At least some of the cases would have mitigating evidence that warranted a sentence below what the mandatory minimum requires. As a result, the state would spend less money on incarceration on the whole if the

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382. *See* FED. R. CRIM. P. 11 (giving procedures required for pleas).

383. *See* Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, at A12 ("[Ninety-seven] percent of federal cases and 94 percent of state cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence.").

384. *See* Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1556 (2016) (making the case for imposing more carefully calibrated sentences as a means to reduce recidivism).

385. *See* Ryan, *supra* note 335, at 2176 (discussing the intersection of rehabilitation and offender dignity).

386. *See* Mary Price, Miller*(ing) Mandatory Minimums: What Federal Lawmakers Should Take from* Miller v. Alabama, 78 MO. L. REV. 1147, 1148 (discussing the cost savings that result from proportionate sentencing).

Constitution required individualized sentencing determinations in every case.

5. Stare Decisis

Another factor further opens the door to the Court reversing its precedents in this area. *Harmelin*, one of the cases that would need to be reversed, discusses the limitations of stare decisis in this area in justifying its own overruling of *Solem*.[387] In Justice Scalia's *Harmelin* opinion, he explained:

> We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents, *see Payne v. Tennessee*, *ante* at 501 U. S. 828; *Smith v. Allwright*, 321 U. S. 649, 321 U. S. 665, and n. 10 (1944); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 416 U. S. 627-628 (1974) (Powell, J., concurring); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 285 U. S. 406-408 (1932) (Brandeis, J., dissenting), and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions.[388]

It is not difficult to make the case that the decisions in *Graham* and *Miller* are in tension with *Harmelin* and other cases that limit the extension of the Eighth Amendment to noncapital cases. Justice Thomas' dissent in *Graham* made this very point.[389] To be sure, the recent shift away from the bright line between capital and noncapital cases suggests that other noncapital extensions of the Eighth Amendment might be both possible and reasonable. Just as Justice Scalia concluded that "*Solem* was simply wrong,"[390] the Court could conclude that refusing to apply the Eighth Amendment to noncapital cases is simply wrong. The Court's early

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387. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (explaining why the Court could "address anew, and in greater detail," a "constitutional precedent that is both recent and in apparent tension with other decisions").

388. Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

389. *See* Graham v. Florida, 560 U.S. 48, 103 (2010) (Thomas, J., dissenting) (pointing out the Court's previous reticence to "crossing th[e] divide" with regard to the "'death is different' distinction").

390. *Harmelin*, 501 U.S. at 965.

decisions in *Weems* and *Trop*, both of which reversed excessive noncapital sentences, lends support to this idea.[391]

In addition to *Harmelin* and *Solem*, the Court has on two other occasions overruled Eighth Amendment precedents. In *Atkins v. Virginia*,[392] the Court reversed its prior decision in *Penry v. Lynaugh*[393] and held that intellectually disabled offenders were ineligible for the death penalty.[394] Similarly, in *Roper v. Simmons*, the Court reversed its earlier decision in *Stanford v. Kentucky*[395] and held that the Eighth Amendment barred the execution of juvenile offenders.[396] These cases indicate a willingness of the Court to reverse prior limits on the scope of the Eighth Amendment.

V. Consequences of Broadening Individualized Sentencing

Adopting the proposed expansion of the Eighth Amendment would have at least three important consequences: (1) giving defendants a day in court, (2) eliminating draconian mandatory sentencing practices, and (3) shifting back to a model of judicial sentencing from a model of prosecutorial sentencing. This section considers each of these virtues in turn.

A. Giving Defendants a Day in Court

At the core of our criminal justice system is the notion that the state cannot impose punishment on its citizens without due process of law. Part of this process includes the idea that a

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391. *See* Weems v. United States, 217 U.S. 349, 366 (1910) (holding the punishment of *cadena temporal* (hard labor) unconstitutional in light of the offense committed); Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding removal of citizenship an unconstitutional punishment for desertion).

392. 536 U.S. 304 (2002).

393. 492 U.S. 302 (1989).

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

395. 492 U.S. 361 (1989).

396. Roper v. Simmons, 543 U.S. 551, 578 (2002) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

defendant deserves his day in court—an opportunity to go before the judge prior to the judge deciding the offender's fate. Whether this opportunity will affect the outcome is in some sense beside the point. The issue is whether the accused can speak, or at least have an advocate speak, on his behalf in a court of law.

This right is particularly important when the consequence for the offender is severe, which as the article has established, is every felony case.[397] At the minimum, the opportunity to plead for the mercy of the court should be afforded to every criminal defendant.

This is particularly true because the consequences continue for the remainder of the offender's life in many cases.[398] Denial of the ability to speak to these questions as a defendant fundamentally offends basic notions of due process. If a significant deprivation is to occur, one ought to have the opportunity to challenge the deprivation as to its character or its accuracy prior to its imposition.

The denial of such a right not only undermines basic conceptions of due process, it also compromises the dignity of the offender.[399] The automatic nature of mandatory sentences or non-litigated collateral consequences ignores the individual character of the offender and presumes a uniform connection between criminal act and consequence. While in most cases there must be some consequence, electing to ignore the details of the crime and the character of the offender exacerbates the possibility for injustice in individual cases.

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397. *See supra* notes 31–40 and accompanying text (discussing the "dehumanizing effects" that result from felony convictions).

398. *See, e.g.*, Pinard, *supra* note 31, at 459 ("[I]ndividuals must confront a wide range of collateral consequences stemming from their convictions, including ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement."); Kathleen M. Olivares, et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 10 (1996) ("Upon release, incarcerated offenders often encounter barriers to successful reintegration involving stigma, loss of job opportunities, friendships, familial relationships, and denial of legal and civil rights.").

399. *See* Ryan, *supra* note 335, at 2132 ("Eighth Amendment dignity means the individuality of an offender must be respected . . . .").

Given that most cases result in a plea bargain, individualized sentencing determinations become increasingly important.[400] Although the defendant may forego a trial, sentencing remains an opportunity for the defendant to interact with the court in relation to his conduct. This is not just important for mitigation and the chance to reduce the sentence; it also provides an opportunity to express remorse and potentially accept responsibility for his criminal conduct.

Mandatory sentences, however, thwart this process. If the minimum sentence is already decided prior to entering the court, the defendant's day in court can becomes a mere formality. With a mandatory outcome, there is no consideration of the aggravating and mitigating circumstances related to the offender and his actions.

Historically, mandatory sentences have been fraught with jury nullification problems, particularly in the capital context as described earlier in the Article.[401] Even where such nullification may not occur, it seems an impossible task to capture the consequence for every serious crime through a statutory scheme or even a sentencing guidelines scheme. Having a judge or jury actually consider the relevant evidence in making a punishment determination is highly preferable to mandatory line drawing.

B. Eliminating Draconian Mandatory Sentencing Practices

A second advantage of broadening the constitutional requirement for individualized sentencing to all felony crimes would be the elimination of mandatory minimum sentences. These sentences, often a vestige of the rise of penal populism in the 1980s and 1990s, impose draconian outcomes for minor offenses in many cases.[402]

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400. *See supra* note 383 and accompanying text (discussing the prevalence of plea bargains).

401. *See supra* note 78 and accompanying text (tracing the Court's long history of recognizing jury nullification).

402. *See* Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1431 ("In response to these increased crime rates, Congress and the state legislatures enacted laws that for most crimes imposed much higher sentences and greatly

These types of sentences are pervasive with respect to illegal drugs.[403] Nonviolent first-time drug offenders often serve significant sentences (5 or more years) because of mandatory minimums.[404] These sentences discourage rehabilitation and promote recidivism in addition to being clearly disproportionate.[405]

Another area that such restrictions appear is as recidivist premiums. As discussed above, such minimum sentences are unfair because they punish an offender a second time for the first crime.[406] While recidivism that encourages aggravation for repeat offenders, recidivism may be less likely where individualized sentencing determinations were made with respect to the initial sentence.

The career offender and three strikes laws create the greatest possibility for injustice in this area. Such sentences punish based on cumulative effect, not based on the crime at issue.[407] As a result, very minor felonies can receive quite harsh sentences, in some cases, mandatory life without parole.

Such sentences often frustrate judges, who lose the flexibility to reduce such sentences when compelling mitigating evidence exists. This goes beyond simply being unfair at the margins. It imposes excessive sentences on individuals that might be better served with a warning or probation, and an opportunity for a second chance without the life-altering sentence that the statute requires.

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reduced judicial sentencing discretion.").

403. *See, e.g.*, JONATHAN P. CAULKINS ET AL., RAND, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? XVI (1997) (concluding that mandatory minimum sentences are not justifiable on a cost-effectiveness basis in the context of certain drug crimes).

404. WILLIAM H. PRYOR ET AL., U.S. SENTENCING COMM'N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (2017) (describing the triggers and consequences for mandatory minimum penalties).

405. *See* Rakoff, *supra* note 402, at 1432 (discussing the disproportionately "huge sentences" that result from mandatory minimum sentencing regimes).

406. *See* Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 554 (2006) (suggesting that a significant number of recidivists will be "unfairly incapacitated because of recidivism fears").

407. *See generally* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY (2001).

C. Shifting Back to Judicial Sentencing from Prosecutorial Sentencing

In addition to the problems with mandatory sentences discussed above, a final issue resolved by broadening individualized sentencing under the Constitution would be restoring the sentencing role to judges. As discussed, the practical effect of adopting mandatory sentences is to delegate the sentencing decision from the judge to the prosecutor through the plea-bargaining process.[408]

If, on the other hand, mandatory sentences are unavailable, then the plea bargain will create a range of potential sentences, but the judge—or jury—will have the final say in crafting the punishment for the offender.[409] This has been the model traditionally in the United States,[410] and benefits from the transparency that comes with sentencing hearings in open court. Prosecutorial decision making is not subject to any review and is made in secret; judicial decision making is made in public and benefits from accountability.[411] While this is clearly true at the state level, where judges are typically elected, research shows that this is also true for federal judges.[412] Indeed, although such judges enjoy life tenure, they also exhibit some concern for popular opinion in their decision making.[413]

If states really want prosecutors to engage in criminal sentencing, they should restructure the criminal sentencing proceeding. Using mandatory sentencing practices that serve as de facto delegate sentencing compromises the broader aims of the criminal justice system and ultimately can threaten its legitimacy.

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408. *See supra* note 17 and accompanying text (gathering sources discussing prosecutorial discretion in the context of mandatory minimums).

409. *See* Hoffman, *supra* note 377, at 953–55 (tracing the roles judge and jury play in the current sentencing process).

410. *See* Rakoff, *supra* note 402, at 1430–32 (tracing the development of plea bargaining, mandatory sentencing, and the role of the judge in criminal trials).

411. *See id.* at 1432 (noting the secrecy of prosecutorial decisions during the plea-bargaining process).

412. *See* Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (discussing the tension between having a judiciary accountable to popular opinion and one unchecked by political preferences).

413. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 370 (2015) ("The accountability of the justices . . . to the popular will has been established time and time again.").

VI. Conclusion

This Article has argued for the expansion of the Eighth Amendment's individualized sentencing principle to all felony cases, including all relevant collateral consequences. While the Court currently adheres to the arbitrary bright-line rule limiting application of this principle to "different" cases (death penalty and juvenile life without parole), this article makes the case that such an extension is warranted and would improve the ability of the criminal justice system to achieve just and accurate sentencing outcomes.

Viewed through the lens of the two core Eighth Amendment concepts—uniqueness and differentness—the Article demonstrated how such an expansion would be consistent with these theoretical underpinnings. It further showed how some possible roadblocks could be navigated, jurisprudentially and otherwise, to reach the intended doctrinal goal.

Finally, the Article highlights three core benefits of adopting this reading of the Eighth Amendment: elimination of mandatory sentences, restoration of judicial sentencing, and allowing offenders to have the day in court that their dignity demands.