EXCAVATING MISSISSIPPI'S PUNISHMENT CLAUSE

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INTRODUCTION

The United States Supreme Court has interpreted the Eighth Amendment's cruel and unusual punishment clause quite narrowly despite its open-ended language.[1] The Court has been hesitant to find disproportionate punishments unconstitutional,[2] even though

[1] U.S. CONST. amend. VIII ("[N]or cruel and unusual punishments inflicted."). *See generally* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry eds., 2020).

[2] Indeed, the Court has seldom held that a non-capital, non-juvenile life without parole sentence violated the Eighth Amendment. This is true even where the sentence seems particularly excessive. *See* Lockyer v. Andrade, 538 U.S. 63, 66-67, 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 defendant had three prior felony convictions); *see also* Ewing v. California, 538 U.S. 11, 18, 30-31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994, 996 (1991) (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370-72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265-66 (1980) (affirming mandatory life sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279-84 (1983) (reversing sentence of life-without-parole for presenting a no-account check for $100, where defendant had six prior felony convictions); Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding that removal of citizenship is an unconstitutional punishment for desertion); Weems v. United States, 217 U.S. 349, 366 (1910) (holding the punishment of *cadena temporal* (hard labor) unconstitutional in light of the offense committed).

the original meaning[3] of the language is that it will evolve over time.[4]

The few exceptions to this passive judicial approach relate to capital cases and juvenile life-without-parole (JLWOP) cases. Specifically, the Court has created categorical limits on the use of the death penalty and JLWOP for particular kinds of crimes[5] and particular kinds of criminal offenders,[6] as well as barring the mandatory imposition of the death penalty and JLWOP.[7]

One explanation for the Court's hesitancy to impose constitutional limits under the Eighth Amendment is its history of deference to states in the area of criminal justice.[8] This federalism

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[3] *See generally* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation,* 102 NW. U. L. REV. 1739 (2008) (exploring the original meaning of the Eighth Amendment) [hereinafter *Original Meaning of "Unusual"*]; *see also* John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L. J. 441 (2017) (same) [hereinafter *Original Meaning of "Cruel"*].

[4] *Weems*, 217 U.S. at 373 (finding that the Eighth Amendment evolves over time and explaining, "[l]egislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'"); *Trop*, 356 U.S. at 100-01 ("the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[5] Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding death sentences for rape unconstitutional); Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (finding death sentences for child rape unconstitutional); Enmund v. Florida, 458 U.S. 782, 797 (1982) (finding death sentences for some felony murders unconstitutional); Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (narrowing the holding from *Enmund*).

[6] Roper v. Simmons, 543 U.S. 551, 564, 568 (2005) (finding death sentences for juvenile offenders unconstitutional); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (finding death sentences for intellectually disabled offenders unconstitutional).

[7] Woodson v. North Carolina, 428 U.S. 280 (1976) (barring mandatory death sentences); Roberts v. Louisiana, 431 U.S. 633 (1976) (same); Miller v. Alabama, 567 U.S. 460 (2012) (barring mandatory JLWOP sentences); Montgomery v. Louisiana, 577 U.S. 190, 205-06 (2016) (applying the Court's decision in *Miller* retroactively).

[8] *See* Youngjae Lee, *Federalism and the Eighth Amendment*, 98 IOWA L. REV. BULL. 69 (2013); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2005); *see generally* Michael J.Z. Mannheimer, *Eighth Amendment Federalism*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 1.

ideal counsels leaving the administration of criminal justice to the states, at least in areas that the Congress has not federalized.[9]

But leaving the administration of criminal justice to the states does not mean that every statute passed by state legislatures is constitutional. To the contrary, each state has its own Constitution, almost all of which contain their own punishment clauses.[10]

These state constitution punishment clauses are not simply imitations of the federal constitution requiring lockstep interpretation with the Eighth Amendment.[11] Rather, they are unique clauses with their own histories and meanings, often with different language than the federal Constitution.[12] Indeed, these are often laws voted on directly by the citizens of the state, as opposed to the acts of the legislature, which are the products of

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[9] *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011); Julie Rose O'Sullivan, *The Federal Criminal Code: Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57 (2014).

[10] Vermont is the only state without a punishment clause in their state constitution. William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1239 (2020).

[11] *See* Robert Williams, *State Constitutional Fusion Voting Claims: Textbook New Judicial Federalism in New Jersey*, 75 RUTGERS UNIV. L. REV. 1093, 1097-98 (2023); John C. Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965 (2013); Robert Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1219 (1985).

[12] *See* Berry, *supra* note 10; Ben Finholt, *Toward Mercy: Excessive Sentences and the Untapped Power of the North Carolina Constitution*, 16 ELON L. REV. 55 (2024); Maria E. Hawilo & Laura Nirider, *Past, Prologue, and Constitutional Limits on Criminal Penalties*, 114 J. CRIM. L. & CRIMINOLOGY 51 (2024); Kevin Bendesky, "*The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. PA. J. CONST. L. 201 (2023); John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733 (2022); David Shapiro & Molly Bernstein, The Meaning of Life, In Michigan: Mercy from Life Sentences Under the State Constitution (Nov. 22, 2024) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4993230 [https://perma.cc/96X3-29NC]); Casey Adams, *Banishing the Ghost of Red Hannah: Proportionality, Originalism, & The Living Constitution in Delaware*, 27 WIDENER L. REV. 23 (2021); Samuel Weiss, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L. L. REV. 569 (2014); Robert J. Smith, Zoe Robinson, & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023); Kristen Bell, State Constitutional Prohibitions Against Unnecessary Rigor in Arrest and Confinement (Feb. 12, 2024) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5108018 [https://perma.cc/XUA3-L9NT]).

representative decision-making.[13] To assume that a state punishment clause is indistinguishable from the Eighth Amendment may effectively disenfranchise the citizens that voted (or voted through representatives) to amend the state constitution.[14]

As many states have begun to recognize, state constitutions typically contain broader limits on punishment practices that the Eighth Amendment does.[15] Particularly where the constitutional language is different, the state punishment clause imposes more extensive limits on the ability of the state to punish.[16] Mississippi is one such state.[17]

To that end, this article excavates the punishment clause in Mississippi's Constitution.[18] It argues for a broader application of the state constitution to the sentences authorized by the legislature. Specifically, it suggests that the state courts should apply the state constitution to restrict the imposition of cruel or unusual punishment instead of ignoring the state constitution and using the federal constitutional standard.[19]

Part I provides a brief primer on state constitutional law and important differences between state and federal constitutions. In Part II, the article briefly describes the application of federal and

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[13] *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/W6X2-3XRP].

[14] The provision at issue here, the Mississippi punishment clause, was ratified by popular vote in 1868. John W. Winkle III, *Constitution of 1868*, MISS. ENCYC., https://mississippiencyclopedia.org/entries/constitution-of-1868/ [https://perma.cc/LX65-DUEK].

[15] Alaska, California, Connecticut, Illinois, Michigan, Minnesota, New Jersey, Oregon, Washington, West Virginia all follow such an approach. *See* Berry, *supra* note 10 (surveying the state punishment clauses).

[16] Berry, *supra* note 10. Some states use "and" like the federal constitution, some states use "or" like Mississippi, and some states use only "cruel" but not "unusual." *Id.*; *see also* sources cited *supra* note 12 (showing that state constitutions are different from the Eighth Amendment).

[17] *Compare* MISS. CONST. of 1890, art. III, § 28 ("Cruel or unusual punishment shall not be inflicted . . . ."), *with* U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted.").

[18] For a recent excavation of the Arizona constitution, *see generally* Mills & Sternstein, *supra* note 12.

[19] Of course, the Mississippi courts cannot unilaterally do this. It requires lawyers to actually make state constitutional arguments. But it also means that the court should not read its constitution the way that it reads the Eighth Amendment.

state punishment clauses by the Mississippi courts. Part III then excavates the Mississippi Constitution's punishment clause, examining the relevant text and history. In Part IV, the article conceptualizes the punishment clause in light of this text and history. Finally, in Part V, the article explores some possible applications of this new understanding of the Mississippi Constitution's punishment clause.

I. A PRIMER ON STATE CONSTITUTIONAL LAW

Until the late 1970s, state constitutional law jurisprudence was sparse, and in some areas has remained an afterthought.[20] In the 1970s, some state supreme courts had their *Marbury v. Madison* moment[21]—the realization that they have the power and responsibility to define the scope of individual rights of their citizens under their state constitution, independent from the federal constitution.[22] Others have only more recently engaged in state constitutional analysis.[23]

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[20] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *see generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS (2d ed., 2023).

[21] Marbury v. Madison, 5 U.S. 137, 178 (1803) (establishing the principle of judicial review and giving the Supreme Court the power to decide who decides the meaning of the Constitution).

[22] *See*, *e.g.*, People v. Anderson, 493 P.2d 880 (Cal. 1972) (abolishing the California death penalty); State v. Flores, 570 P.2d 965, 970 (Or. 1977) (Linde, J., dissenting); Brown v. Multnomah Cnty. Dist. Court, 570 P.2d 52, 55 (Or. 1977) (quoting OR. CONST., art. I, § 11); State *ex rel.* Johnson v. Woodrich, 566 P.2d 859, 862 (Or. 1977) (citing OR. CONST., art. I, § 12); People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (striking down the drug possession law that the Court upheld in *Harmelin* under the Michigan constitution); State v. Fain, 617 P.2d 720 (Wash. 1980) (finding a life sentence unconstitutional under the state constitution); The D.A. for the Suffolk District v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980).

[23] This is particularly true in the area of state constitutional punishment clauses. *See*, *e.g.*, Matter of Monschke, 482 P.3d 276, 326 (Wash. 2021) (barring mandatory LWOP for 18 to 21 year olds under the state constitution); State v. Bassett, 428 P.3d 343, 345 (Wash. 2018) (barring JLWOP sentences under the state constitution); People v. LaValle, 3 N.Y.3d 88, 120 (N.Y. Ct. App. 2004) (finding that the death penalty violated the New York constitution); Rauf v. Delaware, 145 A.3d 430, 434 (Del. 2016) (finding that the death penalty violated the Delaware constitution); State v. Lyle, 854 N.W.2d 378, 380-81 (Iowa 2014) (finding that all mandatory minimum sentences for juveniles violate the state constitution); State v. Sweet, 879 N.W.2d 811 (Iowa 2016) (finding that JLWOP

Despite all of the "states' rights" rhetoric dating to before the Civil War, state supreme courts have been hesitant to establish unique state doctrines under state constitutions.[24] The individual liberties that state courts have failed to protect contradict the freedom-based rhetoric that justified the argument for federalism in the first place.[25] The fight to protect state liberty from the tyranny of the Federal Government cannot be for the purpose of abdicating the same liberty to state legislatures.[26] It is particularly ironic, and unfortunate, that state courts often eschew their responsibility to interpret their own state constitutions, and instead substitute the Supreme Court's interpretation of the similar federal constitutional provision.[27] Just as interpreting the

violated the state constitution); State v. Kelliher, 873 S.E.2d 366, 370 (N.C. 2022) (holding that any sentence that requires a juvenile offender to serve forty years violates the state constitution); People v. Parks, 226 N.W.2d 710 (Mich. 2021) (barring mandatory LWOP for 18 year olds); People v. Hardin, 84 Cal. App. 5th 273, 278-79 (Cal. 2022); Commonwealth v. Mattis, 240 N.E.3d 410, 431-32 (Mass. 2024) (barring LWOP sentences for 21 and under pursuant to the state constitution); Fletcher v. Alaska, 532 P.3d 286 (Alaska Ct. App. 2023) (declining to follow *Jones v. Mississippi* and instead requiring a factual finding of "irreparable corruption" as a prerequisite to a JLWOP sentence); State v. Comer, 266 A.3d 374 (2022) (holding under the New Jersey constitution that a 30-year mandatory minimum before parole eligibility is unconstitutional as applied to children); *see also* Carol S. Steiker & Jordan M. Steiker, *Little Furmans Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621 (2022).

[24] *See generally* sources cited *supra* note 20.

[25] *See*, U.S. CONST. amend X; United States v. Lopez, 514 U.S. 549, 552 (1995) ("This constitutionally mandated division of authority was 'adopted by the Framers to ensure protection of our fundamental liberties.'"); Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Martin A. Feigenbaum, *The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immorality*, 37 EMORY L. J. 613, 625-26 (1988).

[26] It would be odd indeed to allocate rights to state government from the federal government for the purpose of extinguishing or denying those rights, all in the name of the injustice of federal protection of the same rights.

[27] To be sure, the point of having a state constitution is to allocate a different set of rights than the federal constitution does. The idea that selective incorporation somehow merged state and federal constitutional rights also does not make sense—especially when the state rights pre-dated the incorporation for decades if not a century. *See* sources cited *infra* note 32 (documenting many of the incorporation cases); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

Constitution by looking at comparable international laws seems to undermine the will of the people, so does interpreting state constitutions, voted on and ratified by citizens of the state, by looking to comparable federal constitutional provisions as interpreted by a Court made up of justices who are not citizens of the state in question.[28]

A. State Constitutional Rights are Distinct from Federal Constitutional Rights

The idea that state constitutional rights are different from federal constitutional rights should be obvious in light of the Supreme Court's incorporation cases.[29] At the founding of the United States Constitution and during the Supreme Court's post-civil war cases before 1897, it was clear that the individual rights encapsulated in the federal Bill of Rights did not apply to state governments.[30] As such, if states wanted to accord their citizens individual rights protected against state government infringement, states needed protections of those rights in their state constitutions.[31]

Constitutional Law, 63 TEX. L. REV. 1141, 1147 (1985); James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1312 n.74 (1989).

[28] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.").

[29] *See, e.g.,* Barron v. Baltimore, 32 U.S. 243, 250 (1833) (declining to apply the Bill of Rights to the states); The Slaughter-House Cases, 83 U.S. 36, 111 (1873) (finding that the privileges and immunities clause did not apply the Bill of Rights to the states); Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (incorporating the takings clause of the Fourteenth Amendment to the states). For an argument of why the privileges or immunities clause should be the vehicle for incorporation, *see* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enacting History*, 19 GEO. MASON U. C.R. L.J. 1 (2008); *see also* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219 (2009).

[30] *See, e.g.*, *Barron*, 32 U.S. at 250 (declining to apply the Bill of Rights to the states); Brennan, *supra* note 20, at 493 ("In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action.").

[31] For an exploration of the rights included in state constitutions in 1787 and 1791, *see* Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual*

The selective incorporation of the Bill of Rights to the states has been a slow process.[32] Indeed, the Court did not incorporate any of the Eighth Amendment protections until the twentieth century,[33] including the incorporation of the punishment clause in 1962.[34]

This point is particularly poignant for state punishment clauses. Throughout the history of the United States, the administration of criminal law has remained a state province, not a federal one, as a vestige of the common law.[35] Most of the common law crimes—theft, rape, murder, assault—are the responsibility of

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Rights are Deeply Rooted in American History and Tradition?, 85 S. CAL. L. REV. 1451 (2012). For the rights included at the time of the 1868 constitutions and the adoption of the Fourteenth Amendment at the end of the Civil War, *see* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 83 (2008).

[32] *See*, *e.g.*, Gitlow v. New York, 268 U.S. 652 (1925) (first amendment freedom of speech); Near v. Minnesota, 283 U.S. 697 (1931) (first amendment freedom of the press); De Jonge v. Oregon, 299 U.S. 353 (1937) (first amendment free exercise of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (first amendment establishment clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947); McDonald v. City of Chicago, 561 U.S. 742 (2015) (second amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (fourth amendment unreasonable searches); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); Ker v. California, 374 U.S. 23 (1963) (fourth amendment reasonableness); Aguilar v. Texas, 378 U.S. 108 (1964) (fourth amendment warrant requirement); *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 226 (fifth amendment takings); Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment double jeopardy); *in re* Oliver, 333 U.S. 257 (1948) (sixth amendment right to public trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment confrontation); Powell v. Alabama, 287 U.S. 45 (1932) (sixth amendment right to counsel in capital cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel in all felony cases).

[33] The Court incorporated the protection against excessive bail in 1971 in Schilb v. Kuebel, 404 U.S. 357 (1971), and the protection against excessive fines in 2019 in Timbs v. Indiana, 586 U.S. 146 (2019).

[34] Robinson v. California, 370 U.S. 660 (1962). Interestingly, the Court never made an explicit statement in *Robinson* concerning incorporation—it just used the Eighth Amendment to strike down a California statute that punished an individual based on their status as an addict. *Id.* at 667. The Court recently rejected an attempt to extend the decision in *Robinson* to local ordinances that arguably criminalized the status of homelessness. City of Grants Pass, Oregon v. Johnson, 603 U.S. 520 (2024).

[35] *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1(a) (2d ed. 2003) (noting that "the substantive criminal law began as common law for the most part, and only later became primarily statutory . . . ."); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

state government, not federal government.[36] Indeed, the federalization of certain kinds of crime—drug crimes, gun crimes, and financial crimes—has engendered much academic criticism, not only in the overreach of the federal government in duplicative prosecution,[37] but also in questions concerning the scope of the commerce power.[38]

With states governing the substance of crime and the scope of punishment for such crimes, state constitutional restrictions on crime ought to be central to protecting the individual right of citizens to be free of draconian and excessive punishment. Almost every state has a constitutional provision that bars "cruel," "cruel or unusual," or "cruel and unusual" punishments.[39]

States can, of course, link their constitution directly to the federal constitution, but this is not often what state constitutions require.[40] And states wrote their constitutions in order to provide

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[36] *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that states "historically have been sovereign" in criminal law enforcement); Patterson v. New York, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . ." (citing Irvine v. California, 347 U.S. 128 (1954))).

[37] *See*, *e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (highlighting and criticizing the extensive overlap between state and federal criminal law).

[38] *See*, *e.g.*, Lino Graglia, Lopez*,* Morrison*, and* Raich*: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761 (2008); *see also Lopez*, 514 U.S. 549 (finding federal criminalization of guns in school zones unconstitutional).

[39] *See* Berry, *supra* note 10 (cataloging the current punishment clauses of the various states). Tom Stacy has observed that "the available evidence indicates that the Founders understood [the formulations 'cruel and unusual,' 'cruel or unusual' and 'cruel'] to capture the same meaning." Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 503 (2005). Stacy, however, bases this conclusion on the change in the New York Constitution from 1787 to 1788 in which the legislature changed from "and" to "or" and "no one remarked on the difference." *Id.* at 503, n.148, citing N.Y. BILL OF RIGHTS (1787), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 613, 615 (Neil H. Cogan ed., 1997). Stacy may be correct, but it is worth noting that most conventions do not have any remarks on the adoption of the punishment clause in question, and even if discussed, the conversation is sparse. *See infra* note 193 (transcript of the adoption of the Mississippi punishment clause in 1868). Even if one reads historical silence one way with reference to the founders, it does not follow that the same presumption continued for over one hundred years through many jurisdictions adopting different iterations with different judicial interpretations.

[40] Florida's punishment clause is a good example of this idea. 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

separate and different rights than the federal Constitution because the rights related to the power of the state government, not the federal government.[41]

The concept of states' rights is not a theoretical matter. It is a constitutional matter. Justice William Brennan explained this idea:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.[42]

Judge Hans Linde similarly emphasized:

> My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.[43]

It is the province and the duty of state courts to interpret state constitutions and accord meaning to such provisions, particularly when they involve the individual rights of citizens.[44] State

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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*. . . .") (emphasis added).

[41] *See* sources cited *supra* note 31; *see also* Donna E. Blanton, *The State Constitution's Cruel or Unusual Punishment Clause: The Basis for Future Death Penalty Jurisprudence in Florida?*, 20 FLA. ST. U. L. REV. 229 (1992).

[42] Brennan, *supra* note 20, at 491. For a more recent exposition on the value of state constitutions, *see generally* SUTTON, *supra* note 20.

[43] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984).

[44] Jeffrey S. Sutton, *Response to the University of Illinois Law Review Symposium on 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1393, 1399–1400 (2020) ("State constitutions, like federalism itself, ultimately amount to neutral safeguards of freedom—sometimes leaning against the government, sometimes leaning for it. Just ask Justice Brennan and Justice Scalia. The former wrote a landmark article in support of independent state constitutional rights in 1977, and the latter acknowledged their role in his last opinion for the Court in 2016.").

constitutional rights are distinct from federal constitutional rights and deserve their own adjudication.[45]

B. State Constitutional Interpretation Does Not Face a Counter-majoritarian Problem

Constitutionalizing a category of cases strikes at the heart of our federal system.[46] On the one hand, the historical role of the Court has been to protect the individual's constitutional rights, particularly those enumerated in the Bill of Rights, against congressional and state legislative overreach.[47] Protecting the constitutional rights of individuals against the majority will, particularly when according such rights might be unpopular, is part of the constitutional check the courts provide through judicial review.[48]

On the other hand, excessive expansion of constitutional rights through overly expansive readings of the Constitution infringes upon the power of legislatures to regulate the behavior of citizens pursuant to the representative will of the majority.[49] The pejorative "judicial activism" often accompanies decisions perceived to involve

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[45] Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017) ("[R]edundancy in interpretive authority—whereby state courts and federal courts independently construe guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy.").

[46] *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153, 210 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 1-2 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part III: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385-86 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part IV: Law's Politics*, 148 U. PA. L. REV. 971, 1011 (2000); Barry Friedman, *The History of The Countermajoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336 (1998). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[47] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Roe v. Wade, 410 U.S. 113, 154 (1973); Burch v. Louisiana, 441 U.S. 130, 134 (1979); Lawrence v. Texas, 539 U.S. 558, 578 (2003). Justia has compiled a list of almost a thousand such cases. *See State Laws Held Unconstitutional*, JUSTIA, https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html [http://perma.cc/M2DP-VM5E] (last visited Mar. 24, 2025).

[48] *See* sources cited *supra* note 46.

[49] *See* sources cited *supra* note 46.

the Court unduly trammeling on the authority of legislatures.[50] The concern has been with unelected judges substituting their normative views for those of "the people."[51] The counter-majoritarian difficulty thus can serve as a call to judicial restraint.[52]

Part of the problem relates to the open-ended nature of constitutional language. The Eighth Amendment provides an obvious example,[53] proscribing cruel and unusual punishments.[54] It is not clear what punishments cross the constitutional line; citizens with different normative views certainly might draw the line in

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[50] *See* sources cited *supra* note 46.

[51] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting); Coppage v. Kansas, 236 U.S. 1, 38 (1915) (Day, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 559-60 (1923); *see generally* BICKEL, *supra* note 46.

[52] *See* sources cited *supra* note 46.

[53] The vague and open-ended nature of the Bill of Rights in particular requires courts to give substance to these protections. The Court has been hesitant to do this under the Eighth Amendment after the public response to its decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *See* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards*," 57 UCLA L. REV. 365, 414 (2009) (arguing the Eighth Amendment is not constitutionally unique).

[54] U.S. CONST. amend. VIII. The Court has not addressed the meaning of "and," although most but not all scholars have read it conjunctively. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778-79 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1199-1200 (2006); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 120 (1997); 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, 77 (2002); Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual*,*"* 74 U. CIN. L. REV. 819, 831 (2006); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 614 (2010). *But see* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695, 720 (2016); HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 96–97 (1987); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 119 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 n.120 (2003); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 968–69 (2011); JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 180-81 (2012). For a discussion of the possible readings, see Berry, *supra* note 10, at 1207-08.

different places.[55] The punishment practices of the various states theoretically reflect one thought about what punishments are and are not appropriate based on the actions of state officials, whether in writing the laws or enforcing them.

But state constitutions are different.[56] They include similar open-ended language like the federal constitution, as most of the provisions track similar language or substantive concepts.[57] But there are broader contexts in state constitutions as well.[58] State constitutions contain affirmative obligations, not just limitations on state power, and incorporate distinct institutional norms into their provisions.[59]

Importantly, the consequence of a court interpreting the meaning and scope of a state constitutional provision is not the same. Unlike the federal constitution, where the Court decision freezes the result until the Court reverses itself, state constitutions are much more open to political accountability.[60] In other words, the counter-majoritarian difficulty is not really a problem.[61]

First, many judges and justices of state courts must campaign for their seats. If the voters do not like the way that a state court reads the state constitution, it can vote the justices or judges out and elect new ones. Second, state constitutions are much easier to amend. Most states have adopted several constitutions in their history.[62] Even without a constitutional amendment, voters can

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[55] And yet, this is the role of the Court and the purpose of judicial review. *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the principle of judicial review and, according to the Supreme Court, the power to decide who decides the meaning of the Constitution).

[56] For an excellent exposition of all of the many differences, *see* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855 (2023).

[57] This is certainly true with the punishment clauses. *See* Berry, *supra* note 15.

[58] *See* Bulman-Pozen & Seifter, *supra* note 56.

[59] *See id.*

[60] A supreme court rarely reverses itself without a change in the composition of the court, but state court elections ensure significant turnover of state supreme courts.

[61] *See* Bulman-Pozen & Seifter, *supra* note 56 (pointing out the error in invoking the counter-majoritarian difficulty and judicial restraint when judges are popularly elected).

[62] Mississippi has had four constitutions as a member of the United States and one as a member of the Confederate States. David G. Sansing, *Mississippi's Four Constitutions*, 56 MISS. L.J. 3 (1988); *see also* J. OF THE STATE CONVENTION, AND ORDINANCES AND RESOLS. ADOPTED IN MARCH, 1861 (1st ed. 1999) (including the Confederate constitution and the 1868 Mississippi Constitution).

often change the constitution during an election through a voter referendum.[63] States have different processes for referenda, but they occur regularly, with a number of initiatives on the ballot during each election cycle.

If anything, state legislatures may be more counter-majoritarian than state courts.[64] While judges have direct political accountability, legislatures may have less so in light of the power of incumbency and the effects of gerrymandering.[65]

As such, state judges should have no hesitancy with respect to interpreting state constitutions. It is their role to interpret the meaning to the text that the citizens of the state have adopted. If the judges get the interpretation "wrong," it is easily fixable through the next election or referendum.

II. JUDICIAL INTERPRETATION OF MISSISSIPPI'S PUNISHMENT CLAUSE

From 1817 to 1868, the Mississippi constitutions' punishment clause proscribed the imposition of "cruel" punishments.[66] From 1868 to the present, Mississippi's constitution has barred the imposition of a "cruel or unusual punishment."[67] During that entire period, the Eighth Amendment has barred "cruel and unusual punishments."[68]

Despite the clear linguistic difference, Mississippi courts have generally interpreted the state and federal provisions as if they

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[63] Indeed, state citizens often play an active role in amending their constitutions. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191 (2023).

[64] *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 790 (1995); *see also* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

[65] *See* Croley, *supra* note 64, at 790; *see also* Seifter, *supra* note 64.

[66] MISS. CONST. of 1817, art. I, §16; MISS. CONST. of 1832, art. I, §16.

[67] MISS. CONST. of 1890, art. III, § 28; MISS. CONST. of 1868, art. I, §8. It is worth noting that state law requires courts give statutory words their "common and ordinary" meaning, a rule that would presumably apply to the constitutional punishment clause conjunction "or." MISS. CODE ANN. § 1-3-65 (West 2025). It is not clear that the use of punishment as opposed to punishments has any real significance, but this linguistic difference is noted in case it later becomes meaningful.

[68] *See* text and sources cited *supra* note 54.

were the same.[69] 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[70] where the court presumes proportionality.[71] Even worse, in many cases, the Mississippi courts apply the deferential doctrine, and do not even reach a proportionality analysis.[72] Under this doctrine, the court presumes that any punishment imposed within the applicable statutory range is constitutional.[73] This deferential doctrine eschews the role of the court in placing constitutional limits on the punishments imposed by the legislature as part of its basic function of judicial review.[74]

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[69] JAMES L. ROBERTSON, 3 MS PRAC. SERIES: ENCYC. MS LAW § 19:119 (3d ed. 2023). The Mississippi cases generally view the Eighth Amendment question (is a punishment cruel and unusual) and the State punishment clause question (is a punishment cruel or unusual) as the same one, with no separate analysis of the state constitutional question. *See*, *e.g.*, Pettit v. State, 351 So. 2d 1352 (Miss. 1977); Howard v. State, 319 So. 2d 219 (Miss. 1975); Baker v. State, 394 So. 2d 1376 (Miss. 1981); Kleckner v. State, 109 So. 3d 1072 (Miss. Ct. App. 2012). One case, *Jordan v. State*, 224 So. 3d 1252 (Miss. 2017), has the court seeming to engage in separate state constitutional analysis, looking at the question of whether a particular death sentence is unusual under the Mississippi constitution, but the court quickly rejects that argument. *Id.* at 1253.

[70] *See* cases cited *supra* note 2. In capital and JLWOP cases, the Supreme Court applies the evolving standards of decency, which offers categorical exceptions for certain offenses and certain classes of offenders. *See generally* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 1; cases cited *supra* notes 5-7.

[71] *See*, *e.g.*, Barnwell v. State, 567 So. 2d 215, 221-22 (Miss. 1990); Alston v. State, 841 So. 2d 215, 217 (Miss. Ct. App. 2003); Triplett v. State, 840 So. 2d 727, 732-33 (Miss. Ct. App. 2002).

[72] *See*, *e.g.*, Bell v. State, 797 So. 2d 945 (Miss. 2001); Stromas v. State, 618 So. 2d 116, 122 (Miss. 1993); Wallace v. State, 607 So. 2d at 1188; Fleming v. State, 604 So. 2d 280, 302 (Miss. 1992); Reed v. State, 536 So. 2d 1336, 1339 (Miss. 1988); Corley v. State, 536 So. 2d 1314, 1319 (Miss. 1988); Presley v. State, 474 So. 2d 612 (Miss. 1985); Johnson v. State, 461 So. 2d 1288 (Miss. 1984); Contreras v. State, 445 So. 2d 543 (Miss. 1984); Allen v. State, 440 So. 2d 544 (Miss. 1983); Adams v. State, 410 So. 2d 1332 (Miss. 1982); Baker v. State, 394 So. 2d 1376 (Miss. 1981); Boyington v. State, 389 So. 2d 485 (Miss. 1980); Anderson v. State, 381 So. 2d 1019 (Miss. 1980); Horton v. State, 374 So. 2d 764 (Miss. 1979); Boone v. State, 291 So. 2d 182 (Miss. 1974); Clanton v. State, 279 So. 2d 599 (Miss. 1973); McCormick v. State, 279 So. 2d 596 (Miss. 1973); Green v. State, 270 So. 2d 695 (Miss. 1972); Capler v. State, 237 So. 2d 445 (Miss. 1970); *but see* Sinclair v. State, 132 So. 581 (Miss. 1931) (in banc) (arguing for a liberal construction of the state constitution's punishment clause as applied to state criminal statutes); discussion *infra* Part III.

[73] *See* cases cited *supra* note 72.

[74] For an argument of why courts should abandon this commonly used doctrine, *see* William W. Berry III, *Rescuing State Punishment Clauses from the Deferential Doctrine*, 59 GA. L. REV. (forthcoming 2025),

Not surprisingly, virtually all challenges under this provision fail.[75]

A. The Gross Disproportionality Test

These results are not surprising given the Court's application of the Eighth Amendment. In addition to its evolving standards of decency jurisprudence which places categorical limits on capital and JLWOP sentences, the Supreme Court has adopted a different test under the Eighth Amendment in non-capital, non-JLWOP cases.[76] This approach asks the question whether the punishment is grossly disproportionate to the criminal conduct at issue.[77] 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.[78]

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5190631 [https://perma.cc/E27H-GLFK].

[75] *See*, *e.g.*, Nichols v. State, 826 So. 2d 1288, 1292 (Miss. 2002); Bell, 797 So. 2d at 950-51; Braxton v. State, 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); *McCormick*, 279 So. 2d at 599; Ealy v. State, 262 So. 2d 420, 421-22 (Miss. 1972); Williams v. State, 24 So. 3d 360, 365-66 (Miss. Ct. App. 2009); *Alston*, 841 So. 2d at 217; Jefferson v. State, 832 So. 2d 1270, 1272 (Miss. Ct. App. 2002); Womack v. State, 827 So. 2d 55, 58-59 (Miss. Ct. App. 2002).

[76] *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); *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).

[77] *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).

[78] This is true even where the sentence seems particularly excessive. *See Lockyer*, 538 U.S. at 66-67, 77 (affirming on habeas review that two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes was reasonable where defendant had three prior felony convictions); *see also Ewing*, 538 U.S. at 18, 30-31 (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); *Harmelin*, 501 U.S. at 961, 994, 996 (affirming sentence of life-without-parole for first offense of possessing 672 grams of cocaine); *Hutto*, 454 U.S. at 370-72 (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); *Rummel*, 445 U.S. at 265-66 (affirming mandatory life sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions). *But see* Solem v. Helm, 463 U.S. 277, 279-84 (1983) (reversing sentence of life-without-parole for presenting a no-account check for $100, where defendant had six prior felony

In *Solem v. Helm*,[79] the one modern case in which the Court found an adult non-capital punishment to be disproportionate—a life without parole sentence for a seventh non-violent felony—the Court advanced a basic test to assess proportionality.[80] 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.[81] Note that the *Solem* test incorporates both cruel considerations—the gravity of the offense—and unusual considerations—the sentences imposed upon other offenders.[82]

The Supreme Court soon after limited the scope of *Solem* in *Harmelin v. Michigan*[83] in a divided opinion.[84] 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."[85] *Harmelin* thus reestablished that the Eighth Amendment does not require strict proportionality in cases involving non-capital punishments.[86]

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.[87] One way, then, of understanding the gross disproportionality test is as requiring a punishment to be *both* cruel and unusual.[88] The corollary of this concept is that a punishment

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).

[79] *Solem*, 463 U.S. at 277.

[80] *See Solem*, 463 U.S. at 290-95.

[81] *Id*. at 292.

[82] *Id*.

[83] *Harmelin*, 501 U.S. at 957 (1991).

[84] *Harmelin*, 501 U.S. at 958. I have argued elsewhere that the Court decided *Harmelin* incorrectly. *See* Berry, *supra* note 53, at 328-30.

[85] *Harmelin*, 501 U.S. at 959, 1005.

[86] *Id*. at 1001.

[87] *Id*. at 994-95.

[88] *See id*. As explored in Part III, this approach is clearly contrary to the text and historical meaning of the Mississippi Constitution.

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.

The extreme level of judicial deference to state punishments might make such a distinction academic, as the Court has rendered the Eighth Amendment a dead letter in non-capital cases.[89] But part of this deference relates to federalism. Justice Kavanaugh's opinion in *Jones v. Mississippi* makes this point repeatedly.[90] He wrote:

> state practices matter here because, as the Court explained in *Montgomery*, when "a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."[91]

While the Court may choose not to expand the Eighth Amendment, it does not mean that state courts should not restrict state punishment practices.[92] To the contrary, the Court simply prefers to leave those questions up to the states, recognizing the diversity of views on questions of punishment among the states and the value of not adopting a one-size-fits-all rule.[93]

B. Mississippi Cases

Challenges to sentences imposed by Mississippi courts under the state punishment clause have typically either focused on the nature of the punishment and its infliction or on the

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[89] *See* sources cited *supra* note 53.

[90] Jones v. Mississippi, 593 U.S. 98, 117-21 (2021).

[91] *Id.* at 117.

[92] As Kavanaugh wrote, "Our decision allows Jones to present those arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor. Those state avenues for sentencing relief remain open to Jones, and they will remain open to him for years to come." *Id.* at 121.

[93] *See*, *e.g.*, Atkins v. Virginia, 536 U.S. 304, 337 (Scalia, J., dissenting) ("There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.").

disproportionate nature of the punishment.[94] Like the Supreme Court, the Mississippi courts never find such punishments unconstitutional largely because they assess state constitutional challenges under the federal gross disproportionality test[95] or the courts apply the deferential doctrine and never even reach that question. [96]

Mississippi courts ordinarily assume that any sentence within the limits prescribed by statute is, prima facie, not cruel or unusual.[97] This view stems from the flawed premise that the Mississippi Constitution vests in the legislature the unreviewed power of establishing sentences for offenses.[98] Instead, as discussed below in Part IV, the Mississippi courts need to take an active role

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[94] ROBERTSON, *supra* note 69. In the first category, the State may not "inflict physical or emotional cruelty nor contravene social norms." JOHN W. WINKLE III, THE MISSISSIPPI CONSTITUTION: A REFERENCE GUIDE 54 (1993).

[95] *See* Barnwell v. State, 567 So. 2d 215, 221-22 (Miss. 1990); Alston v. State, 841 So. 2d 215, 217 (Miss. Ct. App. 2003); Triplett v. State, 840 So. 2d 727, 732-33 (Miss. Ct. App. 2002); Nichols v. State, 826 So. 2d 1288, 1292 (Miss. 2002); Bell v. State, 797 So. 2d 945, 950-51 (Miss. 2001); Braxton v. State, 797 So. 2d 826, 829 (Miss. 2000); Whitley v. State, 511 So. 2d 929, 932 (Miss. 1987); McAdory v. State, 354 So. 2d 263, 266 (Miss. 1978); McCormick v. State, 279 So. 2d 596, 599 (Miss. 1973); Ealy v. State, 262 So. 2d 420, 421-22 (Miss. 1972); Williams v. State, 24 So. 3d 360, 365-66 (Miss. Ct. App. 2009); Jefferson v. State, 832 So. 2d 1270, 1272 (Miss. Ct. App. 2002); Womack v. State, 827 So. 2d 55, 58-59 (Miss. Ct. App. 2002). To be fair, most litigants have brought these challenges as Eighth Amendment challenges, not as state constitutional challenges. Even when there is a state challenge, the litigant typically makes the challenge in conjunction with the federal challenge and does not offer a different legal test.

[96] *See*, *e.g.*, *Nichols*, 826 So. 2d at 1292; *Bell*, 797 So. 2d at 950-51; *Braxton*, 797 So. 2d at 829; *Barnwell*, 567 So. 2d at 221-22; *Whitley*, 511 So. 2d at 932; *McAdory*, 354 So. 2d at 266; *McCormick*, 279 So. 2d at 599; *Ealy*, 262 So. 2d at 421-22; *Williams*, 24 So. 3d at 365-66; *Alston*, 841 So. 2d at 217; *Jefferson*, 832 So. 2d at 1272; *Womack*, 827 So. 2d at 58-59.

[97] *McAdory*, 354 So. 2d at 266 (overruled on other grounds by *Stewart v. State*, 372 So. 2d 257 (Miss. 1979)) (ninety–year sentence was within statutory limits and thus not cruel or unusual or excessive); *McCormick*, 279 So. 2d at 599 (abrogated on other grounds by *Hopson v. State*, 625 So. 2d 395 (Miss. 1993)); *see* cases cited *supra* note 75; ROBERTSON, *supra* note 69. As explored below in Part IV, this approach is at best an abdication of the court's responsibility to engage in judicial review and at worst a fundamental misunderstanding of basic principles of constitutional law.

[98] Horton v. State, 374 So. 2d 764 (Miss. 1979); *Nichols*, 826 So. 2d at 1292 (Miss. 2002); *Bell*, 797 So. 2d at 950-51; *Braxton*, 797 So. 2d at 829; *Barnwell*, 567 So. 2d at 221-22; *Whitley*, 511 So. 2d at 932; *McAdory*, 354 So. 2d at 266; *McCormick*, 279 So. 2d at 599; *Ealy*, 262 So. 2d at 421-22; *Williams*, 24 So. 3d at 365-66; *Alston*, 841 So. 2d at 217; *Jefferson*, 832 So. 2d at 1272; *Womack*, 827 So. 2d at 58-59; ROBERTSON, *supra* note 69. *See* discussion *infra* Part IV.

in reviewing the punishments that the legislature chooses to adopt.[99]

Determining whether a lengthy sentence is unconstitutional in Mississippi is a two-step process drawn directly from the Court's Eighth Amendment cases.[100] Again, the courts and litigants alike have proceeded under the assumption that the state and federal constitutions are the same.

First, the person seeking relief must show that the sentence itself leads to an inference of gross disproportionality.[101] If a litigant can show an inference of gross disproportionality, the court will conduct an analysis of the sentence under three factors, which are (1) the gravity of the offense and the harshness of the penalty, (2) the sentence imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.[102]

The Mississippi courts have also established a boilerplate rule based on the sentence as compared to the underlying statute. Rather than assessing the constitutionality of the sentence and engaging in constitutionally-required judicial review, the Mississippi courts have decided that, as a general matter, sentences that do not exceed the maximum punishment allowed by statute are not grossly disproportionate.[103]

Even when the punishment is outside the statute, it is very unlikely the Mississippi courts will strike it down on constitutional grounds. In *Stewart v. State*, for instance, the jury convicted the defendant of armed robbery.[104] The penalty was life imprisonment but only if the jury fixed that penalty.[105] The jury found the defendant guilty but did not include the life sentence in its verdict.[106] The trial judge then sentenced the defendant to

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[99] *See* discussion *infra* Part IV.

[100] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69; *see* Solem v. Helm, 463 U.S. 277 (1983); Harmelin v. Michigan, 501 U.S. 957 (1991).

[101] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69; Brown v. State, 130 So. 3d 1074, 1080 (Miss. 2013); Berry, *supra* note 74.

[102] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69; *Brown*, 130 So. 3d at 1080; *see Solem*, 463 U.S. at 277; *see also Harmelin*, 501 U.S. at 957.

[103] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69; *Brown*, 130 So. 3d at 1074; Berry, *supra* note 74.

[104] Stewart v. State, 372 So. 2d 257 (Miss. 1979).

[105] *Id.* at 258.

[106] *Id.*

imprisonment for seventy-five years.[107] Given the jury's verdict, the defendant's constitutional right resulted in a sentence to a term reasonably expected to be less than life, even though a seventy-five year sentence does not seem to satisfy that requirement.[108]

Mississippi's draconian habitual offender statutes have led to similarly unsuccessful constitutional challenges.[109] Upon a third conviction, the court must impose a mandatory life without parole sentence.[110] Sentences imposed under these statutes ordinarily survive scrutiny under the state and federal constitutions under the flawed premise that the legislature has the prerogative of setting the punishments for crime without judicial review.[111]

There has also been extensive litigation involving juvenile life-without-parole sentences in light of the Supreme Court's 2012 decision in *Miller v. Alabama* that barred mandatory juvenile life-without-parole sentences.[112] This decision meant that sentencing courts had to consider mitigating evidence before imposing a juvenile life-without-parole (JLWOP) sentence and the legislature could not impose a mandatory JLWOP sentence.[113] Mississippi inmate Brett Jones challenged his JLWOP sentence, arguing that *Miller* and *Montgomery v. Louisiana* created an Eighth Amendment requirement that courts make a factual finding that a person is

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[107] *Id.*

[108] *Id.* at 259. The court did require the trial court to resentence the defendant within the statutory limit, here, something less than a life sentence (with a 75-year sentence assumed to be equal to or in excess of a life sentence). *See also* Lee v. State, 322 So. 2d 751 (Miss. 1975) and McAdory v. State, 354 So. 2d 263 (Miss. 1978) (finding that sentences can be excessive on statutory grounds but not constitutional grounds).

[109] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69. These laws have a disproportionate racial impact. One study found that among those serving LWOP in Mississippi, seventy-four percent of those sentenced under the state's habitual offender law between 1986 and 2018 are Black. *See* Liz Komar et al., *Counting Down: Paths to a 20-Year Maximum Prison Sentence*, SENT'G PROJECT, Feb. 15, 2023, https://www.sentencingproject.org/reports/counting-down-paths-to-a-20-year-maximum-prison-sentence/ [https://perma.cc/X3L7-BST5].

[110] ROBERTSON, *supra* note 69. On rare occasions, the court will engage in its gross disproportionality analysis where the third offense is a minor one. *See*, *e.g.,* Edwards v. State, 615 So. 2d 590 (Miss. 1993); Presley v. State, 474 So. 2d 612 (Miss. 1985); Clowers v. State, 522 So. 2d 762, 763 (Miss. 1988); Wall v. State, 718 So. 2d 1107 (Miss. 1998).

[111] *See* cases cited *supra* notes 71, 72, and 75; ROBERTSON, *supra* note 69.

[112] Miller v. Alabama, 567 U.S. 460 (2012). Interestingly, the Mississippi Supreme Court held that this decision applied retroactively, an interpretation confirmed by the Court in *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

[113] *Miller,* 567 U.S. at 461-62.

"permanently incorrigible" prior to imposing a JLWOP sentence.[114] The Court, however, rejected Jones' argument, holding that the Eighth Amendment did not impose a factfinding requirement prior to imposing a JLWOP sentence.[115]

Mississippi Supreme Court Justice James L. Robertson's entry into the *Encyclopedia of Mississippi Law* recognizes that the Mississippi courts have essentially blended state and federal rights in the reported cases.[116] He writes that "faithfulness to text and the English language" suggest that "the day will come" where the court separates the state and federal punishment clauses in its jurisprudence.[117]

Justice Robertson's encyclopedia entry gives several reasons why the Mississippi courts should interpret the state constitution differently than the federal constitution.[118] First, he notes that punishments can be cruel without being unusual.[119] He also suggests that because the Mississippi draftsmen of the 1890 constitution would have been aware of the federal constitution,[120] courts should regard the disjunctive "or" as a "purposeful choice" making it "particularly susceptible to constructions and applications" that are broader than those in the Eighth Amendment.[121]

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[114] Jones v. Mississippi, 593 U.S. 98 (2021).

[115] *Id.*; *see* William W. Berry III, *The Evolving Standards, As Applied*, 74 FLA. L. REV. 775 (2022) (arguing that the Court's opinion opens the door to as applied Eighth Amendment challenges); Fletcher v. Alaska, 532 P.3d 286 (Alaska Ct. App. 2023) (declining to follow *Jones v. Mississippi* and instead requiring a factual finding of "irreparable corruption" as a prerequisite to a JLWOP sentence).

[116] ROBERTSON, *supra* note 69, at § 19:119.

[117] *Id.*

[118] *Id.*

[119] *Id.* Interestingly, he suggests that lethal injection might be a cruel punishment but would not be unusual because it is the most commonly used method of execution. *Id.*; *see also Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/QDJ5-49ZV] (last visited June 22, 2024).

[120] *See* Part III *infra* for an exploration of the origins of this constitutional language.

[121] ROBERTSON, *supra* note 69, at § 19:119. Indeed, Justice Robertson shows how Mississippi courts do the same thing in other contexts:

Many Mississippi cases have held that the disjunctive "or" should be taken seriously in legal texts, whether those be statutes, regulations, contracts, or whatever. . . . No reason is apparent why the construction and application of the disjunctive "or" should not be controlled by Miss. Code Ann § 1-3-65 to the effect that "[a]ll words and phrases in the statutes are used according to their common and ordinary acceptation and meaning."

The next section of the Article demonstrates why the history of Mississippi's constitutional punishment clause supports Justice Robertson's reading.

III. EXCAVATING MISSISSIPPI'S PUNISHMENT CLAUSE

The punishment clauses of the American constitutions generally adopt a formulation barring the imposition of "cruel" punishment or punishments, "cruel or unusual" punishment or punishments, or "cruel and unusual" punishment or punishments.[122]

Constitutional punishment clauses date back to the English Bill of Rights of 1689. George Mason successfully advocated for the adoption of a bill of rights in the Virginia Constitution in 1776.[123] This group of rights included a proscription against the imposition of "cruel and unusual punishments."[124] Mason apparently took this language directly from the English Bill of Rights of 1689.[125] In 1791, the United States adopted Mason's provision as the Eighth Amendment to the United States Constitution.[126]

Id., at §19:119 n.9 (citations omitted). *See* Part V *infra* for an exploration of some possible applications of a broader reading of the state punishment clause.

[122] *See also* Berry, *supra* note 10 (cataloging the current punishment clauses of the various states).

[123] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969); *see also* Letter from George Mason to John Mercer (Oct. 2, 1778), *in* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, 30 (1955); HUGH BLAIR GRIGSBY, THE VIRGINIA CONVENTION OF 1776, 18 (1855).

[124] VA CONST. art. I, § 9 (1776).

[125] *An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne* (1688), *in* 6 THE STATUTES OF THE REALM 142, 143 (1819).

[126] U.S. CONST. amend. VIII (1791) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The limited debates of the First Congress seemed to contemplate a common law-type approach to constitutionally limiting punishments. As Professor Akhil Amar has explained, "At most, the clause seemed to disfavor the oddball statute, wholly out of sync with other congressional criminal laws." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 279 (1998). John Stinneford's work on the meaning of unusual as a limit to punishment innovation contrary to long usage supports this reading, with the caveat that punishments falling out of usage would become unconstitutional. *See Original Meaning of "Unusual," supra* note 3.

But six state constitution punishment clauses pre-dated the Eighth Amendment.[127] Delaware, Massachusetts,[128] New Hampshire, and North Carolina, unlike Virginia, used the formulation "nor cruel or unusual punishments inflicted."[129] Maryland had two punishment clauses—one conjunctive and one disjunctive.[130]

In 1787, the Northwest Ordinance also included the same disjunctive formulation adopted by Delaware, Maryland, Massachusetts, New Hampshire, and North Carolina.[131] In 1790, Pennsylvania and South Carolina adopted a different punishment clause, one that only barred "cruel punishments."[132] Delaware and Kentucky each adopted an identical constitutional punishment clause banning "cruel punishments" in 1792.[133]

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[127] *See* DEL. CONST. of 1776, Decl. of Rights, § 16; MD. CONST. of 1776, Decl. of Rights, §§ XIV, XXII; MASS. CONST. of 1780, art. XXVI, pt. 1; N.H. CONST. of 1784, art. I, § XXXIII; N.C. CONST. of 1776, Decl. of Rights, § X; VA. CONST. of 1776, Bill of Rights, § 9; *see also* Calabresi et al., *supra* note 31, at 82-84.

[128] At the Massachusetts State Convention on January 30, 1788, Mr. Holmes explained the need for a punishment clause: "[Congress is] nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."
MASSACHUSETTS STATE CONVENTION, 2 J. ELLIOTT'S DEBATES 111 (1787), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 619 (Neil Cogan, ed., 1997).

[129] DEL. CONST., Decl. of Rights, § 16 (1776); MASS. CONST. of 1780, art. XXVI, pt. 1; N.H. CONST. of 1784, art. 1, § XXXIII; N.C. CONST. of 1776, Decl. of Rights, § X.

[130] MD. CONST. of 1776, Decl. of Rights, §§ XIV, XXII. One applied to the legislature (the "and"), which was a sanguinary law ban, and one applied to the courts ("or"). Scholars have taken different views on how to read the conjunctive "and." *See* sources cited *supra* note 54.

[131] Northwest Ordinance of 1787, art. II, 1 Stat. 50, 52 (1789) ("no cruel or unusual punishments shall be inflicted."). This language, which the First Congress reapproved in 1789, apparently comes from the 1780 Massachusetts Constitution, written in part by future president John Adams. *See* JOHN BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 118 (2012). The Northwest Ordinance was binding on Mississippi, except for its prohibition against slavery. *Id.*

[132] PA. CONST. of 1790, art. IX, § 13; S.C. CONST. OF 1790, art. IX, § 4. It is worth noting that both of these states, along with New Hampshire, had constitutional clauses mandating that punishments be proportionate to the crime for which the state imposed them. Calabresi et al., *supra* note 31, at 1519.

[133] DEL. CONST. of 1792, art. I, § 11 (1792) ("nor cruel punishments inflicted"); KY. CONST. of 1792, art. XII, § 15 ("nor cruel punishments inflicted").

A. The 1817 and 1832 Mississippi Constitutions

There is evidence of a desire of some for a punishment clause in the territorial papers of the Mississippi Territory. In an October 21, 1799 letter on behalf of inhabitants to Governor Sargent and Judges McGuire and Bruin, inhabitants committee chair Cato West emphasized the need for a check on territorial legislative power.[134] Citing the Eighth Amendment, West suggested that the punishments imposed were excessive and that the territorial government was over-regulating crime.[135]

1. The 1817 Constitution

The framers of Mississippi's first charter of governance modeled the document on the content and style of the frontier constitutions of sister states Tennessee (1796) and Kentucky (1792).[136] George Poindexter,[137] who had served as a territorial

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[134] Cato West, *Committee of Inhabitants to Governor Sargent and Judges McGuire and Bruin*, *in* 5 THE TERRITORIAL PAPERS OF THE UNITED STATES 87-88 (Clarence Edwin Carter ed., 1799).

[135] His letter stated:

In our Territorial Code, any person or persons convicted of Treason, shall suffer the pains of death, & moreover forfeit all his, her, or their estate, real & personal to this Territory—The Constitution says that Congress alone shall have the power to declare the punishment of Treason, & by their Laws no forfeiture is required—On conviction of Arson the person or persons so convicted, are to be whipt—pilloried—confin[e]d in goal not exceeding three years; and forfeit all his her [sic], or their estate real & personal to this Territory—the Constitution says that excessive fines shall not be imposed, nor cruel & unusual punishments inflicted—It says moreover, that none of these offences shall work corruption of blood, or forfeiture of estate, longer than during the life of the person convicted, and that in the case of treason alone.—.Is not this then a flagrant breach of the Federal Constitution . . . is it not an insuperable argument that the lessening of fines & penalties in favor of the Citizen are not the leading features of your legislative labors? . . . [this] affords a hint to legislative bodies, that merits their deepest attention—

Id.

[136] Winkle, *supra* note 14; *see* WINKLE, *supra* note 94, at 2 ("Adapted, if not borrowed verbatim, from other frontier constitutions such as those of Kentucky and Tennessee, the Mississippi version offered few, if any, distinctive features among its six articles."); *see generally* GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1928).

[137] Poindexter had a distinguished career after serving as chair, becoming the Mississippi's first representative to Congress in 1817. *George Poindexter*, 5 APPLETONS' CYCLOPAEDIA OF AMERICAN BIOGRAPHY 48 (James Grant Wilson & John Fisk eds. 1888). He subsequently served as Governor of Mississippi from 1820-22 before serving in the United States Senate from 1830-35. *Id.*

judge, chaired the committee that drafted the 1817 Mississippi Constitution and was responsible for much of its language.[138]

With its identical language barring "cruel punishments," Mississippi's punishment clause seems to emerge from the Kentucky Constitution.[139] Kentucky adopted the "nor cruel punishments inflicted" language in its 1792 Constitution.[140] The subsequent Kentucky Constitution of 1799 also employed the same punishment clause.[141]

In 1817, Mississippi adopted its first constitution as part of its admission into the United States of America. In that constitution, the state adopted a punishment clause. It read:

> Art. I, Section 16. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.[142]

This provision banned cruel punishments. It did not mention unusual punishment or unusual punishments.[143]

At the time, thirteen of the other nineteen states had constitutional punishment clauses, but only four states had a punishment provision identical to Mississippi—Kentucky, Delaware, Pennsylvania, and South Carolina.[144] Four had a provision identical to the federal constitution.[145] And five had a

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[138] *See* MACK SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER: A STORY OF THE FIRST SOUTHWEST 146, 155 (1934); Sansing, *supra* note 62, at 5; Winbourne Magruder Drake, *The Framing of Mississippi's First Constitution*, 29 J. MISS. HIST. 301, 326-27 (1967).

[139] The Tennessee Constitution barred "cruel and unusual punishments" like the Eighth Amendment, which is different from the bar on "cruel punishments" that Mississippi adopted.

[140] KY. CONST. of 1792, art. XII, § 15 ("nor cruel punishments inflicted."). Much of the Kentucky Constitution of 1792 came from the Virginia Constitution, as much of its territory was originally part of Virginia; *see, e.g.*, Anna Price, *What's in a Name? The Four U.S. States that are Technically Commonwealths*, LIBR. CONG.: IN CUSTODIA LEGIS (Aug. 16, 2023), https://blogs.loc.gov/law/2023/08/whats-in-a-name-the-four-u-s-states-that-are-technically-commonwealths/ [https://perma.cc/NW67-J4CU].

[141] KY. CONST. of 1799, art. X, § 15 ("nor cruel punishments inflicted").

[142] MISS. CONST. of 1817, art. I, § 16.

[143] *Id*.

[144] PA. CONST. of 1790, art. IX, § 13; S.C. CONST. OF 1790, art. IX, § 4; DEL. CONST. of 1792, art. I, § 11; KY. CONST. of 1799, art. XII, § 15.

[145] U.S. CONST. amend. VIII (1787) ("nor cruel and unusual punishments inflicted."); TENN. CONST. of 1796, art. XI, § 16; IND. CONST. of 1816, art. I, § 15; VA. CONST. of 1776, art. I, § 9; OHIO CONST. of 1802, art. VIII, § 13.

disjunctive constitutional punishment barring cruel or unusual punishments.[146]

Interestingly, none of the three other constitutions adopted contemporaneously to the Mississippi Constitution included a punishment clause limited only to cruel punishments. Ohio, which adopted its constitution in 1802, barred "cruel and unusual punishment."[147] Louisiana did not include a punishment clause in its 1812 constitution.[148] And Indiana followed the Eighth Amendment bar on "cruel and unusual punishments."[149]

2. Slave Codes

While the evidence surrounding the decision to bar cruel punishments as opposed to cruel or unusual punishments is scant, it is worth noting that Mississippi adopted a statute barring the imposition of "cruel or unusual punishment" just five years later in 1822.[150] This law did not protect criminal defendants; it protected slaves.[151]

The Slave Code, entitled "Act concerning Slaves, Free Negroes and Mulattoes" provided,

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[146] N.Y. CONST. of 1777, 1787 Decl. of Rights, § 8; MD. CONST. of 1776, Decl. of Rights, § XIV, XXII; MASS. CONST. of 1780, art. XXVI, pt. 1; N.H. CONST. of 1784, art. 1, § 33; N.C. CONST. of 1776, Decl. of Rights, § X.

[147] OHIO CONST. of 1802, art. VIII, § 13.

[148] *See generally* LA. CONST. of 1812.

[149] IND. CONST. of 1816, art. I, § 15.

[150] This would be the language that Mississippi would adopt for its state constitution in 1868, after the Civil War and the Emancipation Proclamation. *See* discussion *supra* Part III.B.

[151] Like the Mississippi Constitution, the slave laws morphed from barring "cruel" punishment to "cruel or unusual" punishment. BESSLER, *supra* note 131, at 217. These statutes dated from a 1740 South Carolina statute, with ten Southern penal codes ultimately adopting similar provisions. BESSLER, *supra* note 131, at 216-17.

> No cruel or unusual punishment shall be inflicted on any slave in this state. And any master or other person entitled to the service of any slave, who shall inflict such cruel or unusual punishment, or shall authorize or permit the same to be inflicted, shall, on conviction thereof, before any court having cognizance, be fined according to the magnitude of the offense, at the discretion of the court, in any sum not exceeding five hundred dollars, to be paid into the treasury of the state, for the use and benefit of the literary fund.[152]

By implication, the law covered an additional category of punishments not part of the 1817 Mississippi constitution's punishment clause—unusual punishment. The concern here seemed to be to promote the protection of slaves as a form of property,[153] as the punishment for violating the statute was a fine of $500.[154] Another Mississippi statute made police patrols liable in

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[152] WILLIAM GOODELL, THE AMERICAN SLAVE CODE 164-65 (1853); THE STATUTES OF THE STATE OF MISSISSIPPI OF A PUBLIC AND GENERAL NATURE, Ch. XI, § 28 (V.E. Howard & A. Hutchinson eds. 1840). A later version of the same statute corrected the passive voice, but otherwise read the same: "No master shall inflict cruel or unusual punishment . . . [or] shall inflict such cruel or unusual punishment on such slave or slaves . . . ." REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI, ch. XXXIII, § II, art. 4 (1857). Article 8 also provided that "the person having immediate control of such slave, at the time of the infliction of such cruel or unusual punishment, or other unlawful treatment, shall, until the contrary appear, be presumed to have inflicted the same." *Id*. at ch. XXXIII, § II, art. 8. One example of the state of Mississippi enforcing this law was the Pike County Circuit Court case of State v. Hezekiah Williams, where the jury convicted the defendant of the cruel and unusual punishment of a slave and the court imposed the $500 fine. VICKSBURG WHIG, Sept. 28, 1859, at 1. While criminalizing the treatment of slaves, this law could nonetheless be seen as providing some immunity for slave owners by capping the damages at $500 and not providing for other criminal liability.

[153] Mississippi appellate courts in the nineteenth century did uphold some "murder" and "manslaughter" convictions for the killing of slaves. *See* Jolly v. State, 21 Miss. (13 S. & M.) 223, 226 (1849) (fourth degree manslaughter conviction affirmed, two-year jail term); *but see* Jenkins v. State, 30 Miss. 408, 410 (1855) (manslaughter conviction and twelve-year sentence reversed); *see also* Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93 (1985).

[154] In 1829, North Carolina chief justice Thomas Ruffin wrote that "[t]he power of the master must be absolute, to render the submission of the slave perfect." BESSLER, *supra* note 131, at 216. The statutes may have been equally concerned with legitimizing commonly accepted brutal methods of chastisement, including whipping. Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1005 (2009); GOODELL, *supra* note 152, at 157 ("It could hardly be supposed that, in any civilized

tort for "improper or cruel punishment inflicted on slaves in the discharge of patrol duty" with liability for "each and every person present, and assisting or participating in such . . . injuries to slaves . . . ."[155] A North Carolina case, *State v. Tackett*, underscored the limited nature of such protections for slaves.[156]

The public conversation concerning this provision is relevant to the meaning of the current Mississippi constitutional punishment clause, which uses the exact same language—"[c]ruel or unusual punishment shall not be inflicted[.]"[157] Several cases before the Mississippi High Court of Errors and Appeals are instructive.

In 1844, the court explained in *Kelly v. State* that "what is a cruel and unusual punishment" is "a question of fact for the jury, who most generally are slave owners."[158] Reviewing a manslaughter conviction for the killing of a slave, the *Kelly* court concluded "[i]t is not contended that a greater degree of punishment may not be inflicted here by the master upon his slave, than by the

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country, the Legislature would, by express statute, *authorize* the master to commit cruel outrages upon the persons of his slaves[.]").

[155] REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI, ch. XXXIII, § VII, art. 38 (1857). Interestingly, this provision uses "improper or cruel punishment" instead of "cruel or unusual punishment." It could signal improper as a synonym for unusual, but that would seem contrary to the common understanding of unusual. *See generally Original Meaning of "Unusual," supra* note 3, at 1742. Either way, it again supports the idea that the legislature was using two different ideas—here improper and cruel, in other statutes, unusual and cruel, and thus giving two categories of behavior that contravened the statute—improper punishment as well as cruel punishment.

[156] State v. Tackett, 8 N.C. (1 Hawks) 210, 218 (1820). Lawyer Andrew Fede explains: "slaves were 'protected' by the law of homicide only to the extent that was 'necessary' to protect their property values from wanton white killers and to promote the power and authority of the master class—always with due regard for slave control and without any regard for slave 'rights' or 'humanity.'" Fede, *supra* note 153, at 115.

[157] MISS. CONST. of 1890, art. III, § 28. *See also Original Meaning of "Cruel," supra* note 3, at"" 466 ("[D]iscussions of cruel and unusual punishments by legally informed speakers in formal legal contexts have particular salience for our inquiry. Such statements carry more interpretive weight than statements by other speakers in other contexts because they are more likely to be intended as statements of legal meaning, and they are more likely to reflect such meaning accurately.").

[158] W. C. SMEDES & T. A. MARSHALL, 3 REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ERRORS AND APPEALS FOR THE STATE OF MISSISSIPPI 526 (1844) (citing Kelly v. State, 11 Miss. (3 S. & M.) 518, 526 (1844)). It is also worth noting in using the language "cruel and unusual," the court actually has a disjunctive meaning, as in the jury must decide both whether the punishment is cruel and whether it is unusual, with either element sufficient to violate the statute.

master upon the servant at Common Law, because such here may be usual from necessity[.]"[159] In other words, the court found that the ability to make the killing of a slave "usual" did not foreclose a finding that killing the slave was "cruel."

Another Mississippi case in 1853, *Trotter v. McCall*, implied the same point that the "cruel or unusual punishment" slave statute required proof of cruel *or* unusual treatment, not *both*.[160] The owner of a slave hired her out to another person and then brought suit against the hirer for his treatment of her.[161] The court explained that if the hirer drives the slave "by his cruel treatment, to seek protection of the master," the master could refuse to surrender the slave to the hirer, especially if the "abuse and cruelty of the hirer" had already materially injured the slave.[162] The court did not discuss any unusual treatment in the case in applying the statutory language.[163]

An 1856 case, *Scott v. State*, makes the same point in reviewing an indictment against an overseer for the punishment of a slave.[164] In examining the statute barring "cruel or unusual punishment" of a slave,[165] the court wrote, "[t]he first clause of this statute makes it criminal for anyone to inflict cruel punishment on a slave within this State."[166] The court then upheld the conviction

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[159] *Id.*

[160] JOHN F. CUSHMAN, 26 REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ERRORS AND APPEALS FOR THE STATE OF MISSISSIPPI 413 (1853-1854) (citing Trotter v. McCall, 26 Miss. 410, 413 (1853)).

[161] *Trotter*, 26 Miss. at 412-13. The court reported that the runway slave who was in "a delicate condition peculiar to females" received injury because the hirer had whipped her in a "cruel and unusual manner" and subjected her to "cruel treatment," "ill treatment," "cruel and unusual treatment," "cruel and unjustifiable treatment," and "cruel punishment." *Id.*

[162] *Id.* at 413.

[163] *Id.*

[164] JAMES Z. GEORGE, 31 REPORTS OF CASES ARGUED AND DETERMINED IN THIS HIGH COURT OF ERRORS AND APPEALS FOR THE STATE OF MISSISSIPPI 476 (1856) (citing Scott v. State, 31 Miss. 473 (1856)).

[165] One example is the case of *State v. Davenport*, a Bolivar County Circuit Court decision reported in the Natchez newspaper. THE NATCHEZ WEEKLY DEMOCRAT, Mar. 31, 1858, at 1. In that case, the court convicted the defendant of manslaughter for the homicide of a slave, where the slave resisted, by finding that the slave had a right to resist the infliction of cruel and unusual punishment by the overseer. *Id.*

[166] GEORGE, *supra* note 164, at 478.

of the overseer for his inflicting of "cruel punishment upon said slave" with the statute including overseers, not just masters.[167]

As indicated by *Kelly*, some commentators concluded that the use of unusual carried less weight in practice because individuals could make a punishment usual by using it more often. In Southern states, the term unusual provided "a way to validate then-prevailing customs in relation to the treatment and punishment of slaves."[168] Punishing in a way that made unusual punishment common (and therefore usual) had the practical effect of making the terms synonymous in their application. Discussing Mississippi's cruel or unusual punishment statute, Pennsylvania lawyer George M. Stroud explained, "'*Cruel*' and '*unusual*,' connected as they are by the disjunctive '*or*,' mean precisely the same thing, and will be so construed by the court. And what horrible barbarities may be excused under the name of *usual* punishments . . . ."[169] What Stroud means here is that repeating a punishment, i.e., converting it from unusual to usual, will not save it under the punishment statute, because the punishment statute also bars cruel punishment.

Citing Stroud, abolitionist Charles Elliott echoed this sentiment in 1850: "[b]esides, *cruel* or *unusual* mean precisely the same thing . . . ." under the laws of South Carolina and Louisiana.[170] This was because in the same way that using punishments makes unusual punishments usual, anti-cruelty laws go unenforced

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[167] *Id.* at 475. Two other cases used the concept of cruel and unusual punishment in upholding jury instructions. *See* JAMES Z. GEORGE, 39 REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ERRORS AND APPEALS FOR THE STATE OF MISSISSIPPI 345 (1860-1863) (citing Lamar v. Williams, 39 Miss. 342, 345 (1860)) (concerning the defendants' whipping another owner's slave to extract information about a runaway slave); *Id.* at 527 (citing Oliver v. State, 39 Miss. 526 (1869)) (concerning a manslaughter charge against an owner for killing his slave in the corn fields). Oliver was a particularly egregious example of Mississippi courts failing to hold a master liable for the homicide of his slave. Fede, *supra* note 153, at 119-20. *See also* MARK TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-60: CONSIDERATIONS OF HUMANITY AND INTEREST 106-08 (1981).

[168] John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BR. J. AM. LEG. STUDIES 297, 334 (2013).

[169] GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 42 (1827), *reprinted in* SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872, at 198 (Paul Finkelman ed., 2007). A graduate of Princeton, Stroud served in the Pennsylvania legislature and later became a judge in Philadelphia. 8 WAYNE CUTLER, ED., CORRESPONDENCE OF JAMES K. POLK 7 (1993); *see also* Bessler, *supra* note 168, at 336-37.

[170] 1 CHARLES ELLIOTT, SINFULNESS OF AMERICAN SLAVERY 194 (B.F. Tefft, ed., (1850) (italics in original).

because "those who are *not white*" cannot testify during "the trial of a *white* person."[171]

John Stinneford's work on the original meaning of "unusual" in the Eighth Amendment also speaks to this question.[172] Stinneford reads the original meaning of the Eighth Amendment to conceptualize "unusual" as contrary to long usage.[173] This concept of long usage, coming from the common law tradition of judge-defined crimes, suggests that new, harsher punishments are unusual.[174] Stinneford suggests that a practice does not become unusual until states abandon it for a generation or more.[175] He also finds that the original meaning contemplates a one-way ratchet toward more progressive, gentler punishments, meaning that one cannot make a harsh punishment usual by using it repeatedly.[176]

3. The 1832 Constitution

In 1832, Mississippi passed a new constitution, participating with other states in the move toward Jacksonian democracy.[177] Three issues drove the agenda presided over by Rutilius Pray.[178]

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[171] STROUD, *supra* note 169, at 36 (emphasis in original).

[172] *See generally Original Meaning of "Unusual," supra* note 3.

[173] *Id.* at 1745.

[174] *Id.* For an interesting exploration into the role that common law still plays in modern American criminal law, *see* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965 (2019).

[175] *Original Meaning of "Unusual," supra* note 3, at 1763-64.

[176] *Id.* at 1750-51. One wonders, though, about the use of life-without-parole ("LWOP") sentences over the past three decades. Introduced and widely adopted in the mid-1990s, LWOP seemingly can no longer be unusual based on its widespread use despite being a punishment that was not the product of the common law or otherwise long usage. For an argument for LWOP abolition, *see* William W. Berry III, *Life-with-Hope Sentencing*, 76 OHIO ST. L. J. 1051, 1053 (2015). *See also* Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. JUR. REV. 39 (2019); ASHLEY NELLIS, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT, (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf [https://perma.cc/B8H4-VZUW].

[177] John W. Winkle III, *Constitution of 1832*, MISS. ENCYC., https://mississippiencyclopedia.org/entries/constitution-of-1832/ [https://perma.cc/398Y-TJMB] (last updated Apr. 13, 2018); *see also* Winbourne Magruder Drake, *The Mississippi Constitutional Convention of 1832*, 23 J. S. HIST. 354 (1957).

[178] Winkle, *supra* note 177. George Poindexter opted not to run because he wanted a truly deliberative body. *See* VICKSBURG MISSISSIPPIAN, March 11, 1832, p. 3, (quoting letter of George Poindexter of January 11, 1832, from Woodville Southern Planter); *see also* Drake *supra* note 177, at 358-59. Publius Rutilius Rufus Pray, named after a Roman

The first two were not controversial —the choosing of Jackson as the permanent state capital and land expansion resulting from agreement with native American tribes.[179] The third issue was more contentious—the question of whether to appoint or elect state judges.[180] Mississippi decided to move to a fully elected judiciary, becoming the first state to elect its judges.[181]

There is no record of a discussion about the Mississippi punishment clause in the historical record. The state kept its proscription against "cruel punishments."[182] Even with the slave codes being in effect for over a decade from 1817 to 1832, Mississippi did not change its punishment clause in its second constitution in 1832. The change in the punishment clause of the Mississippi constitution would have to wait until 1868.

B. The 1868 and 1890 Mississippi Constitutions

Before the adoption of its 1868 Constitution, Mississippi adopted a constitution in 1861 as part of its secession from the United States and admission into the Confederate States of America.[183] The Confederate constitution had a punishment clause identical to the Eighth Amendment.[184] Mississippi did not change its punishment clause to add "unusual," although it did change "punishments" to "punishment."[185] Mississippi's 1861 Confederate constitution proscribed only "cruel punishment."[186]

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statesman, gained the added responsibility of revising the statutes of the state in 1833. *See* Thomas H. Somerville, *A Sketch of the Supreme Court of Mississippi*, *reprinted in* 11 THE GREEN BAG 508 (Horace W. Fuller ed., 1899). Having spent time in New Orleans and gaining a fondness for civil law, Pray wrote a new code that was "ambitious of originality" but ultimately rejected because it "smack[ed] too strongly of Roman law." *Id.* Pray subsequently served on the Mississippi Supreme Court from 1837 until his death in 1839. *Id.*

[179] Winkle, *supra* note 177. The land expansion resulted from agreements with the Choctaw (Treaty of Doak's Stand in 1820 and Treaty of Dancing Rabbit Creek in 1830) and the Chickasaw (Treaty of Pontotoc in 1832). *Id.*

[180] *Id.*

[181] *Id.*; *see also* Leslie Southwick, *Mississippi Supreme Court Elections: A Historical Perspective 1916-1996*, 18 MISS. C.L. REV. 115, 118 (1997).

[182] MISS. CONST. of 1832, art. I, §16.

[183] JOURNAL OF STATE CONVENTION, & ORDINANCES & RESOLUTIONS ADOPTED IN MARCH, 1861.

[184] *Id.* at art. I, §19 ("nor cruel and unusual punishments be inflicted").

[185] *Id.* at art. I, §16 ("nor cruel punishment inflicted").

[186] *Id.*

1. The 1868 Constitution

The 1868 Mississippi Constitutional Convention was historic in that it involved an integrated group of sixteen Black and seventy-eight White politicians.[187] This constitution arose in the context of federally imposed martial law during Reconstruction.[188]

Contemporaneous with the new constitution was the passage of the Fourteenth Amendment to the United States Constitution, which provided for equal protection under the law and laid the groundwork for the application of the federal Bill of Rights to the states.[189] Congress passed the Fourteenth Amendment on June 13, 1866, and the states ratified it on July 9, 1868.[190]

In its 1868 constitution, Mississippi changed its punishment clause from "nor cruel punishments inflicted" to "cruel or unusual punishment shall not be inflicted."[191] The complete text of the 1868 Mississippi Constitution punishment clause is as follows: "Art I, Sec. 8. Cruel or unusual punishment shall not be inflicted, nor shall excessive fines be imposed; excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or presumption great."[192]

The recorded conversation surrounding the adoption of the punishment clause in the 1868 constitutional convention does not offer much information concerning the particular intention of the legislators in changing the language.[193] One legislator tried to

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[187] *Jan. 7, 1868: Mississippi Constitutional* Convention, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/mississippi-constitutional-convention/#:~:text=On%20Jan.,for%20children%20regardless%20of%20race [https://perma.cc/MB2F-7H2D] (last visited May 19, 2024) ("The Mississippi Constitution was one of the first pieces of legislation that provide a uniform system of free public education for children regardless of race.")

[188] Winkle, *supra* note 14.

[189] In practice, however, this did not come until much later. *See supra* notes 32-34 and accompanying text.

[190] *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, at https://www.archives.gov/milestone-documents/14th-amendment [https://perma.cc/VZM5-MDW5] (last visited May 20, 2024).

[191] *Compare* MISS. CONST. of 1832, art. I, §16 *with* MISS. CONST. of 1868, art. I, §8.

[192] MISS. CONST. of 1868, art. I, §8 ("Cruel and unusual punishment shall not be inflicted").

[193] Here is the entire transcript:

Section 8:

change the language from "cruel punishment" to "cruel or unnatural punishment," but the legislators rejected that amendment.[194] Instead, they adopted the phrase "cruel or unusual punishment shall not be inflicted."[195]

To gain a better understanding of what the legislature intended in 1868 as well as the contemporaneous meaning of "cruel or unusual punishment," examining the broader context, as well as other evidence, is necessary.

In 1868, thirty-four states, seventy-five percent, had punishment clauses in their state constitutions.[196] Of those, seventeen used a conjunctive "and" clause, fourteen used a disjunctive "or" clause, and four used only cruel and not unusual.[197]

> Mr. Orr moved to amend as follows: After the word "required," in the second line, insert "cruel or unnatural punishment shall not be inflicted."
>
> Mr. Compton moved to amend as follows: Before the word "excessive," in the first line, insert "cruel or unusual punishment shall not be inflicted."
>
> A motion to adjourn was lost.
>
> Mr. Morgan moved to table the amendment of Mr. Compton;
>
> Which was lost.
>
> And the amendment of Mr. Compton was adopted.
>
> And the amendment of Mr. Orr was lost.
>
> Mr. Conley moved to amend as follows: After the word "required," in the second line, insert "nor excessive fines imposed;"
>
> Which was adopted.
>
> Section 8 was adopted, as amended.
>
> A motion was made to lay on the table;
>
> Which was lost.
>
> And the motion to reconsider was carried.
>
> Mr. Compton then moved to so transpose the amendments as that section 8 would read as follows:
>
> "Cruel and unusual punishment shall not be inflicted, nor excessive fines imposed," etc.;
>
> Which was adopted.

JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 1868 (1871).

194 *Id.*

195 *Id.*

196 *See* Calabresi & Agudo, *supra* note 31, at 83. This meant that 91% of Americans lived in states with a punishment clause in their state constitutions in 1868. *Id.*

197 *Id.*

With the end of the Civil War in 1865, many of the Confederate states began passing new constitutions in order to gain readmittance into the United States. Twelve states passed new constitutions between 1867 and 1870 with all including punishment clauses.[198] Of these, only Florida, Maryland, and Texas adopted the same disjunctive singular punishment clause of "cruel or unusual punishment."[199]

Interestingly, Florida, Mississippi, and South Carolina were the only states that changed their punishment clauses in their post-Civil War constitutions. Florida, like Mississippi, adopted a singular disjunctive punishment clause changing to punishment from punishments.[200] South Carolina, like Mississippi, added unusual but used a conjunctive singular (from cruel punishments to cruel and unusual punishment).[201]

Mississippi's new constitutional punishment clause did not copy either the provisional or permanent punishment clauses of the Confederacy, both of which were conjunctive like the Eighth Amendment.[202] This change is important because the Fourteenth Amendment likely meant that the Eighth Amendment would now apply to the states.[203] Instead, Mississippi chose a broader

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[198] *See* ALA CONST. of 1867, art. I, §17 (cruel punishments); *see also* ARK. CONST. of 1868, art. I §7 (cruel or unusual punishments); FLA. CONST. of 1868, Decl. of Rights, §6 (cruel or unusual punishment); GA. CONST. of 1868, art. I, §16 (cruel and unusual punishments); LA. CONST. of 1868, art. I, §8 (cruel and unusual punishments); MD. CONST. of 1867, Decl. of Rights, §25 (cruel or unusual punishment); MISS. CONST. of 1868, art. I, §8 (cruel or unusual punishment); N.C. CONST. of 1868, art. I, §14 (cruel or unusual punishments); S.C. CONST. of 1868, art. I, §38 (cruel and unusual punishments); TENN. CONST. of 1870, art. I, §16 (cruel or unusual punishments); TX CONST. of 1869, art. I, §8 (cruel or unusual punishment); VA. CONST. of 1868, art. I, §11 (cruel and unusual punishments).

[199] *See* FLA. CONST. of 1868, Decl. of Rights, §6 (cruel or unusual punishment); *see also* MD. CONST. of 1867, Decl. of Rights, §25 (cruel or unusual punishment); TX CONST. of 1869, art. I, §11 (cruel or unusual punishment).

[200] *Compare* FLA. CONST. of 1868, Decl. of Rights, §6 (cruel or unusual punishment) *with* FLA. CONST. of 1865, art. I, §12 (cruel or unusual punishments).

[201] *Compare* S.C. CONST. of 1868, Art. I, §38 (cruel and unusual punishments) *with* S.C. CONST. of 1865, art. IX, §5 (cruel punishments).

[202] The provisional constitution of the Confederate States of America (CSA) barred "cruel and unusual punishment," and the permanent constitution of CSA was identical to the Eighth Amendment in barring "cruel and unusual punishments." ETHRIDGE, *supra* note 136, at 562, 573.

[203] *See* cases cited *supra* notes 29 and 32.

punishment clause that granted more rights than the federal constitution.

The origins of this change from "cruel punishments" to "cruel or unusual punishment" perhaps date to the adoption of the 1822 Mississippi slave code which used identical language.[204] If so, the experience with this language over four decades perhaps led to the change, as the 1832 Constitution used the same language as the 1817 Constitution.[205]

2. Reconstruction Laws

Interestingly, Congress parroted the same punishment clause language used in the slave codes in its Reconstruction statute of 1867.[206] This punishment clause pertained not to slave punishment but to limits on the punishment that Reconstruction military tribunals could impose upon former Confederate soldiers. The statute provided:

> That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and *no cruel or unusual punishment shall be inflicted*, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions . . . .[207]

So, the concern of Congress was to place a limit on the ability of military tribunals to impose cruel punishment as well as unusual punishment.

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[204] *See supra* note 152 and accompanying text.

[205] *Compare* MISS. CONST. of 1832, art I, §16 *with* MISS. CONST. of 1817, art I, §16.

[206] The Reconstruction Act of 1867, ch. 153, 39 Stat. 428 (1867), *reprinted in* RECONSTRUCTION, 1865-1877 89-92 (Robert W. Johannsen ed., 1970.

[207] §4 (emphasis added). The statute also included a proviso requiring the approval of the President prior to the imposition of the death penalty. *Id.* ("Provided, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President.").

President Andrew Johnson vetoed the initial statute before Congress overrode his veto.[208] Part of Johnson's rationale involved the punishment clause:

> Second. Cruel or unusual punishment is not to be inflicted; but who is to decide what is cruel and what is unusual? The words have acquired a legal meaning by long use in the courts. Can it be expected that military officers will understand or follow a rule expressed in language so purely technical and not pertaining in the least degree to their profession? If not, then each officer may define cruelty according to his own temper, and if it is not usual he will make it usual.[209]

Johnson's response illustrates a couple of important ideas about the contemporaneous understanding of the "cruel or unusual punishment" clause at the time Mississippi adopted that language in its 1868 constitution.

First, it is clear that cruel and unusual are separate concepts that require separate inquiries. Johnson's worry was that cruel would be too subjective a concept to result in a military tribunal using the concept as a limit on punishments military officers might impose. And the concept of unusual poses a different concern. Johnson worried that officers would make unusual punishments "usual" by repeating them. In other words, unusual would not provide a meaningful limit because military officers would repeat

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[208] *See generally* Andrew Johnson, *Veto for the First Reconstruction Act March 2, 1867*, AM. HIST. FROM REVOLUTION TO RECONSTRUCTION & BEYOND, http://www.let.rug.nl/usa/presidents/andrew-johnson/veto-for-the-first-reconstruction-act-march-2-1867.php [https://perma.cc/5TRS-FSQW] (last visited May 21, 2024); *see also Andrew Johnson - Key Events*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/andrew-johnson/key-events [https://perma.cc/5TY2-646R] (last visited May 21. 2024). In 1867, William McCardle challenged the constitutionality of the Reconstruction Acts after military authorities arrested him for publishing critical editorials. *See ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). The Supreme Court declined jurisdiction because Congress had revoked its appellate jurisdiction in habeas cases. *Id.*

[209] *March 2, 1867: Veto Message Regarding Rebel State Governments*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/the-presidency/presidential-speeches/march-2-1867-veto-message-regarding-rebel-state-governments [https://perma.cc/R5H8-QCJK] (last visited May 21, 2024).

unusual punishments to such an extent that the punishment would become common and thus no longer unusual.[210]

Second, Johnson made the point that context matters when determining what punishment violated each provision of the statute. He expressed concern about whether the respective meanings of cruel punishment and unusual punishment in the context of military tribunals would reflect their use in the criminal justice system. At the time of his veto, the Supreme Court had not provided any analysis on the scope of the Eighth Amendment, and so no one could tell where the statutory line would be. In particular, Johnson saw the language as a tool that could allow for abuse of power. He explained, "[c]orporal punishment, imprisonment, the gag, the ball and chain, and all the almost insupportable forms of torture invented for military punishment lie within the range of choice."[211]

In addition, the language adopted by the Reconstruction constitution in its voting rights provision also included the same "cruel or unusual punishment" language.[212] Here, the language served to provide a basis for disenfranchising former Confederate soldiers:

> [T]he following classes of persons shall not be permitted to register, vote or hold office:
> Those who during the late rebellion inflicted or caused to be inflicted any *cruel or unusual punishment* upon any soldier, sailor, marine, employee, or citizen of the United States . . . .[213]

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[210] *See generally* HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY (1989). President Johnson was not a lawyer—he was a tailor before becoming president. *Id.* at 31. But his reading supports Stinneford's claims that unusual refers to long usage and that evolving standards work in one direction—from more severe to less severe. *See Original Meaning of "Unusual," supra* note 3. Johnson's argument suggests, though, that the long usage may not be that long of a time frame. *See* UNIV. OF VA.: MILLER CTR., *supra* note 209.

[211] UNIV. OF VA.: MILLER CTR., *supra* note 209. To the extent Johnson was aware that the slave codes used the same language, he might have a similar worry—that without judicial intervention, excessive and illegal punishment could persist. *See supra* Part III.A.

[212] *See*, *e.g.*, THE WEEKLY DEMOCRAT, Nov. 25, 1867, p. 3 (printing the adopted provision).

[213] *Id.* (emphasis added).

Again, the import of this language seems to be broader than the Eighth Amendment. The disjunctive nature of the clause signaled that either cruel punishment or unusual punishment would trigger the disenfranchisement.[214]

The Mississippi legislature also used the same "cruel or unusual punishment language in its Penitentiary bill of 1872.[215] Specifically, the law provided that

> [T]he head of no female convict shall be shorn, and if the Superintendent shall inflict cruel or unusual punishment upon any convict of either sex, upon proof of the same to the Governor, he shall suspend or reprimand said Superintendent . . . and for such offense said Superintendent shall upon conviction, pay a fine of not less than one hundred, nor more than five hundred dollars and shall be imprisoned not more than six months, one or both in the discretion of the Court.[216]

Even if the shaving of an inmate's head became a usual indignity, the action was still punishable because of its inherent cruelty.

3. The 1890 Constitution

When the State adopted a new constitution in 1890, the did not change the language of its punishment clause.[217] The records of the constitutional convention do not indicate any discussion of the punishment clause other than adopting the same provision from 1868.[218]

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[214] Interestingly, the Mississippi voters rejected the constitution in the summer of 1868 based largely on this provision. Winkle, *supra* note 14. They were not rejecting it based on the shift from "cruel punishments" to "cruel or unusual punishments." Rather, they rejected it because they opposed the disenfranchisement of former Confederate soldiers. President Grant forced a second vote during the 1868 elections but required citizens to vote section-by-section. *Id.* Not surprisingly, the voters passed the 1868 Constitution, except for the disenfranchisement provision. *Id.*

[215] THE WEEKLY CLARION, Mar. 14, 1872, at 3 (reporting on the House legislative session on the evening of March 7, 1872). *See also* THE SEMI-WEEKLY CLARION, March 19, 1872, at 1.

[216] Penitentiary bill of 1872, sec. 6.

[217] MISS. CONST. OF 1890 art. III, § 28 ("Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed."). This is the current applicable state constitutional provision.

[218] *Id.*

An 1891 speech by Mississippi Senator James Z. George further supports the understanding that the "cruel or unusual punishment" language connoted a different meaning than "cruel and unusual punishments," and had a distinct and separate meaning than the Eighth Amendment.[219] Discussing the Alabama Reconstruction statute that barred Confederate soldiers from voting who had inflicted cruel or unusual punishment on Union soldiers, George said:

> The following were not allowed to register or vote:
> First. Those who, during the late rebellion, inflicted or caused to be inflicted any cruel or—
> Not "and," as in the Constitution of the United States—
> any cruel or unusual punishment upon any soldier or citizen of the United States.
> Now, sir, what is "cruel or unusual punishment?"[220]

The implication of George's comment is that the requirement of cruel or unusual is broader than the Eighth Amendment and created the unfair outcome of encapsulating both those who engaged in cruel conduct and those who engaged in unusual conduct as opposed to only those who engaged in both cruel and unusual conduct.

One final window into the popular understanding of Mississippi's punishment clause comes from Justice George Ethridge's 1928 book about the Mississippi Constitutions. Ethridge writes:

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[219] *See* ETHRIDGE, *supra* note 136, at 673. George is complaining about the reaction to Mississippi's 1890 constitution which denied black citizens the right to vote. *Id.* He is citing state constitutional provisions in southern states adopted after the war which barred some former confederate soldiers from voting. *Id.*

[220] *Id.*

> This guarantee is primarily directed to the legislature, each member of which takes a special oath to read the constitution and to specially note and observe its provisions. Its aim is to have humane and just criminal laws, laws whose penalties and punishments are not out of proportion to the evils to be remedied thereby. But if the legislature refused to obey its mandates and directs cruel punishments to be inflicted the courts will act and declare the act of the legislature unconstitutional. It will be impossible to state just exactly what will be considered cruel and unusual punishment, but cutting of a persons' ears, branding their cheeks with firebrands and similar acts of mutilation are prohibited. The legislature of course must be allowed, within reasonable limits, to declare what punishment will be inflicted for a given act or what fine shall be imposed or what punishment is best calculated to make the prohibition effective. But it must act reasonably and has not unlimited power in the matter. The rights of the citizen cannot arbitrarily be interfered with by any department of the government, nor can any officer go beyond the limits of law and reason. The courts are open to the people to have the reasonableness declared. Of late years much latitude is allowed in such cases.[221]

Ethridge's note reinforces the same basic points that this excavation has revealed. First, the concept of cruel punishment is separate from unusual punishment. His example of the legislature imposing a cruel punishment that proves unconstitutional demonstrates this idea.

Second, Justice Ethridge emphasizes the role of the courts in protecting state constitutional rights. When the legislature directs the infliction of cruel punishment, the court must act and declare the act of the legislature unconstitutional.

Indeed, Justice Ethridge's own jurisprudence demonstrates the Mississippi Supreme Court's broad construction of the 1890 Constitution to protect individual liberties, including under the punishment clause. In *Sinclair v. State*, the court considered the application of a Mississippi homicide statute to a defendant that the district attorney admitted was insane.[222] The law in question

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[221] *Id.* at 147.

[222] *See generally* Sinclair v. State, 132 So. 581 (Miss. 1931) (in banc).

stated that "the insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder."[223] In addition to the punishment clause's bar against "cruel or unusual punishment," the 1890 Constitution provided that "No person shall be deprived of life, liberty, or property except by due process of law."[224] The *Sinclair* court held that abolishing the insanity defense violated the state constitution, both its punishment clause and its due process clause.[225]

In his opinion, Justice Ethridge explained,

> This section of the Constitution being embraced in and a part of the Bill of Rights and being designated for the protection of the citizens against those exercising the powers of government should receive a liberal construction. In other words, the provisions embraced in the bill of rights are liberally construed by the court in favor of the liberties of the citizens.[226]

He then opined further on the proper construction of the 1890 Constitution:

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[223] *Id.* at 582.

[224] MISS. CONST. OF 1890 Art. I, §14.

[225] *Sinclair*, 132 So. at 582.

[226] *Id.* at 583 (citing Falkner v. State, 98 So. 691 (Miss. 1924); then citing Boyd v. U. S., 116 U. S. 616 (1886); and then citing Gouled v. U. S., 255 U. S. 298 (1921)).

> In construing the Constitution the duty of the court is to ascertain the meaning of the Constitution as intended by its framers, and to give it its full legal and logical effect first without reference to any statute enacted by the Legislature . . . The protection of the Constitution is never to be impaired in order to save a statute, but a statute will be given a reasonable construction, if possible, to make it conform to the Constitution. Another rule of construction is that the Constitution should be construed so as to effectuate and not defeat the policies indicated by its framers. Brien v. Williamson, 7 How. (Miss.) 14. As applied to the case before us, would it be cruel or unusual to convict a person of murder and impose a life sentence upon him when he was totally insane and incapable of knowing the nature and quality of the act constituting the crime at the time the crime was committed?[227]

In *Sinclair*, Justice Ethridge thus underscores that the proper interpretation of the Mississippi punishment clause is a liberal one, not in a political sense, but in an interpretive sense. In other words, the Mississippi courts should broadly construe the individual liberties adopted in the state constitution in order to prevent the legislature from infringing upon them, including the right to be free from cruel or unusual punishment.

IV. CONCEPTUALIZING MISSISSIPPI'S PUNISHMENT CLAUSE

In light of the text and history of the Mississippi punishment clause, one can conceptualize this language to, at the very least, provide some basic interpretive parameters. There are certain things that the punishment clause cannot mean and other things that it must mean.

The Mississippi punishment clause cannot have the same meaning as the Eighth Amendment. As an initial matter, the text is different. The Eighth Amendment proscribes "cruel and unusual punishments." The Mississippi Constitution bars "cruel or unusual punishment."

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[227] *Id.*

As a textual matter, the difference in conjunctions matters. While the Eighth Amendment might require punishments to be both cruel and unusual to violate the Constitution, the Mississippi constitution does not. If a punishment is cruel, it violates the punishment clause of Article III, section 28. The punishment does not also have to be an unusual punishment to be unconstitutional under the state constitution. If a punishment is unusual, it violates the punishment clause of Article III, section 28. It does not also have to be a cruel punishment to violate the Mississippi Constitution.

The basic history of the Mississippi Constitution's punishment clause demonstrates this point. The initial provision of the 1817 and 1832 constitutions only barred cruel punishments. It did not bar unusual punishments.

When Mississippi amended this provision, it added unusual punishment as a second category of constitutional protection for criminal defendants. To signal this disjunctive approach, the constitution used "or" to show that there were two categories of unconstitutional punishment.

The provision Mississippi adopted was different from both the United States and Confederate constitutions as well as the constitutions of a majority of states. It was one of four Confederate states that chose a disjunctive punishment clause. And Mississippi was the only state that changed from "cruel punishments" to "cruel or unusual punishment" among the constitutions adopted between 1868 and 1871.

The provision Mississippi adopted was identical to both the provision in its slave code used to protect slaves and the provision Congress adopted to protect former Confederates charged by Reconstruction military tribunals.

As discussed in part III, the understanding of the "cruel or unusual punishment" provisions was consistently disjunctive; that is, courts, commentators, and even the President saw the bar on "cruel or unusual punishment" as having two distinct inquiries—whether the punishment was cruel and whether the punishment was unusual. The central complaint of President Johnson and others about the "cruel or unusual punishment" clause was the potential manipulability of the concept of unusual such that there would be only one inquiry instead of two.

As a result, the Mississippi punishment clause must mean that there are two distinct analytical questions required by the State constitution. In analyzing any constitutional challenge to a punishment imposed by the State, the court must ask whether the punishment is cruel. In analyzing any constitutional challenge to a punishment imposed by the State, the court must also ask, as a separate inquiry, whether the punishment is unusual.

State constitutional challenges can also be either categorical or as applied. A defendant could claim, for instance, that a punishment is unconstitutional under the punishment clause because it is categorically cruel, meaning the punishment is cruel in every situation. Similarly, a defendant could claim that a punishment is unconstitutional under the punishment clause because it is categorically unusual, meaning the punishment is unusual in every situation.

As applied challenges work the same way but with a lower standard and without making a broadly applicable rule. So, a punishment could, for a particular defendant, be unconstitutionally cruel as applied to that defendant under the State constitution. Likewise, a punishment could, for a particular defendant, be unconstitutionally unusual as applied to that defendant under the State constitution.

This reading also means that the state cannot use the *Solem* and *Harmelin* gross proportionality tests to determine if a punishment is constitutional under the Mississippi punishment clause. That test is assessing cruel *and* unusual punishments, not cruel *or* unusual punishment. Mississippi's constitutional drafters selected a different constitutional provision. As a result, the State constitution has a different constitutional test.

To be clear, Mississippi courts can assess the Eighth Amendment question and apply Eighth Amendment doctrine to determine if a Mississippi punishment violates the federal constitution. But the Mississippi courts must separately assess whether a punishment violates the State constitution, assuming the defendant raises a state constitutional challenge. And this inquiry is entirely separate and different substantively from the inquiry under the Eighth Amendment.

The citizens of Mississippi have, on four occasions, voted (directly in 1868, through representatives the other three times) for a constitution with a different and broader protection with respect to the individual's right to be free from draconian punishment. On two occasions, the punishment clause provisions made punishments that were merely cruel and not unusual unconstitutional. The two more recent constitutions indicate that there are two categories of unconstitutional punishment—cruel punishments and unusual punishments. While punishments can be both cruel and unusual, punishments only need to be one or the other to violate Mississippi's constitution.

Finally, the excavation of the Mississippi punishment clause reveals that the presumption of constitutionality used by the state courts is, as a matter of basic constitutional law, wrong. The State's test acts as if there is no constitutional provision and blindly defers to the punishment as long as it fits within the limit allowed under the statute. This is true with respect to both the federal and state constitutional inquiries.

The role of Mississippi courts under the Mississippi constitution is not to defer to the state legislature. Rather, the point of having a punishment clause is to place limits on the punishment that the legislature and trial court can impose. Without the Mississippi courts placing some limit on the state legislature, the imposition of draconian punishments can persist without check. The counter-majoritarian nature of individual rights is such that the state appellate courts must protect the individual against punitive overreach by the state legislature and trial courts.

The whole point of having a constitutional bill of rights is to restrict the power of the state to interfere with the individual rights of its citizens by having courts intervene on behalf of the individual to protect the constitutional rights. And the need is there precisely because protecting such rights from the legislative majority is unpopular.[228] The Mississippi courts must impose these constitutional limits, or the constitutional rights of its citizens will cease to exist.

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[228] Interestingly, over time, courts tend to gravitate in the direction of public opinion in making these determinations. *See* Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1242 (2010).

Specifically, there are two state constitutional limits under the punishment clause. One is whether the punishment is cruel. A second limit is whether the punishment is unusual. State courts that recycle the same broken deferential boilerplate eschew their role as jurists. Punishments require careful analysis as to both the applicable constitutional questions, which allow the defendant to prevail in cases where the punishment imposed is either cruel or unusual.

As demonstrated by the proliferation of punishment in Mississippi and its draconian imposition, the state courts have imposed essentially no state constitutional limit on punishment. To be fair, litigants have not advanced meaningful state constitutional arguments. The hope of this Article is that defendants will advance the arguments excavated here to better protect the individual rights of criminal defendants from cruel punishment and from unusual punishment.

V. APPLYING MISSISSIPPI'S PUNISHMENT CLAUSE

This section concludes the Article by examining the practical application of the Mississippi punishment clause, first generally and then to various state punishments.

A. How to Apply the Mississippi Punishment Clause

Based on the excavation of the Mississippi Punishment clause as explored in Part III, the Mississippi courts should engage in two separate inquiries when assessing whether a punishment violates the "[c]ruel or unusual punishments shall not be inflicted" requirement of the Mississippi constitution.[229]

1. Is the Punishment Cruel?

In its common law usage, the concept of cruel punishment refers to the effect of the punishment on the defendant, not the intent of the individual or institution imposing the punishment.[230]

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[229] The analysis that follows provides some ideas of how Mississippi courts can apply appropriate tests under their punishment clause. For a broader taxonomy of possible options, see William W. Berry III, *Unlocking State Punishment Clauses*, 76 RUTGERS L. REV. __ (forthcoming 2025).

[230] *Original Meaning of "Cruel," supra* note 3, at 471.

And the effect here relates to excessiveness. Cruel punishments are excessive in the two different senses—they inflict torture, and they are disproportionate.

One way to think of this distinction is in the same vein as the distinction between categorical and as applied constitutional challenges. A punishment can be cruel because it involves torture and causes severe pain. Draconian medieval punishments such as drawing-and-quartering, the rack, whipping, stocks, pillory, and burning at the stake would meet this definition of cruel.[231]

On the other hand, in the as applied sense, a punishment can be cruel in light of the concept of proportionality. A sentence of twenty years in prison for parking in a handicapped parking spot would be an obvious example of such a punishment.

At its core, the concept of proportionality stems from the *just deserts* conception of retribution.[232] Just deserts means imposing a sentence that is not more than and no less than what the offender deserves.[233] Under this theory, desert should reflect both the culpability of the offender and the harm caused by the criminal act.[234]

This idea of proportionality is different from gross disproportionality, especially in the way the Supreme Court has used that concept. A cruel punishment is simply a disproportionate punishment.[235] Making the constitutional requirement gross disproportionality means that virtually all punishments are constitutional.[236] Rather than place a heavy thumb on the scale

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[231] *See*, *e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing gruesome medieval punishments).

[232] *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).

[233] *Id.* The federal sentencing statute reflects this idea of proportionality in its parsimony clause, which directs courts to "impose a sentence sufficient, but not greater than necessary." 18 U.S.C. § 3553(a) (2023).

[234] *See* William W. Berry III, *Separating Retribution from Proportionality*, 97 VA. L. REV. IN BRIEF 61, 69 (2011).

[235] *See id.* Note that a punishment can also be disproportionate, and thus cruel, with respect to the other purposes of punishment. A sentence could offer marginal or negligible deterrence above what a lesser sentence would; a sentence could incapacitate someone who is no longer dangerous, or a sentence could continue to incarcerate an already rehabilitated prisoner. *Id.*

[236] *Solem* was the exception to this, and the Court rejected that approach in *Harmelin*. *See* discussion *supra* Part II.

which relieves the court of the responsibility of making difficult decisions, Mississippi courts should embrace this constitutional responsibility and engage in robust judicial review. Put simply, Mississippi courts should require state-imposed punishments to be proportional to the culpability of the offender and the harm caused and reverse them if they are not. Doing so not only protects the individual rights of criminal defendants; it also protects the resources of the state.

So, the cruel inquiry under the Mississippi constitution's cruel punishment prohibition requires courts to assess first whether the punishment in question is a cruel punishment generally. In some cases, the state courts should impose a categorical restriction against the imposition of particular punishments.[237] There are several examples of state courts in other jurisdictions creating categorical bars for cruel punishments under their state constitutions, including the death penalty and juvenile life-without-parole.[238]

Then, the court must determine whether the punishment is cruel as applied to the defendant in the case; that is, whether the sentence is disproportionate to the applicable purpose of

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[237] The Supreme Court has done this under the Eighth Amendment with respect to a number of punishments. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital statute); *see also* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital statute); Roper v. Simmons, 543 U.S. 551, 577-78 (2005) (barring executions of juvenile defendants); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding death sentences for intellectually disabled offenders unconstitutional); Hall v. Florida, 572 U.S. 701, 702 (2014) (requiring that the intellectual disability determination be more than just IQ); Moore v. Texas, 581 U.S. 1, 5-6 (2017) (requiring that the intellectual disability determination apply modern definitional approaches); Ford v. Wainwright, 477 U.S. 399, 409 (1986) (finding death sentences for insane individuals unconstitutional); Enmund v. Florida, 458 U.S. 782, 797 (1982) (finding death sentences for some felony murders unconstitutional); Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (narrowing the holding from *Enmund*); Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding death sentences for rape unconstitutional); Kennedy v. Louisiana, 554 U.S. 407, 412-13 (2008) (finding the death sentences for child rape unconstitutional); Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring mandatory JLWOP sentences); Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (applying the Court's decision in *Miller* retroactively); Graham v. Florida, 560 U.S. 48, 82 (2010) (barring JLWOP as a punishment for non-homicide crimes).

[238] *See* sources cited *supra* note 23. The most recent example of this is the Michigan Supreme Court striking down mandatory LWOP sentences for individuals under the age of 21 as a cruel and unusual punishment under the Michigan constitution. People v. Taylor, 2025 WL 1085247 (April 10, 2025).

punishment—retribution, deterrence, incapacitation, or rehabilitation. If the punishment is more than what is needed to achieve any one of these purposes, it violates the state constitution.

To be clear, a sentence is unconstitutionally cruel as applied if: (1) it imposes a punishment greater than what the defendant deserves in light of the defendant's culpability and harm caused by the defendant; (2) it imposes a punishment greater than what is necessary to deter others from committing the same crime; (3) it imposes a punishment greater than what is necessary to incapacitate a dangerous offender; OR (4) it imposes a punishment greater than what is necessary to rehabilitate an offender.

American courts have historically overestimated, in extreme ways, all of these categories. Even the most serious crimes rarely deserve more than twenty years of incarceration.[239] The deterrence achieved by increasing a sentence beyond a decade is marginal at best.[240] Inmates are far less dangerous than assumed and rarely commit crimes after age thirty-five.[241]

The roots of the punishment clauses, both state and federal, relate to a common law as encapsulated in the idea of unusual.[242] It is only fitting, then, that the Mississippi courts develop a state constitutional common law of cruelty, establishing on a case-by-case basis where punishments have crossed the state constitutional line.

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[239] *See* German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, Vox, (Feb. 19, 2019), https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration [https://perma.cc/Q9HW-9HFA]; Komar et al., *supra* note 109. Norway is the most obvious example, capping it sentences at twenty-one years, with lower violent crime and reoffending rates than the United States.

[240] *See*, *e.g.*, John J. Donahue III & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005); *see also* Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 787 (2005).

[241] *See generally* ROBERT J. SAMPSON & JOHN LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS IN LIFE (1993); ROBERT J. SAMPSON & JOHN LAUB, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003); Robert J. Sampson & Roland Neil, *The Birth Lottery of History: Arrest over the Life Course of Multiple Cohorts Coming of Age, 1995-2018*, 126 AM. J. SOC. 1127 (2021).

[242] *See Original Meaning of "Unusual," supra* note 3.

2. Alternatively, Is the Punishment Unusual?

As established, the question of whether a punishment is unusual under the Mississippi Constitution is an entirely different question than whether a punishment is cruel. And a finding that a punishment is unusual is enough to find that it violates the state constitution.

Unusual punishment is punishment that is contrary to long usage.[243] The question, however, is what constitutes long usage under the Mississippi Constitution. The concept of long usage is a common law one. The idea is to bar legislatures and courts from creating new harsh punishments not previously used.

Another piece of the analysis with respect to unusual relates to the direction of punishment intensity.[244] Generally, the presumption is that punishments become less draconian over time. As a result, the concept of unusualness is a one-way ratchet against harsher punishment.[245] The idea here is to prevent the legislature and courts from coming up with new, creative ways to inflict draconian punishment.

Finally, the idea of unusual contemplates that draconian punishments will sunset over time. If jurisdictions cease to use particular punishments or even use them sparingly, the punishment becomes unusual. Unusualness is thus a constitutional encapsulation of a use-it-or-lose-it approach. This idea makes sense because the emotional reaction to a particular crime should not authorize a departure from the societal trends and norms related to punishment.

The contemporary concern at the time related to the imposition of punishment by slave owners and later, reconstruction military commissions. Punishers should not be able to avoid the bar against unusual punishments simply by using the new harsh punishment for a while to make it usual.

Professor Stinneford's originalist work suggests that it takes thirty years or more, a generation, to establish long usage of a particular punishment practice.[246] This would mean that a court

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[243] *Id.* at 1745.
[244] *Id.* at 1809.
[245] *Id.* at 1821.
[246] *Id*. at 1819.

would assess whether the state had imposed the sentence for the past two or three decades to determine if it were usual.

Another lens would be to use the time of adoption as a baseline. To be usual, a sentence would have needed to be in place in 1868 when the State adopted the "cruel or unusual punishment" clause. At the very latest, 1890 could be a point of reference because the court readopted the same language in its constitution that year. Using these dates as reference points makes particular sense because the state of Mississippi did not bar unusual punishment prior to 1868.[247]

Taking both of these historical ideas together, then, a criminal sentence imposed in Mississippi would be an unusual punishment in violation of the State constitution if the punishment was either (1) not a punishment available in 1868 or (2) the State has not used the punishment regularly for the past few decades. Of course, the adoption of new kinds of less harsh forms of punishment would not be unusual because unusual contemplates a one-way ratchet.

As with the cruel punishment inquiry, challenges to sentences as unusual punishment violating the State constitution can be categorical or as applied. With respect to categorical constitutional limitations, an unusual punishment would be an innovation that is constitutionally off-limits because of its lack of availability in 1868 or its lack of recent use.

With respect to as applied challenges, a punishment would be unusual in violation of the Mississippi Constitution if it applied in a new way to a crime with unique circumstances or an individual with a particular condition.

B. Some Substantive Areas

Both tests above seek to help Mississippi courts easily apply the State constitution in a clear and defensible manner. Before looking at specific punishments, it is worth noting that the other contexts in which Mississippi used the language of cruel and unusual punishment in the nineteenth century also provide a flavor

[247] Also, the Eighth Amendment bar against "cruel and unusual punishments" did not apply to Mississippi governments until the adoption of the Fourteenth Amendment in 1868.

for what punishment might be cruel as well as what punishments might be unusual.

The Slave Code proscriptions give a sense of the meanings of cruel punishment as well as unusual punishment. In this context, the idea of cruel punishment was punishment not inflicting permanent damage. The idea was to allow corrective behavior but not in such a way that would impair the economic value of the slave.

Transferring these ideas from the abusive context of slavery to the similarly abusive context of criminal justice suggests that courts should endeavor and monitor judicial punishment in the same way as the statutes suggest.[248] Punishment that scars, rather than corrects and rehabilitates, is cruel.

Similarly, moving outside of the societal norm is unusual. Punishing slaves in new or unseemly ways is unusual, and repeating the same objectionable punishments should not make it usual.

The lessons of the Reconstruction bill follow this same trajectory. President Johnson demonstrated a worry about cruel punishment of former Confederate soldiers. This worry captured both senses of cruel—excessive and disproportionate.

And the concern about unusual becoming usual signals the need for state courts to intervene to address unusual punishment. Allowing states to repeat draconian punishments for a generation has caused the mass incarceration epidemic.

The other usages of cruel offer support for these readings. The idea of "cruel and inhuman treatment" demonstrates a distinct conception from "cruel or unusual punishment" whether in the spousal context or parenting context. This kind of cruelty connects to inhumanity—a harshness demonstrating no remorse. It provides a glimpse into the understanding of what makes excessive punishment cruel – its lack of humanity.

Careful review of Mississippi punishment practices under these doctrines of "cruel or unusual punishment" invite deeper judicial scrutiny. Specifically, the death penalty, LWOP, mandatory sentences, and habitual offender statutes all might be cruel, unusual, or both.

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[248] This is, of course, putting aside the dehumanizing reality of slavery and the regular possibility that white juries would choose to nullify these laws. *See* Fede, *supra* note 153.

1. The Death Penalty

With two executions in the past decade and a death row of only thirty-five inmates, the death penalty appears to be dying in Mississippi.[249] The exonerations of multiple innocent individuals from death row[250] and the exorbitant cost of capital cases seem to be hastening its demise.[251]

As a categorical matter, judges have concluded that the death penalty is a cruel punishment in its severity.[252] At the same time, it seems unlikely that the Mississippi courts will find the death penalty to be cruel and adopt a categorical rule against its imposition like the state of New York did.[253]

As an as applied cruel punishment, though, death penalty in certain cases may violate the State constitution. Part of the issue with the death penalty is its haphazard application. Rarely do the worst of the worst offenders receive this punishment. Using juries to decide who receives the death penalty means that there is disparity, arbitrariness, and even randomness in who receives this ultimate punishment.[254]

The Supreme Court of Mississippi should carefully review both the characteristics of the crime and the characteristics of the offender in determining whether particular capital sentences violate the Mississippi constitution. Felony murder cases, in particular, where the defendant did not kill or intend to kill, deserve review under the state constitution. Similarly, cases involving intellectually disabled or low IQ offenders who lack capacity and therefore culpability might be good candidates for

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[249] *Execution Database*, *DEATH* PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions [https://perma.cc/GZ7M-R48L] (last visited June 22, 2024).

[250] *See generally* RADLEY BALKO & TUCKER CARRINGTON, THE CADAVER KING AND THE COUNTRY DENTIST (2018).

[251] *See*, Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

[252] *See*, *e.g.*, Furman v. Georgia, 408 U.S. 238, 316 (1972) (Marshall, J., concurring); *Id.* at 305 (1972) (Brennan, J., concurring). It is also interesting that three Republican appointees to the United States Supreme Court reached the same conclusion after initially supporting the death penalty. William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 444 (2011).

[253] *See generally* People v. LaValle, 817 N.E.2d 341, 3 N.Y.3d 88, 99 (N.Y. Ct. App. 2004) (finding that the death penalty violated the New York constitution).

[254] *See*, *e.g.*, Glossip v. Gross, 576 U.S. 863, 908-09 (2015) (Breyer, J., dissenting).

finding death sentences to be as applied violations of the Mississippi constitution.[255]

The consequence of finding a death sentence violates the State constitution does not mean the release of the offender. Rather, the court could find that the death sentence violates the state constitution and impose a life sentence in its place.

Even if the court finds that a particular capital sentence is not cruel, it still might be unusual. As a categorical matter, the death penalty was an available punishment in 1868. But the State has used it so sparingly in the past half century that the death penalty might be unusual. Mississippi has executed only 23 people since 1976 and only two in the past decade.[256]

Another area of potential challenges to the imposition of unusual punishment under the state constitution in capital cases relates to the method of execution. These challenges could be categorical or as applied. The primary method of execution in Mississippi in 1868 and until 1940 was hanging. So, the addition of lethal injection as a method of execution would make it unusual.[257]

Putting aside 1868, lethal injection would still be unusual given the experimental nature of current protocols. Mississippi now uses midazolam, which means that each lethal injection is literally a new experiment perpetrated on the inmate.[258] This practice is the very kind of novel experimentation in punishment that the unusual punishment proscription sought to bar.

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[255] Many of those executed in recent years fall in this category. *2021 Year End Report: Virginia's Historic Abolition Highlights Continuing Decline of Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), https://deathpenaltyinfo.org/dpic-2021-year-end-report-virginias-historic-abolition-highlights-continuing-decline-of-death-penalty [https://perma.cc/96QP-TNCM] (finding that a majority of inmates executed had mental disability issues).

[256] *See* Gershowitz, *supra* note 251; *see also* William W. Berry III, *Evolved Standards, Evolving Justices?*, 96 WASH. U. L. REV. 105, 145 (2018).

[257] One might argue that lethal injection is more humane than hanging or electrocution. But the likelihood of torture that occurs with a lethal injection is just as bad if not worse. *See generally* CORINNA BARRETT LAIN, SECRETS OF THE KILLING STATE: THE UNTOLD STORY OF LETHAL INJECTION (2025).

[258] Glossip v. Gross, 576 U.S. 863, 966 (2015) (Sotomayor, J., dissenting). This would be even more unusual if the state followed Alabama and Louisiana and tried to execute an inmate using nitrogen hypoxia.

2. Life without Parole Sentences

Life without parole ("LWOP") sentences deserve scrutiny under the Mississippi Constitution. The inherent cruelty in such sentences is apparent. Choosing to lock someone in a cage until they die is no more than another form of a death penalty.

The cruelty of an LWOP sentence is not the life imprisonment, although some might argue that any punishment over twenty years is cruel.[259] Instead, the cruelty is living without having the possibility of release. Scholars have documented the mental torture of such sentences.[260]

It is important to note that abolishing LWOP sentences does not mean releasing dangerous criminals. Rather, it means examining, over time, whether someone is dangerous and still deserves incarceration instead of making a one-time decision in the shadow of the crime they committed.[261]

Even if the court is unwilling to find that all LWOP sentences are cruel punishments under the Mississippi constitution, it is clear that a number of LWOP sentences are cruel punishments as applied. The mandatory nature of the Mississippi homicide statute ensures that this phenomenon is true, particularly in the felony murder context.[262] This means that the state uses sloppy categorization that captures a wide range of culpabilities and harms in imposing LWOP sentences on some people who clearly do not deserve such serious sentences. Certainly, the character of the crime and the character of the offender in certain cases suggest that the imposition of LWOP in some cases constitutes a

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[259] *See* Lopez *supra* note 239; *see also* Komar et al., *supra* note 109.

[260] I have explored this topic extensively. *See generally* Berry, *supra* note 176.

[261] *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (arguing against judging one's life entirely by the worst act they committed).

[262] There is a disconnect with how some district attorneys view felony murder as compared to criminal law professors. They see a homicide, which then becomes aggravated with the presence of a felony, thus heightening the level of the crime and justifying LWOP or death sentences. Criminal law professors, however, often see felony murder as a tool to avoid the proof requirements of first-degree or aggravated murder. Rather than having to demonstrate the malice or premeditation mens rea of the defendant, the prosecutor can substitute the presence of a felony in place of the mens rea requirement. This means that individuals who did not intend to kill or killed in the heat of passion receive the same treatment as defendants who commit premeditated, cold-blooded murders.

disproportionate sentence—a cruel punishment—that violates the Mississippi Constitution.

LWOP also is arguably an unusual punishment. Adopted in 1880, the punishment was not in place at the time of the 1868 constitution.[263] LWOP was in place in 1890, though, so that might mean it was usual, except that use of LWOP is largely a twenty-first century phenomenon. Currently, Mississippi has over 2,000 people serving life sentences, including roughly 1,600 people serving LWOP sentences.[264]

This raises the question as to whether this practice is contrary to long usage. If Mississippi has only used LWOP regularly for the past twenty years, it might be an unusual punishment.

Juvenile LWOP sentences are even more suspect under the state constitution. The level of cruelty is higher both because of the extra time of incarceration for younger offenders and because the punishments are more likely to be disproportionate. In terms of retribution, the likelihood that juveniles deserve LWOP is remote, especially given their reduced level of culpability. Similarly, the utilitarian purposes of punishment require a conclusion that juveniles are irreparably corrupt.[265]

And JLWOP sentences are becoming increasingly unusual. After *Miller*, over half of the states in the country have abolished such sentences.[266] In Mississippi, eighty-seven juveniles were serving JLWOP sentences prior to *Miller*.[267] It is unlikely that this practice extends back far enough for it to qualify as usual.

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[263] REVISED CODE OF THE STATUTE OF LAWS OF THE STATE OF MISSISSIPPI § 2877 (1880).

[264] Jimmie E. Gates, *These Mississippi Teens Escaped Life Without Parole. But They Will Still Die in Prison*, CLARION-LEDGER, (Apr. 21, 2021, 8:59 AM), https://www.clarionledger.com/story/news/local/2021/04/21/mississippi-inmates-no-life-sentences-will-never-be-released-from-prison/7302418002/ [https://perma.cc/5LKN-M4TV] (finding that 2,041 people were serving life sentences in 2021, including 1,600 LWOP sentences and 370 serving "virtual life" sentences).

[265] *See* Berry, *supra* note 115, at 787. *See also* Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring mandatory JLWOP sentences); Montgomery v. Louisiana, 577 U.S. 190, 206-208 (2016) (applying the Court's decision in *Miller* retroactively); Jones v. Mississippi, 593 U.S. 98, 111-14 (2021) (rejecting this concept as a required constitutional test under the Eighth Amendment).

[266] Indeed, the United States is the only country in the world that allows JLWOP sentences.

[267] Jerry Mitchell, *Life Without Parole for Juveniles isn't Rare in Mississippi, Despite Supreme Court Ruling*, CLARION-LEDGER (Nov. 22, 2020, 9:00 PM),

3. Mandatory Sentences

Mandatory sentences are another category of sentences that probably violates the Mississippi Constitution. In the Supreme Court's Eighth Amendment cases, it has found that both mandatory death sentences and mandatory JLWOP sentences are unconstitutional.[268] The justification relates to the right to individualized consideration of one's crime and personal characteristics in the imposition of one's sentence.[269]

Failure to consider the culpability of the defendant and the harm caused is cruel because it is likely to make the punishment imposed disproportionate. The legislature's best attempts to measure culpability in its imposition of mandatory sentences remain flawed if not draconian. There is no reason to guess that every person that participates in a crime connected to a homicide deserves to die in prison. Rather, judges should decide the appropriate sentence based on the facts and circumstances surrounding the crime as well as the character and person of the defendant.[270] Mandatory punishments can both be categorically cruel and cruel in the way that the state applies them in individual cases. The worst of these are the mandatory LWOP sentences imposed in capital cases where the jury does not choose death. The jury should have the option of life with parole as a choice.[271]

Mandatory sentences, particularly JLWOP sentences, also can be unusual. The use of mandatory sentencing is a late twentieth-century phenomenon, a vestige of the tough on crime era of the 1980s and 1990s.[272] And it is not clear that the mandatory JLWOP

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https://www.clarionledger.com/story/news/local/2020/11/23/supreme-court-juvenile-offenders-mississippi/3772136001/ [https://perma.cc/2TVE-NV4U].

[268] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory capital statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's mandatory capital statute); *Miller*, 567 U.S. at 465 (barring mandatory JLWOP sentences); *Montgomery*, 577 U.S. at 206 (applying the Court's decision in *Miller* retroactively).

[269] *See generally* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019).

[270] Too often, courts dehumanize criminal defendants, reducing them to their worst acts, instead of considering the whole person, good and bad, in fashioning the appropriate punishments. *See generally* STEVENSON, *supra* note 261.

[271] For an explanation of the importance of such a choice, *see* William W. Berry III, *Capital Trifurcation*, 12 TEXAS A&M L. REV. 129 (2024).

[272] *See generally* DAVID GARLAND, THE CULTURE OF CONTROL (2001).

sentences have achieved the status of long usage with most such sentences imposed in Mississippi in the last twenty years.

4. Habitual Offender Sentences

Finally, habitual offender statutes may violate the Mississippi constitution's proscriptions against cruel punishment as well as unusual punishment. By their very nature, these statutes constitute a kind of double jeopardy, adding additional punishment for the prior offense to the punishment for the current offense.[273]

The cruelty of such sentences relates to their disproportionality. By definition, these sentences are disproportionate because they impose more of a sentence than the defendant deserves for the crime at issue. The extra part of the punishment related to the prior offense or offenses is in excess of what the offender otherwise would receive as punishment for the crime. As such, it is a cruel punishment.

The unusual argument carries less weight as such sentences are ubiquitous. Such sentences were available in 1868 and probably survive the test for long usage.

CONCLUSION

The Mississippi courts have long interpreted the Mississippi Constitution's punishment clause, which bars "cruel or unusual punishment," in the same way as the U.S. Supreme Court interprets the Eighth Amendment, which bars "cruel and unusual punishments." This assumption of the Mississippi courts— that the two clauses mean the same thing—is contrary to both the relevant history and basic principles of state constitutional law.

This Article has excavated the origins of the punishment clause in the Mississippi Constitution. It has shown, at the very least, that the two constitutional provisions have different meanings which stem not only from their textual differences but also from the contemporaneous understandings of the clauses themselves. And this reading suggests, at the very least, that there are two distinct questions that the Mississippi courts must consider under the state constitution's punishment clause—whether the

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[273] *See generally* RICHARD S. FRASE & JULIAN V. ROBERTS, PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS (2019).

sentence imposed is cruel and whether the sentence imposed is unusual.

In providing a brief primer on state constitutional law, the Article emphasized both the importance of having a distinct interpretation of the state constitution separate from the federal constitution as well as the reason why the counter-majoritarian difficulty is not a concern. The Article then summarized the Mississippi punishment clause cases. The heart of the Article involved the excavation of the Mississippi punishment clause, exploring both the adoption history and contemporaneous usage. The Article then ended by conceptualizing those findings and applying them to a number of different punishments to demonstrate how the state constitution could and perhaps should operate in practice.

In the final analysis, this Article raises serious questions about the prior reading of the Mississippi constitution's punishment clause and invites the Mississippi courts to take this language more seriously in placing limits on the use of excessive and draconian punishment in Mississippi.