

CRUEL STATE PUNISHMENTS*

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The Supreme Court has almost systematically expanded Eighth Amendment protections over the past decade and a half, adopting categorical limitations to the death penalty and juvenile life without parole. With Justice Kennedy's recent retirement, this expansion seems like it might be ending. As this door is closing, however, another door may be opening for restricting excessive punishments—state constitutional analogues to the Eighth Amendment. A close examination of such provisions reveals that some of the provisions use “or” instead of “and,” a linguistic difference that suggests many state constitutions might be broader than the Eighth Amendment.

This Article explores the consequences of linguistic differences between the Eighth Amendment and its state constitutional analogues, focusing in particular on the effect of disjunctive state constitutional provisions. Specifically, the Article argues that these linguistic differences open the door to broader application of state Eighth Amendment analogues to rein in excessive punishment practices of state governments.

In Part I, the Article begins by providing an overview of Eighth Amendment doctrine and the importance of the conjunction in its application to criminal sentences. Part II surveys state constitutions and examines the language of the provision analogous to the Eighth Amendment, grouping these provisions into three broad categories. In Part III, the Article advances its core claim: state constitutional prohibitions against “cruel” punishments should limit the ability of states to impose disproportionate punishments. Part IV concludes the Article by exploring the many practical consequences of limiting the imposition of cruel punishments.

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INTRODUCTION

For much of the twentieth century, the Eighth Amendment to the U.S. Constitution was a dead letter.¹ The U.S. Supreme Court did not place any serious limitations on the use of punishments, with the exception of a particular application of *cadena temporal* in the Philippines² and the revocation of citizenship as a punishment for desertion.³

In 1972, however, the Court held that the death penalty, as applied, constituted a cruel and unusual punishment in violation of the Eighth Amendment.⁴ This result was short-lived, with the Court approving new capital statutes in several states in 1976.⁵ Over time, the Court interpreted the Eighth Amendment to bar certain uses of the death penalty under its evolving standards of decency doctrine.⁶ Such barred uses include proscriptions against implementing mandatory death sentences,⁷ executing juvenile offenders⁸ and

1. See U.S. CONST. amend. VIII (prohibiting the imposition of cruel and unusual punishments).

2. *Weems v. United States*, 217 U.S. 349, 357–58, 382 (1910).

3. *Trop v. Dulles*, 356 U.S. 86, 87, 103 (1958).

4. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); see discussion *infra* Section III.B.2.

5. See *Gregg v. Georgia*, 428 U.S. 153, 162–63, 168–69, 186–87 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247–53 (1976); *Jurek v. Texas*, 428 U.S. 262, 267–68, 276 (1976).

6. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–64, 578–79 (2005); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002); *Trop*, 356 U.S. at 100–01, 104; see also discussion *infra* Section I.B.

7. *Lockett v. Ohio*, 438 U.S. 586, 603–04 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

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

intellectually disabled offenders,⁹ imposing death sentences in non-homicide cases of child rape¹⁰ and rape,¹¹ and permitting the death penalty in some felony murder cases.¹² More recently, the Court has restricted the imposition of mandatory juvenile life without parole sentences¹³ and juvenile life without parole sentences (“JLWOP”) in non-homicide cases under the Eighth Amendment.¹⁴

While these carve-outs have limited certain punishments in specific contexts, the practice of the Court has not been to examine punishments on a case-by-case basis under the Eighth Amendment, particularly through as-applied challenges to individual punishments.¹⁵ Instead, the Court has largely rejected almost all Eighth Amendment challenges to criminal sentences outside of the capital and JLWOP exceptions just described.¹⁶

The Court has essentially drawn a bright line between capital and non-capital sentences (excepting JLWOP), with capital sentences receiving some scrutiny under the evolving standards of decency doctrine and non-capital sentences receiving virtually none. The standard the Court has used in non-capital, non-JLWOP cases—gross disproportionality¹⁷—creates such a high bar that almost no case has met it, despite a number of cases which have imposed extreme punishments for rather minor offenses.¹⁸ Under the Court’s

9. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017); *Hall v. Florida*, 572 U.S. 701, 723–24 (2014); *Atkins*, 536 U.S. at 321.

10. *Kennedy v. Louisiana*, 554 U.S. 407, 445–46 (2008).

11. *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

12. *See Enmund v. Florida*, 458 U.S. 782, 798, 801 (1982). *But see Tison v. Arizona*, 481 U.S. 137, 152–158 (1987) (narrowing the Court’s holding in *Enmund*). For arguments in favor of expanding this doctrine, see Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1141–44 (2017). *See also* William W. Berry III, *Rethinking Capital Felony Murder*, JOTWELL (Feb. 12, 2018), <https://crim.jotwell.com/rethinking-capital-felony-murder/> [<https://perma.cc/Q4G3-53L7>] (reviewing Binder et al., *supra*).

13. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736–37 (2016) (finding that *Miller v. Alabama*, 567 U.S. 460 (2012), established a new constitutional rule limiting JLWOP); *Miller*, 567 U.S. at 489.

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

15. *See* discussion *infra* Part I.

16. *See* discussion *infra* Part I.

17. In the Court’s usage, “gross disproportionality” means that the sentence imposed is grossly excessive in light of the criminal actions of the defendant and the applicable purposes of punishments, including utilitarian purposes. *Solem v. Helm*, 463 U.S. 277, 289–93 (1983); *see also* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005) (developing a robust conception of “political” proportionality and explaining that proportionality can be broader than the retributive concept of “just deserts”). *But see* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 961 (2011) (arguing that Eighth Amendment conceptions of proportionality should be based only on just deserts retribution).

18. Indeed, the Court has seldom held that a non-capital, non-JLWOP 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 that two consecutive sentences of twenty-five years to life for stealing approximately \$150 of videotapes was reasonable where

narrow application, the Eighth Amendment has thus placed almost no limitations on non-capital, non-JLWOP sentences, and its limits on capital and JLWOP sentences have been only categorical.

Future expansion of the Eighth Amendment also seems unlikely. While the Court adopted five categorical limitations between 2002 and 2012, those cases were largely 5-4 decisions.¹⁹ The fifth vote—Justice Anthony Kennedy—retired at the end of 2018. His replacement is more ideologically conservative and unlikely to continue Kennedy’s voting pattern in similar cases.²⁰

Even so, the imposition of constitutional limits on excessive criminal sentences is still possible. As the Supreme Court of Washington demonstrated in late 2018, state constitutions also place restrictions on criminal sentences.²¹ The Washington Supreme Court held that the death penalty and JLWOP violated its state constitution.²²

Indeed, almost all states have an analogue to the Eighth Amendment.²³ In most states, the application of such provisions has not exceeded the scope

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 \$1200 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*, 463 U.S. at 279–84 (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).

19. *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Graham*, 560 U.S. at 82; *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008); *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

20. Clare Foran & Joan Biskupic, *Where Brett Kavanaugh Stands on Key Issues*, CNN (Oct. 6, 2018) <https://www.cnn.com/2018/07/09/politics/kavanaugh-on-the-issues/index.html> [<https://perma.cc/R8TH-XAVY>].

21. *State v. Bassett*, 428 P.3d 343, 345–46 (Wash. 2018) (abolishing juvenile life without parole under the state constitution); *State v. Gregory*, 427 P.3d 621, 626–27 (Wash. 2018) (abolishing the death penalty under the state constitution).

22. *Bassett*, 428 P.3d at 345–46; *Gregory*, 427 P.3d at 626–27.

23. *See* ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. 1, § 8; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § I, para. XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; ILL. CONST., art. I, § 11; IND. CONST. art. 1, § 16; IOWA CONST. art. 1, § 17; KAN. CONST. BILL OF RIGHTS § 9; KY. CONST. § 17; LA. CONST. art. I, § 20; ME CONST. art. I, § 9; MD. DECLARATION OF RIGHTS art. 16; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. 1, § 6; N.H. CONST. pt. I, art. 33; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST.

of the Eighth Amendment, meaning that the state constitutional provisions have not added any further restrictions beyond that of the federal provision.²⁴

However, a careful examination of state analogues to the Eighth Amendment reveals that many state provisions use different language than the U.S. Constitution.²⁵ As such, while the limits of federal and state constitutions may overlap, alternative language in state constitutions suggests that some state provisions, as in Washington, may place greater restrictions on state punishment practices than the U.S. Constitution.²⁶

For instance, some state constitutions prohibit “cruel *or* unusual” punishments, as opposed to “cruel *and* unusual” punishments.²⁷ As explored below, this means that punishments that are cruel would violate the state constitution, irrespective of whether they were also unusual.²⁸

This Article explores the consequences of linguistic differences between the Eighth Amendment and its state constitutional analogues, focusing in particular on the effect of disjunctive state constitutional provisions. Specifically, the Article argues that these linguistic differences open the door to broader application of state Eighth Amendment analogues to rein in excessive punishment practices of state governments.

In Part I, the Article begins by providing an overview of Eighth Amendment doctrine and the importance of the conjunction in its application to criminal sentences. Part II surveys the state constitutions and examines the language of the state constitution provisions that are analogous to the Eighth Amendment, grouping these provisions into three broad categories. In Part III, the Article advances its core claim: state constitutional prohibitions against “cruel” punishments should limit the ability of states to impose disproportionate punishments. Part IV concludes the Article by exploring the practical consequences of limiting the imposition of cruel punishments.

I. EIGHTH AMENDMENT CONJUNCTIVES

The Supreme Court has never developed an explicit doctrinal rule concerning the meaning of the conjunction “and” in the Eighth Amendment.

art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. 1, § 14.

24. See discussion *infra* Part II.

25. See discussion *infra* Part II.

26. See discussion *infra* Part II.

27. See ALA. CONST. art. I, § 15; ARK. CONST. art. 2, § 9; CAL. CONST. art. I, § 17; KAN. CONST. BILL OF RIGHTS, § 9; MISS. CONST. art. 3, § 28; NEV. CONST. art. 1, § 6; N.H. CONST. pt. I, art. 33; N.C. CONST. art. I, § 27; OKLA. CONST. art. II, § 9; TEX. CONST. art. I, § 13; WYO. CONST. art. 1, § 14.

28. See discussion *infra* Part III.

The Court's implicit assumption, though, has been that punishments must be both "cruel" and "unusual" to be unconstitutional under the Eighth Amendment.²⁹ To be sure, reading the Eighth Amendment to proscribe criminal sentences has occurred only when the punishments in question were cruel *and* unusual under the Court's evolving standards of decency doctrine.³⁰ Before exploring this application, however, it is instructive to analyze the different possible meanings of this central conjunction to see the interpretive options available to the Court.

A. Interpreting "AND"

The Eighth Amendment to the U.S. Constitution proscribes "cruel and unusual" punishments.³¹ There are multiple possible ways to read the "and" in this phrase. First, "and" can be conjunctive, meaning "and" or "both." This reading would proscribe punishments that are *both* cruel and unusual. Scholars have most commonly read the Eighth Amendment in this way.³²

A second reading of the conjunction "and" is disjunctive, meaning "or." This reading would proscribe both punishments that are cruel (irrespective of usualness) and punishments that are unusual (irrespective of cruelty).

29. See, e.g., *Glossip v. Gross*, 136 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting) ("The Eighth Amendment forbids punishments that are cruel and *unusual*."); *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) ("To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment*."); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) ("According to its terms, then, by forbidding 'cruel and *unusual* punishments,' the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.") (citations omitted); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such . . .").

30. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 419–20, 422–23 (2008); *Roper v. Simmons*, 543 U.S. 551, 560, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311–13 (2002); *Tison v. Arizona*, 481 U.S. 137, 147–48 (1987); *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982); *Coker v. Georgia*, 433 U.S. 584, 592–93 (1977).

31. U.S. CONST. amend. VIII.

32. See, e.g., Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 120 (1997); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1779 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1200 (2006); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997); David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 PUB. AFFS. Q. 77 (2002); Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual"*, 74 U. CIN. L. REV. 819, 831–32 (2006); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 572 (2010).

Although a plausible reading, the general consensus is that such a reading may be in tension with the more natural conjunctive reading of the text.³³

A third reading of “cruel and unusual” could be as a singular, unitary concept that interlocks the two words. Under this approach, “cruel and unusual” comprises a single, inseparable idea.³⁴ In other words, there is something in the nature of cruel punishments that is unusual and something in the nature of unusual punishments that is cruel.³⁵

A fourth reading of “cruel and usual” could be as a tautology. This would mean that cruel and unusual are essentially synonyms, or two ways of saying the same thing.³⁶ Thus, cruel punishments are unusual punishments, and unusual punishments are cruel punishments.³⁷

Finally, one can read “cruel and unusual” as a hendiadys, meaning that the second term essentially modifies the first.³⁸ Under this interpretive approach, cruel and unusual means unusually cruel.³⁹

B. *The Evolving Standards of Decency*

The U.S. Supreme Court has not explicitly addressed the meaning of the conjunction in the Eighth Amendment—the meaning of the “and” that links cruel and unusual in its evolving standards of decency cases. It is certainly possible to read these cases as not bothering to disentangle the two concepts of cruel and unusual.⁴⁰ The Court’s cases that apply the Eighth Amendment do make clear, however, that elements of *both* cruelty *and* unusualness are part of its basic test, at least in the capital context.⁴¹

33. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (“Although the Eighth Amendment literally reads as prohibiting only those punishments that are both ‘cruel’ and ‘unusual,’”); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 883 n.3 (2009) (“The conjunction ‘and’ in ‘cruel and unusual’ notwithstanding”); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 491 (2005) (“The Justices sometimes have said that an unconstitutional punishment must be both cruel and unusual, just as the literal text provides.”).

34. See, e.g., HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 96 (1987); KENT GREENAWALT, *INTERPRETING THE CONSTITUTION* 113, 119 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 n.120 (2003); Stinneford, *supra* note 17, at 968–69.

35. See, e.g., BEDAU, *supra* note 34, at 96; GREENAWALT, *supra* note 34, at 119; Nelson, *supra* note 34, at 545 n.120; Stinneford, *supra* note 17, at 968–69.

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

37. *Id.*

38. Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 712 (2016).

39. *Id.*

40. See, e.g., Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 591–92 (2010).

41. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

In death penalty cases, the Court has applied its evolving standards of decency test to assess whether particular punishments are cruel and unusual.⁴² This test has two components: one that arguably corresponds to the concept of “cruel” and one that arguably corresponds to the concept of “unusual.”⁴³ The first part of the test examines the predominant practice of the states with respect to the punishment at issue.⁴⁴ For instance, in *Roper v. Simmons*,⁴⁵ where the Court considered the constitutionality of juvenile death sentences, the Court counted the number of states that allowed the imposition of such sentences.⁴⁶ By counting the states that still executed juveniles, the Court could ascertain the societal standard of decency and whether the practice in question was widely accepted or largely abandoned.⁴⁷

In addition to counting states, the Court has also looked to jury sentencing outcomes, the direction of change with respect to the practice in the form of pending and recently adopted legislation, and international norms.⁴⁸ This inquiry embodies the concept of “unusual” in the language of the Eighth Amendment. By examining the consensus of practices in the states, the Supreme Court determines whether the punishment in question is consistent with the current standard of decency manifested by the states.⁴⁹ In essence, the first part of the evolving standards of decency test, by engaging in its state-counting inquiry, is asking whether the punishment is unusual.⁵⁰

After the Court examines what the societal consensus is with respect to a particular punishment practice, the Court “brings its own judgment to bear” in the second part of the test.⁵¹ This part of the test uses the purposes of punishment—retribution, deterrence, and incapacitation—to determine whether any of the purposes justifies the imposition of the punishment.⁵² The

42. See, e.g., *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304.

43. *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304.

44. *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304.

45. 543 U.S. 551 (2005).

46. *Id.* at 564–66.

47. *Id.* at 567.

48. *Id.* at 575–78.

49. See, e.g., *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989); *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 828–30 (1988); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 603 (1977).

50. This inquiry has taken different forms, including assessing jury verdicts, the direction of legislative changes, and international consensus. *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; *Enmund*, 458 U.S. at 782.

51. This approach originated in *Coker v. Georgia*, 433 U.S. 584 (1977). “[F]or the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty and the Eighth Amendment.” *Coker*, 433 U.S. at 597.

52. See, e.g., *Kennedy*, 441 U.S. at 407; *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319.

Court here assesses whether the punishment is proportional or excessive with respect to all of the applicable purposes.⁵³

For instance, in *Roper*, the Court assessed whether the purposes of retribution or deterrence could justify the execution of juvenile offenders.⁵⁴ The Court's opinion explained that juvenile offenders were less culpable, meaning retribution did not support a capital sentence, and that juvenile offenders were impulsive in a way that made it unlikely that capital sentences would deter them.⁵⁵

This inquiry, at its core, focuses on whether the punishment at issue is cruel in the sense that it is excessive and otherwise unjustified by some legitimate purpose.⁵⁶ A cruel punishment thus consists of punishment disproportionate to the conduct and character of the defendant in light of the purpose of the punishment in question.⁵⁷

In its cases, the Court has interestingly found every punishment it has considered to have the same outcome with respect to the subjective and objective tests, at least in the death penalty context.⁵⁸ In other words, the Court always supports its view that a particular punishment is unusual by pointing to its cruelty.⁵⁹ Perhaps this substantiates the reading of cruel and unusual as a hendiadys—meaning that the Eighth Amendment is really about prohibiting punishments that are unusually cruel.⁶⁰

It thus seems that cruelty without some unusualness is not enough to violate the Eighth Amendment, at least in light of the Court's cases to date. Applying this principle under state constitutions with the same language seems to point to similar applications, barring other considerations.

53. See *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304.

54. *Roper*, 543 U.S. at 571.

55. *Id.*

56. See, e.g., *Kennedy*, 554 U.S. at 441; *Roper*, 557 U.S. at 551; *Atkins*, 536 U.S. at 319. See generally William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 97–98 (2011) (relating the subjective purposes of punishment analysis to the cruelty inquiry); John F. Stinneford, *The Original Meaning of 'Cruel'*, 105 GEO. L.J. 441, 441–42 (2017) (same).

57. See generally William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61 (2011) (arguing that proportionality can refer to both retributive and utilitarian purposes of punishment); Stinneford, *supra* note 17, at 914–17 (linking proportionality solely to retribution).

58. See, e.g., *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; *Coker*, 433 U.S. at 584.

59. See, e.g., *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; see also Stinneford, *supra* note 17, at 921 (“Rather, in every case where the Court has found a punishment unconstitutionally cruel, it has claimed to find a societal consensus against the punishment.”).

60. Bray, *supra* note 38, at 706.

C. *Gross Disproportionality*

In addition to its evolving standards of decency jurisprudence, the Supreme Court has adopted a different test under the Eighth Amendment in non-capital, non-JLWOP cases.⁶¹ This approach asks the question whether the punishment is grossly disproportionate to the criminal conduct at issue.⁶² With one exception, the Court has uniformly held over the past fifty years that non-capital, non-JLWOP punishments do not violate the Eighth Amendment.⁶³

In *Solem v. Helm*,⁶⁴ the one case in which the Court found an adult non-capital punishment—a life without parole sentence for a seventh non-violent felony—to be disproportionate, the Court advanced a basic test to assess proportionality.⁶⁵ Specifically, the Court explained that the Eighth Amendment required consideration of (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.⁶⁶ Note that the *Solem* test incorporates both cruel considerations—the gravity of the offense—and unusual considerations—the sentences imposed upon other offenders.⁶⁷

The Supreme Court soon after limited the scope of *Solem* in *Harmelin v. Michigan*⁶⁸ in a divided opinion.⁶⁹ Justice Kennedy’s controlling concurrence reemphasized that the Eighth Amendment only bars disproportionate punishments that are “grossly disproportionate,” with reviewing courts granting “substantial deference to legislative determinations.”⁷⁰ *Harmelin* thus reestablished that “the Eighth Amendment does not require strict proportionality.”⁷¹

61. 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). See generally 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).

62. See, e.g., *Ewing v. California*, 538 U.S. 11, 11–12 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 64 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991); *Hutto v. Davis*, 454 U.S. 370, 372–73 (1982); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

63. See *supra* notes 17–18 and accompanying text.

64. 463 U.S. 277 (1983).

65. *Id.* at 290–95.

66. *Id.* at 292.

67. *Id.*

68. 501 U.S. 957 (1991).

69. *Id.* at 958. I have argued elsewhere that *Harmelin* was wrongly decided. See William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 328–30 (2018).

70. *Harmelin*, 501 U.S. at 998–1001.

71. *Id.* at 1001.

The part of Justice Scalia's majority opinion joined by all five Justices in *Harmelin* also found that while Harmelin's sentence of life without parole for a first-time drug offense might be cruel, it was not unusual.⁷² One way, then, of understanding the gross disproportionality test is as requiring a punishment to be *both* cruel and unusual.⁷³ The corollary of this concept is that a punishment might be cruel even if it is not grossly disproportionate under the Eighth Amendment. As explored below, a logical distinction might be that a strictly disproportionate punishment might be cruel, but it must also be unusual to meet the gross disproportionality standard under the Eighth Amendment.

Further, the part of the majority opinion joined by all five Justices also emphasized the distinction between capital and non-capital cases under the Eighth Amendment as developed in prior cases.⁷⁴ If the analysis under the evolving standards of decency doctrine mandates a strict scrutiny level of review of the punishment, its cruelty, and its unusualness, then the analysis under the gross disproportionality test mirrors a rational basis test, where there is a strong presumption that the punishment is constitutional.⁷⁵

The justification for this difference in approach relates to the death penalty. Until 2010, the Court restricted its application of the evolving standards of decency to capital cases.⁷⁶ The rationale for this distinction was that "death is different," meaning that the uniqueness of the death penalty justified heightened scrutiny in capital cases.⁷⁷ Specifically, the death penalty is both the most severe punishment and an irrevocable punishment, which warrants increased attention from the Court.⁷⁸

72. *Id.* at 994–95.

73. *See id.*

74. *Id.* at 995–96.

75. *See, e.g.,* *Ewing v. California*, 538 U.S. 11, 30–31 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 73, 77 (2003); *Harmelin*, 501 U.S. at 999; *Hutto v. Davis*, 454 U.S. 370, 372–73 (1982); *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). *But see* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 414 (2009) ("[The] Supreme Court [is] naturally inclined towards majoritarian decisionmaking *anyway*, rendering the debate over 'evolving standards' largely moot.").

76. *See* *Graham v. Florida*, 560 U.S. 48, 58 (2010) (extending the evolving standard of decency analysis to a non-homicide, non-capital case).

77. Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), is apparently the origin of the Court's "death is different" capital jurisprudence. *See Furman*, 408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117–118 (2004) (discussing the Court's death-is-different jurisprudence and requesting additional procedural safeguards "when humans play at God"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

78. *See, e.g.,* *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (stating that death is qualitatively and profoundly different from other penalties); *Woodson v. North Carolina*, 428 U.S. 280, 287 (1976) (distinguishing the penalty of death as "unique and irreversible").

In 2010, the Court held that juvenile offenders were also different, adding JLWOP sentences to the category of punishments receiving evolving standards of decency review.⁷⁹ Two years later, the Court cemented this new category of differentness in holding that mandatory JLWOP sentences violated the Eighth Amendment.⁸⁰

D. *Differentness as a Type of Unusualness*

Thus, the Supreme Court's Eighth Amendment cases treat capital cases and JLWOP cases as warranting close review and largely ignore non-capital, non-juvenile cases. One reading of the differentness concept might be that "different" cases are in some sense "unusual." Indeed, death cases and JLWOP cases are unique in such a way as to warrant, at least according to the Court, a heightened level of Eighth Amendment scrutiny.

By contrast, non-capital, non-JLWOP cases are not different, not unusual, and as a result, receive a presumption of constitutionality. As Justice Scalia indicated in *Harmelin*, not all cruel punishments are unusual.⁸¹ Because such punishments are generally common, they do not violate the Eighth Amendment even if they are excessive, at least under the Court's current jurisprudence.

Thus, one can read the absence of constitutional limitations in such cases as related, at least in part, to the conjunctive nature of the constitutional proscription. In other words, it is possible to determine that the reason that the Supreme Court does not accord non-capital, non-JLWOP cases any meaningful Eighth Amendment scrutiny is that it has implicitly concluded that the punishments in such cases are not unusual.

II. CONJUNCTIVE AND DISJUNCTIVE STATE CONSTITUTIONS

Most state constitutions contain analogues to the Eighth Amendment of the U.S. Constitution. These analogues often use different language than the Eighth Amendment, at least with respect to the conjunctions that connect the substantive linguistic provisions. The state constitutions that proscribe cruel punishments or unusual punishments generally fall into three categories: (1) provisions that prohibit cruel "and" unusual punishments, (2) provisions that prohibit cruel "or" unusual punishments, and (3) provisions that adopt an alternative approach.

79. *Graham*, 560 U.S. 48, 82.

80. *Miller v. Alabama*, 567 U.S. 460, 460 (2012); William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1053 (2013); see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 724 (2016) (holding that the *Miller* prohibition on mandatory JLWOP applies retroactively); William W. Berry III, *Eighth Amendment Presumptions*, 89 S. CAL. L. REV. 67, 76–77 (2015).

81. *Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991).

Where the language is identical to the U.S. Constitution, state supreme courts can reasonably align the interpretation of the state constitutional provision with the application of the federal constitutional provision. In such cases, the state constitution typically does not add any additional proscriptions to the limits imposed by the Eighth Amendment.⁸²

Even though similar in some respects, the state constitutional restrictions contain different language that one can reasonably read to depart from the U.S. Constitution. At the very least, state supreme court justices may interpret the state constitutional provisions to be broader than the Eighth Amendment in light of the linguistic differences between the two provisions.⁸³

A survey of the state constitutional analogues to the Eighth Amendment demonstrates that these differences, while perhaps subtle, arguably give rise to meaningful differences in application. Some states recognize these differences, while others choose to disregard them.

In capital cases, states have typically followed the Eighth Amendment with respect to its categorical limitations and have not created additional categories of proscription. State courts have also not recognized “as applied” challenges to the death penalty either. The exceptions to this, of course, are the few cases where states have declared the death penalty unconstitutional under the state constitution.

As a result, the analysis below focuses on the use of state constitutional provisions to review the imposition of non-capital punishments, putting aside the recent categorical restrictions on certain JLWOP sentences.

A. *Cruel “AND” Unusual*

Where the state constitutional provision uses identical language to the Eighth Amendment, a fair reading of the meaning of the state constitution can be that it simply encompasses the same meaning as the U.S. Constitution, at least with respect to the language at issue. Twenty-three states⁸⁴ currently have analogues to the Eighth Amendment that use the “cruel and unusual” language.

While the states with these provisions have generally followed the Supreme Court’s approach under the Eighth Amendment in interpreting their state constitutions, there are four with notable exceptions, three of which have additional language in the state constitution.

82. See discussion *infra* Section II.A.

83. See discussion *infra* Sections II.B–II.C.

84. Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. See discussion *infra* Part II.

1. Adopting the Eighth Amendment Approach

These jurisdictions generally follow the Supreme Court's application of the Eighth Amendment to non-capital cases, albeit with a few nuances and exceptions. These state courts have generally concluded that their Eighth Amendment analogues do not change the analysis.

a. Identical Language (Arizona, Colorado, Georgia, Idaho, New Mexico, New York, Ohio, Tennessee, Utah, Virginia, and Wisconsin)

Arizona's constitutional analogue uses identical language to the Eighth Amendment.⁸⁵ Arizona courts, not surprisingly, assess the constitutionality of criminal sentences under the Arizona Constitution using the Supreme Court's Eighth Amendment analysis.⁸⁶ As such, the state prohibition against cruel and unusual punishment does not provide greater protection than its federal counterpart.⁸⁷ Given the narrow scope of the Eighth Amendment's gross disproportionality principle as applied to non-capital, non-JLWOP cases, Arizona courts have generally rejected such challenges.⁸⁸

Colorado's state constitution also uses identical language to the Eighth Amendment.⁸⁹ Its application tracks the Eighth Amendment's gross disproportionality test⁹⁰ and requires that a sentence "shock the conscience" of the court to be unconstitutional.⁹¹ In addition, similar to *Harmelin*, Colorado courts have emphasized that the individual characteristics of a particular

85. ARIZ. CONST. art. II, § 15.

86. See *State v. Berger*, 134 P.3d 378, 380–81 (Ariz. 2006) (en banc) (declining to consider the state provision separately from the federal one).

87. See, e.g., *State v. Davis*, 79 P.3d 64, 66 (Ariz. 2003); *State v. Long*, 83 P.3d 618, 619 (Ariz. Ct. App. 2004); *State v. Berger*, 103 P.3d 298, 298 (Ariz. Ct. App. 2004), *vacated in part en banc*, 134 P.3d 378 (Ariz. 2006).

88. See, e.g., *Berger*, 134 P.3d at 378; *State v. Myers*, 570 P.2d 1252, 12555 (Ariz. 1977); *Wigglesworth v. Mauldin*, 990 P.2d 26, 26 (Ariz. Ct. App. 1999) (en banc); *State v. Lujan*, 911 P.2d 562, 562 (Ariz. Ct. App. 1995); *State v. DePiano*, 926 P.2d 508, 517 (Ariz. Ct. App. 1995), *aff'd in part and vacated in part*, 926 P.2d 494 (Ariz. 2003); *State v. Hamilton*, 868 P.2d 986, 986 (Ariz. Ct. App. 1993); *State v. Zimmer*, 874 P.2d 964, 965 (Ariz. Ct. App. 1993); *State v. Olsen*, 760 P.2d 603, 603 (Ariz. Ct. App. 1988). *But see* *State v. Davis*, 79 P.3d 64, 64 (Ariz. 2003) (en banc) (finding that the mandatory minimum sentencing of a twenty-year-old to fifty-two years without the possibility of parole is so grossly disproportionate to the crime of "having voluntary sex with two post-pubescent teenage girls" as to violate the Eighth Amendment).

89. COLO. CONST. art. II, § 20 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

90. *Close v. People*, 48 P.3d 528, 532–533 (Colo. 2002) (en banc), *abrogated by* 48 P.3d 528 (Colo. 2019); *People v. Mershon*, 874 P.2d 1025, 1025 (Colo. 1994) (en banc), *abrogated by* 451 P.3d 415 (Colo. 2019); *People v. Coolidge*, 953 P.2d 949, 951–52 (Colo. App. 1997).

91. *People v. Fulmer*, 524 P.2d 606, 607 (Colo. 1974); *People v. O'Donnell*, 518 P.2d 945, 948 (en banc) (Colo. 1974); *Trujillo v. People*, 496 P.2d 1026, 1028 (Colo. 1972) (en banc); *People v. Nieto*, 715 P.2d 1262, 1264–65 (Colo. App. 1985); *People v. McKnight*, 588 P.2d 886, 888 (Colo. App. 1978), *cert. dismissed en banc*, 607 P.2d 1007 (Colo. 1980).

defendant are irrelevant to the cruel and unusual punishment inquiry.⁹² As with the U.S. Constitution, Colorado punishments typically do not rise to the level of gross disproportionality.⁹³

Georgia uses language identical to the Eighth Amendment, along with an additional prohibition against abuse.⁹⁴ Georgia's application of the state constitution largely tracks the Eighth Amendment, and defines cruel and unusual punishments as those (1) unsupported by the purposes of punishment or (2) grossly disproportionate.⁹⁵ Like other states, the Georgia cases emphasize that the only sentences that will violate the state constitution are ones that shock the conscience, as the courts should defer to the legislature in almost every situation.⁹⁶

Idaho's state constitution also uses language identical to the Eighth Amendment.⁹⁷ Idaho's courts have consistently tracked Supreme Court precedent in applying the cruel and unusual punishment clause and using the gross disproportionality test.⁹⁸ Idaho courts even explicitly overruled an Idaho precedent⁹⁹ that followed the Supreme Court's decision in *Solem v. Helm*¹⁰⁰ to reflect the U.S. Supreme Court's later decision that essentially overruled

92. *Coolidge*, 953 P.2d at 949.

93. *See, e.g.*, *People v. Deroulet*, 48 P.3d 520, 527 (Colo. 2002) (en banc), *abrogated by* 454 P.3d 191 (Colo. 2019); *Mershon*, 874 P.2d at 1025; *Fulmer*, 524 P.2d at 606; *Wolford v. People*, 496 P.2d 1011, 1013 (Colo. 1972) (en banc); *Normand v. People*, 440 P.2d 282, 284 (Colo. 1968); *Walker v. People*, 248 P.2d 287, 302–03 (Colo. 1952) (en banc); *Coolidge*, 953 P.2d at 949; *People v. Moya*, 899 P.2d 212, 219–20 (Colo. App. 1994); *People v. Cabral*, 878 P.2d 1,3 (Colo. App. 1993); *People v. Valenzuela*, 825 P.2d 1015, 1017–18 (Colo. App. 1991), *aff'd en banc*, 856 P.2d 805 (Colo. 1993); *Nieto*, 715 P.2d at 1262.

94. GA. CONST. art. I, § I, para. XVII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.”).

95. *Johnson v. State*, 573 S.E.2d 362, 366 (Ga. 2002); *Christian v. State*, 819 S.E.2d 682, 686 (Ga. Ct. App. 2018).

96. *Johnson*, 573 S.E.2d at 366; *Lambeth v. State*, 354 S.E.2d 144, 145 (Ga. 1987); *Christian*, 819 S.E.2d at 686.

97. IDAHO CONST. art. I, § 6 (“Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.”).

98. *See, e.g.*, *State v. Grazian*, 164 P.3d 790, 797 (Idaho 2007), *abrogated on other grounds by* 265 P.3d 502, (Colo. 2011) (“When reviewing a claim of cruel and unusual punishment the Court uses a proportionality analysis limited to cases which are out of proportion to the gravity of the offense committed. The Court compares the crime committed and the sentence imposed to determine whether the sentence is grossly disproportionate. This gross disproportionality test is equivalent to the standard under the Idaho Constitution which focuses on whether the punishment is so out of proportion to the gravity of the offense to shock the conscience of reasonable people. An ‘intra- and inter-jurisdictional analysis’ is ‘appropriate only in the rare case’ where the sentence is grossly disproportionate to the crime committed.” quoting *State v. Matteson*, 851 P.2d 336, 340 (Idaho 1993)).

99. *State v. Brown*, 825 P.2d 482, 490–91 (Idaho 1992) (overruling reliance on *Solem* in *State v. Broadhead*, 814 P.2d 401, 408 (Idaho 1991)).

100. 463 U.S. 277 (1983).

Solem in Harmelin v. Michigan.¹⁰¹ As such, defendants typically lose cruel and unusual state constitutional law challenges in Idaho.¹⁰²

The “cruel and unusual” punishment provision in the New Mexico state constitution is identical to the Eighth Amendment.¹⁰³ New Mexico has adopted an interstitial approach to interpreting its state constitution in light of parallel federal provisions,¹⁰⁴ but in practice has not found any reason to interpret its cruel and unusual punishment clause differently from the Eighth Amendment.¹⁰⁵

The New York Constitution contains language proscribing cruel and unusual punishments identical to the Eighth Amendment.¹⁰⁶ New York courts have applied the Eighth Amendment’s gross disproportionality test and almost never find a punishment to be disproportionate.¹⁰⁷

With respect to cruel and unusual punishments, the Ohio Constitution uses identical language to the Eighth Amendment.¹⁰⁸ The Ohio courts use a test of gross disproportionality when applying the state constitution to sentences,¹⁰⁹ making most sentences constitutional.¹¹⁰

101. 501 U.S. 957, 965 (1991).

102. *See, e.g.*, *State v. Adamcik*, 272 P.3d 417, 459 (Idaho 2012); *State v. Draper*, 261 P.3d 853, 879 (Idaho 2011); *Grazian*, 164 P.3d at 797; *State v. Matteson*, 851 P.2d 336, 341 (Idaho 1993); *State v. Prince*, 556 P.2d 369, 370 (Idaho 1976); *Williams v. State*, 283 P.3d 127, 141 (Idaho Ct. App. 2012); *State v. Thomas*, 991 P.2d 870, 878 (Idaho Ct. App. 1999); *State v. Rogerson*, 966 P.2d 53, 59 (Idaho Ct. App. 1998); *State v. Toney*, 949 P.2d 1065, 1068 (Idaho Ct. App. 1997); *State v. Schneider*, 888 P.2d 798, 804 (Idaho Ct. App. 1995); *State v. Moore*, 906 P.2d 150, 154 (Idaho Ct. App. 1995); *State v. Clay*, 859 P.2d 365, 368 (Idaho Ct. App. 1993); *State v. Hayes*, 824 P.2d 163, 169 (Idaho Ct. App. 1992); *State v. Romero*, 753 P.2d 828, 830 (Idaho Ct. App. 1988).

103. N.M. CONST. art. II, § 13 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”).

104. *See State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (explaining that a state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics); *see also Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982) (explaining the interstitial approach).

105. *See, e.g.*, *State v. Castillo*, 252 P.3d 760, 769 (N.M. Ct. App. 2011); *State v. Rueda*, 975 P.2d 351, 353–54 (N.M. Ct. App. 1998); *State v. Arrington*, 897 P.2d 241, 242 (N.M. Ct. App. 1995).

106. N.Y. CONST. art. I, § 5 (“Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”).

107. *See, e.g.*, *People v. Broadie*, 332 N.E.2d 338, 346–47 (N.Y. 1975); *People v. Goodwin*, 870 N.Y.S.2d 224, 224 (City Ct. of Poughkeepsie 2008).

108. OHIO CONST. art. I, § 9 (“Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.”).

109. *See McDougle v. Maxwell*, 203 N.E.2d 334, 336–37 (Ohio 1964); *see also State v. Smithhisler*, 2017-Ohio-5725, at ¶ 29, 93 N.E.3d 1274, 1280 (Ohio Ct. App. 2017); *State v. Thomas*, 2002-Ohio-7333U, at ¶ 32, *on reconsideration*, 2009-Ohio-971, at ¶¶ 30–31, *vacated*, 2010-Ohio-577, at ¶¶ 30–31, 124 Ohio St. 3d 412, 922 N.E.2d 964.

110. *See, e.g.*, *Coleman v. DeWitt*, 282 F.3d 915, 915 (6th Cir. 2002); *State v. Nitsche*, 2016-Ohio-3170, at ¶ 63, 66 N.E.3d 135, 153; *State v. Dukes*, 2015-Ohio-4714, at ¶¶ 32–35, 49 N.E.3d 840, 847; *State v. Mayberry*, 2014-Ohio-4706, at ¶ 38, 22 N.E.3d 222, 232–33; *State v. Manhart*,

The Tennessee Constitution contains identical language to the Eighth Amendment in its analogue.¹¹¹ Although Tennessee courts have noted that the textual parallels between the federal and state constitution's proscriptions against cruel and unusual punishments do not foreclose a broader reading of the state constitution,¹¹² Tennessee courts have, in practice,¹¹³ generally followed the Eighth Amendment's gross disproportionality test in non-capital cases and upheld most sentences.¹¹⁴

Utah's state constitutional Eighth Amendment analogue is almost identical—proscribing cruel and unusual punishments¹¹⁵ but also adding a unique provision that prohibits treating persons arrested or imprisoned “with unnecessary rigor.”¹¹⁶ In applying these provisions, Utah courts generally track the Eighth Amendment and use the gross disproportionality test, finding most punishments to be constitutional.¹¹⁷

The Virginia Constitution uses identical language to the Eighth Amendment.¹¹⁸ As such, Virginia courts use the same test as the Eighth Amendment.¹¹⁹

Wisconsin's state constitution uses identical language to the Eighth Amendment.¹²⁰ Wisconsin follows the Eighth Amendment—as the scope of

734 N.E.2d 860, 863 (Ohio Ct. App. 1999); *State v. Garland*, 688 N.E.2d 557, 561 (Ohio Ct. App. 1996).

111. TENN. CONST. art. I, § 16 (“That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

112. *State v. Black*, 815 S.W.2d 166, 188 (Tenn. 1991).

113. *State v. Harris*, 844 S.W.2d 601, 603 (Tenn. 1992); *Cozzolino v. State*, 584 S.W.2d 765, 767 (Tenn. 1979).

114. *See, e.g., Harris*, 844 S.W.2d at 603; *State v. Smith*, 48 S.W.3d 159, 173 (Tenn. Crim. App. 2000); *State v. McKee*, 803 S.W.2d 705, 706 (Tenn. Crim. App. 1990); *State v. Dobbins*, 754 S.W.2d 637, 644 (Tenn. Crim. App. 1988).

115. UTAH CONST. art. I, § 9 (“Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.”).

116. *Id.* The Utah courts have, to date, only applied this to conditions of incarceration. *See, e.g., State v. Houston*, 2015 UT 40, ¶¶ 50–51, 353 P.3d 55, 72.

117. *See, e.g., Houston*, 2015 UT at ¶¶ 50–51, 353 P.3d at 72; *State v. Lafferty*, 2001 UT 19, ¶¶ 74–77, 20 P.3d 342, 365–66; *State v. Herrera*, 1999 UT 64, ¶ 49, 993 P.2d 854, 867; *State v. Andrews*, 843 P.2d 1027, 1031 (Utah 1992); *State v. Bishop*, 717 P.2d 261, 272 (Utah 1986); *State v. Amicone*, 689 P.2d 1341, 1343–44 (Utah 1984); *State v. Moreno*, 2005 UT App 200, ¶ 18, 113 P.3d 992, 997; *State v. Wanlass*, 953 P.2d 1147, 1149 (Utah Ct. App. 1998).

118. VA. CONST. art. I, § 9 (“[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . .”).

119. *See, e.g., Dunaway v. Commonwealth*, 663 S.E.2d 117, 133 (Va. Ct. App. 2008); *Dep’t of Prof’l & Occupational Regulation, Bd. for Asbestos & Lead v. Abateco Servs., Inc.*, 534 S.E.2d 352, 357 (Va. Ct. App. 2000).

120. WIS. CONST. art. I, § 6 (“Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted.”).

the state constitution is identical to that of the Eighth Amendment.¹²¹ As such, Wisconsin courts reject most claims under the gross disproportionality test.¹²²

b. Identical Language Plus a Proportionality Requirement (Indiana, Maine, and New Hampshire)

Indiana's state constitutional analogue to the Eighth Amendment is conjunctive, but it also adds a separate provision explicitly requiring punishments to be proportional to the nature of the offense.¹²³ Nonetheless, Indiana courts have held that the protections under the state constitution and the Eighth Amendment are the same.¹²⁴ Unsurprisingly, Indiana courts apply the state constitution narrowly, typically upholding challenged punishments.¹²⁵

The Maine Constitution uses similar conjunctive language to that of the Eighth Amendment but also includes a proportionality requirement.¹²⁶ The Maine Supreme Court explained that "under the Maine Constitution, whether a punishment is unconstitutionally disproportionate to the offense committed or is otherwise cruel or unusual are closely related, but not identical, questions."¹²⁷ The Maine Supreme Court has established a two-part test to correspond to the two separate provisions: the court first looks to whether the penalty is greatly disproportionate, and then if not, it looks to

121. See, e.g., *State v. Pratt*, 153 N.W.2d 18, 22–23 (Wis. 1967).

122. See, e.g., *State v. Ninham*, 2011 WI 33, ¶¶ 97–98, 797 N.W.2d 451, 478; *State v. Paske*, 471 N.W.2d 55, 63 (Wis. 1991); *Steen v. State*, 271 N.W.2d 396, 401 (Wis. 1978); *Pratt*, 153 N.W.2d at 23; *State v. Lindsey*, 554 N.W.2d 215, 221 (Wis. Ct. App. 1996); *State v. Teynor*, 414 N.W.2d 76, 88 (Wis. Ct. App. 1987).

123. IND. CONST. art. 1, § 16 ("Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

124. See, e.g., *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012).

125. See, e.g., *Conley*, 972 N.E.2d at 880; *Dunlop v. State*, 724 N.E.2d 592, 597 (Ind. 2000); *Eubank v. State*, 456 N.E.2d 1012, 1018 (Ind. 1983); *Kelly v. State*, 452 N.E.2d 907, 912 (Ind. 1983); *Johnson v. State*, 432 N.E.2d 1358, 1362 (Ind. 1982); *Marts v. State*, 432 N.E.2d 18, 22 (Ind. 1982); *Stuck v. State*, 421 N.E.2d 622, 625 (Ind. 1981); *Fryback v. State*, 400 N.E.2d 1128, 1133 (Ind. 1980); *Jennings v. State*, 389 N.E.2d 281, 283 (Ind. 1979); *Phelps v. State*, 969 N.E.2d 1009, 1021 (Ind. Ct. App. 2012); *Newkirk v. State*, 898 N.E.2d 473, 480 (Ind. Ct. App. 2008). *But see* *Fointno v. State*, 487 N.E.2d 140, 149 (Ind. 1986) (finding a sentence of imprisonment of 104 years for defendant convicted of rape, criminal deviate conduct, confinement, robbery, and intimidation was manifestly unreasonable).

126. ME. CONST. art. I, § 9 ("Sanguinary laws shall not be passed: all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.").

127. *State v. Lopez*, 2018 ME 59, ¶¶ 14–15, 184 A.3d 880, 885; see also *State v. Ward*, 2011 ME 74, ¶¶ 16–17, 21 A.3d 1033, 1038.

whether it offends the prevailing notions of decency.¹²⁸ If a sentence fails either test, it is unconstitutional.¹²⁹

When applying the greatly disproportionate part of the test, the court largely tracks the analysis under the Eighth Amendment. First, the court assesses the disproportionality, and then compares the present case with other similar cases in Maine before doing so with cases in other jurisdictions.¹³⁰ The prevailing notions of decency test simply looks to see whether one or more purposes of punishment justify the sentence.¹³¹ The consequence of adopting the two-part test has been that most sentences satisfy both tests and are upheld.¹³²

New Hampshire uses identical language to the U.S. Constitution in its Eighth Amendment state constitution analogue.¹³³ Their state constitution also contains a separate provision that explicitly requires proportionality in criminal sentencing in light of the purposes of punishment.¹³⁴ According to its courts, New Hampshire “provides at least as much” protection under the state constitution as the Eighth Amendment does.¹³⁵ Nonetheless, New Hampshire courts use a gross disproportionality test similar to that applied by the U.S. Supreme Court, meaning that most punishments are found constitutional.¹³⁶

128. *Lopez*, 2018 ME at ¶¶ 14–15, 184 A.3d at 885; *Ward*, 2011 ME at ¶¶ 17–18, 21 A.3d at 1038.

129. *Lopez*, 2018 ME at ¶¶ 14–15, 184 A.3d at 885; *Ward*, 2011 ME at ¶ 18, 21 A.3d at 1038 n.4; *State v. Frye*, 390 A.2d 520, 521 (Me. 1978).

130. *Lopez*, 2018 ME at ¶¶ 15–17, 184 A.3d at 886; *State v. Stanislaw*, 2013 ME 43, ¶¶ 28–29, 65 A.3d 1242, 1251.

131. *Lopez*, 2018 ME at ¶ 17, 184 A.3d at 887; *Stanislaw*, 2013 ME at ¶ 50, 65 A.3d at 1257.

132. *See, e.g., Lopez*, 2018 ME at ¶ 21, 184 A.3d at 887; *State v. Hoover*, 2017 ME 158, ¶ 40, 169 A.3d 904, 913; *State v. Bennett*, 2015 ME 46, ¶ 15, 114 A.3d 994, 1000; *Ward*, 2011 ME at ¶ 20, 21 A.3d at 1038; *State v. Worthley*, 2003 ME 14, ¶ 7, 815 A.2d 375, 377. *But see Stanislaw*, 2013 ME at ¶ 50, 65 A.3d at 1257 (finding “a sentence that included twenty-seven unsuspended years of incarceration” disproportionate).

133. N.H. CONST. pt. I, art. 33 (“No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

134. N.H. CONST. pt. I, art. 18 (“All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.”).

135. *State v. Dayutis*, 498 A.2d 325, 329 (N.H. 1985).

136. *See, e.g., State v. Carpentino*, 85 A.3d 906, 917 (N.H. 2014); *State v. Bird*, 8 A.3d 146, 154 (N.H. 2010); *Duquette v. Warden, N. H. State Prison*, 919 A.2d 767, 774 (N.H. 2007); *State v. Enderson*, 804 A.2d 448, 454 (N.H. 2002); *State v. Hammond*, 742 A.2d 532, 539 (N.H. 1999); *State v. Elbert*, 480 A.2d 854, 862 (N.H. 1984). *But see Dayutis*, 498 A.2d at 329 (holding that “the sentence of life imprisonment with a minimum term of thirty-five years is disproportionate to the offense of second degree murder” under the applicable statute).

c. Identical Language Plus a Citation to the Eighth Amendment (Florida)

Florida's constitutional analogue to the Eighth Amendment proscribes cruel and unusual punishments, but goes further and specifically links the language to the Eighth Amendment itself.¹³⁷ The 1998 amendment to this provision changed the conjunction from "or" to "and."¹³⁸ As a result, the current provision provides that for both "and" and "or," the meaning of the constitutional proscription "shall be construed in conformity with decisions of the U.S. Supreme Court" in applying the Eighth Amendment.¹³⁹ As with the Eighth Amendment, Florida courts have uniformly upheld punishments in non-homicide cases under the state constitution,¹⁴⁰ with the exception of cases falling under the Supreme Court's JLWOP categorical exceptions.¹⁴¹

d. Identical Language Plus "Excessive" (Louisiana)

Louisiana's state constitutional analogue prohibits the imposition of a "cruel, excessive, or unusual punishment."¹⁴² Louisiana courts have applied a gross disproportionality test under the state constitution, using similar language to the Eighth Amendment cases.¹⁴³ According to the Louisiana courts, the term excessive in the state constitution is synonymous with gross

137. FLA. CONST. art. 1, § 17 ("Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution . . .").

138. FLA. CONST. art. I, § 17 (amended 1998).

139. *Id.*

140. *See, e.g.,* McGirth v. State, 48 So. 3d 777, 797 (Fla. 2010); Adaway v. State, 902 So. 2d 746, 753 (Fla. 2005); Jackson v. State, 241 So. 3d 914, 918 (Fla. Dist. Ct. App. 2018); Rogers v. State, 96 So. 3d 922, 923 (Fla. Dist. Ct. App. 2012); Andrews v. State, 82 So. 3d 979, 987 (Fla. Dist. Ct. App. 2011); Paey v. State, 943 So. 2d 919, 927 (Fla. Dist. Ct. App. 2006); Morrow v. State, 856 So. 2d 1043, 1045 (Fla. Dist. Ct. App. 2003).

141. *See, e.g.,* Gridine v. State, 175 So. 3d 672, 673 (Fla. 2015); Hawkins v. State, 219 So. 3d 982, 984 (Fla. Dist. Ct. App. 2017).

142. LA. CONST. art. I, § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.").

143. *See, e.g.,* State v. Howard, 43,227, p. 13 (La. App. 2 Cir. 6/11/08); 987 So. 2d 330, 338 ("A sentence violates LA. CONST. art. 1, § 20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice." (internal citations omitted)); *see also* State v. Smith, 2001-2574, pp. 2-4 (La. 1/14/03); 839 So. 2d 1, 4; State v. Weaver, 2001-0467, p. 11 (La. 1/15/02); 805 So. 2d 166, 174; State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993); State v. Lobato, 603 So. 2d 739, 751 (La. 1992); State v. Bonanno, 384 So. 2d 355, 358 (La. 1980); State v. Robinson, 40,983, p. 3 (La. App. 2 Cir. 1/24/07); 948 So. 2d 379, 381; State v. Bradford, 29,519, p. 3 (La. App. 2 Cir. 4/2/97); 691 So. 2d 864.

disproportionality.¹⁴⁴ As such, Louisiana courts have typically rejected state constitutional cruel punishment claims.¹⁴⁵

e. Identical Language Plus a Dignity Requirement (Montana)

Montana uses identical language to the Eighth Amendment in its analogue.¹⁴⁶ The state constitution, however, contains an additional provision that guarantees protection of individual dignity.¹⁴⁷ The Montana courts read these provisions together to provide broader protection from cruel and unusual punishments than that given by the Eighth Amendment.¹⁴⁸

The protection of offender dignity, though, primarily pertains to prison conditions, not duration of punishment.¹⁴⁹ As such, Montana courts use the Eighth Amendment's gross disproportionality test in applying the state constitutional proscription against cruel and unusual punishments, almost never reversing sentences.¹⁵⁰

144. *See, e.g.*, *State v. Taylor*, 99-296, p. 12 (La. App. 5 Cir. 7/27/99); 740 So. 2d 216, 223; *State v. Bowers*, 99-416, p. 4 (La. App. 5 Cir. 9/28/99); 746 So. 2d 82, 85; *State v. Zeno*, 99-69, p. 17 (La. App. 5 Cir. 8/31/99); 742 So. 2d 699, 711; *State v. Alexander*, 989-993, p. 7 (La. App. 5 Cir. 3/10/99); 734 So. 2d 43, 46.

145. *See, e.g.*, *State v. Stetson*, 317 So. 2d 172, 176-77 (La. 1975); *State v. Miller*, 269 So. 2d 829, 830 (La. 1972); *State v. Crook*, 221 So. 2d 473, 476 (La. 1969); *Howard*, 987 So. 2d at 338-39. *But see* *State v. Dixon*, 18-79, pp. 14 (La. App. 5 Cir. 8/29/18); 254 So. 3d 828, 840-41 (finding disproportionate a sentence of ninety-nine years without parole for sexual battery of a juvenile under the age of thirteen).

146. MONT. CONST. art. II § 22 ("Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.")

147. MONT. CONST. art. II § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.")

148. *See, e.g.*, *Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 120-21, 68 P.3d 872, 883.

149. *See, e.g., id.* at ¶¶ 75-76, 316 Mont. at 120-21, 68 P.3d at 883.

150. *See, e.g.*, *State v. Paulsrud*, 2012 MT 180, ¶¶ 8, 19, 366 Mont. 62, 66-67, 285 P.3d 505, 508; *State v. Rickman*, 2008 MT 142, ¶¶ 15-16, 18, 343 Mont. 120, 122-24, 183 P.3d 49, 52-53; *State v. Shults*, 2006 MT 100, ¶ 30, 332 Mont. 130, 137-38, 136 P.3d 507, 513; *State v. Wardell*, 2005 MT 252, ¶ 28, 329 Mont. 9, 15-16, 122 P.3d 443, 448; *State v. Webb*, 2005 MT 5, ¶¶ 18, 32-34, 325 Mont. 317, 326-27, 106 P.3d 521, 526, 529-30; *State v. Johnson*, 2002 MT 251, ¶¶ 14-15, 17-20, 312 Mont. 164, 167-68, 58 P.3d 172, 174-75, *rev'd on other grounds*, *State v. Herman*, 2008 MT 187, 343 Mont. 494, 188 P.3d 978; *State v. DeSalvo*, 903 P.2d 202, 206-07 (Mont. 1995), *rev'd on other grounds*, *State v. Herman*, 2008 MT 187, 188 P.3d 978; *State v. Peck*, 865 P.2d 304, 306 (Mont. 1993); *State v. Dahms*, 825 P.2d 1214, 1221 (Mont. 1992), *modified*, *City of Billings v. Bruce*, 965 P.2d 866 (Mont. 1998); *State ex rel. Majerus v. Carter*, 693 P.2d 501, 505 (Mont. 1984); *State v. Bruns*, 691 P.2d 817, 820-21 (Mont. 1984); *State v. Watson*, 686 P.2d 879, 889, 891 (Mont. 1984); *State v. Kirkland*, 602 P.2d 586, 595 (Mont. 1979); *State v. Maldonado*, 578 P.2d 296, 304-05 (Mont. 1978).

f. Identical Language but a Singular Punishment (Iowa, Missouri, and Nebraska)

Iowa uses language identical to the Eighth Amendment in its state constitutional analogue, except the word “punishment” is singular, not plural.¹⁵¹ Iowa courts look to the Eighth Amendment for guidance in interpreting the state provision.¹⁵² As such, the application of the state constitution by Iowa courts generally falls within the scope defined by the Supreme Court, severely limiting relief in non-capital cases.¹⁵³ Iowa courts have explored expanding the scope of protections for juvenile offenders within, but not beyond, the framework the U.S. Supreme Court established under the Eighth Amendment.¹⁵⁴

Missouri’s Eighth Amendment analogue is conjunctive and proscribes the infliction of a cruel and unusual punishment.¹⁵⁵ Missouri courts interpret this provision as essentially identical to the Eighth Amendment.¹⁵⁶ Missouri courts apply the gross disproportionality test,¹⁵⁷ meaning litigants virtually never succeed under the state constitution’s cruel and unusual punishment clause.¹⁵⁸

Nebraska’s Eighth Amendment analogue is conjunctive and bars the infliction of a cruel and unusual punishment.¹⁵⁹ Nebraska courts have held that

151. IOWA CONST. art. 1, § 17 (“Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.”).

152. *See, e.g.*, State v. Harrison, 914 N.W.2d 178, 188–91 (Iowa 2018); State v. Musser, 721 N.W.2d 734, 748–49 (Iowa 2006); State v. Ramirez, 597 N.W.2d 795, 797 (Iowa 1999), *overruled on other grounds* by 773 N.W.2d 862 (Iowa 2009).

153. *See, e.g.*, Wessling v. Bennett, 410 F.2d 205, 207 (8th Cir. 1969); State v. Wickes, 910 N.W.2d 554, 572–75 (Iowa 2018); State v. Propps, 897 N.W.2d 91, 98–104 (Iowa 2017); State v. Oliver, 812 N.W.2d 636, 639–53 (Iowa 2012); State v. Nims, 357 N.W.2d 608, 610–11 (Iowa 1984); State v. Jones, 298 N.W.2d 296, 299–300 (Iowa 1980); State v. McNeal, 167 N.W.2d 674, 78 (Iowa 1969); State v. Di Paglia, 71 N.W.2d 601, 604–05 (Iowa 1955); State v. Jorgensen, 785 N.W.2d 708, 712–13 (Iowa Ct. App. 2009).

154. *See, e.g.*, State v. Lyle, 854 N.W.2d 378, 386–403 (Iowa 2014).

155. MO. CONST. art. I, § 21 (“That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”).

156. *See, e.g.*, State v. Pribble, 285 S.W.3d 310, 313–14 (Mo. 2009) (en banc); State v. Lee, 841 S.W.2d 648, 654 (Mo. 1992) (en banc); State v. Bell, 719 S.W.2d 763, 766–67 (Mo. 1986) (en banc).

157. *See, e.g.*, Pribble, 285 S.W.3d at 314; Lee, 841 S.W.2d at 654; Bell, 719 S.W.2d 763 at 766.

158. *See, e.g.*, Pribble, 285 S.W.3d at 314; Lee, 841 S.W.2d at 654–55; Bell, 719 S.W.2d at 766–67; State v. Thomas, 625 S.W.2d 115, 126 (Mo. 1981); State v. Wishom, 416 S.W.2d 921, 927 (Mo. 1967); State v. Bolds, 11 S.W.3d 633, 636–67 (Mo. Ct. App. 1999); State v. Graham, 906 S.W.2d 771, 783–84 (Mo. Ct. App. 1995), *mandate vacated on other grounds*, 969 S.W.2d 759 (Mo. Ct. App. 1998); State v. Nixon, 858 S.W.2d 782, 788 (Mo. Ct. App. 1993); State v. Katura, 837 S.W.2d 547, 551 (Mo. Ct. App. 1984); State v. Whitehead, 675 S.W.2d 939, 943 (Mo. Ct. App. 1984); State v. Bailey, 659 S.W.2d 559, 561 (Mo. Ct. App. 1983); State v. Boley, 565 S.W.2d 828, 832 (Mo. Ct. App. 1978); State v. Gaye, 532 S.W.2d 783, 794 (Mo. Ct. App. 1975); Curtis v. Tozer, 374 S.W.2d 557, 595–96 (Mo. Ct. App. 1964).

159. NEB. CONST. art. I, § 9 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”).

the state constitutional punishment provision does not require more than the Eighth Amendment.¹⁶⁰ Generally, Nebraska defendants are unable to establish that their sentences are grossly disproportionate.¹⁶¹ Nevertheless, Nebraska courts have held that electrocutions are unconstitutional punishments under the state constitution.¹⁶²

2. Adopting a Separate State Constitutional Approach

The following states have created their own approach. Some approaches incorporate ideas from the Eighth Amendment cases, but the inquiry is unique and different from the one established under the U.S. Constitution.

a. *Identical Language Plus Purposes of Punishment (Alaska)*

Alaska applies its own state constitutional test¹⁶³ independent of the Eighth Amendment.¹⁶⁴ Part of the difference stems from a second sentence in Alaska's state constitutional provision that requires criminal sentences to be based on the various purposes of punishment.¹⁶⁵ The Alaska test, which is the same for cruel and unusual punishments and violations of state substantive due process, states:

Only those punishments which are cruel and unusual in the sense that they are inhuman or barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of

160. *See, e.g., Doe v. Nebraska*, 734 F. Supp. 2d 882, 922 (D. Neb. 2010); *State v. Hurbenca*, 669 N.W.2d 668, 675 (Neb. 2003); *State v. Moore*, 591 N.W.2d 86, 95 (Neb. 1999).

161. *See, e.g., State v. Jones*, 900 N.W.2d 757, 764 (Neb. 2017); *State v. Johnson*, 859 N.W.2d 877, 886 (Neb. 2015); *State v. Golka*, 796 N.W.2d 198, 216 (Neb. 2011); *State v. Robinson*, 769 N.W.2d 366, 378 (Neb. 2009); *Hurbenca*, 669 N.W.2d at 677; *State v. Brand*, 363 N.W.2d 516, 520 (Neb. 1985); *State v. Ruzicka*, 357 N.W.2d 457, 461–62 (Neb. 1984), *abrogated by* 745 N.W.2d 229 (Iowa 2008); *State v. Tucker*, 162 N.W.2d 774, 775–76 (Neb. 1968), *abrogated by* 745 N.W.2d 229 (Iowa 2008).

162. *State v. Sandoval*, 788 N.W.2d 172, 224 (Neb. 2010).

163. ALASKA CONST. art I, § 12.

164. *See, e.g., Burnor v. State*, 829 P.2d 837, 839–40 (Alaska Ct. App. 1992); *Dancer v. State*, 715 P.2d 1174, 1177 (Alaska Ct. App. 1986).

165. ALASKA CONST. art I, § 12 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.”). The Alaska courts seem to cherry pick from these purposes rather than choosing one over the other. *See, e.g., Smith v. State*, 691 P.2d 293, 295 (Alaska Ct. App. 1984) (explaining that, although the court must in each instance consider permissible sentencing goals, it is the court's prerogative to decide the weight and order in priority to give each goal based on circumstances of the individual case and that the sentencing court is not required to give priority to rehabilitation in imposing a sentence). Such an approach is common to such provisions, even though the consequence of choosing one purpose of punishment over another might be a different criminal sentence. *See William W. Berry III, Discretion Without Guidance*, 40 CONN. L. REV. 631, 650–51 (2008).

justice may be stricken as violating the due process [and cruel and unusual punishment] clauses.¹⁶⁶

Alaska courts distinguish this test from the Eighth Amendment test used by the Supreme Court¹⁶⁷ and use it to strike down excessive sentences more often than the Supreme Court has done so.¹⁶⁸ The approach taken by the Alaska Supreme Court in these cases has simply been to assess whether, based on the facts, the sentence was excessive in the sense that it was disproportionate by not satisfying one or more of the purposes of punishment.¹⁶⁹

b. Identical Language Plus a Death Penalty Rule (New Jersey)

New Jersey's state constitutional analogue to the Eighth Amendment is conjunctive, proscribing cruel and unusual punishments.¹⁷⁰ New Jersey courts have adopted a three-part test to assess the constitutionality of a punishment under the New Jersey Constitution, which is essentially a hybrid of the Eighth Amendment's evolving standards of decency and gross disproportionality tests.¹⁷¹ Despite the New Jersey courts' examination of contemporary standards and penological goals, the courts have typically upheld punishments challenged under the state constitution.¹⁷²

166. *Green v. State*, 390 P.2d 433, 435 (Alaska 1964); *see also Moore v. State*, 262 P.3d 217, 222 (Alaska Ct. App. 2011); *McNabb v. State*, 860 P.2d 1294, 1298–99 (Alaska Ct. App. 1993).

167. *Dancer*, 715 P.2d at 1180.

168. *See, e.g., Kelly v. State*, 622 P.2d 432, 440 (Alaska 1981); *Wharton v. State*, 590 P.2d 427, 430 (Alaska 1979); *Hansen v. State*, 582 P.2d 1041, 1045–46 (Alaska 1978); *Szeratics v. State*, 572 P.2d 63, 67 (1977); *Black v. State*, 569 P.2d 804, 805 (1977); *Huff v. State*, 568 P.2d 1014, 1020 (Alaska 1977); *Mattern v. State*, 500 P.2d 228, 234 (Alaska 1972); *Galaktionoff v. State*, 486 P.2d 919, 923 (Alaska 1971); *Yu v. State*, 706 P.2d 348, 349 (Alaska Ct. App. 1985); *Husted v. State*, 629 P.2d 985, 986–87 (Alaska Ct. App. 1981).

169. *See supra* note 168 and accompanying text (listing Alaska cases where the court reversed the sentence for being excessive).

170. N.J. CONST. art. I, para. 12 (“Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.”). New Jersey legislatively abolished the death penalty in 1997. *See State and Federal Info New Jersey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/new-jersey-1> [<https://perma.cc/5HQP-X85Y>].

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

172. *See, e.g., State v. Josephs*, 803 A.2d 1074, 1130 (N.J. 2002); *Johnson*, 766 A.2d at 1140; *State v. Des Marets*, 455 A.2d 1074, 1084 (N.J. 1983); *State v. DeAngelis*, 747 A.2d 289, 295 (N.J. Super. Ct. App. Div. 2000); *State v. Nunez*, 620 A.2d 1061, 1064 (N.J. Super. Ct. App. Div. 1993); *State v. Oliver*, 689 A.2d 876, 882–83 (N.J. Super. Ct. Law Div. 1996).

c. Identical Language Plus a Proportionality Requirement (Oregon and West Virginia)

Like the Eighth Amendment, the Oregon Constitution proscribes “cruel and unusual” punishments, but it also adds a requirement that all penalties be proportional to the offense.¹⁷³ Oregon courts interpret the proportionality and cruel and unusual punishment provisions separately, although each can inform the interpretation of the other.¹⁷⁴ The application of Oregon’s cruel and unusual punishment provision mirrors that of the Eighth Amendment, requiring gross disproportionality for the punishment to be unconstitutional.¹⁷⁵

In assessing proportionality under the state constitution, Oregon courts ask whether the sentence would “shock[] the moral sense” of reasonable people.¹⁷⁶ In making this determination, Oregon courts weigh three factors: “(1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant.”¹⁷⁷ Although typically unsuccessful,¹⁷⁸ appeals relying on the application of this proportionality test have resulted in the reversal of sentences in a few cases under the state constitution.¹⁷⁹

The West Virginia Constitution employs identical language to the Eighth Amendment but also contains a separate proportionality requirement.¹⁸⁰ West Virginia courts apply this state constitutional test in two parts, first assessing whether the sentence is subjectively disproportionate in

173. OR. CONST. art. I, § 16 (“Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.”).

174. *See, e.g.*, *State v. Althouse*, 375 P.3d 475, 484 (Or. 2016); *State v. Wheeler*, 175 P.3d 438, 446 (Or. 2007).

175. *See, e.g.*, *State v. Simonson*, 259 P.3d 962, 965 (Or. Ct. App. 2011); *State v. Ronniger*, 492 P.2d 298, 304 (Or. Ct. App. 1971); *State v. Hecket*, 467 P.2d 122, 123 (Or. Ct. App. 1970), *cert. denied sub. nom.*, *Wade v. Oregon*, 406 U.S. 972 (1972).

176. *See, e.g.*, *Althouse*, 375 P.3d at 484; *State v. Rogers*, 836 P.2d 1308, 1323 (Or. 1992); *State v. Padilla*, 371 P.3d 1242, 1244 (Or. Ct. App. 2016); *State v. Pardee*, 215 P.3d 870, 872 (Or. Ct. App. 2009).

177. *State v. Rodriguez*, 217 P.3d 659, 668 (Or. 2009); *see also Padilla*, 371 P.3d at 1243; *Simonson*, 259 P.3d at 965.

178. *See, e.g.*, *State v. Burgert*, 423 P.3d 169, 170 (Or. Ct. App. 2018); *State v. Horseman*, 432 P.3d 258, 265 (Or. Ct. App. 2018), *review denied*, 441 P.3d 1165 (Or. 2019); *State v. Smith*, 372 P.3d 549, 557 (Or. Ct. App. 2016); *State v. Johnson*, 260 P.3d 782, 786–87 (Or. Ct. App. 2011).

179. *See, e.g.*, *State v. Ryan*, 396 P.3d 867, 884 (Or. 2017); *State v. Davidson*, 380 P.3d 963, 974–75, 975–76 (Or. 2016); *Rodriguez*, 217 P.3d at 668; *State v. Carey-Martin*, 430 P.3d 98, 133–34 (Or. Ct. App. 2018) (en banc).

180. W. VA. CONST. art. III, § 5 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the state for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.”).

that it shocks the conscience and offends fundamental notions of human dignity, much like the Eighth Amendment's gross disproportionality test.¹⁸¹ The second test, which the courts apply if the sentence survives the first test, applies an objective assessment of proportionality that requires the court to consider (1) "the nature of the offense," (2) "the legislative purpose behind the punishment," (3) how the punishment compares "with what would be inflicted in other jurisdictions," and (4) how the punishment compares to the punishments of "other related offenses within the same jurisdiction."¹⁸² Most punishments survive both tests,¹⁸³ but the West Virginia courts have reversed a significant number of cases under its state constitutional proportionality principle.¹⁸⁴

B. *Cruel "OR" Unusual*

A number of states have an Eighth Amendment analogue in their constitutions that use a different conjunction from the federal amendment. These states have constitutions that bar cruel "or" unusual punishments. In theory, this would allow the state supreme courts to proscribe "cruel" punishments, irrespective of their unusualness. Most of these jurisdictions, however, have ignored the difference between "or" and "and" by blindly adopting the Eighth Amendment approach.

1. Adopting the Eighth Amendment Approach

a. Identical Disjunctive Language (Alabama, Arkansas, Hawaii, Kansas, Massachusetts, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Texas, and Wyoming)

Alabama's provision states: "That excessive fines shall not be imposed, nor cruel or unusual punishment inflicted."¹⁸⁵ With respect to non-homicide crimes, Alabama courts have used the Supreme Court's Eighth Amendment gross disproportionality test in interpreting the Alabama Constitution's

181. *State v. Shafer*, 789 S.E.2d 153, 159 (W. Va. 2015); *State v. Mann*, 518 S.E.2d 60, 71–72 (W. Va. 1999); *State v. Cooper*, 304 S.E.2d 851, 857 (W. Va. 1983).

182. *Shafer*, 789 S.E.2d at 159; *State v. Cook*, 723 S.E.2d 388, 397 (W. Va. 2010); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W. Va. 1981); *Martin v. Leverette*, 244 S.E.2d 39, 43 (W. Va. 1978).

183. *See, e.g.*, *State v. Blevins*, 744 S.E.2d 245, 268 (W. Va. 2013); *State v. Woodson*, 671 S.E.2d 438, 451 (W. Va. 2008); *State v. Adams*, 565 S.E.2d 353, 357 (W. Va. 2002); *State ex rel. Appleby v. Recht*, 583 S.E.2d 800, 811 (W. Va. 2002); *State v. Farr*, 456 S.E.2d 199, 202 (W. Va. 1995); *State v. King*, 518 S.E.2d 663, 669–71 (W. Va. 1995).

184. *See, e.g.*, *State v. Kilmer*, 808 S.E.2d 867, 870–71 (W. Va. 2017); *State v. Wilson*, No. 11-0432, 2012 WL 3031065, at *2 (W. Va. Mar. 12, 2012); *State v. David D. W.*, 588 S.E.2d 156, 165–66 (W. Va. 2003); *State v. Miller*, 400 S.E.2d 897, 900–01 (W. Va. 1990); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W. Va. 1981).

185. ALA. CONST. art. I, § 15.

analogue to the Eighth Amendment.¹⁸⁶ Alabama courts have also uniformly upheld the death penalty under the state constitution,¹⁸⁷ including the judicial override provision that was only recently abandoned.¹⁸⁸

The Arkansas Constitution's analogue to the Eighth Amendment uses "or" as its conjunction.¹⁸⁹ Under Arkansas law, a state appellate court generally may not overturn a sentence imposed within legislative limits, even if unduly harsh.¹⁹⁰ The Arkansas Supreme Court has interpreted the provisions in both the state and federal constitutions "identically on the issue of the prohibition against cruel and unusual punishment."¹⁹¹ Even so, the Arkansas Supreme Court has indicated that there are three "extremely narrow" exceptions to this approach: "(1) where the punishment resulted from passion or prejudice, (2) where it was a clear abuse of the jury's discretion, or (3) where it was so wholly disproportionate to the nature of the offense as to shock the moral sense of the community."¹⁹²

Hawaii's constitution prohibits the imposition of cruel "or" unusual punishments.¹⁹³ Hawaii courts, however, have found the difference in conjunction between the Hawaii Constitution and the Eighth Amendment to be without significance because the intent of the drafters of the state constitution was to copy the U.S. Constitution.¹⁹⁴ As such, Hawaii has

186. See, e.g., *Lane v. State*, 66 So. 3d 830, 831 (Ala. Crim. App. 2010) (recognizing the Eighth Amendment proportionality principle); *Wilson v. State*, 830 So. 2d 765, 777–78 (Ala. Crim. App. 2001) (same); *Eldridge v. State*, 418 So. 2d 203, 207 (Ala. Crim. App. 1982); *Cabble v. State*, 347 So. 2d 546, 548–49 (Ala. Crim. App. 1977), *cert. denied*, 347 So. 2d 551 (Ala. 1977); *Parnell v. State*, 49 So. 2d 919, 920 (Ala. Ct. App. 1950).

187. See, e.g., *Mitchell v. State*, 84 So. 3d 968, 995 (Ala. Crim. App. 2010), *cert. denied*, 84 So. 3d 1013, *cert. denied*, 568 U.S. 829 (affirming the constitutionality of the judicial override).

188. There are serious questions, particularly after *Hurst v. Florida*, 136 S.Ct. 616 (2016), concerning whether the judicial override violated the Sixth Amendment. See generally Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing after Hurst*, 66 UCLA L. REV. 448 (2019) (arguing that *Hurst* opens the door to a broader application of the Sixth Amendment).

189. ARK. CONST. art. II, § 9 ("Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained.").

190. See *Bunch v. State*, 43 S.W.3d 132, 138 (Ark. 2001); *Williams v. State*, 930 S.W.2d 297, 301 (Ark. 1996); *Parker v. State*, 790 S.W.2d 894, 895 (Ark. 1990).

191. *Bunch*, 43 S.W.3d at 138.

192. *Steele v. State*, 434 S.W.3d 424, 431 (Ark. Ct. App. 2014); see also *Williams v. State*, 898 S.W.2d 38, 39 (Ark. 1995); *Dunlap v. State*, 795 S.W.2d 920, 924 (Ark. 1990); *Parker*, 790 S.W.2d at 895. It does not appear that Arkansas has ever found a case to be an exception to this rule.

193. HAW. CONST. art. I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.").

194. *State v. Kido*, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982) ("The difference, however, appears to be only one of form and not of substance. When the Hawaii provision was originally adopted, the delegates to the 1950 constitutional convention used the eighth amendment to the

adopted the Eighth Amendment approach to assessing non-capital sentences, affirming them unless they are so disproportionate as to shock the conscience.¹⁹⁵ The courts of Hawaii have uniformly upheld such challenges under the state constitution.¹⁹⁶

The Kansas Constitution contains a disjunctive Eighth Amendment analogue.¹⁹⁷ Kansas courts have determined that because the language in the state constitution and the Eighth Amendment are similar, they should be construed similarly.¹⁹⁸ In assessing a punishment under the state constitution, Kansas courts apply the Eighth Amendment concept of gross disproportionality¹⁹⁹ and use the same three-part inquiry that other states use in this vein.²⁰⁰ Similarly to litigants under the Eighth Amendment, litigants rarely prevail under this standard.²⁰¹

The Massachusetts Constitution contains a disjunctive Eighth Amendment analogue.²⁰² Even so, Massachusetts courts use a similar three-part test to determine constitutionality: nature of offender and offense in light

United States Constitution as a model and intended federal precedent to be followed in construing the state's 'cruel or unusual punishment' clause.”).

195. *See, e.g.*, *State v. Solomon*, 111 P.3d 12, 28 (Haw. 2005); *State v. Jenkins*, 997 P.2d 13, 40–41 (Haw. 2000); *State v. Davia*, 953 P.2d 1347, 1356–57 (Haw. 1998); *State v. Loa*, 926 P.2d 1258, 1279–80 (Haw. 1996); *State v. Iaukea*, 537 P.2d 724, 736 (Haw. 1975); *Kido*, 654 P.2d at 1360–61.

196. *Davia*, 953 P.2d at 1356. The Hawaii courts use the same three-pronged test for determining whether punishment is cruel and unusual, with the court to consider: “(1) the nature of the offense and/or the offender, with particular regard to the degree of danger posed by both to society; (2) the extent of the challenged penalty as compared to the punishments prescribed for more serious crimes within the same jurisdiction; and (3) the extent of the challenged penalty as compared to the punishment prescribed for the same offense in other jurisdictions.” *Id.*

197. KAN. CONST. BILL OF RIGHTS § 9 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.”).

198. *State v. Scott*, 961 P.2d 667, 672–73 (Kan. 1998).

199. *See State v. Weigel*, 612 P.2d 636, 644–45 (Kan. 1980) (noting that the criteria which are to be considered in determining what is cruel or unusual punishment as to the length of a sentence include excessiveness, disproportionality, lack of necessity, unacceptability to society, and arbitrariness of infliction).

200. Kansas refers to these indicia as *Freeman* factors. *See State v. Freeman*, 574 P.2d 950 (1978). In its analysis, the court asks whether the purposes of punishment justify the sentence imposed, examine how the sentence compares to others sentenced in Kansas, and how it compares to sentences in other jurisdictions. *Id.* at 956; *see, e.g.*, *State v. Swint*, 352 P.3d 1014, 1028–30 (Kan. 2015); *State v. Britt*, 287 P.3d 905, 916–18 (Kan. 2012); *State v. Thomas*, 199 P.3d 1265, 1267–68 (Kan. 2009). Like other jurisdictions, the Kansas courts also require something on the level of “shocking the conscience.” *See, e.g.*, *State v. Riffe*, 418 P.3d 1278, 1291–92 (Kan. 2018); *State v. Proctor*, 280 P.3d 839, 869 (Kan. Ct. App. 2012), *rev'd for further consideration* (2013 Kan. LEXIS 587).

201. *See, e.g.*, *Swint*, 352 P.3d at 1030; *State v. Seward*, 297 P.3d 272, 280–81 (Kan. 2013); *Britt*, 287 P.3d at 916–18; *State v. Mossman*, 281 P.3d 153, 166 (Kan. 2012); *State v. Woodard*, 280 P.3d 203, 209–10 (Kan. 2012); *State v. Baber*, 240 P.3d 980, 984–85 (Kan. 2010); *State v. Spain*, 4 P.3d 621, 626 (Kan. 2000); *State v. McDaniel*, 612 P.2d 1231, 1239 (Kan. 1980); *Davis v. State*, 466 P.2d 311, 316 (Kan. 1970); *State v. Marion*, 333 P.3d 194, 200–01 (Kan. Ct. App. 2014).

202. MASS. CONST. pt. 1, art. XXVI (“No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

of degree of harm to society, sentencing provisions in other jurisdictions for similar offenses, and sentences for more severe offenses within the Commonwealth.²⁰³ In applying the gross disproportionality test, the state constitution mirrors the Eighth Amendment and requires that the punishment in question shock the conscience.²⁰⁴ Most punishments do not violate the state constitution.²⁰⁵

Mississippi's constitution bars the imposition of a "cruel or unusual punishment."²⁰⁶ Mississippi courts do not give any effect to the disjunctive nature of the state constitution and instead simply apply the Eighth Amendment gross disproportionality test where the court finds an inference of disproportionality.²⁰⁷ Not surprisingly, virtually all challenges to this provision fail.²⁰⁸

Nevada uses the disjunctive prohibition against cruel or unusual punishments in its state constitutional Eighth Amendment analogue.²⁰⁹ Even so, Nevada courts use the basic Eighth Amendment gross proportionality doctrine to assess punishments under the state constitution,²¹⁰ with defendants almost never prevailing.²¹¹

203. *Commonwealth v. Alvarez*, 596 N.E.2d 325, 330–31 (Mass. 1992), *abrogated by* 138 N.E.2d 364 (Mass. 2020).

204. *See, e.g.*, *Commonwealth v. Sanchez*, 540 N.E.2d 1316, 1323–24 (Mass. 1989); *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 19–21 (Mass. 1981); *Commonwealth v. Jackson*, 344 N.E.2d 166, 173–74 (Mass. 1976).

205. *See, e.g.*, *Alvarez*, 596 N.E.2d at 330–31; *Commonwealth v. Tart*, 557 N.E.2d 1123, 1135 (Mass. 1990); *Sanchez*, 540 N.E.2d at 1323–24; *Commonwealth v. Bianco*, 454 N.E.2d 901, 905–06 (Mass. 1983); *Cepulonis*, 427 N.E.2d at 19–21; *Commonwealth v. Morrow*, 296 N.E.2d 468, 476–77 (Mass. 1973); *Commonwealth v. Tirella*, 249 N.E.2d 573, 576 (Mass. 1969); *Commonwealth v. Derry*, 522 N.E.2d 436, 437–38 (Mass. App. Ct. 1988).

206. MISS. CONST. art. III, § 28 ("Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.").

207. *See, e.g.*, *Barnwell v. State*, 567 So. 2d 215, 221–22 (Miss. 1990); *Alston v. State*, 2002-CA-00555-COA (¶ 8), 841 So. 2d 215, 217 (Miss. Ct. App. 2003); *Triplett v. State*, 2002-KA-00015-COA (¶¶ 18–21), 840 So. 2d 727, 732–33 (Miss. Ct. App. 2002).

208. *See, e.g.*, *Nichols v. State*, 2000-KA-00807-SCT (¶ 17), 826 So. 2d 1288, 1292 (Miss. 2002); *Bell v. State*, 1999-KA-01686-SCT (¶¶ 23–32), 797 So. 2d 945, 950–51 (Miss. 2001); *Braxton v. State*, 1998-KA-01541-SCT (¶¶ 11–12), 797 So. 2d 826, 829 (Miss. 2000); *Barnwell*, 567 So. 2d at 221–22; *Whitley v. State*, 511 So. 2d 929, 932 (Miss. 1987); *McAdory v. State*, 354 So. 2d 263, 266 (Miss. 1978) *overruled on other grounds by* 372 So. 2d 257 (Miss. 1979); *McCormick v. State*, 279 So. 2d 596, 599 (Miss. 1973), *abrogated on other grounds* 625 So. 2d 395 (Miss. 1993); *Ealy v. State*, 262 So. 2d 420, 421–22 (Miss. 1972); *Williams v. State*, 2008-KP-00227-COA (¶¶ 12–15), 24 So. 3d 360, 365–66 (Miss. Ct. App. 2009); *Alston*, 2002-CA-00555-COA (¶ 8), 841 So. 2d at 217; *Jefferson v. State*, 2001-KA-01868-COA (¶¶ 9–10), 832 So. 2d 1270, 1272 (Miss. Ct. App. 2002); *Womack v. State*, 2000-KA-01428-COA (¶¶ 11–13), 827 So. 2d 55, 58–59 (Miss. Ct. App. 2002).

209. NEV. CONST. art. I, § 6 ("Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.").

210. *See, e.g.*, *Blume v. State*, 915 P.2d 282, 284 (Nev. 1996).

211. *See, e.g.*, *Farmer v. State*, 405 P.3d 114, 125 (Nev. 2017); *Mitchell v. State*, No. 59749, 2013 WL 5314891, at *4 (Nev. 2013); *Chavez v. State*, 213 P.3d 476, 489–90 (Nev. 2009); *Blume*, 915 P.2d

The North Carolina Constitution prohibits cruel “or” unusual punishments.²¹² North Carolina courts, however, interpret the state constitution in an identical manner to the Eighth Amendment.²¹³ The courts thus apply the gross disproportionality test, meaning defendants almost never prevail on their state constitutional cruel or unusual punishment claims.²¹⁴

North Dakota uses a disjunctive analogue to the Eighth Amendment in its state constitution, proscribing cruel “or” unusual punishments.²¹⁵ The state courts of North Dakota have not issued any modern decisions giving guidance on the meaning of the disjunctive language in the state constitution.²¹⁶

Oklahoma’s constitutional analogue to the Eighth Amendment is disjunctive, banning cruel or unusual punishments.²¹⁷ The disjunctive conjunction is of no consequence under the decisions of the Oklahoma courts, which simply apply the Eighth Amendment gross disproportionality test,²¹⁸ meaning that defendants almost never prevail under the cruel or unusual punishments provision of the state constitution.²¹⁹

The Texas Constitution uses a disjunctive construction of cruel and unusual punishments,²²⁰ but Texas courts interpret the state constitution

282, 284 (Nev. 1996); *Culverson v. State*, 596 P.2d 220, 221–22 (Nev. 1979); *Schmidt v. State*, 584 P.2d 695, 697 (Nev. 1978).

212. N.C. CONST. art. I, § 27 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”).

213. *See, e.g.*, *State v. Green*, 348 N.C. 588, 611–12, 502 S.E.2d 819, 833–34 (1998).

214. *See, e.g.*, *State v. Allen*, 346 N.C. 731, 738–39, 488 S.E.2d 188, 192 (1997); *State v. Ysaguiere*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983); *State v. Stubbs*, 232 N.C. App. 274, 285–86, 754 S.E.2d 174, 182 (2014); *State v. Pettigrew*, 204 N.C. App. 248, 259, 693 S.E.2d 698, 705 (2010); *State v. Clifton*, 158 N.C. App. 88, 94–96, 580 S.E.2d 40, 45–96 (2003); *State v. Lee*, 148 N.C. App. 518, 524–25, 558 S.E.2d 883, 888 (2002); *State v. Hinson*, 102 N.C. App. 29, 37–38, 401 S.E.2d 371, 376 (1991); *State v. Norman*, 100 N.C. App. 660, 663–64, 397 S.E.2d 647, 649 (1990). *But see* *State v. Pemberton*, 228 N.C. App. 234, 246–47, 743 S.E.2d 719, 728 (2013) (finding a JLWOP sentence to constitute cruel and unusual punishment).

215. N.D. CONST. art. I, § 11 (“Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted.”).

216. Older cases have explained that “cruel” refers to the form of punishment and “unusual” refers to its frequency. *See* *State v. Kingen*, 226 N.W. 505, 506 (N.D. 1929) (quoting *State v. Jochim*, 213 N.W. 485, 488 (N.D. 1927)).

217. OKLA. CONST. art. II, § 9 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”).

218. *See, e.g.*, *Applegate v. State*, 904 P.2d 130, 135 (Okla. Crim. App. 1995); *Dodd v. State*, 879 P.2d 822, 827 (Okla. Crim. App. 1994).

219. *See, e.g.*, *Randolph v. State*, 2010 OK CR 2, ¶ 34, 231 P.3d 672, 683; *Applegate*, 904 P.2d at 135; *Dodd*, 879 P.2d at 827; *Lee v. State*, 637 P.2d 879, 885 (Okla. Crim. App. 1981).

220. TEX. CONST. art. I, § 13 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.”).

identically to the Eighth Amendment.²²¹ Consequently, cruel and unusual punishment claims typically fail under the Texas Constitution.²²²

The Eighth Amendment analogue in the Wyoming Constitution is disjunctive and singular, proscribing the infliction of a cruel or unusual punishment.²²³ Wyoming courts, however, appear to apply the Eighth Amendment test in applying the state constitution's proscription against cruel or unusual punishment.²²⁴

b. Disjunctive Language and Corporal Punishment (South Carolina)

South Carolina's analogue to the Eighth Amendment proscribes cruel punishment, corporal punishment, and unusual punishment.²²⁵ South Carolina courts have applied the Eighth Amendment's gross disproportionality test to assess punishments under the state constitution, upholding virtually every sentence.²²⁶

2. Adopting a Separate State Constitutional Approach

a. Combining Gross Disproportionality with Evolving Standards (California, Michigan, and Minnesota)

California's constitutional analogue to the Eighth Amendment uses "or" instead of "and."²²⁷ California courts have explained that this distinction "is purposeful and substantive rather than merely semantic."²²⁸ The courts thus

221. *See, e.g.*, *Randall v. State*, 529 S.W.3d 566, 569 (Tex. App. 2017); *Reyes v. State*, 557 S.W.3d 624, 635 (Tex. App. 2017); *Toledo*, 519 S.W.3d 273, 284–86 (Tex. App. 2017).

222. *See, e.g.*, *State v. Simpson*, 488 S.W.3d 318, 323–24 (Tex. Crim. App. 2016); *Chambers v. State*, 601 S.W.2d 360, 362 (Tex. Crim. App. 1980); *Toledo v. State*, 519 S.W.3d 273, 286 (Tex. App. 2017); *Woods v. State*, 488 S.W.3d 809, 812–13 (Tex. App. 2016); *Lopez v. State*, 493 S.W.3d 126, 139 (Tex. App. 2016); *Pantoja v. State*, 496 S.W.3d 186, 193–94 (Tex. App. 2016); *Robertson v. State*, 397 S.W.3d 774, 777 (Tex. App. 2013); *Glover v. State*, 406 S.W.3d 343, 350 (Tex. App. 2013); *Cienfuegos v. State*, 113 S.W.3d 481, 496 (Tex. App. 2003); *Atchison v. State*, 124 S.W.3d 755, 760 (Tex. App. 2003); *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App. 1999); *Phillips v. State*, 887 S.W.2d 267, 270 (Tex. App. 1994); *Benjamin v. State*, 874 S.W.2d 132, 134–35 (Tex. App. 1994); *Swinney v. State*, 828 S.W.2d 254, 258–59 (Tex. App. 1992).

223. WYO. CONST. art. I, § 14 ("Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.")

224. *See, e.g.*, *Tilley v. State*, 912 P.2d 1140, 1143 (Wyo. 1996); *Oakley v. State*, 715 P.2d 1374, 1377 (Wyo. 1986); *Martin v. State*, 720 P.2d 894, 897 (Wyo. 1986).

225. S.C. CONST. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.")

226. *See, e.g.*, *State v. White*, 562 S.E.2d 305, 306–07 (S.C. 2002); *State v. De La Cruz*, 393 S.E.2d 184, 186 (S.C. 1990); *State v. Kiser*, 343 S.E.2d 292, 293 (S.C. 1986); *Stockton v. Leeke*, 237 S.E.2d 896, 898 (S.C. 1977); *State v. Johnson*, 567 S.E.2d 486, 487–88 (S.C. Ct. App. 2002).

227. CAL. CONST. art. I, § 17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed.")

228. *People v. Baker*, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (quoting *People v. Carmony*, 26 Cal. Rptr. 3d 365, 378 (Cal. Ct. App. 2005)).

construe the state constitution separately from the Eighth Amendment²²⁹ and apply it more broadly than its federal constitutional counterpart.²³⁰

The standard under the California Constitution is that “a punishment” may be unconstitutional “if . . . although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.”²³¹ Specifically, California courts examine three criteria to identify unconstitutional punishments: (1) the nature of the offense and defendant’s background, with particular regard to the degree of danger both present to society; (2) the punishment for more serious offenses; or (3) punishment for similar offenses in other jurisdictions.²³² It is worth noting that a defendant only needs to establish one of the criteria to demonstrate a constitutional violation.²³³ This inquiry examines both the crime and the defendant’s criminal acts, as well as the defendant’s relevant personal mitigating characteristics.²³⁴

Importantly, California courts have emphasized that in determining whether a punishment violates the state constitution, the courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive but necessarily embodies a moral judgment.²³⁵ Further, “cruel” as used in the California Constitution has retained its ordinary meaning of causing physical pain or mental anguish of inhuman or torturous nature.²³⁶

Even with the broader analysis under their state constitution, California courts have not migrated away from the idea of gross disproportionality²³⁷ and have even upheld draconian three strikes sentences.²³⁸ Indeed, California courts typically reject challenges to punishments under state constitutional law.²³⁹

229. *People v. Palafox*, 179 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2014), *abrogated on other grounds* by *People v. Padilla*, 209 Cal. Rptr. 3d 209 (Cal. Ct. App. 2016).

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

231. *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972); *see also* *People v. Garcia*, 213 Cal. Rptr. 3d 217, 224–25 (Cal. Ct. App. 2017).

232. *Lynch*, 503 P.2d at 930–32; *In re Nuñez*, 93 Cal. Rptr. 3d 242, 254 (Cal. Ct. App. 2009); *People v. Em*, 90 Cal. Rptr. 3d 264, 271 (Cal. Dist. Ct. App. 2009); *see also* *People v. Dillon*, 668 P.2d 697, 720–22 (Cal. 1983).

233. *Dillon*, 668 P.2d at 726 n.38; *Nuñez*, 93 Cal. Rptr. 3d at 254.

234. *People v. Landry*, 385 P.3d 327, 382 (Cal. 2016); *People v. Cage*, 362 P.3d 376, 405 (Cal. 2015); *People v. Mendez*, 114 Cal. Rptr. 3d 870, 884–85 (Cal. Ct. App. 2010).

235. *People v. Watson*, 214 Cal. Rptr. 3d 48, 56–57 (Cal. Ct. App. 2017).

236. *People v. Anderson*, 493 P.2d 880, 882 (Cal. 1972) (en banc).

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

238. *See, e.g.,* *People v. Mantanez*, 119 Cal. Rptr. 2d 756, 763–64 (Cal. Ct. App. 2002).

239. *People v. Carmony*, 26 Cal. Rptr. 3d 365, 368 (Cal. Ct. App. 2005) (“It is a rare case that violates the prohibition against cruel and/or unusual punishment.”); *see also* *Cage*, 362 P.3d at 406;

Similarly, the Michigan Constitution contains a disjunctive Eighth Amendment analogue.²⁴⁰ Michigan courts have recognized that the “or” makes the state constitutional provision broader than the Eighth Amendment.²⁴¹ The state constitutional provision incorporates the Eighth Amendment’s gross disproportionality test but also adds an inquiry as to whether the punishment satisfies the goal of rehabilitation.²⁴² In essence, the Michigan approach shadows the Eighth Amendment but incorporates the purposes of punishment, particularly rehabilitation, into its analysis. As such, while Michigan courts certainly reject many state constitutional challenges,²⁴³ the courts have found it possible for non-capital punishments to be cruel or unusual.²⁴⁴

Minnesota’s constitution prohibits cruel or unusual punishments.²⁴⁵ Minnesota courts indicate that this language requires two separate inquiries.²⁴⁶

People v. Cunningham, 352 P.3d 318, 364 (Cal. 2015); People v. Jackson, 319 P.3d 925, 961–62 (Cal. 2014); People v. Christensen, 177 Cal. Rptr. 3d 712, 732 (Cal. Ct. App. 2014); People v. Abundio, 165 Cal. Rptr. 3d 183, 190 (Cal. Ct. App. 2013). *But see* People v. Dillon, 668 P.2d 297, 727 (Cal. 1983) (holding that, under the circumstances of the case, life imprisonment for first-degree felony-murder was cruel and unusual).

240. MICH. CONST. art. I, § 16 (“Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.”).

241. *See, e.g.*, People v. Benton, 817 N.W.2d 599, 607 (Mich. Ct. App. 2011); People v. Nunez, 619 N.W.2d 550, 554 n.2 (Mich. Ct. App. 2000); Carlton v. Dep’t of Corr., 546 N.W.2d 671, 678 (Mich. Ct. App. 1996) (“In an appropriate case, the Michigan Constitution’s prohibition against ‘cruel or unusual’ punishment may be interpreted more broadly than the Eighth Amendment’s prohibition . . .”).

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

243. *See, e.g.*, People v. Fluker, 498 N.W.2d 431, 431 (Mich. 1993); People v. Stewart, 256 N.W.2d 31, 36–37 (Mich. 1977); People v. Burton, 240 N.W.2d 239, 241–42 (Mich. 1976); People v. Hall, 242 N.W.2d 377, 380 (Mich. 1976); People v. Powell, 750 N.W.2d 607, 610 (Mich. Ct. App. 2008) (per curiam); People v. Poole, 555 N.W.2d 485, 492 (Mich. Ct. App. 1996); People v. DiVietri, 520 N.W.2d 643, 645 (Mich. Ct. App. 1994) (per curiam), *appeal denied*, 408 Mich. App. 886 (1995); People v. Cortez, 346 N.W.2d 540, 548–49 (Mich. Ct. App. 1984); People v. Landis, 361 N.W.2d 748, 749 (Mich. Ct. App. 1984) (per curiam); People v. O’Donnell, 339 N.W.2d 540, 543–44 (Mich. Ct. App. 1983) (per curiam); People v. Johnson, 321 N.W.2d 752, 755 (Mich. Ct. App. 1982) (per curiam); People v. Kirchoff, 327 N.W.2d 535, 537 (Mich. Ct. App. 1982) (per curiam); People v. Korona, 326 N.W.2d 143, 145 (Mich. Ct. App. 1982) (per curiam); People v. Hamp, 312 N.W.2d 175, 181 (Mich. Ct. App. 1981); People v. Ross, 251 N.W.2d 268, 270 (Mich. Ct. App. 1977) (per curiam); People v. Gunn, 190 N.W.2d 793, 795 (Mich. Ct. App. 1971) (per curiam).

244. *See, e.g.*, People v. Lorentzen, 194 N.W.2d 827, 834 (Mich. 1972); *Dipiazza*, 778 N.W.2d at 273.

245. MINN. CONST. art. I, § 5 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”).

246. *See, e.g.*, State v. Ali, 855 N.W.2d 235, 258 (Minn. 2014); State v. Vang, 847 N.W.2d 248, 263 (Minn. 2014) (“To determine whether a particular sentence is cruel or unusual under the

To determine whether a punishment is “cruel,” Minnesota courts compare the gravity of the offense to the severity of the sentence, using a proportionality test similar to the Eighth Amendment.²⁴⁷ To determine whether a punishment is “unusual,” Minnesota courts generally consider whether a consensus exists among the states that the sentence offends the evolving standards of decency.²⁴⁸ Despite the two-part inquiry, defendants challenging sentences under the state constitution typically do not prevail.²⁴⁹

C. *Alternatives*

Some state constitutions do not proscribe “cruel and unusual” or “cruel or unusual” punishments, but instead have different language to address unconstitutional punishments. Interestingly, many still follow the Eighth Amendment doctrine in evaluating punishments under their state constitution.

1. Adopting the Eighth Amendment Approach

a. *Cruel, but Not Unusual (Delaware, Kentucky, Pennsylvania, Rhode Island, and South Dakota)*

Delaware’s constitution contains an Eighth Amendment analogue, but it prohibits only cruel punishments, not unusual ones.²⁵⁰ The initial approach of Delaware courts to the state constitutional analogue to the Eighth Amendment found that the courts should defer to the legislature completely and not place any limitations on punishment.²⁵¹ The Delaware Supreme Court’s subsequent analysis applies a gross disproportionality standard to the review of punishments under the state constitution.²⁵²

Kentucky’s constitution similarly bans cruel punishments but not unusual ones.²⁵³ Despite the lack of prohibition for unusual punishments,

Minnesota Constitution, we ‘separately examine whether the sentence is cruel and whether the sentence is unusual.’”).

247. See, e.g., *Vang*, 847 N.W.2d at 263; *State v. Juarez*, 837 N.W.2d 473, 482 (Minn. 2013); *State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010); *State v. Gutierrez*, 667 N.W.2d 426, 438 (Minn. 2003); *State v. Pedersen*, 679 N.W.2d 368, 377–78 (Minn. Ct. App. 2004).

248. See, e.g., *Vang*, 847 N.W.2d at 263; *Juarez*, 837 N.W.2d at 482.

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

250. DEL. CONST. art I, § 11 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners.”).

251. *State v. Cannon*, 190 A.2d 514, 517–18 (Del. 1963).

252. *State v. Ayers*, 260 A.2d 162, 169 (Del. 1969).

253. KY. BILL OF RIGHTS § 17 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.”).

Kentucky courts track the Eighth Amendment and impose the same three-part gross disproportionality test under the state constitution.²⁵⁴ The Kentucky courts have upheld virtually all of the challenges to sentences under the state constitution.²⁵⁵

Pennsylvania's constitutional analogue to the Eighth Amendment bars cruel punishments, but not unusual ones.²⁵⁶ Pennsylvania courts have held that the state constitution provides no broader protections than the Eighth Amendment.²⁵⁷ As a result, the Pennsylvania courts apply the Eighth Amendment gross disproportionality test, and defendants are unable to prevail under the state constitution.²⁵⁸

The Rhode Island state constitutional analogue to the Eighth Amendment proscribes cruel punishments, but not unusual ones, as well as adding a proportionality requirement.²⁵⁹ The Rhode Island courts, however, do not distinguish between the state constitution and the Eighth Amendment,²⁶⁰ using the gross disproportionality test as a bar to state constitutional claims of cruel and unusual punishment.²⁶¹

The South Dakota analogue to the Eighth Amendment proscribes cruel punishments, but not unusual ones.²⁶² Nonetheless, South Dakota courts apply

254. *See, e.g.*, *Howard v. Commonwealth*, 496 S.W.3d 471, 477–78 (Ky. 2016); *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003).

255. *See, e.g.*, *Howard*, 496 S.W.3d at 634; *Riley*, 120 S.W.3d at 634; *Taylor v. Commonwealth*, 125 S.W.3d 216, 220 (Ky. 2003); *Harrison v. Commonwealth*, 858 S.W.2d 172, 177 (Ky. 1993); *Stark v. Commonwealth*, 828 S.W.2d 603, 608 (Ky. 1991), *overruled on other grounds by Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996); *Brown v. Commonwealth*, 818 S.W.2d 600, 601 (Ky. 1991); *Martin v. Commonwealth*, 493 S.W.2d 714, 714 (Ky. 1973); *Walsh v. Commonwealth*, 189 S.W.2d 840, 841 (Ky. 1945); *Covington v. Commonwealth*, 849 S.W.2d 560, 563 (Ky. Ct. App. 1992); *Collett v. Commonwealth*, 686 S.W.2d 822, 825 (Ky. Ct. App. 1984).

256. PA. CONST. art. I, § 13 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.”).

257. *Commonwealth v. Bonner*, 2016 PA Super 48, ¶ 8 n.18, 135 A.3d 592, 597 n.18; *Commonwealth v. Elia*, 2013 PA Super 323, ¶ 37, 83 A.3d 254, 267; *Commonwealth v. Spells*, 612 A.2d 458, 461 (Pa. Super. Ct. 1992).

258. *See, e.g.*, *Commonwealth v. Lankford*, 2017 PA Super 166, ¶¶ 7–12, 164 A.3d 1250, 1252–53; *Commonwealth v. Proctor*, 2017 PA Super 30, ¶¶ 33–35, 156 A.3d 261, 274–76; *Elia*, 2013 PA Super at 323 ¶¶ 37–42, 83 A.3d at 267–69; *Commonwealth v. Bucknor*, 657 A.2d 1005, 1007 (Pa. Super. Ct. 1995) (per curiam); *Commonwealth v. Gaddis*, 639 A.2d 462, 473 (Pa. Super. Ct. 1994); *Spells*, 612 A.2d at 461; *Commonwealth v. Strunk*, 582 A.2d 1326, 1332–33 (Pa. Super. Ct. 1990).

259. R.I. CONST. art. I, § 8 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offense.”).

260. *Alessio v. State*, 924 A.2d 751, 755 (R.I. 2007).

261. *See, e.g.*, *State v. Miguel*, 101 A.3d 880, 883 (R.I. 2014); *Alessio*, 924 A.2d at 756; *State v. Monteiro*, 924 A.2d 784, 795–96 (R.I. 2007); *McKinney v. State*, 843 A.2d 463, 473 (R.I. 2004); *Ret. Bd. of Emps.’ Ret. Sys. of State v. Azar*, 721 A.2d 872, 881 (R.I. 1998); *State v. Smith*, 602 A.2d 931, 938 (R.I. 1992). *But see* *State v. Ballard*, 699 A.2d 14, 17 (R.I. 1997) (holding that two consecutive life sentences were manifestly excessive), *declined to follow by State v. Coleman*, 984 A.2d 650, 656 (R.I. 2009).

262. S.D. CONST. art. VI, § 23 (“Excessive bail shall not be required, excessive fines imposed, nor cruel punishments inflicted.”).

the gross disproportionality test in assessing punishments under the state constitution, making the analysis consistent with the Eighth Amendment approach of denying non-capital, non-JLWOP claims.²⁶³

b. Disjunctive and Conjunctive (Maryland)

Maryland's two analogues to the Eighth Amendment are both conjunctive and disjunctive, prohibiting the infliction of "cruel and unusual pains" by the legislature²⁶⁴ and "cruel or unusual punishment" by the courts.²⁶⁵ Despite the differing conjunctions, Maryland courts generally track the Eighth Amendment in applying the state constitution.²⁶⁶

The general concept that the Maryland courts have adopted is that a punishment is satisfactory under the state constitution as long as it "conforms with the basic concept of human dignity and is neither cruelly inhumane nor disproportionate to the offense."²⁶⁷ Generally speaking, Maryland courts construe the state constitution *in pari materia* with the Eighth Amendment.²⁶⁸ As with other states, Maryland courts have found most punishments constitutional under the state constitution.²⁶⁹ On the occasions where Maryland courts have reversed cases,²⁷⁰ they have adopted the Supreme Court's reasoning in *Solem v. Helm*.²⁷¹

263. See, e.g., *State v. Bausch*, 2017 SD 1, ¶ 38, 889 N.W.2d 404, 415; *State v. Ainsworth*, 2016 SD 40, ¶¶ 8–9, 879 N.W.2d 762, 765; *State v. Diaz*, 2016 SD 78, ¶ 56, 887 N.W.2d 751, 768; *State v. McCahren*, 2016 SD 34, ¶ 37, 878 N.W.2d 586, 602; *State v. Rice*, 2016 SD 18, ¶ 29, 877 N.W.2d 75, 85; *State v. Traversie*, 2016 SD 19, ¶ 19, 877 N.W.2d 327, 333; *State v. Coleman*, 2015 SD 48, ¶ 19, 865 N.W.2d 848, 854; *State v. Garreau*, 2015 SD 36, ¶ 13, 864 N.W.2d 771, 776; *State v. Brende*, 2013 SD 56, ¶ 38, 835 N.W.2d 131, 146; *State v. Graham*, 2012 SD 42, ¶ 43, 815 N.W.2d 293, 308; *State v. Iannarelli*, 2008 SD 121, ¶ 19, 759 N.W.2d 122, 127; *State v. Blair*, 2006 SD 75, ¶ 67, 721 N.W.2d 55, 72–73; *State v. Knecht*, 1997 SD 53, ¶¶ 25–28, 563 N.W.2d 413, 422; *State v. Gehrke*, 491 N.W.2d 421, 425 (S.D. 1992). *But see* *State v. Bult*, 529 N.W.2d 197, 200 (S.D. 1995) (reversing a sentence of life without parole for an eighteen-year-old because it shocked the conscience of the court).

264. MD. DECLARATION OF RIGHTS art. 16 ("That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter.")

265. *Id.* at art. 25 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.")

266. *Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. 1993).

267. *Phipps v. State*, 385 A.2d 90, 94 (Md. Ct. App. 1978) (citations omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175, 182 (1976)).

268. *Thompson v. Grindle*, 688 A.2d 466, 470 n.5 (Md. Ct. App. 1997).

269. See, e.g., *State v. Bolden*, 737 A.2d 1086, 1090 (Md. 1999); *Minor v. State*, 546 A.2d 1028, 1034 (Md. 1988); *Hobbs v. State*, 191 A.2d 238, 240 (Md. 1963); *Martin v. State*, 177 A.2d 247, 249 (Md. 1962); *Dobson v. Warden*, 135 A.2d 890, 891 (Md. 1957); *Apple v. State*, 59 A.2d 509, 513 (Md. 1948); *Clark v. State*, 981 A.2d 710, 726 (Md. Ct. Spec. App. 2009); *Horsman v. State*, 570 A.2d 354, 358 (Md. Ct. Spec. App. 1990); *Teeter v. State*, 499 A.2d 503, 509–10 (Md. Ct. Spec. App. 1985); *Washington v. State*, 236 A.2d 32, 33 (Md. Ct. Spec. App. 1967) (per curiam).

270. *Epps v. State*, 634 A.2d 20, 24 (Md. 1993); *Thomas*, 634 A.2d at 7–9 (Md. 1993).

271. 463 U.S. 277, 290–92 (1983).

c. No Cruel and Unusual Analogue (Vermont)

The Vermont Constitution does not contain a bar against cruel or unusual punishments, instead prohibiting only the imposition of disproportionate fines.²⁷² As a result, the Vermont courts review challenges to punishment under the Eighth Amendment.²⁷³

2. Adopting a Separate State Constitutional Approach

a. Cruel, but Not Unusual (Washington)

Washington's constitutional analogue to the Eighth Amendment proscribes cruel punishments and does not also require them to be unusual.²⁷⁴ Washington courts have made clear that the state constitution offers broader protections than the Eighth Amendment.²⁷⁵

With respect to non-capital offenses, Washington conducts a separate analysis using a four-part test that contains elements of the Eighth Amendment's gross disproportionality test and seldom allows defendants to prevail.²⁷⁶ Specifically, the proportionality test under the Washington Constitution examines: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.²⁷⁷

In some cases, the Washington Supreme Court has elected to impose a categorical ban under the state constitution on specific types of punishment.

272. VT. CONST. ch. II, § 39 ("All prosecutions shall commence, *By the authority of the State of Vermont*. All Indictments shall conclude with these words, *against the peace and dignity of the State*. And all fines shall be proportioned to the offences." (emphasis added)).

273. See, e.g., *In re Stevens*, 2014 VT 6, ¶¶ 5–7, 195 Vt. 486, 488–90, 90 A.3d 910, 912–13; *State v. Rideout*, 2007 VT 59A, ¶ 28, 182 Vt. 113, 126–28, 933 A.2d 706, 716–17; *State v. Alexander*, 2005 VT 25, ¶ 9, 178 Vt. 482, 484–85, 871 A.2d 972, 975; *State v. Venman*, 564 A.2d 574, 581 (Vt. 1989).

274. WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted"); *State v. Witherspoon*, 329 P.3d 888, 894 (Wash. 2014) (en banc) ("The Eighth Amendment bars cruel and unusual punishment while article I, section 14 bars cruel punishment.").

275. *State v. Whitfield*, 134 P.3d 1203, 1216 (Wash. 2014); *State v. Roberts*, 14 P.3d 713, 733 (Wash. 2000); *State v. Ames*, 950 P.2d 514, 517 n.8 (Wash. Ct. App. 1998).

276. See *Wahleithner v. Thompson*, 143 P.3d 321, 326 (Wash. Ct. App. 2006); see also *State v. Magers*, 189 P.3d 126, 136 (Wash. 2008) (en banc); *State v. Manussier*, 921 P.2d 473, 489 (Wash. 1996) (en banc); *State v. Rivers*, 921 P.2d 495, 503 (Wash. 1996) (en banc); *State v. Thorne*, 921 P.2d 514, 533 (Wash. 1996) (en banc), *abrogated on other grounds by* 457 P.3d 543 (Wash. 2020); *State v. Grenning*, 174 P.3d 706, 720 (Wash. Ct. App. 2008); *State v. Whitfield*, 134 P.3d at 1217 (Wash. Ct. App. 2006); *State v. Flores*, 56 P.3d 622, 625 (Wash. Ct. App. 2002); *State v. Gimarelli*, 20 P.3d 430, 436 (Wash. Ct. App. 2001); *In re Haynes*, 996 P.2d 637, 643 (Wash. Ct. App. 2000); *State v. Morin*, 995 P.2d 113, 118 (Wash. Ct. App. 2000); *Ames*, 950 P.2d at 518 (Wash. Ct. App. 1998).

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

Recently, for example, Washington courts have held that the death penalty²⁷⁸ and JLWOP violate the state constitution.²⁷⁹

b. Implicit Cruel and Unusual (Connecticut)

While not having an explicit textual proscription against cruel and unusual punishments, the Connecticut Constitution, as interpreted by Connecticut courts, bars cruel and unusual punishments.²⁸⁰ The Connecticut Supreme Court has explained that sections eight and nine of article one articulate due process protections that “prohibit governmental infliction of cruel and unusual punishments.”²⁸¹

The Connecticut Supreme Court has further indicated that the interpretation of its state constitutional provisions, while informed by the interpretation of the Eighth Amendment, constitutes its own inquiry.²⁸² Until recently, the only applications of this doctrine related to the death penalty.²⁸³ In 2015, the Connecticut Supreme Court held that the death penalty violated the state constitution because it failed to satisfy any legitimate penological purpose and was unconstitutionally excessive as a punishment.²⁸⁴

c. Retribution and Rehabilitation (Illinois)

The Illinois Constitution does not have a provision that bars cruel and unusual punishments per se; it instead requires all penalties to relate to the seriousness of the offense with the goal of restoring the offender to society.²⁸⁵ In other words, the state constitution requires punishments to be both retributive and rehabilitative.²⁸⁶

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

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

280. See CONN. CONST. art. I, §§ 8, 9; see also *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015).

281. *State v. Ross*, 646 A.2d 1318, 1354 (Conn. 1994).

282. See generally *Santiago*, 122 A.3d at 18 (“These factors, which we consider in turn, inform our application of the established state constitutional standards—standards that, as we explain hereinafter, derive from United States Supreme Court precedent concerning the eighth amendment—to the defendant’s claims in the present case.”).

283. See *Santiago*, 122 A.3d at 18 (applying doctrine to the death penalty); see also *State v. Reynolds*, 836 A.2d 224, 286 (Conn. 2003) (same); *State v. Rizzo*, 833 A.2d 363, 390–91 (Conn. 2003) (same); *Ross*, 646 A.2d 1318, 1354 (Conn. 1994) (same). The two non-capital challenges under the state constitution related to the application of the Supreme Court’s decision in *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012). In those cases, the Connecticut appeals courts rejected claims that the juvenile mandatory minimum sentence of twenty-five years was the equivalent of a mandatory JLWOP sentence. See *State v. Hathaway*, 172 A.3d 258, 260 (Conn. Ct. App. 2017); *State v. Rivera*, 172 A.3d 260, 280 (Conn. Ct. App. 2017).

284. See *Santiago*, 122 A.3d at 73.

285. ILL. CONST. art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”).

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

Illinois courts have interpreted their state constitution's own proportionate penalties clause in a similar manner to the Supreme Court's interpretation of the Eighth Amendment in non-capital, non-JLWOP cases.²⁸⁷ Specifically, Illinois courts emphasize the necessity of both giving deference to the legislature and the need for the punishment to be so disproportionate as to shock the conscience of the community in order to violate the state constitution.²⁸⁸

While a majority of offenders do not prevail on their disproportionate punishment claims under the state constitution,²⁸⁹ Illinois courts have found punishments to violate its proportionate penalties clause on several occasions.²⁹⁰ One reason that Illinois courts might depart from the practices of the Supreme Court in these cases while in theory applying a similar standard is that the Illinois courts must balance the goal of rehabilitation with the goal of retribution, making punishments more likely to be seen as disproportionate.²⁹¹

III. CRUELTY AS A CONSTITUTIONAL LIMITATION TO PUNISHMENT

With most state courts failing to impose any state constitutional restrictions on criminal sentences, the past three decades have seen a mass

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

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

289. See, e.g., *People v. Hunter*, 62 N.E.3d 246, 262–62 (Ill. App. Ct. 2016); see also *Pollard*, 54 N.E.3d at 251; *People v. Pace*, 44 N.E.3d 378, 414 (Ill. App. Ct. 2015); *In re Shermaine S.*, 25 N.E.3d 723, 731–32 (Ill. App. Ct. 2015); *People v. Knox*, 19 N.E.3d 1070, 1083 (Ill. App. Ct. 2014); *People v. Smolley*, 873 N.E.2d 8, 14 (Ill. App. Ct. 2007); *People v. Moore*, 797 N.E.2d 217, 231 (Ill. App. Ct. 2003); *People v. Stork*, 713 N.E.2d 187, 196 (Ill. App. Ct. 1999).

290. See, e.g., *People v. Tetter*, 121 N.E.3d 434, 450 (Ill. App. Ct. 2018) (holding that lifetime registration as a sex-offender was grossly disproportionate); see also *People v. Taylor*, 25 N.E.3d 627, 633 (Ill. 2015); *People v. House*, 72 N.E.3d 357, 389 (Ill. App. Ct. 2015) (finding that the mandatory life sentence in that case shocks the moral sense of the community); *People v. Lampkins*, 26 N.E.3d 601, 604–06 (Ill. App. Ct. 2015).

291. See, e.g., *Pace*, 44 N.E.3d at 404–05 (explaining that the proportionate penalties clause calls for the balancing of the retributive and rehabilitative purposes of punishment; that balancing, in turn, requires that the court engage in an inclusive, holistic consideration of all of the factors in aggravation and mitigation, including the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it).

incarceration epidemic unlike any in the history of the world.²⁹² The United States currently incarcerates over 2.2 million people, comprising twenty-five percent of the world's prison population, despite having only five percent of the world's population.²⁹³

Given these metrics, state and federal governments have recently started to engage in criminal justice reform with respect to low-level sentences and have reduced the sentences of first-time drug offenders.²⁹⁴ These changes, while promising, do not adequately address the proliferation of excessive punishments that still exist under the present state statutory regimes.

Even so, the concept of cruelty as a constitutional bar to punishment does not, on its face, provide guidance to legislatures and courts concerning the extent to which states can impose particular sentences on criminal offenders.²⁹⁵ An easy approach for state courts to address this problem, however, would be to follow the cruel part of the Supreme Court's evolving standards of decency test which centers the proportionality analysis on the purposes of punishment.

A. *Evolving Standards of Cruelty*

Under the evolving standards of decency test, the second part of the analysis, as described above, assesses whether the criminal punishment in question satisfies one or more of the purposes of punishment.²⁹⁶ As explained by the U.S. Supreme Court, this part of the test requires the court considering a given punishment to use its own subjective judgment to assess whether the punishment imposed is appropriate or, alternatively, so cruel that it is inappropriate.²⁹⁷ To aid in that determination, the court looks at the purposes

292. For a discussion of this mass incarceration phenomenon, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014); EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

293. See, e.g., Lorna Collier, *Incarceration Nation*, 45 AM. PSYCHOL. ASS'N. 56, 56 (2014).

294. See, e.g., First STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 18, 21 & 34 U.S.C.).

295. A number of scholarly articles have offered proposals of how to fill aspects of this interpretive gap. See, e.g., William W. Berry III, *Eighth Amendment Presumptions*, 89 S. CAL. L. REV. 67, 67–68 (2015); William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 96–97 (2011); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1745 (2012); Stinneford, *supra* note 56, at 441–42.

296. See discussion *supra* Part I.

297. See discussion *supra* Part I.

of punishment—retribution, deterrence, incapacitation, and rehabilitation—to determine whether any one purpose justifies the punishment under consideration.²⁹⁸ In other words, the question the court assesses is whether the punishment satisfies one or more purposes.²⁹⁹

1. Applying the Purposes of Punishment

Take, for instance, a sentence of ten years in prison for the offense of armed bank robbery. Under this approach, the court would investigate whether the sentence satisfied one or more purposes of punishment. First, the court would consider the purpose of retribution and inquire whether the offender deserved the ten-year sentence. Generally speaking, the “just deserts” retribution analysis examines the culpability of the offender and the harm caused to determine the appropriate sentence.³⁰⁰ If the offender deserved ten years, the sentence would satisfy the purpose of punishment.

Deterrence could similarly serve as a valid justification for the sentence imposed if evidence existed demonstrating that the ten-year sentence effectively deterred other potential offenders from committing armed bank robbery. The presence of such evidence would mean that the sentence satisfied the stated purpose.

Even if the sentence did not satisfy either the purposes of retribution or deterrence, it could still meet the constitutional requirement—being a sentence that is not cruel—if it could satisfy either of the other purposes of punishment: incapacitation or rehabilitation. If the state could demonstrate that the future dangerousness of the offender warranted a ten-year sentence, the sentence would meet the purpose of incapacitation. Similarly, if the state could demonstrate that a ten-year sentence was necessary to rehabilitate the offender, the sentence would satisfy the purpose of rehabilitation.

If none of the purposes—retribution, deterrence, incapacitation, or rehabilitation—justified the sentence, it would be cruel, and thus unconstitutional under the state constitutional analogue to the Eighth Amendment. Note that this approach does not just apply to facial constitutional challenges, as in the categorical rules adopted by the Court in capital and JLWOP cases. Rather, the state could also consider as applied challenges. In other words, while a particular punishment might be appropriate generally, at least in some circumstances, the punishment is excessive in light of the relevant evidence in the case at issue. A second, implicit part of the court’s application of the evolving standards of decency

298. See discussion *supra* Part I.

299. See discussion *supra* Part I.

300. See, e.g., ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 13–17 (2005).

test—the concept of proportionality—fleshes out this idea and demonstrates its potential.

2. Assessing Proportionality

Under the U.S. Supreme Court's application of the purposes of punishment in its evolving standards of decency cases, the Court's analysis also implicitly contains a proportionality component in the discussion of the purposes of punishment. Indeed, commentators often refer to the categorical limitations under the Eighth Amendment as proportionality restrictions.

The examination of whether a particular sentence satisfies a purpose of punishment is rarely done in the abstract. It is possible to say, for instance, that the death penalty never satisfies the purpose of deterrence³⁰¹ or the purpose of incapacitation.³⁰²

More commonly, though, the question is whether the sentence is proportional as applied under the circumstances of the crime. While some have argued that the concept of proportionality pertains only to retribution,³⁰³ a better approach is to apply this concept to all purposes of punishment.³⁰⁴ The application of this limit of proportionality manifests itself in slightly different ways with respect to each purpose of punishment.

The concept of just deserts retribution contemplates giving the offender a punishment no more than and no less than—i.e., proportional to—the offender's culpability and the harm caused by the crime.³⁰⁵ The analysis with respect to just deserts retribution is virtually identical because proportionality is inherent in the concept of retribution.

With respect to deterrence, the concept of proportionality raises the question of whether the sentence achieves a proportional amount of deterrence—that is, whether the sentence is long enough, but not longer than necessary to achieve the desired level of deterrence. Returning to the armed robbery example, at some point increasing the sentence will achieve only marginal additional deterrence, and then, at some further point, no additional

301. Compare Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708–11 (2005) (exploring the consequences of the death penalty deterring would-be offenders), with Carol S. Steiker, *No, Capital Punishment is not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 771 (2005) (responding to Sunstein and Vermeule).

302. See William W. Berry III, *Ending Death by Dangerousness*, 52 ARIZ. L. REV. 889, 894 (2010). Scholars have even argued that it never satisfies the purpose of retribution, see Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C. L. L. REV. 407, 409–11 (2005), and that it can satisfy the purpose of rehabilitation, see Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1231 (2013).

303. See Stinneford, *supra* note 17, at 97–98.

304. See Berry, *supra* note 57, at 67.

305. See, e.g., VON HIRSCH & ASHWORTH, *supra* note 300, at 12–15 (2005).

deterrence at all. In assessing whether the purpose of deterrence justifies a sentence, then, the question is not only whether the sentence will actually deter, but also whether the sentence achieves the desired amount of deterrence with the lowest required sentence. If a sentence of five years would deter 99% of potential offenders from committing armed robbery, applying the concept of proportionality would lead to the conclusion that a ten-year sentence was cruel under the deterrence analysis.

The same analysis also applies for the purposes of incapacitation and rehabilitation. If an offender that commits armed robbery will only be dangerous for five years into the future, a ten-year sentence would be a cruel punishment under future risk analysis because it is so disproportionate. If an armed robber needs only five years to achieve the level of rehabilitation allowing him to rejoin society without recidivating, then a ten-year sentence would be a cruel punishment.

The concept of proportionality serves to prevent excessively long sentences when the U.S. Supreme Court considers the purpose of punishments. The sentence should be the least amount of time necessary to achieve the purpose of the punishment.³⁰⁶

For constitutional purposes, this parsimony requirement of proportionality does not mean that the given state constitutional Eighth Amendment analogue should provide a basis to strike down every sentence that is slightly excessive. On the other hand, where the sentence is clearly excessive, state supreme courts should intervene to place reasonable limits on the ability of the prosecutors, legislatures, and judges to impose unnecessarily harsh sentences on criminal offenders.

One issue that arises through the application of the purposes of punishment in this context is the likelihood of contradictory results as one shifts from purpose to purpose.³⁰⁷ As with the Supreme Court's application of the Eighth Amendment, typically finding one purpose of punishment for which the sentence is proportional should suffice to allow the sentence to survive under the state constitution. As explored in Part IV below, however, there are many common sentences that are disproportionate under any purpose that deserve state constitutional scrutiny.

B. *Unlinking Cruel from Unusual*

Under the Court's application of the Eighth Amendment, the cruelty inquiry remains part of a larger test in capital and JLWOP cases. It is not

306. Indeed, the federal sentencing statute, 18 U.S.C. § 3553, provides as much, stating that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of punishment].” 18 U.S.C. § 3553(a) (2018).

307. 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, 631 (2008).

really a part of the Court's gross disproportionality test, which sets the bar so high—so unusual—that almost no non-capital, non-juvenile punishment is disproportionate, even if it is cruel.

The Eighth Amendment, however, is an application of a prohibition of cruel “and” unusual punishments. If one examines state constitutions that link cruel and unusual disjunctively instead of conjunctively, the doctrine's application should shift from the Eighth Amendment standards. Given the interpretive options discussed above with respect to the relevant conjunction, states that proscribe “cruel and unusual” punishments could also in theory find “cruel” punishments to violate the state constitution.

In other words, prohibition of cruel punishments that need not be unusual opens the door to a broader analysis under state constitutions that use the disjunctive language (and perhaps even the conjunctive language). This occurs in two important ways—the elimination of jurisdiction counting and the removal of differentness as a limit on the scope of the constitutional provision.

1. Jurisdiction Counting No Longer Required

Under the evolving standards of decency test, the first step in determining whether a particular sentence is cruel and unusual is considering whether a majority of jurisdictions still use the punishment for the crime in question. This state counting provides an objective measure of the evolving standards of decency, the current societal standard with respect to the punishment at issue.³⁰⁸ Where states continue to use a punishment widely in the context in question, then the punishment does not violate the evolving standards of decency.³⁰⁹ As a result, the Supreme Court would likely deny a petition for certiorari made under the Eighth Amendment if the punishment being challenged was one that states continued to use.

If state supreme court interpretations of state constitutions simply mirror the Supreme Court's interpretation of the Eighth Amendment, then the unusual part of the evolving standards of decency test will limit any expansion of state constitutional law in this area unless the state court examines the issue from an intra-state perspective rather than an inter-state perspective.³¹⁰ Practically, as explored above, many states limit the scope of

308. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 594 (1977); see also *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008); *Roper v. Simmons*, 543 U.S. 551, 567–68 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *Tison v. Arizona*, 481 U.S. 137, 149–59 (1987); *Enmund v. Florida*, 458 U.S. 782, 796 (1982).

309. See, e.g., cases cited *supra* note 308.

310. See William W. Berry III, *Unusual State Punishments*, 72 FLA. L. REV. 1, 5 (2020).

their constitutional provision to the scope that the Supreme Court has articulated under the Eighth Amendment.³¹¹

With a disjunctive constitution that proscribes cruel “or” unusual punishments, the unusual part of the analysis disappears. State supreme courts in these situations are free to move beyond the scope of the Eighth Amendment and explore which punishments are merely cruel in order to limit the imposition of such punishments.

Without the unusual requirement, state courts do not have to engage in state counting as the Supreme Court does under the evolving standards of decency. To the extent that state supreme courts merely adopt the Eighth Amendment analysis and outcomes, the counting of other states seems troubling, as the meaning of one state’s constitution should not depend on the practices of other states with respect to particular punishments.

Perhaps most importantly, states with disjunctive Eighth Amendment analogues should endeavor to interpret the scope of their state constitution separately from the Eighth Amendment. Given that there is no requirement that a punishment must be unusual to be unconstitutional under a state constitution with disjunctive language, such states should engage in analysis of whether a particular punishment is indeed cruel.

While making this shift with respect to death penalty and JLWOP means discarding half of the Eighth Amendment evolving standards of decency test, applying the gross disproportionality test and assessing non-JLWOP and non-capital crimes both require a different approach.

2. Differentness No Longer Limits Analysis

The differentness concept embodied in the Eighth Amendment depends in part on the idea that some punishments are unusual, and thus deserve higher scrutiny. If the language of the state constitution decouples the question of whether punishments are unusual from whether punishments are cruel, the analysis of cruelty does not require the kind of two-track approach to constitutional limits that the Supreme Court has utilized in applying the Eighth Amendment.

The Supreme Court, as discussed above, provides a higher level of Eighth Amendment scrutiny to crimes that are “different.” Specifically, the Court applies the evolving standards of decency only in capital and JLWOP cases.

This differentness analysis rests in part on the idea that these punishments—death and JLWOP—are unique, and, as such, have a higher likelihood of being unusual. The relatively sparse use of these punishments

311. *See supra* Part II.

(and they continue to become increasingly rare) reflects the idea that the need for Eighth Amendment scrutiny relates to their unusualness as punishments.

Put another way, the differentness of the death penalty and juvenile life without parole stems from the limit on unusual punishments under the Eighth Amendment. An examination of the development of the Eighth Amendment doctrine bears out this connection. In *Furman v. Georgia*,³¹² several members of the Court in their opinions emphasized that the rarity of the use of the death penalty contributed to its arbitrary and random imposition and made it an unusual punishment.³¹³ In *Gregg v. Georgia*,³¹⁴ the Supreme Court allowed the new Georgia death penalty statute to survive the Eighth Amendment in light of new safeguards that presumably would remove the arbitrary and random choice of a few cases and replace it with a more principled set of tools designed to achieve consistent results.³¹⁵

In *Coker v. Georgia*,³¹⁶ which applied the evolving standards of decency test, the Court incorporated its idea from *Furman* that rare use constituted unusualness.³¹⁷ Specifically, the Court emphasized the rareness of punishing rape with death sentences.³¹⁸ This approach continued through the Court's use of the evolving standards of decency test in capital and juvenile life without parole cases.³¹⁹

By contrast, the Court's analysis in non-capital cases has typically not explored the unusualness of the punishment in question. Instead, the application of the gross disproportionality test looks at the question of cruelty through disproportionality. In *Solem v. Helm*,³²⁰ the one non-capital case in the post-*Furman* era that has found a crime to be excessive, the Court's proportionality analysis focused on the excessive nature of the penalty for the crime.³²¹ The Court discussed looking to the practices of other jurisdictions as part of the analysis, but the inquiry did not seek to determine if the penalty had been imposed rarely in other jurisdictions for the crime in question.³²² Instead, the Court looked to the practices of other jurisdictions in order to

312. 408 U.S. 238 (1976).

313. *Id.* at 310 (1972) (per curiam) (Potter, J., concurring).

314. 428 U.S. 153 (1976).

315. *Id.* at 206–07 (holding that the Georgia legislature's capital punishment is sufficient to survive Eighth Amendment scrutiny).

316. 433 U.S. 584 (1977).

317. *Id.* at 592–96 (noting that Georgia was the only state that applied the death penalty in these particular rape cases).

318. *Id.*

319. See *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Graham v. Florida*, 560 U.S. 48, 101 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Roper v. Simmons*, 543 U.S. 551, 551–63 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

320. 463 U.S. 277 (1983).

321. *Id.* at 290–92 (1983).

322. *Id.*

find objective confirmation that the punishment in question was excessive.³²³ The Court has similarly ignored the question of unusualness in its other non-capital, non-JLWOP Eighth Amendment cases in which it has used the gross disproportionality test.³²⁴

The distinction is perhaps subtle, but nonetheless important. Because the Court equates differentness to unusualness, its reduced scrutiny for non-capital cases need not apply when construing state constitutional analogues to the Eighth Amendment. State courts can read disjunctive state constitutions to require heightened scrutiny for cruel punishments because there is no differentness requirement under the state constitution.

3. Gross Disproportionality Need Not Be the Standard

Finally, most state courts, as demonstrated above, have elected to defer to state legislatures blindly in their imposition of excessive punishments. Doing so means the courts have largely abdicated their role as the third branch of government entrusted with defending the state constitution.

With respect to the U.S. Supreme Court, there may exist reasons why the Court should be hesitant to apply the U.S. Constitution to restrict the actions of Congress and state legislatures. The counter-majoritarian difficulty—the idea that the views of five Justices should not trump the will of the people as reflected in legislative judgments—suggests the Court should be wary of such judgments. Further, amending the U.S. Constitution is quite difficult. As a result, such decisions have a finality about them that other judicial decisions do not. This may be less true with respect to the Eighth Amendment in light of the Court’s adoption of the evolving standards of decency test, as the test incorporates a majoritarian objective requirement.³²⁵

But in state courts, the counter-majoritarian difficulty does not exist. If state courts overreach, citizens have several available democratic responses. Citizens can vote for new justices in most states, and state constitutions are

323. *Id.*

324. See *Lockyer v. Andrade*, 538 U.S. 63, 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); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately \$1200 of golf clubs, where defendant had four prior felony convictions); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (affirming mandatory life sentence for felony theft of \$120.75 by false pretenses where defendant had two prior convictions).

325. See William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 152 (2018).

generally quite easy to amend. Additionally, with respect to controversial issues, states can have referenda to determine the views of the people.

Further, the protection against cruel and/or unusual punishments is a counter-majoritarian right—a protection of the individual against the excessive punitiveness of the majority. If state courts do not ever limit the ability of legislatures to punish, the state constitutional analogue to the Eighth Amendment becomes a dead letter and has no meaning.

In light of all of these considerations, there is no requirement, constitutional or otherwise, that mandates a test of gross disproportionality in non-capital cases. This is particularly true when courts assume every punishment (or almost every punishment) satisfies that standard. Given the seriousness of the deprivation of freedom and the lifelong consequences felony convictions impose, it makes little sense to have a heightened standard for punishment.

Just as guilt requires proof beyond a reasonable doubt, punishment should require some level of proportionality or at least connection to one or more purposes of punishment. The justification for the length of a criminal punishment should go beyond what the legislature or sentencing judge determined; it must have some proportional connection to the crime and relate to a purpose of punishment. The unwillingness of many state courts to examine this question seriously is stunning, invites abuse, and deprives many criminal defendants of their state constitutional rights.

IV. APPLYING STATE CONSTITUTIONS TO CRUEL PUNISHMENTS

Having explored the state Eighth Amendment analogues and their approaches to punishment, this Article concludes by examining the effect of state courts taking state constitutional rights seriously in this context. Specifically, this part considers the practical implications of state supreme courts applying a strict proportionality test and/or using the purposes of punishment to assess criminal sentences.

A. *Capital Punishment*

In the death penalty context, state supreme courts should strongly consider whether, as the Washington Supreme Court recently found, the capital punishment violates their respective state constitutions. Irrespective of whether one believes in the efficacy of the death penalty, the current administration of the death penalty in the United States remains broken.³²⁶ The proliferation of constitutional errors, innocent individuals on death row, racial injustice, arbitrary administration, and problems with methods of

326. See, e.g., *Glossip v. Gross*, 136 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting).

execution all point to the likelihood that the death penalty, as applied, is an unconstitutional punishment.

B. *JLWOP*

Similarly, state supreme courts should consider holding that juvenile life without parole offenses violate state constitutions. The U.S. remains the only country in the world to impose such sentences, and states are increasingly abolishing JLWOP sentences after *Miller v. Alabama*. Abolition of juvenile life without parole does not mean that juveniles cannot serve life sentences; it simply means that one must give such sentences a second look or an opportunity for parole at some point.

C. *Life Without Parole*

Sentences of life without parole for adult offenders have similar problems. The decision to impose a life without parole sentence eliminates the possibility that an individual ever rejoins society—a very serious determination that state courts should not make lightly. This is one place where adopting a strict proportionality test instead of a gross disproportionality test might really matter. Further, state courts should seriously consider whether a purpose of punishment actually justifies a life without parole sentence. This is arguably not the case for most life without parole sentences—and is certainly not the case for all LWOP sentences that do not involve homicides.

D. *Excessive Sentences*

Finally, state courts should ask whether each sentence imposed is disproportionate and has a legitimate penal justification. Excessive sentences related to the crime committed do not necessarily have to involve incarceration for a decade or more. A five-year sentence for parking in a handicap parking spot without a tag, for instance, would clearly be a disproportionate punishment.

State courts, particularly in light of the language of their state constitutions, have an obligation to assess the punishments imposed by legislatures, rather than blindly deferring to them. By reviewing cases using an as applied proportionality standard, state courts can uphold their state constitutions, protect against individual injustices, and curb punitive overreach by state legislators and trial judges.

CONCLUSION

This Article has demonstrated the need for state supreme courts to engage in more robust reviews of punishments under their applicable state

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constitutional provisions. The shift in language from conjunctive to disjunctive opens the door for such interpretations, but also begs the question of why state courts do not engage more seriously with these Eighth Amendment analogues. Reversing the tide of blind deference to state legislative and sentencing decisions provides one possible way to begin to address the mass incarceration crisis that plagues states and their prisons.

APPENDIX

The charts that follow summarize the current language of state constitutional analogues of the Eighth Amendment and the corresponding interpretive approaches of the states.

The first chart divides the states in the same manner as the Article does, separating states into three broad categories—conjunctive, disjunctive, and other, before further breaking down the states by the language of the analogue and whether the state follows the Eighth Amendment approach or employs a separate state constitutional approach.

The second chart provides a broader summary of the analogues. Specifically, it delineates the breakdown of states based on three broad categories of analogues: (1) those with identical language to the Eighth Amendment, (2) those with identical language plus another statutory requirement, and (3) those with different language. Most states, even those with different language, adopt the interpretive approach used by the Supreme Court in Eighth Amendment cases.

<u>Category</u>	<u>Type of State Constitutional Analogue</u>	<u>Interpretive Approach</u>	<u>States</u>
Conjunctives	Identical Language (Cruel AND Unusual)	Adopt Eighth Amendment Approach	Arizona, Colorado, Georgia, Idaho, New Mexico, New York, Ohio, Tennessee, Utah, Virginia, and Wisconsin
Conjunctives	Identical Language (Cruel AND Unusual) + a Proportionality Requirement	Adopt Eighth Amendment Approach	Indiana, Maine, and New Hampshire
Conjunctives	Identical Language (Cruel AND Unusual) + Incorporation of 8th Amendment	Adopt Eighth Amendment Approach	Florida
Conjunctives	Identical Language (Cruel	Adopt Eighth	Louisiana

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	AND Unusual) + Excessive	Amendment Approach	
Conjunctives	Identical Language (Cruel AND Unusual) + Dignity Requirement	Adopt Eighth Amendment Approach	Montana
Conjunctives	Identical Language (Cruel AND Unusual) + Singular Punishment	Adopt Eighth Amendment Approach	Iowa, Missouri, Nebraska
Conjunctives	Identical Language (Cruel AND Unusual) + Purposes of Punishment	Adopt Separate State Constitutional Approach	Alaska
Conjunctives	Identical Language (Cruel AND Unusual) + Death Penalty Rule	Adopt Separate State Constitutional Approach	New Jersey
Conjunctives	Identical Language (Cruel AND Unusual) + a Proportionality Requirement	Adopt Separate State Constitutional Approach	Oregon and West Virginia
Disjunctives	Disjunctive Language (Cruel OR Unusual)	Adopt Eighth Amendment Approach	Alabama, Arkansas, Hawaii, Kansas, Massachusetts, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Texas, and Wyoming
Disjunctives	Disjunctive Language (Cruel OR Unusual) + Corporal Punishment	Adopt Eighth Amendment Approach	South Carolina
Disjunctives	Disjunctive Language (Cruel OR Unusual) + Combining Evolving Standards with Gross Disproportionality	Adopt Separate State Constitutional Approach	California, Michigan, and Minnesota

Other	Cruel, BUT NOT Unusual	Adopt Eighth Amendment Approach	Delaware, Kentucky, Pennsylvania, Rhode Island, and South Dakota
Other	Disjunctive and Conjunctive	Adopt Eighth Amendment Approach	Maryland
Other	No Analogue	Adopt Eighth Amendment Approach	Vermont
Other	Cruel, BUT NOT Unusual	Adopt Separate State Constitutional Approach	Washington
Other	Implicit Cruel and Unusual	Adopt Separate State Constitutional Approach	Connecticut
Other	Retribution and Rehabilitation	Adopt Separate State Constitutional Approach	Illinois