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THE SIXTH AND EIGHTH AMENDMENT NEXUS AND THE FUTURE OF MANDATORY SENTENCES*

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In some respects, the Sixth and Eighth Amendments have followed parallel tracks in their modern development. In both contexts, statutory schemes emerged from a concern related to arbitrary and inconsistent sentencing outcomes. These statutory approaches sought to remedy the sentencing problem by imposing mandatory sentencing requirements. The Court subsequently found the mandatory approaches to be unconstitutional.

Even so, in both contexts, mandatory sentencing outcomes persist. Part of the explanation for this lies in a judicial fear of sentencing discretion. Part of the explanation may also relate to a hesitancy to use the Constitution to restrict majoritarian legislative power.

In light of this descriptive account, this Article advocates for the loosening of the vestiges of mandatory sentencing schemes in favor of increased sentencing discretion in individual cases through constitutional expansion. Specifically, the Article seeks to rebalance state and federal criminal sentencing decisions in light of individualized circumstances related to the purposes of punishment.

In Part I, the Article tells the parallel stories of the Sixth and Eighth Amendments and the constitutional limits placed on mandatory sentencing. Part II explores how and why elements of mandatory sentencing still persist. Finally, in Part III, the Article advocates for the minimization and, in some cases, elimination of mandatory sentencing schemes.

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INTRODUCTION

In some respects, the Sixth[1] and Eighth[2] Amendments have followed parallel tracks in their modern development. The parallelism relates to their connection to criminal sentencing and the limits they place on mandatory sentencing. In both contexts, mandatory statutory schemes emerged from a concern related to arbitrary and inconsistent sentencing outcomes. The approach that intersected with the Sixth Amendment—the Federal Sentencing Guidelines ("Guidelines")—was a response to widespread sentencing disparity

1. U.S. CONST. amend. VI.
2. U.S. CONST. amend. VIII.

in federal criminal cases.[3] The Sixth Amendment limitations—imposed first in *Apprendi v. New Jersey*[4] and later in *United States v. Booker*[5]—proscribed the fact-finding of judges at sentencing of facts, other than the finding of a prior conviction,[6] that increased the applicable statutory maximum sentence.[7] The Sixth Amendment right to trial by jury includes the right to have all facts that raise the possible sentence found beyond a reasonable doubt by a jury as elements of the crime.[8] The application of the Sixth Amendment to the Guidelines had the effect of turning them from mandatory into advisory guidelines.[9]

In the Eighth Amendment context, the mandatory statutory scheme—mandatory death sentences—emerged as part of the response to the Court's decision in *Furman v. Georgia*,[10] which struck down the death penalty, as applied, for its random and arbitrary imposition.[11] In the aftermath of *Furman*, states scrambled to pass new death penalty statutes to address the disparity in outcomes that arose from capital jury sentencing.[12] In particular, North Carolina and Louisiana adopted mandatory death penalty statutes,[13] but the Court held

3. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (criticizing sentencing disparities among federal judges).

4. 530 U.S. 466 (2000).

5. 543 U.S. 220 (2005).

6. Almendarez-Torres v. United States, 523 U.S. 224, 246 (1998) (holding that the Sixth Amendment does not require proof to a jury of a prior conviction beyond a reasonable doubt to increase the statutory maximum sentence).

7. *Apprendi*, 530 U.S. at 476. The use of factors other than a prior conviction now also applies to statutory minima. Alleyne v. United States, 570 U.S. 99, 116–17 (2013).

8. *Alleyne*, 570 U.S. at 117; *see also* Patterson v. New York, 432 U.S. 197, 216 (1977) (exploring what facts constitute elements of the crime); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (same); *In re* Winship, 397 U.S. 358, 368 (1970) (same).

9. *Booker*, 543 U.S. at 245–46.

10. 408 U.S. 238 (1972) (per curiam).

11. *Id.* at 239–40; *see also id.* at 304–05 (Brennan, J., concurring) ("The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few."); *id.* at 309–10 (Stewart, J., concurring) (likening the death penalty to being "struck by lightning" and stating that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed").

12. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267 (2002) (asserting that "*Furman* . . . touched off the biggest flurry of capital punishment legislation the nation had ever seen"); Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH L. REV. 1, 48 (2007); Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 795 (2002) ("Few other decisions of the Supreme Court have ever received a more rapid legislative response.").

13. Act of June 19, 1973, 1937 La. Acts 109 (codified as amended at LA. STAT. ANN. § 14:30 (Westlaw through the 2020 2d Extraordinary Sess.)); Act of Apr. 8, 1974, ch. 1201, 1974 N.C. Sess. Laws 323 (codified as amended at N.C. GEN. STAT. § 14-17 (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.)).

that mandatory death sentences violated the Eighth Amendment.[14] More recently, the Court has held that mandatory juvenile life without parole sentences ("JLWOP") also violate the Eighth Amendment.[15]

Even so, in both the Sixth and Eighth Amendment contexts, mandatory or pseudo-mandatory sentencing outcomes still persist. In the Sixth Amendment context, the Guidelines exert a heavy, pseudo-mandatory influence on federal sentencing outcomes with a supermajority of sentences falling within the Guidelines ranges.[16] And in the Eighth Amendment context, the limits on mandatory sentences only apply to capital[17] and JLWOP[18] sentences.[19]

Part of the explanation for this persistence of mandatory sentences may lie in a fear of sentencing discretion.[20] The post-*Booker* cases and substantive appellate reasonableness review provide a meaningful incentive to follow the formerly mandatory guidelines.[21] The Eighth Amendment restrictions on sentencing likewise implement categorical restrictions as opposed to case-by-case balancing tests requiring sentencing discretion.[22]

Part of the explanation may also relate to a hesitancy to use the Constitution to restrict majoritarian legislative power.[23] The connection of the U.S. Sentencing Commission ("Commission"), which promulgates the

14. Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's new capital statute); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (striking down North Carolina's new capital statute).

15. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012). For a detailed analysis on JWLOP sentencing in different counties of North Carolina from 1995 to 2017, see generally Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. 279 (2021).

16. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 85 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf [https://perma.cc/XRE6-4Q99] (illustrating that judges impose sentences conforming to the Guidelines between seventy-five percent and eighty-two percent of the time).

17. *See Woodson*, 428 U.S. at 305.

18. *See Miller*, 567 U.S. at 489.

19. *See, e.g.*, 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 different approaches under the Eighth Amendment in capital and noncapital cases).

20. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 4 (1998) ("The perceived transfer of discretion from the judge to the prosecutor . . . is a central reason for judicial discomfort with the new regime."); William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 331 (2018) [hereinafter Berry, *Unusual Deference*] (explaining that the mandatory sentences shift the sentencing discretion from the court to the prosecutor).

21. *See infra* Section II.A.1.

22. *See infra* Section II.B.1.

23. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 6 (1962) (explaining the countermajoritarian difficulty of having five Justices overrule the legislative majority when finding a statute unconstitutional); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 192 (2002).

Guidelines, to Congress has reinforced the majoritarian approach to the Guidelines, with the Court deferring to the legislature and the Commission.[24] The Court's Sixth Amendment cases, in reinforcing the primacy of the Guidelines, have extended such deference.[25] The Eighth Amendment limits on sentencing outcomes as applied to "different" cases—those involving the death penalty[26] or JLWOP[27]—have meant that the Court similarly has not limited the use of mandatory sentences in other cases.[28]

The exploration of the nexus between the Sixth and Eighth Amendments seems appropriate as part of this *North Carolina Law Review* symposium, which marks the twentieth anniversary of the *Apprendi* decision that gave rise to the Sixth Amendment's limits on mandatory sentencing guidelines. By engaging in a robust analysis of the parallel use and response to mandatory and pseudo-mandatory sentencing rules, this Article aims to advance a number of insights about the future of each Amendment with respect to possible sentencing reform.

In light of this descriptive account, this Article advocates for loosening the vestiges of mandatory sentencing schemes in favor of increased sentencing discretion in individual cases. Specifically, the Article seeks to rebalance state and federal criminal sentencing decisions with individualized circumstances related to the purposes of punishment and argues for a more complete limitation on mandatory sentences.

In Part I, the Article tells the parallel stories of the Sixth and Eighth Amendments and the constitutional limits placed on mandatory sentencing.

24. *See* United States v. Booker, 543 U.S. 220, 245–46 (making the Guidelines advisory as the remedy to the Sixth Amendment violation instead of abolishing the Guidelines).

25. *See, e.g.*, Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016); Rita v. United States, 551 U.S. 338, 341 (2007).

26. The Court has long emphasized "death is different." *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (arguing that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (arguing that death differs from life imprisonment because of its "finality"). Justice Brennan's concurrence in *Furman* is apparently the origin of the Court's "death is different" capital jurisprudence. Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

27. More recently, the Court has held that juveniles are "different" too. *See* Miller v. Alabama, 567 U.S. 460, 470 (2012); Graham v. Florida, 560 U.S. 48, 74 (2010); *see also* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1120–23 (2010); William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1071–75 (2013) [hereinafter Berry, *Eighth Amendment Differentness*].

28. *See* Barkow, *supra* note 19, at 1145.

Part II explores how and why elements of mandatory sentencing still persist. Finally, in Part III, the Article explains how the two constitutional provisions inform one another and open the door for the minimization, and in some cases elimination, of mandatory sentencing schemes.

I. THE RISE OF THE SIXTH AND EIGHTH AMENDMENT LIMITS ON MANDATORY SENTENCING

The Sixth Amendment's guarantee of trial by jury serves, at least in the *Apprendi* line of cases, to require that facts be determined at trial rather than at sentencing.[29] The core function of this requirement is to accord these facts their appropriate level of proof—beyond a reasonable doubt—and ensure they are determined by the appropriate arbiter—a jury, not a judge.[30]

The Eighth Amendment's proscription against cruel and unusual punishments likewise removes substantive considerations from sentencing. Instead of facts, however, the Eighth Amendment limits the consideration of certain "different" punishments[31] under certain circumstances in light of the characterization of the offense[32] or the offender.[33]

Where the two restrictions parallel each other is in their use of limits to circumscribe mandatory sentences. To understand what gave rise to these applications, it is instructive to first explain why legislatures adopted mandatory sentences in the first place.

A. *The Problem of Unfettered Sentencing Discretion*

The adoption of a mandatory sentencing scheme has two basic effects. The first overt effect is the restriction of the judge's discretion at sentencing. A judge, for instance, may not sentence below a mandatory minimum sentence imposed by a statute for a particular crime once a jury finds the individual guilty of the crime. To the extent that judicial sentencing is creating a wide disparity of outcomes in similar cases, a mandatory scheme can reduce or eliminate that disparity.[34]

29. *See, e.g.*, Cunningham v. California, 549 U.S. 270, 293 (2002); *Ring*, 536 U.S. at 589; Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

30. *Cunningham*, 549 U.S. at 293; *Ring*, 536 U.S. at 589; *Apprendi*, 530 U.S. at 490.

31. Barkow, *supra* note 19, at 1146; Berry, *Eighth Amendment Differentness*, *supra* note 27, at 1069.

32. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (barring the death penalty for rape); Kennedy v. Louisiana, 554 U.S. 407, 441–42 (2008) (barring the death penalty for child rape).

33. Roper v. Simmons, 543 U.S. 551, 568 (2005) (barring the death penalty for juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring the death penalty for intellectually disabled offenders).

34. Of course, defining "similar" cases is fraught with its own difficulties, as a wide range of conduct and culpability can fall under a single criminal statute. Felony murder is perhaps the most obvious example of this problem, as felony murder does not require a mens rea with respect to the homicide and thus treats premeditated killings and unintentional killings as "similar" cases.

The second more implicit effect of adopting mandatory sentencing schemes is the diversion of sentencing power from the judge to the prosecutor. In a system where the sentencing outcomes are mandatory, a prosecutor can effectively choose the sentence for an individual by choosing what criminal charge to pursue against the individual.[35] The surety of the sentencing outcome accords this power, as opposed to a discretionary scheme in which judicial discretion makes sentencing less predictable.

Indeed, one might understand the effect of mandatory sentencing schemes as not eliminating sentencing disparity at all but instead relocating it. In the example of the Guidelines, mandatory guidelines situate the sentencing discretion with the prosecutor but are unable to address the disparity created by prosecutorial decision-making. Similarly, in the death penalty context, mandatory death sentences shift the sentencing decision from the jury to the prosecutor.[36] Jury nullification with respect to the crime in question inserts its own form of disparity and inconsistency in the place of inconsistency in jury sentencing.[37]

1. The Indeterminate Sentencing Era

The Constitution does not specify which branch of government possesses responsibility for federal sentencing, but it is well established that Congress has the power to set the sentence for a particular crime as well as control the scope of judicial sentencing discretion.[38] For over 200 years, Congress provided statutory maxima or sentencing ranges and left federal judges broad sentencing discretion under the applicable statutes.[39] Supporting this understanding of broad sentencing discretion was the Supreme Court's narrow interpretation of

35. This is particularly true because of the proliferation of state and federal statutes that overlap, such that one criminal act can result in culpability for a number of different crimes.

36. *See infra* Sections I.A.2, I.B.2.

37. *See* McGautha v. California, 402 U.S. 183, 198–99 (1971).

38. Mistretta v. United States, 488 U.S. 361, 364 (1989) (first citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); and then citing *ex parte* United States, 242 U.S. 27 (1916)); *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.").

39. *See* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995) (discussing how in 1970 "the federal government had indeterminate sentencing systems, in which lawmakers enacted and amended the criminal code and set maximum penalties"); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 86 (1988) (discussing how prior to sentencing guidelines "the trial court had wide discretion in determining the appropriate sentence"). This concept was also codified in 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

the Evarts Act,[40] limiting the ability of appellate courts to review sentencing decisions of trial judges.[41]

In this indeterminate sentencing era, there was often a lack of consistency in sentencing outcomes.[42] Judge Frankel described a sentencing judge's "almost wholly unchecked and sweeping" discretion as "terrifying and intolerable for a society that professes devotion to the rule of law."[43] The continuing sentencing disparity in federal sentences ultimately gave rise to the formation of the Commission and the Guidelines in 1984.[44]

2. Arbitrary and Random Capital Sentencing

A decade before the adoption of the Guidelines, the Supreme Court addressed a different kind of sentencing disparity. Instead of sentences for federal crimes, the concern related to the disparity in capital sentencing outcomes in death penalty states.[45]

In 1971, the Court first addressed this issue in *McGautha v. California*,[46] which consolidated twin Fourteenth Amendment challenges to the states' use of the death penalty in California and Ohio.[47] One of the defendants, McGautha, argued that his sentence violated his procedural due process rights because the death penalty statute at issue gave the jury no guidance on when to

40. Ch. 517, 26 Stat. 826 (1891) (codified as amended in scattered sections of 28 U.S.C.). The Evarts Act established the federal circuit courts of appeal. *Id.* § 2, 26 Stat. at 826.

41. The Court explained, "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Dorszynski v. United States, 418 U.S. 424, 440–41 (1974) (quoting Gurera v. United States, 40 F.2d 338, 340–41 (8th Cir. 1930)).

42. Numerous studies from the indeterminate-sentencing era demonstrated that the differences among judges in their sentencing philosophies caused this disparity. *See, e.g.*, ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUD. CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 36–40 (1974); John S. Carroll, William T. Perkowitz, Arthur J. Lurigio & Frances M. Weaver, *Sentencing Goals, Causal Attributions, Ideology, and Personality*, 52 J. PERSONALITY & SOC. PSYCH. 107, 107–08 (1987); Kevin Clancy, John Bartolomeo, David Richardson & Charles Wellford, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 528–29 (1981); Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109, 110–11 (1975).

43. FRANKEL, *supra* note 3, at 5.

44. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1976, 2017–24 (codified as amended at 28 U.S.C. §§ 991, 994, 995(a)(1)). This scheme went into effect in 1987. *See generally* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017) (describing the process of developing the Commission after its adoption in 1984 until its implementation in 1987).

45. These disparities included race, as evidenced in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the defendant produced a study showing that Black defendants who kill White victims were most likely to receive the death penalty. *Id.* at 287; *see also* JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 151 (2015).

46. 402 U.S. 183 (1971).

47. *Id.* at 185.

impose a death sentence.[48] Indeed, the California statute granted juries wide discretion in imposing sentences, ranging from a minimal sentence to a death sentence.[49]

The other defendant, Crampton, made a similar argument with respect to the Ohio capital statute and also took issue with the unitary trial structure.[50] In Ohio, the court did not separate guilt and sentencing decisions into separate proceedings; the jury decided both guilt and punishment at the same time.[51] Crampton argued that this trial structure violated his constitutional rights because it required him to choose between contesting his guilt and arguing for a lower sentence.[52]

In a 5–4 decision, the Court held that both statutes were constitutional.[53] According to the Court, the Fourteenth Amendment did not place any restriction on unitary trials and did not require any limit be placed on jury sentencing.[54] Part of the Court's reasoning related to the problematic use of mandatory capital sentences in England.[55] The Court reasoned that the likelihood of jury nullification that occurred in mandatory capital sentencing schemes cautioned against placing limits on a jury's sentencing discretion.[56]

A year after *McGautha*, the Court reversed course. In considering an Eighth Amendment challenge to the use of the death penalty with a similar theory to that adopted by the defendants in *McGautha*, the Court held 5–4 in *Furman* that the death penalty, as applied, violated the Eighth Amendment's ban on cruel and unusual punishments.[57] In addition to the Court's brief per curiam opinion, each of the five Justices in the majority wrote an individual opinion explaining why the death penalty violated the Eighth Amendment.[58]

Abandoning the views adopted in *McGautha*, the Court took issue with the broad discretion given to the jury, particularly with the range of potential sentences, the lack of guidance as to when a death sentence was proper, and the absence of bifurcation between the guilt and sentencing phases of trial.[59] In this vein, Justice Stewart concluded that the death penalty *as applied* constituted cruel and unusual punishment because it was "so wantonly and so freakishly

48. *Id.* at 187–91.
49. *Id.* at 190.
50. *Id.* at 191–95.
51. *Id.* at 191–92.
52. *Id.* at 208–09.
53. *Id.* at 186.
54. *Id.* at 207, 213.
55. *Id.* at 197–98, 204–05.
56. *Id.* at 199–201.
57. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).
58. *Id.* at 240.
59. *See id.* at 253 (Douglas, J., concurring) ("[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.").

imposed."[60] Justice Brennan agreed: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily."[61]

The rarity of the death penalty further contributed to the majority's view that its use was arbitrary. Justice White found that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[62]

At its heart, the *Furman* decision found the death penalty unconstitutional *because* there were no indicia or standards determining which murders warranted a punishment of death and which did not. Thus there was no mechanism to ensure that like cases are treated alike. Justice Brennan explained:

> No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.[63]

The Court in *Furman* highlighted the absence of a principle by which to distinguish murderers deserving death from "ordinary" murderers deserving a lesser sentence.[64] This was the direct consequence of jury sentencing.

B. *Mandatory Responses to Standardless Sentencing*

Mandatory sentences are not the only response to the standardless sentencing described by Judge Frankel in the federal courts and by *Furman* in state capital cases. Standards and guided discretion provide a middle-ground, albeit imperfect,[65] solution to the disparity described.

For some, the complete lack of guidance in federal sentencing and state death penalty states required more intervention.[66] As such, some believed that

60. *Id.* at 310 (Stewart, J., concurring).

61. *Id.* at 293 (Brennan, J., concurring). Brennan further commented, "Indeed, [the administration of the death penalty] smacks of little more than a lottery system." *Id.*

62. *Id.* at 313 (White, J., concurring). Similarly, Justice Brennan emphasized its rarity, explaining, "[D]eath is inflicted in only a minute fraction of these cases." *Id.* at 293 (Brennan, J., concurring).

63. *Id.* at 294 (Brennan, J., concurring).

64. *Id.*

65. One could argue that the modern "aggravating and mitigating circumstances" approach to the death penalty is one example, but its manifold flaws might counsel otherwise. *See* Glossip v. Gross, 576 U.S. 863, 908 (2015) (Breyer, J., dissenting). The same might be said for Minnesota's system of sentencing guidelines. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 121–22 (2013) (analyzing the overall efficacy of the "Morris-Minnesota model" of sentencing guidelines).

66. *See* FRANKEL, *supra* note 3, at 104–05 (noting the "need for broad and drastic reform of the law" from elected lawmakers).

the appropriate response to unguided discretion from this perspective would be to remove the discretion altogether or almost altogether.

1. The Mandatory Sentencing Guidelines

The Guidelines did not entirely remove sentencing discretion from federal judges but instead circumscribed their discretion in very serious ways.[67] They required that judges calculate the appropriate range of six months on the sentencing grid and then impose the sentence determined by the Guidelines in most cases.[68]

The Sentencing Reform Act of 1984[69] specified that the Guidelines sentence ranges must be within the statutory limits set by Congress and must be applied by federal district judges except in cases where an aggravating or mitigating circumstance existed which was not adequately considered by the Commission.[70] The Guidelines were thus mandatory and in most cases gave a six-month range within which judges could exercise sentencing discretion.[71]

In addition, the Act slightly altered the judicial discretion of the federal courts of appeals in reviewing decisions. Modifying the principle that appellate courts have no power to overturn a sentence that is within the limits allowed by a statute,[72] Congress permitted appellate review under the Guidelines when the district court sentenced an offender outside the Guidelines range, or the district court incorrectly applied the Guidelines.[73] In 2003, Congress modified the clear

67. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 2004) ("The sentencing judge must select a sentence from within the guideline range.").

68. *Id.* The sentencing grid pinpoints the applicable Guidelines sentence with a vertical axis increasing downward based on the level of the crime committed under the Guidelines (in levels from 1 to 43) and a horizontal axis increasing based on the level of prior criminal history of the defendant (in categories from I to VI). *See* U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2018).

69. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

70. *Id.* § 217(a), 98 Stat. at 2019–20 (codified as amended at 28 U.S.C. § 994(a)–(b)); *id.* § 212(a)(2), 98 Stat. at 1989–90 (codified as amended at 18 U.S.C. § 3553(a)–(b)).

71. *See id.* § 217(a), 98 Stat. at 2020 (codified as amended at 28 U.S.C. § 994(b)(2)); *see also* U.S. SENT'G GUIDELINES MANUAL § 1A1.1(2) (U.S. SENT'G COMM'N 2004) ("The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than greater of 25 percent or six months.").

72. *See* Dorszynski v. United States, 418 U.S. 424, 443 (1974) ("Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all.")

73. Thus, an offender may appeal a sentence when it "is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range," and the government may appeal when the sentence "is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range." Sentencing Reform Act of 1984, § 213(a), 98 Stat. at 2011 (codified as amended at 18 U.S.C. § 3742(a)(3), (b)(3)).

error standard and permitted de novo review of sentences outside the Guidelines range (departures).[74] This change in appellate review reinforced the limits mandatory guidelines placed on judicial sentencing discretion.

2. The Mandatory Death Penalty

A mandatory death penalty provides no escape valve for the judge or jury at sentencing; if the defendant receives a guilty verdict, death is the sentence. In North Carolina and Louisiana, the state legislatures adopted mandatory death statutes in light of *Furman*.[75] These statutes mandated that any individual convicted of first-degree murder would receive the death penalty.[76]

The North Carolina statute included several categories of murder in its definition of murder, including premeditated killings and felony murders.[77] Despite the best efforts of the legislature, it is clear that this definition encompassed a wide range of homicides with varying levels of offender culpability.

The Louisiana statute made it so that only felony murders where the offender possessed the specific intent to kill would qualify as death-eligible, first-degree murders.[78] While narrower than the North Carolina statute, the Louisiana statute nonetheless created a range of potential levels of culpability for individuals committing homicides that could qualify as capital murders.

74. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670 (codified at 18 U.S.C. § 3742(e)).

75. *See* Roberts v. Louisiana, 428 U.S. 325, 325 (1976) ("The post-*Furman* legislation mandates imposition of the death penalty . . . ."); Woodson v. North Carolina, 428 U.S. 280, 280 (1976) ("Following [*Furman*,] the North Carolina law that previously had provided that in cases of first-degree murder the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or life imprisonment was changed to make the death penalty mandatory for that crime.").

76. *See Roberts*, 428 U.S. at 331–32; *Woodson*, 428 U.S. at 286–87.

77. The North Carolina statute provided:

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

N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

78. *Roberts*, 428 U.S. at 329. The statute provides in part that first-degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnaping, aggravated rape, or armed robbery. *Id.*

C. *Constitutional Limitations on Mandatory Sentencing*

The Sixth and Eighth Amendment nexus arises in the similarity of their respective limits on the imposition of mandatory sentences. Indeed, both constitutional provisions dealt a serious blow to mandatory sentencing schemes but not one that erased mandatory sentences altogether.

1. *Apprendi*, *Booker*, and Advisory Guidelines

In 2000, the Supreme Court decided *Apprendi*, commencing a Sixth Amendment revolution that significantly impacted federal and state sentencing, at least with respect to mandatory guidelines.[79] *Apprendi* concerned the Sixth Amendment challenge to a sentencing enhancement based on a hate crime statute.[80] The Court held 5–4 that the judicial determination of the facts underlying the hate crime enhancement, by a preponderance of the evidence, violated the defendant's Sixth Amendment right to a trial by jury.[81] The Court concluded that any fact, other than a prior conviction,[82] that increases the statutorily mandated sentence is an element of the crime and thus must be proven to a jury beyond a reasonable doubt at trial.[83]

In *Booker*, the Court applied its holding in *Apprendi* to the Guidelines.[84] The district court in *Booker* had used judge-found facts to calculate the mandatory sentence under the Guidelines.[85] The Court held 5–4 that this determination violated Booker's Sixth Amendment rights.[86] Indeed, the Court found, as it had in *Apprendi*, that all judge-made factual determinations that increased the applicable mandatory Guidelines' sentence violated the Sixth Amendment.[87]

One of the five Justices in the majority, Justice Ginsburg, joined the four dissenters to fashion the appropriate remedy to the Sixth Amendment violation.[88] This remedial majority held that making the mandatory sentencing under the Guidelines advisory would eliminate the constitutional violation.[89] In other words, the facts that the judge found by applying the Guidelines would

79. Apprendi v. New Jersey, 530 U.S. 466, 497 (2000). Indeed, *Apprendi* is one of the most cited criminal cases of this century. *See, e.g.*, Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 391 (2016) (showing the number of times *Apprendi* has been cited by federal courts and tribunals).

80. *See Apprendi*, 530 U.S. at 474–76.

81. *See id.*

82. Almendarez-Torres v. United States, 523 U.S. 224, 246 (1998).

83. *Apprendi*, 530 U.S. at 490.

84. United States v. Booker, 543 U.S. 220, 244 (2005).

85. *See id.* at 235–36.

86. *Id.*

87. *Id.*

88. *Id.* at 244–49.

89. *See id.* at 265.

not violate the defendant's Sixth Amendment rights if the judge was not mandated to follow the Guidelines.[90]

2. *Woodson*, *Miller*, and Individualized Sentencing Determinations

In 1976, the Supreme Court decided a series of cases assessing the constitutionality of state capital sentencing schemes adopted in response to its decision in *Furman*. This included *Woodson v. North Carolina*,[91] in which the Court struck down the North Carolina death penalty scheme in which all individuals convicted of first-degree murder received a mandatory death sentence.[92] The Court explained that "[t]he inadequacy of distinguishing between murderers solely on the basis of legislative criteria" was the very reason that "led the States to grant juries sentencing discretion in capital cases."[93] The Court also emphasized the likelihood of juries declining to find a defendant guilty where they believed the death penalty was not the appropriate sentence.[94]

Given these deficiencies, the Court found that the North Carolina system failed to address the concerns of *Furman*.[95] Justice Stewart explained:

> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.[96]

The holding in *Woodson* made clear that the Court believed that constitutional capital punishment schemes must give juries (or trial judges) a way to differentiate meaningfully *between* first-degree murders in determining a sentence. These requirements were consistent with the broad principle that capital-sentencing decisions require individualized sentencing determinations in order to pass muster under the Eighth Amendment. In other words, the judge or jury must consider the case-specific characteristics of the crime and the individual defendant. The broad categories articulated by the legislature were insufficient on their own to determine when death was an appropriate sentence.

90. *See id.*

91. 428 U.S. 280 (1976).

92. *Id.* at 305.

93. *Id.* at 291.

94. *Id.* at 295–98. Indeed, in *McGautha*, the Court had recognized the possibility of jury nullification in capital cases in which sentencing was based on mandatory statutes. McGautha v. California, 402 U.S. 183, 199 (1976).

95. *See Woodson*, 428 U.S. at 302–03.

96. *Id.* at 303.

The Court also decided *Roberts v. Louisiana*[97] on the same day as *Woodson*.[98] In *Roberts*, the Court applied its reasoning from *Woodson* in reaching the same conclusion—mandatory death penalty statutes violate the Eighth Amendment.[99] The Court found that Louisiana's statute was not constitutionally distinguishable from North Carolina's statute and that it failed to provide adequate individualized sentencing determinations.[100]

In *Lockett v. Ohio*,[101] two years after *Woodson*, the Supreme Court broadened the principle articulated in *Woodson* by striking down the Ohio capital statute under the Eighth Amendment for not allowing adequate consideration of the individual characteristics of the offender.[102] At the time, Ohio's capital statute required that offenders found guilty of an aggravating circumstance had to prove at least one statutory mitigating circumstance by a preponderance of the evidence to avoid a death sentence.[103] In overturning the death sentence of Sandra Lockett,[104] the Court held that the statute violated the Eighth Amendment because it limited the consideration of the offender's mitigating evidence.[105] As Chief Justice Burger explained,

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[106]

As a result, after *Lockett*, "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."[107]

The Court extended this proscription against mandatory death sentences to mandatory JLWOP sentences in *Miller v. Alabama*.[108] Finding that if "death

97. 428 U.S. 325 (1976).

98. *Id.* at 325 (noting date of decision as July 2, 1976); *Woodson*, 428 U.S. at 280 (noting date of decision as July 2, 1976).

99. *See Roberts*, 428 U.S. at 331–36.

100. *Id.* at 335–36.

101. 438 U.S. 586 (1978).

102. *Id.* at 586.

103. The Ohio statute at issue limited the mitigating evidence to three categories: (1) the victim of the offense induced or facilitated it; (2) it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and (3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. *See* OHIO REV. CODE ANN. § 2929.04(B) (LEXIS through File 8 of the 134th (2021-2022) Gen. Assemb.).

104. Sandra Lockett played, at most, a very minor role in the crime. *See Lockett*, 438 U.S. at 590–91. She was the driver of the getaway car in an armed robbery and was prosecuted under a theory of felony murder, as there was no evidence that she or her coconspirators intended to kill. *Id.*

105. *Id.* at 608.

106. *Id.* at 605.

107. *Id.* at 608.

108. 567 U.S. 460 (2012).

is different" then juveniles are "different too," the Court held that mandatory JLWOP sentences violated the Eighth Amendment.[109] As with *Woodson*, the Court emphasized the importance of individualized sentencing determinations and consideration of applicable mitigating evidence, including the age of the offender.[110]

II. THE PERSISTENCE OF MANDATORY SENTENCING

Despite both the Sixth and Eighth Amendment limitations imposed by the Court on mandatory sentences, mandatory and pseudo-mandatory sentences still persist. After describing how this kind of sentence has persisted, this part explores some explanations for that persistence.

A. *How Mandatory Sentencing Persists*

In the context of federal criminal sentencing, pseudo-mandatory sentences persist because federal judges still treat the Guidelines as if they were mandatory in the supermajority of cases.[111] In the context of state criminal sentencing (and federal mandatory minimum sentences), mandatory sentences persist because the Court has been unwilling to extend its individualized sentencing jurisprudence beyond death penalty and JLWOP sentences.

1. The Influence of the Sentencing Guidelines

Following *Booker*, the Guidelines became advisory in order to comply with the Sixth Amendment.[112] And yet, the cases that followed help to ensure that the Guidelines remained the key driver in sentencing outcomes.

The remedy in *Booker* eliminated the mandatory nature of the Guidelines, but not the role of the Guidelines themselves.[113] Under Justice Breyer's remedial opinion, district courts still begin the sentencing process by calculating the applicable Guidelines sentence.[114]

This calculation effectively anchors the sentencing decision. The question then becomes whether to depart from the applicable Guidelines sentence. This determination is more than a point of reference. It is, in essence, a thumb on the scale in favor of the Guidelines sentence, such that it becomes presumptive.

In making this determination of what sentence to impose, the district court must apply the applicable statute—18 U.S.C. § 3553.[115] This statute contains a

109. *Id.* at 470, 481 (quoting Harmelin v. Michigan, 501 U.S. 957, 959 (1991)).

110. *Id.* at 486–87.

111. *See* U.S. SENT'G COMM'N, *supra* note 16, at 85.

112. United States v. Booker, 543 U.S. 220, 245–49 (2005).

113. *Id.* at 258–65.

114. *Id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

115. *Id.* at 244–49.

parsimony provision (requiring the least punishment required) and asks courts to apply the purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation[116]—to determine the appropriate sentence.[117] Because this statute was adopted at the same time as the Guidelines, many courts presume an equivalency between the Guidelines range and the statute.[118]

Finally, the *Booker* opinion established reasonableness review as a means for appellate review of sentences made under advisory guidelines—in part to protect against the arbitrary sentencing that inspired the Guidelines in the 1980s.[119] This appellate review consists of a procedural review (whether the lower court applied § 3553) and a substantive review (whether the sentence was reasonable).[120]

The post-*Booker* cases only served to reinforce this norm of following the advisory guidelines, rather than exercising independent judicial discretion. In *Rita v. United States*,[121] the Court held that sentences within the Guidelines range are presumed reasonable.[122] This decision alleviated the need to meet the procedural and substantive reasonableness requirements as long as a judge remains within the Guidelines. Other subsequent decisions have emphasized the centrality of the Guidelines to the "advisory" federal sentencing process.[123]

Even so, the Court has made clear that district judges have discretion to depart from the Guidelines. In *United States v. Gall*,[124] the Court held that

116. Note that this is in some ways a quixotic errand, as the purposes of punishment can point to contrary sentencing outcomes when applied. *See* William W. Berry III, *Discretion Without Guidance: The Need To Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 642–45 (2008).

117. *See* 18 U.S.C. § 3553(a)–(b)(1).

118. *See supra* note 16.

119. *See Booker*, 543 U.S. at 264–65 ("These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.").

120. *See id.* at 258–64.

121. 551 U.S. 338 (2007).

122. *Id.* at 341.

123. Hughes v. United States, 138 S. Ct. 1765, 1775 (2018) ("In addition this Court's precedents since Freeman have further confirmed that the Guidelines remain the foundation of federal sentencing decisions."); Beckles v. United States, 137 S. Ct. 886, 895 (2017) ("Our holding today does not render the advisory Guidelines immune from constitutional scrutiny."); Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) ("Today's holding follows from the essential framework the Guidelines establish for sentencing proceedings."); Peugh v. United States, 569 U.S. 530, 533 (2013) ("We consider here whether there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense."); Freeman v. United States, 564 U.S. 522, 525 (2011) ("The Justices who join this plurality opinion conclude that . . . [i]n every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines."); Pepper v. United States, 562 U.S. 476, 487 (2011) (considering whether a "downward variance" from the Guidelines is justified in a case of post-sentencing rehabilitation).

124. 552 U.S. 38 (2007).

sentences outside the Guidelines range are not presumptively unreasonable.[125] Similarly, in *Kimbrough v. United States*,[126] the Court held that a district judge could adopt a lower sentence, outside of the Guidelines, where the judge had a policy disagreement with the Guidelines.[127] In *Kimbrough*, the Court rejected the one-hundred-to-one ratio of crack cocaine to powder cocaine, and instead applied an eighteen-to-one ratio in determining the applicable sentence.[128]

Justice Stevens's concurrence in *Rita* emphasizes the idea that the Guidelines are not simply a reflection of the proper application of § 3553 to criminal conduct.[129] Justice Stevens wrote:

> The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines.[130]

There is a false equivalency here—the Guidelines largely reflect a retributive model of punishment, requiring the examination of the crime and criminal culpability, combined with a sentencing enhancement based on incapacitation related to prior criminal conduct. The other utilitarian purposes of punishment in § 3553, which a court must explicitly consider, are either ignored (deterrence) or explicitly disfavored (rehabilitation) by the Guidelines.[131]

The Court, however, has continued to emphasize the primacy of the guidelines despite the *Booker* remedy's conversion of Guidelines from mandatory to advisory. Justice Sotomayor has explained, "The Guidelines anchor every sentence imposed in federal district courts."[132] And the Court has repeatedly noted that "the Guidelines are in a real sense the basis for the sentence."[133] As such, "[t]hat a district court may ultimately sentence a given defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing."[134]

This weight ascribed to the Guidelines also manifests itself on appellate review. An incorrect Guidelines calculation is a reversible procedural error.[135]

125. *Id.* at 40–41.
126. 552 U.S. 85 (2007).
127. *Id.* at 90–91.
128. *Id.* at 110–12.
129. Rita v. United States, 551 U.S. 338, 360–67 (2007) (Stevens, J., concurring).
130. *Id.* at 364–65.
131. *See* U.S. SENT'G GUIDELINES MANUAL § 5H (U.S. SENT'G COMM'N 2018).
132. Beckles v. United States, 137 S. Ct. 886, 898 (2017) (Sotomayor, J., concurring).
133. Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) (emphasis omitted) (quoting Peugh v. United States, 569 U.S. 530, 542 (2013)).
134. Peugh v. United States, 569 U.S. 530, 542 (2013).
135. *Id.*

The Guidelines serve as the benchmark for reasonableness, helping to iron out sentencing differences in order to promote uniformity.[136] This includes considering the extent of the deviation from the Guidelines.[137]

Not surprisingly in light of the Court's rhetoric, federal judges have leaned heavily on the Guidelines over the past fifteen years, despite the increased discretion offered by *Booker*. Historically, judges have followed the Guidelines range in over eighty percent of cases, with the percentage dropping to seventy-five percent in recent years.[138] Judges who follow the Guidelines enjoy the ease of having the sentence calculated by an objective measure and avoid reasonableness scrutiny on review.

To the extent that the Guidelines persist in influencing the outcomes of individual sentencing decisions, a pseudo-mandatory sentencing scheme persists. If judges are unlikely to move outside of the Guidelines except in unusual cases, the power shift to prosecutors that is present under a mandatory guideline system remains.

2. The "Differentness" Limits on Individualized Sentencing

While the Court's application of the Sixth Amendment allowed the Guidelines to persist, the application of the Eighth Amendment drew a bright line that eliminated mandatory death sentences[139] and, later, mandatory JLWOP sentences.[140]

Prior to *Miller*, the Court's approach to noncapital cases under the Eighth Amendment had been to exclude noncapital cases from heightened scrutiny and essentially presume their constitutionality. In contrast to its evolving standards of decency jurisprudence,[141] the Supreme Court has adopted a different test under the Eighth Amendment in noncapital, non-JLWOP cases.[142] This approach asks whether the punishment is grossly disproportionate to the

136. *Id.*; United States v. Booker, 543 U.S. 220, 263 (2005).

137. Rita v. United States, 551 U.S. 338, 347 (2007).

138. *See* U.S. SENT'G COMM'N, *supra* note 16, at 85.

139. *See* Barkow, *supra* note 19, at 1145.

140. William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 338 (2014).

141. The evolving standards of decency test uses objective and subjective indicia to determine whether a punishment as applied violates the Eighth Amendment and has limited the use of the death penalty and JLWOP based on the character of the offense, *see* Coker v. Georgia, 433 U.S. 584, 584 (1977) (barring the death penalty for rape); Kennedy v. Louisiana, 554 U.S. 407, 441–42 (2008) (barring the death penalty for child rape), and based on the character of the offender, *see* Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring the death penalty for juveniles).

142. *See* Barkow, *supra* note 19, at 1145; *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 noncapital sentencing systems).

criminal conduct at issue.[143] With one exception, the Court has uniformly held over the past fifty years that noncapital, non-JLWOP punishments do not violate the Eighth Amendment.[144]

Solem v. Helm[145] is the one case in which the Court found an adult noncapital punishment to be disproportionate. In *Solem*, the Court overturned a life without parole sentence for a seventh nonviolent felony and advanced a basic test to assess proportionality.[146] 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.[147] Note that the *Solem* test incorporates cruel considerations—the gravity of the offense—and unusual considerations—the sentences imposed upon other offenders.[148]

The Supreme Court, however, limited the scope of *Solem* in *Harmelin v. Michigan*[149] in a divided opinion.[150] 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."[151] *Harmelin* thus reestablished that the Eighth Amendment does not require perfect proportionality.[152]

The part of Justice Scalia's opinion in *Harmelin* that was joined by four other Justices also found that while Harmelin's sentence of life without parole

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

144. *See Ewing*, 538 U.S. at 18, 30–31 (affirming sentence of twenty-five years to life for stealing approximately $1,200 worth of golf clubs, where defendant had four prior felony convictions); *Lockyer*, 538 U.S. at 66, 77 (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 worth of videotapes, where defendant had three prior felony convictions); *Harmelin*, 501 U.S. at 961 (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); *Hutto*, 454 U.S. at 370–72 (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, 285 (affirming life with parole 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, 281–84 (1983) (reversing by a 5–4 vote a sentence of life without parole for presenting a "no account" check for $100, where defendant had six prior felony convictions).

145. 463 U.S. 277 (1983).

146. *See id.* at 290–95.

147. *Id.* at 292.

148. *Id.*

149. 501 U.S. 957 (1991).

150. *Id.* at 957–58. I have argued elsewhere that *Harmelin* was wrongly decided. *See* Berry, *Unusual Deference*, *supra* note 20, at 328–30.

151. *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 280 n.3, 290).

152. *Id.* at 1001.

for a first-time drug offense might be cruel, it was not unusual.[153] One way, then, of understanding the gross disproportionality test is as requiring a punishment to be *both* cruel and unusual.[154] The corollary of this concept is that a punishment might be cruel even if it is not grossly disproportionate under the Eighth Amendment. A logical distinction might be that a strictly disproportionate punishment might be cruel, but it must also be unusual to meet the gross disproportionality standard under the Eighth Amendment.

Further, the part of the opinion joined by four Justices also emphasized the distinction between capital and noncapital cases under the Eighth Amendment as developed in prior cases.[155] If the analysis under the evolving standards of decency doctrine mandates a strict scrutiny kind of examination of the punishment, its cruelty, and its unusualness, then the analysis under the gross disproportionality test mirrors a rational basis test, where there is a strong presumption that the punishment is constitutional.[156]

Thus, the Court's development of its individualized-sentencing-consideration requirement under the Eighth Amendment has applied only to cases in the "different" categories of the death penalty and JLWOP sentences. While the Court's decision in *Miller* confirmed that juveniles are different, it did not address the issue of whether other categories of differentness existed.[157] The *Miller* Court also did not offer any reason as to why its individualized sentencing requirement would be limited to "different" cases.

For now, however, the bright-line standard remains, meaning that other categories of mandatory sentences essentially avoid any meaningful scrutiny under the Eighth Amendment. Two categories of mandatory noncapital sentences avoid individualized sentencing consideration as a result: mandatory minimums and adult life without parole sentences ("LWOP").

The same principles of individualized sentencing the Court used in *Woodson* and *Miller* apply to mandatory minimum sentences. The Court just has to decide to apply higher scrutiny to such cases. These cases, as explained above, delegate sentencing power to prosecutors and deny individuals rights that should arise under the Eighth Amendment.

The same is true for LWOP sentences. Some LWOP sentences themselves are mandatory sentences. In some capital jurisdictions, the only

153. *Id.* at 960, 994–95 (majority opinion).

154. *See id.*

155. *Id.* at 995–96.

156. *See, e.g.*, Ewing v. California, 538 U.S. 11, 30–31 (2003); Lockyer v. Andrade, 538 U.S. 63, 73, 77 (2003); *Harmelin*, 501 U.S at 999 (Kennedy, J., concurring); Hutto v. Davis, 454 U.S. 370, 372–74 (1982); Rummel v. Estelle, 445 U.S. 263, 274–75 (1980). *But see* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 414 (2009) ("[The] Supreme Court [is] naturally inclined towards majoritarian decisionmaking *anyway*, rendering the debate over 'evolving standards' largely moot.").

157. *See* Berry, *Eighth Amendment Differentness*, *supra* note 27, at 1071–75.

sentencing options are LWOP and the death penalty in cases of aggravated murder.[158] As LWOP is a form of a death sentence, this essentially allows mandatory death sentences to persist.

Even if they are not mandatory, some LWOP sentences have pseudo-mandatory characteristics because they are the product of parole abolition, not legislative design.[159] States might have intended a life sentence to be a punishment in which most offenders served a fifteen-year sentence.[160] With the abolition of parole, the "life" sentence of fifteen years has automatically become LWOP, creating a sentence where adequate legislative consideration may have never existed.[161]

B. *Why Mandatory Sentencing Persists*

Two principles undergird the persistence of mandatory and pseudo-mandatory sentencing schemes in state and federal sentencing. The fear of unfettered sentencing practices, as raised by Judge Frankel and referenced in *Furman*, supports the desire to limit sentencing discretion to, at the very least, restrict random and arbitrary outcomes. The fear of constitutional countermajoritarian overreach colors the other reason for persistence of mandatory sentencing.

1. Fear of Unfettered Sentencing Practices

First, given the former state of sentencing as described by Judge Frankel,[162] a move to unfettered discretion seems unattractive for some. This is particularly true given the almost two-decade reign of the mandatory sentencing guidelines from 1987 to 2005. The comfort provided by the Guidelines as a tried-and-true approach to sentencing has meant that a wholesale move away from the Guidelines and its principles remains unlikely.

In many senses, a consistent move away from the Guidelines might signal a step in the direction of the Frankel era. To move away from the Guidelines in a particular case, as an exception to a rule, does not appear to be problematic for judges, but a consistent move away has not been common outside of particular policy disagreements with the Guidelines themselves.

To the extent that wildly departing from the Guidelines would create significant disparity, the move to advisory guidelines has not encouraged such

158. *Life Without Parole*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/sentencing-alternatives/life-without-parole [https://perma.cc/SN4P-4UZQ].

159. *See* William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1051 (2015).

160. *Id.* at 1062.

161. *Id.* at 1062–63.

162. *See supra* text accompanying notes 42–44.

a reality. Instead, the sentencing outcomes from 2005 to 2020 are not unlike those from 1987 to 2005; they largely follow the Guidelines.

Note, however, that this outcome does not mean consistency has carried the day and disparity ceases to exist. On the contrary, disparity may extend further because it remains hidden in the decision-making of federal prosecutors spread across many jurisdictions. While the Department of Justice endeavors to create consistency through the guidance it promulgates for its many offices, the ultimate sentencing decision most often lies in the discretion of individual prosecutors.

With respect to the Eighth Amendment, the Court likewise has demonstrated a hesitancy to limit state punishment practices.[163] The backlash to *Furman* has led to a decision not to assess individual punishments on a case-by-case basis but instead to impose only categorical limits.[164] Despite using an evolving standards of decency test that relies in part on majoritarian legislative assessments to determine the scope of the Eighth Amendment, the Court's cases reflect a concern about overturning statutes where the statutes are not outliers.[165] The Court's decision to hide behind majoritarian approaches instead of engaging in its own constitutional analysis as it did in *Furman* encompasses the same kind of sentiment displayed in the Sixth Amendment context—a fear of judging outside the confines of the framework established by legislatures.

2. Deference to State and Federal Legislatures

Another reason that mandatory sentences persist relates to the value accorded to legislative institutions. In the context of the Guidelines, the Court expressed a need to accord the Guidelines a level of deference even in *Booker*.[166] Certainly Justice Breyer's role in the creation of the Guidelines explains his advocacy for them in the Sixth Amendment cases, but other Justices embraced these values as well.[167]

The underlying assumption is that the determination of the legislature (through the Commission) deserves more deference and weight than the individual discretion of judges at sentencing. The thumb on the scale in favor of consistency and presumed efficacy undermines the ability of the judge to

163. *See* Berry, *Unusual Deference*, *supra* note 20, at 328–30.

164. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 441–42 (2008) (barring the death penalty for child rape); Roper v. Simmons, 543 U.S. 551, 568 (2005) (barring the death penalty for juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring the death penalty for intellectually disabled offenders); Coker v. Georgia, 433 U.S. 584 (1977) (barring the death penalty for rape).

165. *See* Berry, *Unusual Deference*, *supra* note 20, at 328–30.

166. United States v. Booker, 543 U.S. 220, 245–49 (2005); *see also* Gall v. United States, 552 U.S. 38, 40–41 (2007).

167. *See Gall*, 552 U.S. at 39–41 (showing that Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens's opinion holding that courts of appeals must review all sentences under a deferential abuse-of-discretion standard).

exercise sentencing discretion. This deference, though, really just reallocates sentencing discretion from judges to prosecutors. And the presence or absence of disparity remains largely unknown as a result of the black box of prosecutorial discretion. At least with judicial discretion variances, the disparities are apparent and transparent.

In the Eighth Amendment context, the Court likewise weighed institutional considerations in developing its doctrinal approach to punishments. The backlash of the many state statutes in response to the Court's decision in *Furman* filtered into its standard for evaluating the constitutionality of particular sentences under the Eighth Amendment. This evolving standards of decency approach relied first on assessing the objective majoritarian practice with respect to the punishment in question, despite the role of the Eighth Amendment as a protection against majoritarian overreach.

Justice Scalia's criticism of the Court's evolving standards of decency cases (which were all 5–4 decisions) embodies this particular sentiment. Scalia has repeatedly castigated the Court for failing to defer to the punishment practices authorized by state legislatures. In *Atkins v. Virginia*[168] and *Roper v. Simmons*,[169] for example, Scalia chastised his fellow Justices for allegedly substituting their personal views for those of legislators.[170]

The Court's hesitancy to overturn state statutes explains in part the Court's unwillingness to extend the individualized sentencing construct beyond capital and JLWOP cases to other kinds of mandatory sentences. Its view of deferring to majoritarian legislative sentiment remains an obstacle to Eighth Amendment expansion.

III. THE CASE FOR BROADER CONSTITUTIONAL RESTRICTIONS ON MANDATORY SENTENCING

In light of the foregoing, it is evident that the constitutional limits on state and federal sentencing fail to offer a coherent vision for the exercise of sentencing discretion. Specifically, the limits on sentencing should promote the individualized sentencing consideration of the individual actor. The Sixth Amendment's protection of the right to trial by jury should frame this limit on the front end—in the definition of the crime itself—while the Eighth Amendment should delineate the scope of acceptable punishment for the crime in question on the back end.

Individualized sentencing consideration thus requires careful consideration of both the criminal acts of the offender and the individual characteristics of the offender. Section 3553 requires such a focus. The question

168. 536 U.S. 304 (2002).

169. 543 U.S. 551 (2005).

170. *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting); *Roper*, 543 U.S. at 607 (Scalia, J., dissenting).

of just deserts mandates a careful inquiry into the culpability of the offender, derived from the individual's perpetration of the crime, as opposed to the general category of crime itself. The Guidelines attempt to capture this but cannot capture every nuance that might be relevant as to the question of culpability. Similarly, the utilitarian purposes of punishment merit individualized consideration of the characteristics of the offender. Dangerousness arguably connects to prior criminal acts, but while prior crimes are relevant, they do not necessarily measure dangerousness. Likewise, consideration of deterrence and rehabilitation relate to the characteristics of the offender. In terms of deterrence, the characteristics point to who would be deterred; in terms of rehabilitation, the characteristics point to the time needed for correction.

As discussed, both Sixth and Eighth Amendment doctrine point to the need for individualized sentencing consideration—and in some cases require it. But the doctrine is incomplete under both Amendments as neither completely proscribes mandatory or pseudo-mandatory imposition of criminal sentences. Under the Sixth Amendment, the Guidelines are no longer mandatory, but they exert such a heavy presumptive weight that they might as well be mandatory in many cases. Under the Eighth Amendment, mandatory death sentences and mandatory JLWOP sentences are unconstitutional, but these requirements do not extend to other sentences.

Rectifying the incomplete doctrinal evolution of each of these Amendments with respect to mandatory sentences would accomplish this goal. In other words, the Court took important first steps in limiting mandatory sentencing practices under the Sixth and Eighth Amendments but should go further under each Amendment to restrict or eliminate mandatory sentencing practices.

Interestingly, the incomplete doctrinal evolution of each of these Amendments points to the intellectual gap in the other. The gap in the Sixth Amendment is that the Guidelines do not capture the complete individualized sentencing consideration otherwise required by § 3553. This means that advisory guidelines allow pseudo-mandatory sentences. A bright-line standard like the one adopted in the Eighth Amendment context with respect to mandatory death and JLWOP would ensure that judges engage in individualized sentencing consideration beyond the Guidelines. The gap in the Eighth Amendment is its limited application. Its mandatory sentence proscription only applies to mandatory death sentences and mandatory JWLOP sentences. Emulating the Sixth Amendment's applicability of mandatory limitations across all sentences would fill in the doctrinal gap of the Eighth Amendment. The Sixth Amendment's application can thus provide guidance about how to remedy the Eighth Amendment; likewise, the Eighth Amendment's application can do the same for the Sixth Amendment. The

Court is unlikely, without prompting, to continue the doctrinal evolution toward eliminating mandatory sentences. The cross-pollination of the two Amendments, though, can open the door to arguments that can help advance the evolution of each.

A. *Rectifying the Sixth Amendment*

1. Where the Court Went Wrong

The decision in *Booker*, with respect to the appropriate remedy for the Sixth Amendment violation of mandatory sentencing guidelines, in essence created the problem. In order to accord defendants their Sixth Amendment rights, the Court could have required that the facts leading to Guidelines enhancements be charged and proven to a jury beyond a reasonable doubt. Alternatively, the Court could have struck down the Guidelines altogether. But the current approach allows judicial fact-finding to persist on the assurance that the Guidelines are not mandatory even though there is a strong leaning toward their determinative effect.

One way of understanding Justice Ginsburg's decision in *Booker* is as a middle-of-the-road, Goldilocks-type splitting of the difference. If having no guidelines was too far in the direction of favoring judicial discretion and having mandatory guidelines was too far in the direction of limiting judicial discretion, making guidelines advisory was a solution that was "just right." Advisory guidelines could promote consistency while still affording a judge the opportunity to deviate in the extreme or unfair case. Such an approach maintained all of the value of a bright-line rule with none of the negative consequences of hard cases at the margins. Justice Ginsburg's opinion in *Kimbrough* reflected this sentiment,[171] but the behavior of judges—both district and appellate—since *Booker* has reflected a hesitancy to depart from the Guidelines.

Beyond *Booker*, the Court's post-*Booker* cases—*Gall*, *Kimbrough*, and *Rita*—did not go far enough in guiding federal sentencing discretion with respect to the Guidelines' advisory nature. If anything, these decisions had the effect of reinforcing the primacy of the Guidelines.

The better approach would be to allow the purposes of punishment under § 3553 to guide the sentencing decision—with the Guidelines being available as a resource in hard cases—as opposed to the other way around—where the Guidelines receive the presumption of correctness. The draconian nature of the Guidelines and the politicized "tough on crime" origins of this punishment scheme counsel against according it the pseudo-mandatory deference it currently receives.

171. Kimbrough v. United States, 552 U.S. 85, 90 (2008).

The Court's decision to require a calculation under the Guidelines in each case and then require judges to justify any departure reinforces the intellectual disconnect between the Guidelines and § 3553. As explained, the Guidelines focus almost exclusively on retributive and incapacitation justifications for punishment, while ignoring deterrence and retribution. By contrast, § 3553 requires consideration of all these purposes and the individualized facts that undergird each purpose. Starting with the statute and referring to the Guidelines in outlier cases would better accord criminal defendants their Sixth Amendment rights at sentencing.

2. How the Eighth Amendment Can Help

The Court's decisions in *Woodson* and *Miller* drew bright lines. Mandatory death sentences and mandatory JLWOP sentences violated the Eighth Amendment. The Sixth Amendment remedy proposed by Justice Stevens in his dissent in the remedy part of *Booker* would have gone much further to achieve a similar proscription for mandatory sentencing guidelines.

But even without revisiting the decision in *Booker*, the sentencing model advanced by *Woodson* and *Miller* can be instructive for judges attempting to apply the Guidelines. These cases emphasize the importance and meaningfulness of individualized sentencing determinations. If district judges give more weight to individualized circumstances, the pseudo-mandatory power of the Guidelines diminishes.

And such an approach is not foreign under the Sixth Amendment post-*Apprendi*. Justice Stevens's concurrence in *Rita* emphasizes this kind of exercise of discretion.[172] The sentencing decision of federal judges should incorporate this kind of individualized thinking in considering all aggravating and mitigating evidence, instead of being captured by presumptive guidelines. In other words, the approach in *Woodson* and *Miller* should guide the application of § 3553. Judges should look carefully at the aggravating and mitigating evidence when crafting a sentence, as opposed to simply relying on the Guidelines.

To the extent that this move creates more disparity, appellate courts can limit it. This approach also opens the door for the creation of a federal common law of sentencing as opposed to the current federal appellate-mandated use of advisory guidelines. Reasonableness review should have a common-law element to it and not simply reflect guidelines that are no longer mandatory.

Even if appellate courts were to give district courts deference, potential disparities in sentencing outcomes would be apparent in a way that they are currently not—in the hands of prosecutors. Judge Frankel's critique of sentencing disparities resulted from his ability to review the sentences imposed

172. Rita v. United States, 551 U.S. 338, 366–67 (2007) (Stevens, J., concurring).

by different courts and to observe the lack of consistency. If the Guidelines drive the sentencing outcomes, then the disparity becomes hidden in the black box of prosecutorial decision-making. In other words, the disparity persists—it just lies in disparate outcomes in prosecutors' decisions as opposed to disparate sentencing outcomes. With the latter, at least, the problems remain visible.

B. *Rectifying the Eighth Amendment*

Just as Eighth Amendment doctrine can provide tools by which to narrow the consequence of pseudo-mandatory sentences under the Guidelines, the Sixth Amendment can also help provide tools to limit the use of mandatory sentences that the Eighth Amendment cannot yet reach.

1. Where the Court Went Wrong

The Court's Eighth Amendment shortcomings relate to the limits of its differentness bright-line test. Because death is different, mandatory death sentences violate the Eighth Amendment. Because JWLOP is also different, mandatory JLWOP sentences also violate the Eighth Amendment. But no other sentences are classified as different. As such, all other noncapital mandatory sentences do not violate the Eighth Amendment.

To be sure, the bright line does not withstand scrutiny. If individualized consideration is so critical in capital and JLWOP cases, it is likewise important in LWOP cases, which have essentially the same consequence—death in prison. And other mandatory sentences can cause deprivations that have serious effects based on their timing or length. These cases likewise deserve individualized sentencing consideration for defendants.

Even if the consequences are less severe, blindly imposing a mandatory sentence irrespective of the details of the offender's criminal act or personal characteristics presumes a level of foreknowledge on the part of the legislature in divining exactly how much punishment is appropriate for the offender despite potential aggravating and mitigating circumstances. Like strict liability, such sentences should be disfavored if not eliminated.[173] Indeed, all criminal sentences should be subject to the individualized sentencing requirements of *Woodson* and *Miller*.

The result of this approach would be for the Eighth Amendment to bar mandatory sentences. This fits with the notion of individualized sentencing and human dignity encapsulated in the Eighth Amendment. Each offender would receive their day in court and have the opportunity to speak to the appropriate sentence for their crime.

173. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952) (reading in a mens rea requirement where Congress omitted any mention of intent because strict liability crimes are disfavored).

2. How the Sixth Amendment Can Help

In light of the current composition of the Supreme Court, expansion of the Eighth Amendment is unlikely.[174] Treatment of the Sixth Amendment nonetheless points to several justifications for expansion. First, the *Apprendi-Booker* limits on mandatory guidelines apply to *all* criminal sentences. If the Court did not limit the application of the Sixth Amendment to mandatory capital and JLWOP sentences, it follows that the Court should not limit the Eighth Amendment in that way either.

The Court's decision in *Alleyne v. United States*,[175] however, provides another tool to partially blunt the imposition of mandatory minimum sentences.[176] The Supreme Court overruled *Harris v. United States*[177] and made the Sixth Amendment apply to sentences that increase the statutory minimum, as well as the maximum (as established by *Apprendi*), making the burden to establish mandatory minimum sentences higher in that the elements must all be proven to a jury beyond a reasonable doubt.[178]

The corollary of this concept is that guidelines do limit mandatory minimums when constitutionally questionable. *Alleyne* shows that mandatory-minimum sentences can be unconstitutional when they rely on facts determined by a judge by a preponderance of the evidence. As such, mandatory minimums should face constitutional scrutiny. If the Sixth Amendment can apply to mandatory minimum sentences, it follows that the Eighth Amendment can apply as well.

Finally, the Court's decision in *Alleyne* to overrule itself with respect to a constitutional decision concerning mandatory sentences suggests it can do the same thing with respect to noncapital sentences under the Eighth Amendment. In other words, stare decisis seemingly does not preclude expansion of the Eighth Amendment to reach other noncapital mandatory sentences if the Court can overrule its application of the Sixth Amendment to mandatory minimums as it did in *Alleyne*.

C. *The Future of Mandatory Sentencing*

Mandatory sentencing practices, both in terms of the pseudo-mandatory Guidelines and in terms of mandatory state sentences, continue to create excessive, unconstitutional sentences that contribute significantly to the mass incarceration epidemic in the United States. While financial concerns have led

174. *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019) (holding that the Eighth Amendment forbids cruel and unusual methods of capital punishment but does not guarantee a prisoner a painless death).

175. 570 U.S. 99 (2013).

176. *Id.* at 99.

177. 536 U.S. 545 (2002), *overruled by Alleyne*, 570 U.S. 99.

178. *Alleyne*, 570 U.S. at 99.

to some reform in criminal statutes and sentencing practices in recent years, the public appetite for abolishing mandatory sentences does not exist on such a level to eliminate such practices entirely, or even limit them meaningfully.

The nexus of the Sixth and Eighth Amendments demonstrates, however, that each Amendment, if extended, could meaningfully curb such practices. It remains to be seen whether the current conservative-leaning Supreme Court is likely to place additional limits on pseudo-mandatory and mandatory sentencing practices.

The ways in which each Amendment might inform the other, as indicated, opens the door to a broader judicial recognition of both of these important rights—the right to trial by jury and the right to be free from cruel and unusual punishments. While the latter has tended to split along traditional party lines, the former has not. As such, the Sixth Amendment seems more likely to serve as a vehicle for further limiting mandatory sentencing practices.

The nexus of the core values of individualized sentencing under both Amendments likewise makes the case for expansion of both doctrinal frameworks to limit or even eliminate mandatory sentencing practices. As the Court's cases under both Amendments recognize, the solution to disparate sentencing outcomes does not lie in mandatory sentencing. As such, allowing mandatory sentencing to persist undermines a core notion of punishment—that the punishment should fit the criminal act and character of the offender.

CONCLUSION

This Article has explored the intersection of the Sixth and Eighth Amendments in light of the twentieth anniversary of the decision in *Apprendi*. These two amendments have followed the same trajectory in placing limitations on mandatory sentences. Even so, mandatory or pseudo-mandatory sentences have persisted. By borrowing doctrinally and thematically from each other, the Sixth and Eighth Amendments can fill in the gaps of each other to further limit, or at least minimize, the use of pseudo-mandatory and mandatory sentences.