

2014

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Aliza Cover

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Recommended Citation

Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 Brook. L. Rev. (2014).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss3/9>

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Cruel and Invisible Punishment

REDEEMING THE COUNTER-MAJORITARIAN EIGHTH AMENDMENT

Aliza Cover[†]

INTRODUCTION: REDEEMING THE EIGHTH AMENDMENT

Our criminal justice system is in constitutional crisis—a crisis that the courts have yet to recognize. Over the past generation, America has waged an increasingly punitive war on crime,¹ and the casualties of that war have been disproportionately people of color.² Even a casual observer of the American system of punishment would be struck by its racial disparities. Yet the Supreme Court has failed to see a problem of constitutional dimension.³ This judicial blindness is the product of a deficient construction of the Eighth Amendment—a construction that takes its shape from majority norms rather than counter-majoritarian principles.

[†] Westerfield Fellow, Loyola New Orleans College of Law; J.D., Yale Law School. I am indebted to Hilary Allen, Andrea Armstrong, Trey Drury, Jancy Hoeffel, Johanna Kalb, Sandy Mayson, Bidish Sarma, Rob Smith, and Anna VanCleave for their support and feedback as I developed these ideas. Many thanks, as well, to the participants of the Loyola Junior Faculty Forum Works-in-Progress series for their helpful comments. Most of all, I am grateful to Benjamin Plener, my partner in all things, including this.

¹ See, e.g., Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27 (1998); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 340-41 (2006) ("In the last thirty-five years, the number of United States residents in prison has increased dramatically—from 330,000 people in jails and prisons in 1972 to almost 2.3 million imprisoned people today. The United States now has the highest rate of incarceration in the world. Almost five million people are on probation and parole in this country. . . . Corrections spending by state and federal governments has risen from \$6.9 billion in 1980 to \$57 billion in 2001. During the ten year period between 1985 and 1995, prisons were constructed at a pace of one new prison opening each week." (footnotes omitted)).

² "No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of Apartheid." MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6-7 (2010).

³ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

With President Reagan's official declaration of the war on drugs in 1982,⁴ America began an unprecedented experiment with mass incarceration. In 1980, American jails and prisons housed just over 500,000 people.⁵ Thirty-one years later, that number had reached more than 2.2 million.⁶ Drug offenses accounted for a significant portion of this increase. In 1980, 41,000 people were serving time in prisons and jails for drug offenses;⁷ by 2011, that number had risen more than tenfold to nearly 500,000.⁸ America now imprisons more people, with a higher per capita rate of incarceration, than any other country in the world.⁹

The impact on communities of color has been profound. Nationally, at the end of 2007, one in 11 black adults, but only one in 45 white adults, was under correctional supervision.¹⁰ In 2011, more than three percent of all black males, but only 0.5 percent of white males, were serving time in state and federal prisons.¹¹ The incarceration rates of young African American males are particularly striking. Nationwide, “[b]etween 6.6% and 7.5% of all black males ages 25 to 39 were imprisoned in 2011,”¹² and among 18- to 19-year-olds, “black males were imprisoned at more than 9 times the rate of white males.”¹³ In certain parts of the country, the incarceration rate of African Americans is much higher. Wisconsin leads the nation with 12.8%

⁴ President Ronald Reagan, *Radio Address to the Nation on Federal Drug Policy* (Oct. 2, 1982), available at <http://www.presidency.ucsb.edu/ws/?pid=43085>.

⁵ THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 3 (2012), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf (citing LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2011 (2012)).

⁶ LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2011, 4, 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

⁷ THE SENTENCING PROJECT, *supra* note 5, at 3 (citing E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 (2012); MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007)).

⁸ *Id.*

⁹ Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0#.

¹⁰ PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 7 (2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

¹¹ E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

¹² *Id.*

¹³ *Id.*; see also *id.* (“Excluding the youngest and oldest age groups, black males were imprisoned at rates that ranged between 5 and 7 times the rates of white males In comparison, Hispanic males were imprisoned at 2 to 3 times the rate of white males in 2011 In 2011, blacks and Hispanics were imprisoned at higher rates than whites in all age groups for both male and female inmates”).

of black working-age men incarcerated, compared to 1.2% of white men.¹⁴ In Milwaukee County, “[o]ver half of African American men in their 30s and half of men in their early 40s have been incarcerated in state correctional facilities.”¹⁵

This racially disparate impact of mass incarceration and the war on drugs cannot be explained by an easy correlation between race and conduct. In fact, “[s]tudies show that people of all colors *use and sell* illegal drugs at remarkably similar rates. If there are significant differences to be found in the surveys, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color.”¹⁶ Nevertheless, “[i]n some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.”¹⁷ In 2007, only 14% of regular drug users—but “37% of those arrested for drug offenses and 56% of persons in state prison for drug offenses”—were African American.¹⁸ Moreover, “African Americans serve[d] almost as much time in federal prison for a drug offense (58.7 months) as whites d[id] for a violent offense (61.7 months), largely due to racially disparate sentencing laws such as the 100-to-1 crack-powder cocaine disparity”¹⁹

These inequities—though dramatic—are not new. Disparate racial impact is an age-old feature of the American criminal justice system. Punishment was once imposed differentially through overt, legalized racial caste systems, from slavery and the Black Codes to Jim Crow.²⁰ Today, the source of the racial inequality is more elusive: it is the result of layers of discretionary decision-making and complex socioeconomic and cultural dynamics, both within and without the criminal justice system. As the causality has become less visible and harder to remedy, the scope of the inequality has expanded. The sheer number of people in prison has increased by an order of magnitude, and the corresponding burdens now touch entire communities.²¹

¹⁴ JOHN PAWASARAT & LOIS M. QUINN, EMPLOYT & TRAINING INST., UNIV. OF WISC.-MILWAUKEE, WISCONSIN’S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, at 2 (2013), *available at* <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf>.

¹⁵ *Id.*

¹⁶ ALEXANDER, *supra* note 2, at 7 (footnotes omitted).

¹⁷ *Id.* (footnotes omitted).

¹⁸ MAUER & KING, *supra* note 7, at 2.

¹⁹ *Id.*

²⁰ *See infra* Part II.B.

²¹ High incarceration rates affect not only those imprisoned, but the families and communities they leave behind—depriving children of fathers, parents of their partners, and households of much-needed income. Additionally, many minority and

The stark disparate racial impact of our criminal justice system is a predictable result of majoritarian policymaking and law enforcement without a constitutionally adequate counter-majoritarian check. The Constitution creates a careful balance between majoritarian and counter-majoritarian principles. It establishes a representative democracy accountable to the will of the People, but guards against a purely majoritarian political process that is insensitive, and at times overtly hostile, to the needs of the minority. The founders embedded within the constitutional framework an interconnected set of structural and substantive counter-majoritarian checks to protect against untrammelled majoritarian rule, particularly in the application of criminal punishment.²² The scope of the Eighth Amendment must be construed in light of this structural counter-majoritarian principle, synthesized with the principle of racial egalitarianism embodied in the Reconstruction Amendments.

Applying these original principles, I argue that the cruel and unusual punishments clause proscribes *severe punishments disproportionately imposed upon minorities*. From this structural perspective, the word “unusual” not only serves as a license to look at majoritarian “evolving standards of decency”²³ or to curb the “wanton[] and . . . freakish[]”²⁴ imposition of certain harsh penalties. The word “unusual” also signifies that when a punishment is imposed *irregularly against certain suspect classes of people*, the Constitution demands action from the judiciary to scrutinize the punishment and, if necessary, correct the distortion wrought by the majoritarian system.

My theory of the Eighth Amendment is motivated by a redemptive approach to constitutional interpretation that resonates with the work of Jack Balkin, among others. In his theory of “framework originalism,” Balkin argues that faithful

low-income neighborhoods exist as virtual police states, aggressively monitored in ways that are entirely out-of-keeping with expectations of privacy and security in white, affluent areas. See generally M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373 (2011).

²² See *infra* Part I.A.

²³ E.g., *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

²⁴ *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” (footnotes and citations omitted)).

constitutional interpretation is not rigidly tied to the expected application of the original framers, but it must remain tethered to the text of the Constitution and the higher-order principles motivating that text.²⁵ The framers bequeathed to future generations a document that leaves room for interpretation—and they did so deliberately, so as to enable it to endure over time.²⁶ The Constitution provides a framework, not a meticulous blueprint. As such, it is possible—and, indeed, necessary—to both keep faith with the original meaning of the Constitution *and* engage in a project of “constitutional construction” across generations.²⁷ With the opportunity to construct constitutional meaning comes the responsibility to redeem the motivating principles behind the Constitution:²⁸ to “meet[] the challenges of changing conditions in ways that seek to further the promises and commitments of the plan”²⁹

Under my redemptive interpretation of the Eighth Amendment, the term “unusual” signifies a counter-majoritarian distrust of punishments that bear an irregular impact on those who have been systemically underrepresented in the political process. Because the Eighth Amendment is centered on punishment—the end product of the criminal justice process—its prohibition logically refers to unusual outcomes, not unusual motivations, and thus the appropriate focus is on disparate impact rather than discriminatory intent. Moreover, in an age of *de jure* race neutrality, where the *de facto* impact of the criminal justice system remains markedly unequal, a faithful interpretation of

²⁵ See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

²⁶ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819) (“[W]e must never forget that it is a *constitution* we are expounding.”); Paul Brest, *The Intentions of the Adopters Are in the Eyes of the Beholder*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* (Eugene W. Hickok, Jr., ed., 1991) (“[A]s Professor Paul Freund once remarked in a class, ‘We ought not read the Constitution like a last will and testament lest it become one.’”); *id.* at 23 (“[S]hould we not pay the authors the compliment of believing that they meant no more than they said? What they left unsaid, they left open for *us* to decide The Constitution has become something in its own right It has long ceased to be no more than what other men hoped they would do or intended them to do. The Constitution, together with the Court’s work, is not so much pushed by the plans of the past as pulled by hopes of the future. It is not stuffed, but pregnant with meaning.” (quoting CHARLES CURTIS, *LIONS UNDER THE THRONE* 3, 7 (1947))).

²⁷ BALKIN, *supra* note 25, at 7.

²⁸ *Id.* at 75 (“Redemptive constitutionalism is a characteristic feature of the American constitutional tradition. In every generation people have seen injustice in their society and made claims in the name of the Constitution to remedy those injustices. The great political and social movements that secured the basic rights and liberties that Americans now take for granted are examples of redemptive constitutionalism at work.”).

²⁹ *Id.*

these original constitutional principles in the modern context requires a focus on impact rather than intent.

Doctrinally, this interpretation would demand heightened judicial scrutiny into the cruelty of those punishments that bear a disparate impact upon minorities. This searching review would provide a far more robust counter-majoritarian check than either existing equal protection doctrine, which imposes discriminatory purpose as a gatekeeper to heightened scrutiny,³⁰ or existing Eighth Amendment “gross disproportionality” review, which overtly defers to majoritarian legislative determinations of appropriate punishments.³¹ Critically, however, the reach of this doctrine would also be carefully cabined. Heightened scrutiny would be a targeted tool reserved for punishments imposed disparately upon minorities, thus preserving traditional deference to legislative determinations whenever possible, and leaving untouched the ordinary discriminatory purpose requirement of equal protection law.

I make my argument in four parts. First, I delve into the original principles behind the Eighth Amendment and the Reconstruction Amendments, and explain how these principles support an interpretation of the cruel and unusual punishments clause that provides robust counter-majoritarian and anti-discrimination protections against excessive punishment. Second, I make the case for an interpretation of the Eighth Amendment that focuses on *disparate impact* rather than discriminatory intent. I look to the changing historical circumstances and national ethos since Reconstruction and argue that, to remain relevant in the modern age, the Eighth Amendment must be responsive to the contemporary reality of a massive, punitive, formally race-neutral criminal justice system that metes out punishment disproportionately against minorities. I also argue that, as a matter of theory, any effective counter-majoritarian Eighth Amendment jurisprudence logically must reach disparate impact. Third, I critique existing doctrinal interpretations of the Eighth Amendment and equal protection clause as overly majoritarian and insufficiently attentive to the problem of disparate impact in the punishment context. Finally, I begin the conversation about a doctrinal path forward. I propose a two-step judicial inquiry into cruel and

³⁰ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Washington v. Davis*, 426 U.S. 229, 247-48 (1976).

³¹ See *infra* Part III.A; see also, e.g., *Ewing v. California*, 538 U.S. 11, 27-28 (2003) (plurality opinion).

unusual punishments: if a defendant can make a threshold showing that a particular punishment is “unusual”—that it is disproportionately imposed upon minorities—then the court should apply heightened scrutiny in assessing whether the punishment is “cruel.”

I. ORIGINAL PRINCIPLES

In this section, I examine the constitutional principles motivating the Eighth Amendment. I look first to the founding: to the counter-majoritarian and antidiscrimination principles permeating the Constitution, the Bill of Rights, and the Eighth Amendment in particular. I then turn to the principle of racial egalitarianism motivating the Reconstruction Amendments, and argue that a synthesis of these constitutional principles requires an interpretation of the Eighth Amendment that is robustly counter-majoritarian and concerned with discrimination against racial minorities.

A. *The Founding*

The need for a check on majoritarian rule is one of the core original principles infusing the structure and substance of the Constitution. Understanding the word “unusual” to reach punishments disproportionately imposed against minorities keeps faith with the counter-majoritarian promise of the Bill of Rights and of judicial review itself against the unchecked “tyranny of the majority.”³²

Scholars and judges have long been troubled by the “countermajoritarian difficulty”³³ inherent when an arguably undemocratic judiciary exercises review over legislative action. As articulated by John Hart Ely,³⁴ however, and as presaged by footnote four of *Carolene Products*,³⁵ it is precisely this

³² *E.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 240 (Henry Reeve trans., Lawbook Exchange, LTD. 4th ed., 2007).

³³ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

³⁴ *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

³⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political

controversial counter-majoritarian nature of the courts that preserves the rights of minorities from the vagaries of the political process. Unchecked majority rule would lead to entrenchment of certain despised and disadvantaged groups in positions of powerlessness, risking serious and irremediable threats to their individual liberties. Judges should embrace, rather than reject, their counter-majoritarian institutional role, and should interpret the Constitution—and, specifically, the Eighth Amendment—in light of their structural position within our system of government and in light of the counter-majoritarian purpose of the Bill of Rights.³⁶

The founders were well aware of the dangers inherent in majority rule³⁷ and infused our Constitution with strong counter-

processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”(citations omitted).

³⁶ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); *Consent and Consensus: Appeal for Amendments* (speech by James Madison in the House of Representatives, June 8, 1789), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 169 (rev. ed. 1973) (“The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the [E]xecutive or [L]egislative departments of Government, but in the body of the people, operating by the majority against the minority. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention . . . yet . . . it may be one means to control the majority from those acts to which they might be otherwise inclined.”); *id.* at 171-72 (“If [the Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1530 (1990) (“As James Madison noted, ‘the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.’ Although initially resistant to the inclusion of a bill of rights, Madison was later to press for congressional adoption of the first ten amendments, recognizing in it yet another device for filtering majoritarian preferences—for it afforded a role for the judiciary in curbing the more immediately responsive and accountable branches.” (footnotes omitted)).

³⁷ See, e.g., *THE FEDERALIST NO. 10* (James Madison) (“When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passions or interest both the public good and the rights of other citizens.”); *THE FEDERALIST NO. 51* (James Madison) (“It is of great importance in a republic, not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part If a majority be united by a common interest, the rights of the minority will be insecure.”); see also, Erwin Chemerinsky, *The Vanishing Constitution*, 103 *HARV. L. REV.* 43, 75 n.147 (1989).

majoritarian features. Both in the substantive individual rights it guarantees³⁸ and in the structural separation of powers it affords,³⁹ the Constitution protects the rights of minorities against the excesses of majority rule,⁴⁰ even as it empowers that majority through the establishment of the representative political branches. The framers recognized that a purely majoritarian democratic system creates winners and losers and risks cementing those winners and losers into their relative positions of power. They understood that if the majority has unchecked power to enforce its will, minorities' individual rights would be vulnerable.⁴¹

Although the wariness of majority rule runs throughout the Constitution and the Bill of Rights, both common sense and constitutional text identify a special danger when the majority has unlimited power in the criminal context.⁴² The Constitution recognizes that the potential for untrammelled abuses by the majority upon the minority is singularly acute in the context of criminal punishment—perhaps the most coercive of all actions a government takes upon its citizens. Punishment is a violent act, legitimized through the neutral trappings of the justice system.⁴³ It is the ultimate embodiment of the state's (and the majority's)

³⁸ These individual rights are contained not only in the Bill of Rights itself but also in the original Constitution of 1787—through the guarantee of *habeas corpus*, U.S. CONST. art. I, § 9, cl. 2; the prohibition against ex post facto laws and bills of attainder, U.S. CONST. art. I, § 9, cl. 3; and the limitations on treason, U.S. CONST. art. III, § 3, cl. 1. Alexander Hamilton argued that no Bill of Rights was necessary because “[t]he truth is . . . that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” THE FEDERALIST NO. 84, at 475 (Alexander Hamilton).

³⁹ See, e.g., THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”).

⁴⁰ See, e.g., Chemerinsky, *supra* note 37, at 74-75 (“[T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities. The body of the Constitution reflects a commitment to separation of powers and individual liberties (for example, no ex post facto laws or bills of attainder, no state impairment of the obligation of contracts, no congressional suspension of the writ of habeas corpus except in times of insurrection).” (footnote omitted)).

⁴¹ See generally THE FEDERALIST NOS. 10, 51 (James Madison); see also *supra* note 37.

⁴² See Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1963 (2000) (“[T]here is textual, historical, and theoretical support for an approach that gives special attention to the command of equality in the area of criminal procedure. The rights of criminal defendants were, of course, a dominant concern of the Framers of the Constitution, provisions protecting these rights being embedded in the Fourth, Fifth, Sixth, and Eighth Amendments, not to mention the Bill of Attainder, Ex Post Facto, and Habeas Corpus Clauses.”).

⁴³ See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

absolute power over the individual—and the moment at which a counter-majoritarian guarantee is most critical.

The 1787 Constitution, which focuses more on structural protections against majority overreaching than substantive ones, nonetheless contains a number of specific guarantees against arbitrary, excessive, and illegal punishments: it protects against the suspension of habeas corpus,⁴⁴ prohibits ex post facto laws and bills of attainder,⁴⁵ and places important limitations on convictions for treason.⁴⁶ The Bill of Rights strengthens these protections considerably. Four of the 10 constitutional amendments comprising the Bill of Rights relate to individuals' rights when subjected to criminal prosecution. Three of these amendments—the Fourth, Fifth, and Sixth—deal with fair criminal procedures to which criminal defendants are entitled. The Eighth Amendment, uniquely, provides a substantive guarantee against excesses at the end point of the criminal process: punishment.

While this structural counter-majoritarian impulse and the special concern over majoritarian abuses of the criminal justice system are relatively clear, the legislative intent behind the text of the Eighth Amendment itself is notoriously opaque. The Eighth Amendment was drafted without extensive debate,⁴⁷ and while deciphering original intent is always fraught with uncertainty,⁴⁸ a definitive pronouncement of the original expected application of the Eighth Amendment is particularly precarious. But historical evidence suggests that the ban on “cruel and unusual punishments” was specifically motivated by the need to protect against *discriminatory* imposition of severe punishments.⁴⁹ There is thus a direct link between the broad constitutional counter-majoritarian principle, the evident concern by the founders over the risks of coercive majoritarian

⁴⁴ U.S. CONST. art. I, § 9, cl. 2.

⁴⁵ U.S. CONST. art. I, § 9, cl. 3.

⁴⁶ U.S. CONST. art. III, § 3, cl. 2.

⁴⁷ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (Douglas, J., concurring) (quoting the paltry debate from the *Annals of Congress*).

⁴⁸ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 5-11 (2001); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1480 (1985).

⁴⁹ See *Furman*, 408 U.S. at 242 (Douglas, J., concurring); see generally Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004). This reading is in striking contrast to the originalist interpretation advanced by Justices Scalia and Thomas that has focused on the prohibition of torturous *methods* of punishment that were considered barbarous or outmoded at the time of the founding. See, e.g., *Baze v. Rees*, 553 U.S. 35, 97 (2008) (Thomas, J., concurring).

criminal punishment, and a distinct Eighth Amendment concern about discriminatory punishment.

The text of the Eighth Amendment derives from the English Bill of Rights of 1689. Evidence suggests that the English provision “was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.”⁵⁰ The English guarantee was motivated at least in part by parliamentary outrage over discriminatory punishment “against those perceived to be political and religious opponents of the Stuart monarchy,”⁵¹ with particular attention to the extraordinary punishments imposed in the politically sensitive libel cases of Titus Oates⁵² and Samuel Johnson.⁵³ Blackstone

⁵⁰ *Furman*, 408 U.S. at 242 (Douglas, J., concurring); see also Claus, *supra* note 49, at 138, 141-42 (“The manner in which the two Houses of Parliament handled the [Titus] Oates and [Samuel] Johnson cases reveals an overarching concern about immorally discriminatory punishments that were harsher than the law allowed. It was the dual character of the Oates and Johnson punishments as *cruel and illegal* that caused the Parliament to act. The punishments were illegal, unusual and void because they departed from precedent for no morally—and therefore no legally—sufficient reason. The unusualness of the judgments was cited interchangeably with their illegality in Parliament’s deliberations on the judgments and in the Bill of Rights.”).

⁵¹ Claus, *supra* note 49, at 138.

⁵² Titus Oates, by all accounts, perjuringly accused dozens of people of engaging in a papist conspiracy against the King, with bloody results. IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 132-53 (1965). However, his trial became a symbol of governmental discriminatory excess. He was convicted of libel and perjury and sentenced with “bizarre savagery”; these sentences were set aside as “cruel and illegal” after King James was dethroned in the 1688 Revolution. *Id.* at 151; Claus, *supra* note 49, at 139. According to Claus,

Titus Oates’s punishment was unusual not because it successfully articulated a changed understanding of the common law of perjury, but because it was a *departure* from the common law of perjury. It was unusual because other perjurers were not subjected to it. When a legal system is built on custom, to impose a novel sentence is to impose an illegal sentence. Further, the punishments were “cruel, barbaric, inhuman, and unchristian” because they departed from precedent in the direction of greater severity.

Claus, *supra* note 49, at 142 (footnotes omitted).

⁵³ “Samuel Johnson had been convicted on two counts of a misdemeanor called seditious libel.” *Id.* at 137 (footnotes omitted). Among other punishments, he was saddled with imprisonment until he paid a “prohibitively large” fine that he could not afford. *Id.*

A similar fate had befallen other political enemies of the Stuart kings . . . Both fines and bail were susceptible of such discriminatory use to effect indefinite imprisonment, and the evil of that use was a primary consideration underlying the Bill of Rights’ condemnation of excessive bail and fines . . . In 1680, a committee of the House of Commons condemned the King’s courts for an obvious pattern of setting excessive bail and imposing excessive fines. That pattern evidenced discrimination against those perceived to be political and religious opponents of the Stuart monarchy. The committee “resolved that in imposing fines the judges had acted ‘arbitrarily, illegally, and partially,’ and in favor of the Papists.” Seven members of that committee were later to serve on the committees that drafted the Bill of

shared this understanding that the English Bill of Rights of 1689 prohibited *arbitrary* and *discriminatory* punishments and fines,⁵⁴ and the American founders were, in turn, intimately familiar with and heavily influenced by Blackstone.⁵⁵ They were, moreover, well aware of the bloody English history of discriminatory punishment, including the notorious Bloody Assizes, in which hundreds of alleged political dissidents were executed after “pseudo trials.”⁵⁶ This history “helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments,” as, “[u]nless barred by fundamental law, the legal rulings that permitted th[ese] result[s] could easily be employed against any person whose political opinions challenged the party in power.”⁵⁷ Justice Douglas in *Furman* recognized that:

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments’ recurring efforts to foist a particular religion on the people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against “cruel and unusual punishments” contained in the Eighth Amendment. . . . The

Rights. One of these complained during parliamentary debate in 1680 that “[m]en have been fined, not according to their Crimes, but their Principles: Sometimes because they have been Protestants.”

Id. at 138-39 (footnotes omitted).

⁵⁴ See 4 WILLIAM BLACKSTONE, COMMENTARIES *371 (“[I]t is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offense; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.”); *id.* at *372 (“[H]owever unlimited the power of the court may seem, it is far from being wholly arbitrary; but it’s discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king’s bench, in the reign of king James the second.”); see also Claus, *supra* note 49, at 144-46.

⁵⁵ See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (“[A]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone’s *Commentaries*]” (quoting ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)); Claus, *supra* note 49, at 145.

⁵⁶ BRANT, *supra* note 52, at 154-58.

⁵⁷ *Id.* at 155.

high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.⁵⁸

In short, when seeking to understand the original principles behind the Eighth Amendment, we should consider, first, the pervasive structural counter-majoritarian imperative within the Constitution of 1787 and the Bill of Rights of 1791; second, the special constitutional solicitude toward individual rights in the criminal justice context; and third, the particular original concern with discriminatory imposition of punishments.

B. *Reconstruction*

Of course, there is a deep limitation to these original counter-majoritarian and anti-discrimination principles: the explicit protection of the institution of slavery in our founding documents. However, the story of our original constitutional principles does not end with the ratification of the Bill of Rights in 1791. To understand and remain faithful to the principles of the Constitution and the Eighth Amendment, we must next consider the effect of the Reconstruction Amendments—the “Second Founding”⁵⁹—upon the original document. The ratification of the Reconstruction Amendments fundamentally altered the structural and thematic imperatives of the Constitution⁶⁰—and, moreover, directly imported Fourteenth Amendment principles to the Eighth Amendment when applied against the states through incorporation.⁶¹ Whereas a racial caste system was cemented in the

⁵⁸ *Furman v. Georgia*, 408 U.S. 238, 255-56 (1972) (Douglas, J., concurring) (citing BRANT, *supra* note 52, at 155-63).

⁵⁹ Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1205 (2009).

⁶⁰ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 82 (1991) (“The new amendments abolishing slavery, guaranteeing the ‘privileges or immunities of citizens of the United States,’ assuring ‘equal protection’ and ‘due process of law,’ safeguarding voting rights against racial discrimination—our modern disagreements about the precise meaning of these provisions should not blind us to the quantum leap the Republicans had made in nationalizing the protection of individual rights against state abridgment.”).

⁶¹ See, e.g., Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (“An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.”); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 146-48 (2001).

Constitution of 1787 through the protection of slavery, the Thirteenth, Fourteenth, and Fifteenth Amendments signaled a profoundly different constitutional orientation.⁶² The Reconstruction Amendments served to enhance the counter-majoritarian structural and substantive imperatives of the 1787 Constitution and the Bill of Rights, and to link those imperatives directly to racial equality. To uncover how the meaning of the original Constitution should be applied today, we must engage in “principled synthesis” to reconcile these constitutional moments.⁶³

The Constitution of 1787 and the Bill of Rights were drafted in the aftermath of revolution. Although the Constitution created a democracy rather than a monarchy, the framers had a keen understanding of the potential for abuses of political power, whether held by elected representatives or authoritarian kings. The protections for individual rights in the Constitution and Bill of Rights—from the institution of habeas corpus to the protections of free speech and free exercise of religion—reflected a primary concern with overreaching by the majoritarian political authorities against minority political and religious dissidents. Counter-majoritarian protections for other types of minorities that we recognize today—such as racial, ethnic, and sexual minorities—were simply not part of the constitutional conversation.

The Reconstruction Amendments, by contrast, were drafted in the aftermath of civil war—a war that was waged, at least in part, over the legitimacy of race-based chattel slavery. After the Civil War, the dangers of *racial* majoritarian tyranny—rather than *political* majoritarian tyranny—came to the forefront. The Thirteenth, Fourteenth, and Fifteenth Amendments made a significant move from counter-majoritarian protections over the individual rights of political and religious dissidents to counter-majoritarian protections

⁶² See, e.g., Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2006 (1999) (“Reconstruction represented less a fulfillment of the Revolution’s principles than a radical repudiation of the nation’s actual practice for the previous seven decades. Indeed, it was precisely for this reason that the era’s laws and constitutional amendments aroused such bitter opposition. The underlying principles—that the federal government possessed the power to define and protect citizens’ rights, and that blacks were equal members of the body politic—were striking departures in American law The Reconstruction amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government.”).

⁶³ ACKERMAN, *supra* note 60, at 94.

over the individual rights of racial minorities. By outlawing slavery;⁶⁴ guaranteeing citizenship rights, due process of law, and equal protection of the laws;⁶⁵ prohibiting race-based disenfranchisement,⁶⁶ and prioritizing federal power and oversight over states' rights,⁶⁷ the Reconstruction Amendments were designed to dismantle the legalized racial caste system that existed in the American South. Within this broad effort to overhaul the racial caste system, there is, moreover, significant evidence that the drafters of the Reconstruction Amendments were keenly aware of, and intended to remedy, discriminatory use of the criminal justice system against African Americans.⁶⁸

⁶⁴ U.S. CONST. amend. XIII.

⁶⁵ U.S. CONST. amend. XIV, § 1.

⁶⁶ U.S. CONST. amend. XV.

⁶⁷ U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

⁶⁸ Dissenting in *McCleskey v. Kemp*, Justice Blackmun explained:

[T]he legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters. In the introductory remarks to its Report to Congress, the Joint Committee on Reconstruction, which reported out the Joint Resolution proposing the Fourteenth Amendment, specifically noted: "This deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish." H.R. Joint Comm. Rep. No. 30, 39th Cong., 1st Sess., p. XVII (1866). Witnesses who testified before the Committee presented accounts of criminal acts of violence against black persons that were not prosecuted despite evidence as to the identity of the perpetrators.

The Court further stated:

See, e.g., H.R. Joint Comm. Rep. No. 30, 39th Cong., 1st Sess., pt. II, p. 25 (1866) (testimony of George Tucker, Virginia attorney) ("They have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea"); *id.* at 209 (testimony of Dexter H. Clapp) ("Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons"); *id.*, at 213 (testimony of J.A. Campbell) (although identities of men suspected of killing two blacks known, no arrest or trial had occurred); *id.*, pt. III, p. 141 (testimony of Brev. Maj. Gen. Wager Swayne) ("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me"); *id.*, pt. IV, p. 75 (testimony of Maj. Gen. George A. Custer) ("[I]t is of weekly, if not of daily, occurrence that freedmen are murdered. . . . [S]ometimes it is not known who the perpetrators are; but when that is known no action is taken against them. I believe a white man has never been hung for murder in Texas, although it is the law").

McCleskey v. Kemp, 481 U.S. 279, 346-47 & n.2 (1987) (Blackmun, J., dissenting); see also Rosenbaum & Tokaji, *supra* note 42, at 1963 ("[C]oncerns regarding the equal implementation of state criminal laws were a dominant concern at the time of the Civil War Amendments. The Framers of the Fourteenth Amendment were especially wary of

These Amendments move away from the racial caste system previously in place; offer bolstered protections for individual rights against state infringement; and attempt to remedy the political process defects that permitted the perpetual enslavement of one group of people. Thus, a “one-two synthesis”⁶⁹ of the Eighth Amendment and the later Reconstruction Amendments has the primary effect of expanding the original counter-majoritarian and antidiscrimination principles against irregular imposition of harsh punishments to encompass racial minorities.⁷⁰

II. THE CENTRALITY OF DISPARATE IMPACT

One might read all I have written above and be persuaded that the Eighth Amendment prohibits cruel punishments discriminatorily imposed upon minorities—but still remain unconvinced that this prohibition reaches disparate impact in the absence of discriminatory intent. In this section, I explain why a modern interpretation of the Eighth Amendment that remains faithful to original principles must read “unusual punishments” as those that bear a disparate impact on minorities, irrespective of invidious purpose.

Our interpretive project is not complete once we identify original principles. We must next engage in the process of constitutional construction by filling in the framework these principles outline.⁷¹ The phrase “cruel and unusual punishments” is paradigmatic of language that establishes a

southern states denying newly freed blacks through unequal administration of the criminal laws.”). *But see* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1628-29 (2012).

⁶⁹ See ACKERMAN, *supra* note 60, at 94-95.

⁷⁰ There is, however, a more specific reference to punishment in the Reconstruction Amendments that bears noting. The Thirteenth Amendment explicitly recognizes the connections between slavery—racial caste—and punishment. The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States” U.S. CONST. amend. XIII, § 1 (emphasis added). Under one reading, the Thirteenth Amendment sanctions the perpetuation of racial caste system under the guise of criminal punishment. This reading, however, is improbable in light of the overall project of the Reconstruction Amendments to eradicate a racial caste system. More plausibly, the Thirteenth Amendment is an effort to *de-link* the illegitimate racial caste system from the legitimate system of punishment, and recognize that the *work conditions* involved in slavery could only be a punishment for crime: they could not be linked to racial subjugation. Under this reading, a criminal justice system that serves to perpetuate racial subjugation would be contrary to the spirit of the Thirteenth Amendment.

⁷¹ BALKIN, *supra* note 25, at 21-23.

constitutional principle, rather than a rule.⁷² It invites the infusion of interpretive content—the evolution of constitutional meaning over time. As John Hart Ely explained, “[T]he decision to use open-ended language can hardly have been inadvertent.”⁷³ The very ambiguity of the word “unusual” informs its interpretive scope. I argue that, both for historical reasons external to the Eighth Amendment and for theoretical reasons internal to it, the broad text and original principles should be read today to extend to disparate impact.

The original principles discussed above developed in an age when government was relatively limited in size and scope and when discrimination—whether against political, religious, or racial minorities—was overt. To remain faithful to the original antidiscrimination and counter-majoritarian principles of the Eighth Amendment and redeem them for the modern age, we must account for how the historical circumstances in which we now apply these principles have changed.

Below I will consider two such historical trends. First, we now live in a post-*Brown* world—an ostensibly race-neutral society. If anything, we hold more tightly to the Reconstruction ideal that eschews race as a legitimate marker of difference. Second, *de facto* racial inequities have persisted nonetheless. And, even as overt racism has been delegitimized, an entirely new field for racial inequality has emerged: mass incarceration and the prison-industrial complex. To fully realize the original counter-majoritarian and antidiscrimination principles of the Eighth Amendment in this modern context, the “unusualness” inquiry must center on disparate racial impact.

This conclusion is bolstered by a theoretical analysis of the counter-majoritarian principle itself. To meaningfully protect against cruel punishment, the Eighth Amendment must reach disparate impact. The dangers of majoritarian overreaching in the criminal context are not limited to those instances when legislators act with a discriminatory purpose. Rather, the structural risks of majoritarian rule arise because the

⁷² *Id.* at 7 (“[W]e should pay careful attention to the reasons why constitutional designers choose particular kinds of language. Adopters use fixed rules because they want to limit discretion; they use standards or principles because they want to channel politics through certain key concepts but delegate the details to future generations. When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time. When adopters use language that delegates constitutional construction to future generations, fidelity to the Constitution requires future generations to engage in constitutional construction. This is the essence of the method of text and principle.”).

⁷³ ELY, *supra* note 34, at 97.

majority will always seek to externalize costs and internalize benefits. The threat of excessive punishment is accentuated when the majority places burdens disproportionately upon a minority—regardless of discriminatory intent.

A. *The Ethos of Equality*

Since the passage of the Reconstruction Amendments, our national commitment to the antidiscrimination principle has deepened. In today's post-*Brown*, post-Civil Rights Revolution America, we have fully incorporated the imperative of race neutrality into our "Higher Law."

Initially, aside from abolishing the legal practice of slavery, the Reconstruction Amendments had little to no practical effect on racial inequality in the country, and race continued to operate as a constitutionally legitimate marker of differential status.

By the early 1880s the country largely had turned its back on the work of the Reconstruction Congress. Chattel slavery had ended, but in many places that was about it . . . [A]s the country turned its back on the original commitments of the Civil War Amendments, the courts found altogether new meanings in the clauses of the Fourteenth Amendment, interpretations largely constructed to protect the interests of property holders and interstate businesses. These interpretations, arguably quite different from the original understanding of the Reconstruction Amendments, were dominant for almost half a century.⁷⁴

Jim Crow segregation persisted in the South for nearly 100 years after the end of the Civil War. It was only in the twentieth century that "renewed concern about civil rights led to a rebirth of attention to the original commitments of the Civil War Amendments."⁷⁵ After World War II's victory against racism abroad, the Warren Court and Civil Rights Movement ushered in an era of internal struggle over the role of racism in American public life. Through a combination of grassroots popular mobilization, judicial activism, and legislative initiative, America took significant strides toward combatting systemic, legalized racism and redeeming the discarded principles of the Reconstruction Amendments.⁷⁶

⁷⁴ Friedman, *supra* note 59, at 1205; *see also* Foner, *supra* note 62, at 2007.

⁷⁵ Friedman, *supra* note 59, at 1206.

⁷⁶ *See, e.g., id.* at 1235-36 ("As the history of the Reconstruction Amendments demonstrates, the only real alternative is to adopt a synthetic understanding of the Constitution. One must holistically take account of the entire Constitution. And one must labor to read that document as it has changed over time. Reading in this way

The social and legal developments of the Civil Rights Revolution fundamentally altered the way that Americans view race, from both constitutional and moral perspectives. To be sure, racism undeniably retains a strong hold on American life. Nevertheless, there has been a dramatic shift in cultural and doctrinal recognition that race should not be a determining factor in one's chances in life. In Ackermanian terms, the Civil Rights Revolution was a "constitutional moment"—a cultural and political shift that took on the dimension of "higher lawmaking" by "We the People."⁷⁷ Once sticky and divisive, the constitutional claim that race is an illegitimate marker for differential treatment now forms part of the bedrock of our understanding of the American system of law.

The constitutional assumptions of the New Deal and the civil rights revolution and the success of subsequent social movements for equality have become so thoroughly embedded in our contemporary understandings of the Constitution that they influence what we consider easy cases of constitutional equality and inequality Constitutional politics has made constructions like *Brown* and *Loving* not only easy cases, but foundational to our understanding of the equal protection clause. Yet they were not always so central; at one point they would have been highly controversial or even clearly wrong constructions⁷⁸

The legitimacy of overt racial discrimination is no longer a mainstream debate in our country. In the post-Civil Rights Revolution era, we have solidified our constitutional

requires taking account of both those principles adopted, and those rejected, in the words of Justice Harlan, 'what history teaches are the traditions from which it developed as well as the traditions from which it broke.' To take one vivid example, the present commitment to racial equality was not born out of the events of Reconstruction. To the contrary, it had its roots in revulsion to what the rejection of Reconstruction meant, particularly in the Jim Crow South. It is impossible, therefore, to interpret the commitment to equality by looking primarily to 1868, when the relevant events are far closer at hand.") (footnotes omitted).

⁷⁷ See ACKERMAN, *supra* note 60, at 137 ("*Brown* became a symbol energizing a multiracial coalition of blacks and whites into an escalating political struggle against institutionalized racism. As the 1950's moved on, this mobilized appeal for racial justice struck deepening chords amongst broadening sectors of the citizenry—enabling the Presidency and Congress of the mid-1960's finally to transform the embattled judicial pronouncements of the mid-1950's into the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965. As a consequence, *Brown* came to possess the kind of numinous legal authority that is, I believe, uniquely associated with legal documents that express the considered judgments of We the People."); see also Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 63 NW. U. L. REV. 63, 97-110 (2009); Bruce Ackerman, *Section Five and the On-Going Canonization of the Civil Rights Revolution*, BALKINIZATION (June 22, 2009), <http://balkin.blogspot.com/2009/06/section-five-and-on-going-canonization.html>.

⁷⁸ BALKIN, *supra* note 25, at 231; see also ACKERMAN, *supra* note 60, at 137; Ackerman & Nou, *supra* note 77.

commitment to the original principle that race is—or at least *should* be—irrelevant.

B. *The Entrenchment of Inequality*

Notwithstanding the growing intolerance for overt racism, post-Reconstruction American history demonstrates the practical difficulty of eradicating the entrenched effects of slavery and the ease with which “legitimate” criminal punishment emerged to fill the space previously occupied by illegitimate systems of legalized racial subjugation such as slavery, the Black Codes, and Jim Crow segregation.

After Reconstruction and the dismantling of slavery, white southerners began the process of “Redemption”—reinstating in practice the racial caste system that had been prohibited by law. One notable example was the rise of “convict leasing,” in which African Americans were arrested for arbitrary reasons, sentenced to fines they could not afford, and subjected to forced labor—virtual slavery—to pay off their debt.⁷⁹ By 1900, in all areas of public life, Jim Crow—a pervasive legalized system of disenfranchisement, segregation, and discrimination—had firmly taken hold in the South.⁸⁰

After a long and bitter struggle, the Civil Rights Movement of the 1950s and 1960s, culminating in the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, brought an official end to Jim Crow.⁸¹ Yet once again, the end of legal racial inequality ushered in new and less overt forms of subjugation. Perhaps most notably, the rise of the drug war and the associated explosion of the prison population have marked a new era in America’s racial history: an era in which formal race neutrality coexists with a markedly unequal and unprecedentedly punitive system of mass incarceration.⁸²

Overall, the disparate impact of the criminal justice system today cannot be easily traced to the documented discriminatory intent of individual government officials. By

⁷⁹ See generally ALEXANDER, *supra* note 2, at 31; DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

⁸⁰ See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (commemorative ed. 2002) (detailing the history of Jim Crow discrimination); see also, e.g., ALEXANDER, *supra* note 2, at 31.

⁸¹ ALEXANDER, *supra* note 2, at 37-38.

⁸² *Id.* at 49-57; see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was A “War on Blacks”*, 6 J. GENDER RACE & JUST. 381 (2002).

and large, the inequities are linked, instead, to a tough-on-crime political climate in which the costs of punitive measures are largely externalized to minority communities; and to the vast discretion placed in the hands of multiple layers of law enforcement officials and judicial decision-makers, many of whom are never required to justify their decisions.⁸³ Although overt racism has been forced underground, the inequality of the system remains.

Numerous scholars have pointed to the parallels between Jim Crow and our present system of criminal justice, with its far-reaching and disproportionate impact on young African American men and its resulting disenfranchisement and disempowerment of large segments of the black population.⁸⁴ State-sanctioned racism has been outlawed by the Constitution. But our punitive modern criminal justice system remains strikingly unequal.⁸⁵ At the extreme, on penal plantations in many southern states, criminal punishment manifests as a latter-day reenactment of slavery.⁸⁶

We must not limit the contours of the Eighth Amendment according to the expected applications of framers

⁸³ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 332-33 (1987) (Brennan, J., dissenting) (“[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.’ . . . [W]e . . . cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.’ The ongoing influence of history is acknowledged, as the majority observes, by our “‘unceasing efforts” to eradicate racial prejudice from our criminal justice system.’ These efforts, however, signify not the elimination of the problem but its persistence. Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings: in the exercise of peremptory challenges, in the selection of the grand jury, in the selection of the petit jury, in the exercise of prosecutorial discretion, in the conduct of argument, and in the conscious or unconscious bias of jurors” (citations omitted) (some internal quotation marks omitted)); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 25-32 (1998).

⁸⁴ E.g., ALEXANDER, *supra* note 2; Graham Boyd, *Collateral Damage in the War on Drugs*, 47 *VILL. L. REV.* 839, 840 (2002); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 *ALB. L. REV.* 703, 723 (2000). The analogy has its critics, as well. E.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 23 (2012).

⁸⁵ See *supra* Introduction.

⁸⁶ Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 *SEATTLE U. L. REV.* 869, 869-70 (2012) (“In states such as Arkansas, Florida, Louisiana, and Texas, inmates are forced to recreate a practice outlawed in 1865—slavery. For example, Louisiana State Penitentiary in Tunica, Louisiana was originally a slave plantation in the 1840s. It was—and is still—familiarily named ‘Angola,’ reportedly because the best slaves came from that African country. As recently as 1979, inmates were referred to as ‘hands’ in the fields, reminiscent of how masters referred to their slaves before the Civil War.” (footnotes omitted)).

who lived in a world entirely foreign to our own. The original constitutional counter-majoritarian and anti-discrimination principles arose in historical periods marked by overt discrimination against minorities. The Stuart monarchy's discriminatory punishment of dissidents was plain to see, as was the subjugation of African Americans through slavery in antebellum America.

Times have changed. Our world is one that the founders never envisioned—one that is formally race neutral, but in which race disparity abounds; one in which our incarcerated population is roughly equal to the entire American population at the time of the Declaration of Independence.⁸⁷

The systemic racial inequality in today's sprawling criminal justice system is the successor to the discriminatory punishment of dissidents and the legalized differential punishment of minorities. To redeem the original constitutional principles—to make meaningful the counter-majoritarian imperative and the disavowal of racial caste in our society—we must account for the historical differences and consider how those principles apply in the modern context. Today, an interpretation of “unusual punishments” is woefully insufficient if limited to those that are the proven product of intentional discrimination by individual state actors. We must recognize, instead, that “unusual punishments” are those that bear a disparate impact on minorities.

C. *The Externalization of Punishment*

While our modern context demands an interpretation of the cruel and unusual punishments clause that reaches disparate impact, this interpretation also coheres with the text and original principles of the Eighth Amendment. As a matter of counter-majoritarian theory, it is appropriate—indeed, necessary—to consider the disparate impact of punishments upon minorities rather than discriminatory intent.

First, the primary concern of the Eighth Amendment is the *effect* of government action on a particular individual—the actual imposition of the punishment, rather than the motivations of the state actor. We all agree that the rack is an unconstitutional punishment, and this is so regardless of whether

⁸⁷ The Census Bureau estimates that 2.5 million people lived America in July 1776. U.S. Census Bureau, *Profile America: Facts for Features*, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff12.html. By comparison, in 2011, the total number of people in American jails and prisons was more than 2.2 million. GLAZE & ERIKA PARKS, *supra* note 5, at 4, 8.

the intent is to harm the flesh or save the soul. While other constitutional protections regarding fairness in the criminal justice system are limited to procedural guarantees,⁸⁸ the Eighth Amendment is also concerned with substantive outcomes—with impact.

Second, under a counter-majoritarian theory of rights, the *reason* for a punishment's differential impact on minorities is of limited pertinence. Irrespective of discriminatory purpose, a legislator may predictably endorse a punishment that he would consider excessive if applied to people like him because he believes it will apply only to "the other." In an unchecked majoritarian system, those in power may *purposefully*—out of hatred, spite, or determination to subjugate—pass legislation that externalizes costs upon a minority population. However, they may also do so *unconsciously*—because they fail to understand or internalize the costs imposed and lack any incentive to act other than in their own interest. In other words, from a counter-majoritarian perspective, the concern of the Eighth Amendment is not simply that the majority will intentionally target the minority with cruel punishment, but that the majority will tolerate cruelty when applied primarily against minorities. To the politically disadvantaged group of people, the motivation matters little.

The Eighth Amendment contains "a realization that in the context of imposing penalties . . . there is tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.'"⁸⁹ If the criminal justice system is structured—whether intentionally or unintentionally—so as to concentrate punishment upon the "other," the majoritarian political process will fail to protect against excessiveness in the setting or enforcement of those punishments. In fact, the majoritarian political process *exacerbates* the risk that the punishments set will be excessive because the majority internalizes the benefits of lengthy incarceration while externalizing the costs.⁹⁰

⁸⁸ U.S. CONST. amends. IV, V, VI.

⁸⁹ ELY, *supra* note 34, at 97.

⁹⁰ These benefits to society include even marginal increases in deterrence, incapacitation, and retribution. They also include economic and political benefits that stem from the so-called prison-industrial complex. See, e.g., André Douglas Pond Cummings, "All Eyes on Me": *America's War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 419-20 (2012). There is also a strong political incentive for legislators to appear tough on crime, irrespective of concrete benefits to the community. On the other hand, there are some societal costs to lengthy incarceration, including the expense in a time of fiscal austerity and budget shortfalls.

A simplistic majoritarian democratic theorist would claim that the political process should be sufficient to protect the rights of criminal defendants because criminal sanctions are universally applicable, their severity is set according to community values, and only punishments permitted by law are actually imposed.⁹¹ History, however, reveals the flaw in this logic. As explained by John Hart Ely:

A severe (or “cruel”) punishment to which any of us who transgresses is realistically subject is one thing: assuming an impartial enforcement regime, the political processes can be counted on to block beheading as the penalty for tax fraud. *If, however, there are buffers, if the system is constructed so that “people like us” run no realistic risk of such punishment, some nonpolitical check on excessive severity is needed.*⁹²

Ely’s second alternative is not the exception, but the rule. It is far too easy—and entirely foreseeable—for the majority to structure its criminal justice system in such a way that people like those in power *do not* run a realistic likelihood of punishment. The disparate treatment in today’s criminal justice system confirms the risks of an unchecked majoritarian punishment regime. Our nation imposes harsh drug sentences⁹³—but few of the thousands of white teenagers and college students who use and distribute drugs are *realistically* at risk of doing time.⁹⁴ The disparities in the operation of the criminal justice system in practice are symptomatic of the dangers inherent in a political process solution against cruel punishment. Irregularity in the imposition of punishments, even when laws are facially neutral, must give rise to constitutional concern.

Thus I argue that the prohibition on “cruel and unusual punishments” must reach disparate impact. In the modern American context, this view would have far-reaching

⁹¹ Assuming equal enforcement, excessive punishment of minorities can be avoided because the same majoritarian political branches that we elect to represent us will be subject to those same laws—as will we, their constituents. Why would we bind ourselves to the most of cruel and disproportionate punishments of our own design?

⁹² ELY, *supra* note 34, at 173 (emphasis added).

⁹³ For example, in Louisiana, the second marijuana offense is punishable up to five years in prison; the third is punishable up to 20 years in prison. LA. REV. STAT. ANN. §§ 40:966(E)(2)(a), (3) (2012). The fourth marijuana offense triggers a sentence of 20 year to life. LA. REV. STAT. ANN. § 15:529.1(A)(4)(a) (2012).

⁹⁴ See ALEXANDER, *supra* note 2, at 7; MAUER & KING, *supra* note 7, at 2. Note that arrests even for marijuana possession (not distribution) are vastly disparate by race. “Nationally, Blacks are 3.73 times more likely than whites to be arrested for marijuana possession,” despite “roughly equal” rates of marijuana use. AMERICAN CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 47, 66 (2013), available at <https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rel1.pdf>.

significance. Today's punishment regime is historically unprecedented, both within our nation's history and in the world today.⁹⁵ The regime is characterized by a high rate of incarceration and entrenched racial disparities, despite a strong ethos of formal race neutrality. If the Eighth Amendment is to play any meaningful role in curbing the excesses of this system, a focus on disparate impact is critical. Yet that focus has been conspicuously absent from constitutional jurisprudence to date; we have, thus far, failed to redeem the Eighth Amendment for modern times. And, as a result, the Eighth Amendment's relevance has diminished. While retaining importance in the death penalty and prison conditions contexts, the Eighth Amendment has been rendered largely obsolete in the context of prison sentences—which, in our age of mass incarceration, is precisely the area where we most urgently need a counter-majoritarian check.

III. CONSTITUTIONAL CONSTRUCTION: CRUEL AND INVISIBLE PUNISHMENT

In light of these principles and this history, an Eighth Amendment doctrine must have, at a minimum, three features if it is to redeem the Amendment's original meaning in modern times. First, it must provide a robust *counter-majoritarian protection* against majoritarian overreaching. Second, in giving shape to that counter-majoritarian principle, it must focus on *disparate impact upon minorities*, rather than discriminatory intent. Third, it must provide some meaningful bulwark against cruelty—which, in the age of mass incarceration, must include draconian prison sentences.

The Supreme Court's approach to "cruel and unusual punishments" has failed resoundingly to give substance to these features. The judiciary has paid insufficient attention to the counter-majoritarian and anti-discrimination principles behind the Eighth Amendment and has turned a blind eye to the disproportionate impact of mass incarceration upon poor, minority (particularly African American) communities.

In the 1980s and 1990s, as the wars on drugs and crime were building to a crescendo, a crisis was brewing over the legitimacy of the criminal justice system. During this time period, the Court heard a number of challenges to both the

⁹⁵ The United States incarcerates the most people, at the highest rate, of any country in the world. *See, e.g.*, Liptak, *supra* note 9.

endemic racial inequality in the criminal justice system and to the draconian sentencing practices introduced by the new tough-on-crime legislation. The Court refused to interpret either the Eighth or the Fourteenth Amendment to reach criminal legislation and sentencing practices that impose long prison terms—in many cases for victimless or nonviolent offenses, especially drug offenses—bearing a disparate impact on minorities.

A. *Judicial Blindness to Draconian Prison Sentences*

Some tried to challenge the modern phenomenon of mass incarceration through claims of excessive punishment, asserting that the imposition of lengthy prison sentences for relatively minor crimes was grossly disproportionate, in violation of the Eighth Amendment. With only one exception, however, the Supreme Court refused to use the prohibition on “cruel and unusual punishments” as a license to strike down tough-on-crime legislation, including three-strikes laws and harsh prison sentences for drug offenses.⁹⁶

Six cases over the past four decades have established the contours of modern Eighth Amendment proportionality review in the age of mass incarceration. In the early 1980s, the Supreme Court saw the first challenges to the constitutionality of the punitive laws that arose out of the “war on drugs” and the “war on crime.” Faced with the opportunity to curb the rising tide of punishment, however, the Court instead severely curtailed judicial scrutiny over harsh prison terms.

While the Supreme Court has taken a more active role in Eighth Amendment regulation of the imposition of the death penalty⁹⁷ and, in recent years, life without parole for juveniles,⁹⁸

⁹⁶ See, e.g., *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980).

⁹⁷ “The Court has . . . invoked proportionality to declare that capital punishment—though not unconstitutional *per se*—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders.” *Graham v. Florida*, 560 U.S. 48, 100-01 (2010) (citing cases).

Even in the death penalty context, however, the Court pays heavy deference to legislative determinations. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (“McCleskey’s arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are ‘constituted to respond to the will and consequently the moral values of the people.’ Legislatures also are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach

the Court has explicitly reserved decisions about length of incarceration to majoritarian legislatures in all but the most extreme circumstances. Over some objection, most vigorously by Justice Scalia,⁹⁹ the Court continues to pay lip service to the notion that the Eighth Amendment provides a narrow substantive guarantee against punishments that are grossly disproportionate to the offense committed, irrespective of majority consensus.¹⁰⁰ With the rarest exceptions, however, the Court has veered sharply away from the morass of legislative judgments about appropriate terms of incarceration and has refused to conduct any meaningful independent review of the proportionality of prison sentences to the crimes they punish.

First, in *Rummel v. Estelle*, the Court upheld a life sentence under Texas's recidivist statute where the triggering felony was "obtaining \$120.75 by false pretenses," and the defendant's previous convictions were for "fraudulent use of a

that is not available to the courts[.]' Capital punishment is now the law in more than two-thirds of our States." (citations omitted)).

⁹⁸ See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham*, 560 U.S. 48.

⁹⁹ *Ewing*, 538 U.S. at 31 (Scalia, J., concurring) ("Out of respect for the principle of *stare decisis*, I might nonetheless accept . . . that the Eighth Amendment contains a narrow proportionality principle-if I felt I could intelligently apply it. This case demonstrates why I cannot."); *Harmelin*, 501 U.S. at 965 (opinion of Scalia, J.) ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."); see also *Solem v. Helm*, 463 U.S. 277, 310 (1983) (Burger, C.J., dissenting) ("In short, *Rummel* held that the length of a sentence of imprisonment is a matter of legislative discretion; this is so particularly for recidivist statutes. I simply cannot understand how the Court can square *Rummel* with its holding that 'a criminal sentence must be proportionate to the crime for which the defendant has been convicted.'").

¹⁰⁰ *Lockyer*, 538 U.S. at 72 ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."); see also *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle Since *Weems*, we have applied the principle in different Eighth Amendment contexts. Its most extensive application has been in death penalty cases The Eighth Amendment proportionality principle also applies to noncapital sentences.").

Even Chief Justice Burger suggested that an extreme disproportion such as life imprisonment for failure to pay a parking meter would violate the Eighth Amendment, and that the Court might properly declare it so in the exercise of its own judgment, although he maintained that "[i]n all other cases, we should defer to the legislature's line-drawing." *Solem*, 463 U.S. at 311 n.3 (1983) (Burger, C.J., dissenting) ("Both *Rummel* and *Hutto* . . . leave open the possibility that in extraordinary cases—such as a life sentence for overtime parking—it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime. I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, we should defer to the legislature's line-drawing. However, the Court does not contend that this is such an extraordinary case that reasonable men could not differ about the appropriateness of this punishment.").

credit card to obtain \$80 worth of goods or services” and “passing a forged check in the amount of \$28.36.”¹⁰¹ While acknowledging that “[t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime,”¹⁰² the Court rejected the general availability of judicial review over the proportionality of felony prison sentences: “[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.”¹⁰³ Two years later, in *Hutto v. Davis*, the Court denied habeas corpus relief to a defendant serving a 40-year prison sentence for possession with intent to distribute and distribution of less than nine ounces of marijuana.¹⁰⁴ Refusing to engage in any factual inquiry into the proportionality of the punishment, the Court clarified that “*Rummel* stands for the proposition that federal courts should be ‘reluctan[t] to review legislatively mandated terms of imprisonment,’ and that ‘successful challenges to the proportionality of particular sentences’ should be ‘exceedingly rare.’”¹⁰⁵

Only a year later, however, without overturning *Rummel* or *Hutto*, the Court made an about-face and offered a fleeting suggestion that it would engage in a reinvigorated constitutional inquiry into the excessiveness of prison sentences. In *Solem v. Helm*, the Court reaffirmed an Eighth Amendment proportionality principle that was deeply rooted in the common law, firmly established at the time of the founding and acknowledged in Supreme Court precedent for nearly one hundred years,¹⁰⁶ and explicitly rejected the “assertion that the general principle of proportionality does not apply to felony prison sentences.”¹⁰⁷ Applying “objective criteria,”¹⁰⁸ the Court reversed Helm’s life sentence without the possibility of parole for “uttering a ‘no account’ check for \$100”—the seventh nonviolent felony in his record.¹⁰⁹ While retaining a tether to

¹⁰¹ *Rummel*, 445 U.S. at 265-66.

¹⁰² *Id.* at 271.

¹⁰³ *Id.* at 274.

¹⁰⁴ *Hutto v. Davis*, 454 U.S. 370, 371 (1982).

¹⁰⁵ *Id.* at 374 (citations omitted).

¹⁰⁶ *Solem v. Helm*, 463 U.S. 277, 284-88 (1983).

¹⁰⁷ *Id.* at 288.

¹⁰⁸ These criteria included: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 292.

¹⁰⁹ *Id.* at 279, 281.

majoritarian norms through its consideration of “objective criteria,” *Solem* presaged a far more robust role for the courts in counter-balancing growing punitiveness in the political sphere and a judicial grappling, in constitutional terms, with the apparent real-world justice problem of mass incarceration.

This promise proved short-lived. In a series of three decisions beginning in the early 1990s, the Court, without overruling *Solem*, effectively neutralized it by emphasizing the narrowness of the proportionality principle and by paying heavy deference to legislatures. A splintered Court in *Harmelin v. Michigan* upheld a life sentence without parole for possession of more than 650 grams of cocaine.¹¹⁰ Seven of the justices affirmed the continued relevance of at least a “narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”¹¹¹ Yet the tenor of the discussion had changed. Justice Kennedy, in concurrence, articulated four principles pertaining to proportionality review that, taken as a whole, emphasized deference to legislative judgments.¹¹² The dissenters strenuously critiqued the erosion of the three-part test established in *Solem* and the narrowing of the proportionality inquiry, which, they asserted, brought it to the point of evisceration.¹¹³

*Ewing v. California*¹¹⁴ and *Lockyer v. Andrade*,¹¹⁵ handed down on the same day in 2003, cemented the retraction from *Solem*. In *Ewing*, the Court, again without a majority opinion, upheld a sentence of 25 years to life under California’s three-strikes law for a recidivist convicted of stealing three golf clubs, each worth approximately \$400.¹¹⁶ The plurality considered the factors articulated by Justice Kennedy in *Rummel* and, emphasizing the deference owed to the legislature, essentially

¹¹⁰ *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991).

¹¹¹ *Id.* at 996 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 1009-27 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting).

¹¹² *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (identifying four objective factors—“the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors”—all of which “inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”).

¹¹³ *Id.* at 1018 (White, J., dissenting) (“While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell. The analysis Justice Kennedy proffers is contradicted by the language of *Solem* itself and by our other cases interpreting the Eighth Amendment.”).

¹¹⁴ 538 U.S. 11 (2003).

¹¹⁵ 538 U.S. 63 (2003).

¹¹⁶ *Ewing*, 538 U.S. at 18, 30-31.

articulated a rational or reasonable basis test for determining whether the severity of the sentence is constitutional. Justice O'Connor wrote, "We do not sit as a 'superlegislature' to second-guess [the state's] policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'"¹¹⁷

In *Lockyer*, the Court also denied relief, this time under the deferential AEDPA¹¹⁸ standard, to a recidivist serving "two consecutive sentences of 25 years to life" under California's three-strikes law for "stealing approximately \$150 in videotapes."¹¹⁹ In so holding, the Court explained that "[t]he only relevant clearly established law . . . is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."¹²⁰

These six cases constitute a—self-admittedly¹²¹—muddled body of precedent on the scope of defendants' rights against grossly disproportionate punishment. *Solem*, though still good law, is an outlier. The overall thrust of the doctrine emphasizes the narrowness of the proportionality principle, the rarity of its applicability, and the near-absolute deference owed to legislative determinations about the appropriateness of even the harshest sentences for relatively minor misconduct.¹²² The

¹¹⁷ *Id.* at 28 (citations omitted).

¹¹⁸ Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2013).

¹¹⁹ *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003).

¹²⁰ *Id.* at 73 (citations omitted).

¹²¹ *See id.* at 72.

¹²² A more robust proportionality analysis may be suggested by the Court's recent consideration of the constitutionality of sentences of life without parole for juveniles. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding mandatory sentence of life without parole unconstitutional for juveniles convicted of homicide); *Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole unconstitutional sentence for juveniles in non-homicide offenses). However, in these cases the Court consciously located itself at the intersection of the categorical Eighth Amendment death penalty cases and the case-specific "gross disproportionality" cases. *See Miller*, 132 S. Ct. at 2463-64 (explaining the "two strands of precedent reflecting our concern with proportionate punishment" and concluding that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment"); *Graham*, 560 U.S. 48 at 2021-23 ("Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*."). In *Miller*, the Court went further and explicitly aligned juvenile life without parole cases with death penalty jurisprudence, cabining *Miller's* reach and limiting the tension it created with *Harmelin*. *Miller*, 132 S. Ct. at 2470 ("*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children So if (as *Harmelin* recognized) 'death is

Court has explicitly reserved determinations of the proportionality of prison sentences to the legislatures, and in large measure has extracted itself (and the Eighth Amendment) from that balancing inquiry. In practice, it is no longer a constitutional question whether a sentence is disproportionate to the offense; it is a majoritarian legislative judgment. As a result of this judicial reluctance to review majoritarian determinations of appropriate punishment, the modern “punishment wave”¹²³ has swelled in a judicial void.

B. Judicial Blindness to the Counter-Majoritarian Principle

The Supreme Court’s laissez-faire approach to the growing punitiveness in the criminal justice system seems to be due in part to a pragmatic anxiety over how to make principled determinations of disproportionality.¹²⁴ It is also, however, part and parcel of a larger, traditionally majoritarian understanding of the cruel and unusual punishments clause—one that abdicates the robust counter-majoritarian role that guarantee should serve.

The prevailing interpretation can be traced to Chief Justice Warren, who first looked to contemporary societal mores to identify “cruel and unusual punishments”—an overtly

different,’ children are different too Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*.”). The Court’s apparently deliberate choice to locate *Miller* and *Graham* within or near to its capital punishment jurisprudence evinces its intent to limit these holdings to the juvenile context and not to change the substance of “gross disproportionality” doctrine. If this prediction does not bear out, these cases will certainly have an important impact in changing the landscape of proportionality review of prison sentences.

¹²³ Haney, *supra* note 1.

¹²⁴ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 986 (1991) (Scalia, J.) (“The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.”); *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980) (“But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* that the Court’s Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices [T]o recognize that the State of Texas could have imprisoned Rummel for life if he had stolen \$5,000, \$50,000, or \$500,000, rather than the \$120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed ‘subjective,’ and therefore properly within the province of legislatures, not courts.”); see also *Solem v. Helm*, 463 U.S. 277, 314-15 (1983) (Burger, C.J., dissenting).

majoritarian viewpoint.¹²⁵ The notion of “evolving standards of decency” originated in *Trop v. Dulles*, a case in which the Court struck down as “cruel and unusual” the punishment of denationalization for military desertion.¹²⁶ *Trop* did not explicitly locate the notion of “evolving standards of decency” in the word “unusual,”¹²⁷ but rather read the words “cruel and unusual” together to conclude that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹²⁸ The primary effect of this standard has been to link the Eighth Amendment’s protection to practices that are out of the ordinary, with majority norms providing the reference point. Even while recognizing that the Eighth Amendment contains a transcendent connection to the dignity of man, which outlasts the vagaries and fluctuations of contemporary societal norms,¹²⁹ the Court has increasingly insisted upon heavy deference to legislative determinations about the appropriateness of punishments, in part because of its majoritarian focus on “evolving standards of decency.”¹³⁰

For example, the Court has prohibited the imposition of the death penalty against certain classes of people where such punishment was deemed inconsistent with “evolving standards of decency.”¹³¹ To identify these evolving standards, the Court

¹²⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (“[W]e have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual” (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

¹²⁶ *Trop*, 356 U.S. at 101.

¹²⁷ *Id.* at 100-01 n.32 (“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word ‘unusual.’ If the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’ however, the meaning should be the ordinary one, signifying something different from that which is generally done.”) (citations omitted).

¹²⁸ *Id.* at 100-01.

¹²⁹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (“But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’ This means, at least, that the punishment not be ‘excessive.’”) (citations omitted).

¹³⁰ *Id.* at 174-76.

¹³¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (unconstitutional to execute juveniles under 18); *Atkins v. Virginia*, 536 U.S. 304 (2002) (unconstitutional to execute mentally retarded offenders).

has looked primarily to state legislative trends,¹³² as well as jury verdicts¹³³ and, in some cases, international legal practices.¹³⁴ In the death penalty and juvenile context, the Court has also brought its own judgment to bear in determining the constitutionality of the punishment,¹³⁵ but has, as a general matter, been loath to assert its independent judgment without the backing of broader societal trends.¹³⁶

¹³² See, e.g., *Roper*, 543 U.S. at 564 (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”); *Atkins*, 536 U.S. at 312 (“Proportionality review under those evolving standards should be informed by objective factors to the maximum possible extent . . . We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” (internal citations omitted) (internal quotation marks omitted)).

¹³³ *Gregg*, 428 U.S. at 181 (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved . . . The Court has said that ‘one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.’” (citations omitted)).

¹³⁴ See, e.g., *Roper*, 543 U.S. at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” (citation omitted)).

¹³⁵ The Court acknowledges that “the objective evidence, though of great importance, did not ‘wholly determine’ the controversy, ‘for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’” *Atkins*, 536 U.S. at 312 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)). In this way, review of disproportionality in the death penalty context has retained some limited measure of independent judicial review aside from majoritarian preferences.

¹³⁶ There is some recent suggestion that the Court may be increasingly willing to conduct an independent review, even in the absence of compelling evidence of societal consensus. Unlike in *Roper*, *Atkins*, and *Kennedy v. Louisiana*, 554 U.S. 407 (2008), in which the Court focused on “evolving standards of decency” to identify sentencing practices that the majority or a growing number of states had deemed unacceptable, the Court in *Miller* struck down mandatory juvenile life without parole for homicide offenses notwithstanding evidence that there was neither nationwide consensus against nor a trend away from the practice. The Court justified its conclusion as a simple extension of existing precedent:

[O]ur decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments.

Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012). The Court, moreover, noted that several previous Eighth Amendment cases found similarly tentative evidence of national consensus to be sufficient. *Id.* In his dissent, Justice Alito roundly criticized the majority and asserted that “our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards.” *Id.* at 2490 (Alito, J., dissenting).

Thus when the Court banned the execution of mentally retarded offenders in *Atkins*¹³⁷ and of juveniles in *Roper*,¹³⁸ after having reached precisely opposite conclusions only a few years earlier in *Penry v. Lynaugh*¹³⁹ and *Stanford v. Kentucky*,¹⁴⁰ the Court did not overrule those previous decisions. Rather, punishments that used to be constitutional given the majoritarian preferences of the day were no longer constitutional given the societal trends away from those punishments.¹⁴¹ Contemporary

Some have argued that, in any event, the Court's consideration of "objective indicia" is a mere charade, and that the Court reaches the conclusion it wishes to reach, irrespective of the national data. See, e.g., *Atkins*, 536 U.S. at 348-49 (Scalia, J., dissenting) ("Beyond the empty talk of a 'national consensus,' the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people. '[T]he Constitution,' the Court says, 'contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' . . . The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all." (citation omitted)); *Roper*, 543 U.S. at 611 (Scalia, J., dissenting) ("The attempt by the Court to turn its remarkable minority consensus into a faux majority . . . is an act of nomological desperation."); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1757 (2008) ("The differing outcomes in *Stanford* and *Roper* demonstrate the inherent instability and manipulability of the evolving standards of decency test . . . Any change in societal attitudes between *Stanford* and *Roper* was incremental at best; in both cases societal attitudes about the acceptability of executing seventeen-year-olds were split nearly down the middle. The only real difference between these cases lies not in any 'evolution' of societal standards, but in an increased assertiveness of judicial will. The *Roper* majority wanted to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result.").

¹³⁷ *Atkins*, 536 U.S. 304.

¹³⁸ *Roper*, 543 U.S. 551.

¹³⁹ 492 U.S. 302, 302-03 (1989).

¹⁴⁰ 492 U.S. 361 (1989).

¹⁴¹ *Roper*, 543 U.S. at 563 ("Three Terms ago the subject [of execution of mentally retarded offenders] was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" (internal citations omitted)); see also Stinneford, *supra* note 136, at 1741 ("In *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court appeared to agree that the imposition of the death penalty on the mentally retarded and on seventeen-year-olds respectively was not cruel and unusual punishment in 1989, when *Penry v. Lynaugh* and *Stanford v. Kentucky* were decided. Nonetheless, the Court held that such punishments are cruel and unusual today. As Justice Scalia stated in his *Roper* dissent, the decisions in *Atkins* and *Roper* are based on the proposition 'that the meaning of our Constitution has changed over the past 15 years—not, mind you, that

majoritarian preferences changed the scope of the individual constitutional right.

Understood thus as a majoritarian standard, the constitutional protections for individuals under the Eighth Amendment are, perversely, most robust when society is predisposed *against* a particular punishment. The Court may intervene only when cruel punishments are moving or have already moved out of favor in society at large. It is precisely at the moment where a legislative solution seems plausible that a judicial remedy becomes available. The Court's theory of the Eighth Amendment thus cedes control over the scope of a substantive individual right to the whims of the majority. Recognizing this perversity, numerous scholars have critiqued the concept of "evolving standards of decency" as insufficient to protect individuals against unconstitutional punishments.¹⁴²

Under a majoritarian Eighth Amendment, individual rights are protected only insofar as society's standards of decency are in fact *evolving* rather than *devolving*—only insofar as we are in fact making "progress" as a "maturing society,"¹⁴³ and not regressing to more vindictive, cruel, and even barbaric days of old. As Justice Scalia is wont to caution us: there is no such assurance of "progress."¹⁴⁴ Nor, as Chief Justice Roberts stated in *Miller*, is there any assurance that individuals agree that *progress* and *decency* correspond with *leniency*.¹⁴⁵ *Trop* is written with Warren Court optimism that

this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*." (citations omitted).

¹⁴² ELY, *supra* note 34, at 69 ("[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."); Stinneford, *supra* note 136, at 1754 n.81 ("A number of scholars have previously pointed out the cruel irony inherent in the fact that the evolving standards of decency test ties the rights of criminal defendants to the very same majority opinion from which the Eighth Amendment is supposed to protect them." (citing scholarship)).

¹⁴³ See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

¹⁴⁴ See Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40-41 (Amy Gutmann ed., 1997); see also Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 129, 145.

¹⁴⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2478 (2012) (Roberts, C.J., dissenting) ("Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.").

society is, indeed, maturing, and that it is heading toward a state of progressive enlightenment rather than crotchety old age. Today's mass incarceration, however, suggests a different trajectory. The nationwide trends toward harsh three-strikes laws and lengthy prison sentences for drug crimes indicate that we have grown *more* punitive, not less. If the scope of Eighth Amendment rights depends on society's tolerance for cruelty, the protection afforded by these rights will always be precarious.

C. *Judicial Blindness to Disparate Impact*

As the Court has refused to intervene in the imposition of harsh prison sentences, it has simultaneously rebuffed challenges to the systemic disparate impact of the criminal justice system against minorities. The Court has required a showing of discriminatory intent to trigger heightened scrutiny in the equal protection context and a showing of individualized discrimination infecting the sentencing decision in the Eighth Amendment context. In so doing, the Court has subverted its own counter-majoritarian role and neutralized the efficacy of these constitutional guarantees against modern systemic inequality in the age of mass incarceration.¹⁴⁶

McCleskey v. Kemp is paradigmatic of the Court's narrow judicial construction in this area.¹⁴⁷ In *McCleskey*, the Court roundly rejected claims that the imposition of the death

¹⁴⁶ In spite of the overall trend in the opposite direction, some Supreme Court precedent supports a counter-majoritarian vision of the Eighth Amendment that would advance racial equality. Even *McCleskey* implicitly recognized that, if it could be shown that death sentences were imposed *because of* racial bias, they would be unconstitutional. See *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987). And, although they have not won the day, more robust counter-majoritarian interpretations of the Eighth Amendment have emerged at times in the past—most notably, in Justice Douglas's *Furman* concurrence, in which he made a compelling case for a strong Eighth Amendment protection against arbitrary imposition of punishments against minorities. *Furman v. Georgia*, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring). Although he did not explicitly state that the relevant determination should be disparate impact rather than discriminatory intent, he suggested a primary concern with the former. For example, he wrote:

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we 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. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. at 253.

¹⁴⁷ 481 U.S. 279 (1987).

penalty was unconstitutional under the Eighth and Fourteenth Amendments, in the face of a comprehensive statistical study of the capital punishment system in Georgia demonstrating that the death penalty was imposed disproportionately based on the race of the victim and, to a lesser extent, the race of the accused.¹⁴⁸ McCleskey's Fourteenth Amendment equal protection claim failed because, notwithstanding this study, he could not establish discriminatory purpose—a requirement of traditional equal protection doctrine.¹⁴⁹ The Court then rejected McCleskey's Eighth Amendment argument that “the Georgia capital punishment system is arbitrary and capricious in *application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia.”¹⁵⁰ Accepting that a certain degree of disparate impact in the imposition of punishment was inevitable,¹⁵¹ the Court refused to recognize racial bias as the cause of such inequity:

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.¹⁵²

Thus, in both the Eighth and Fourteenth Amendment contexts, *McCleskey* required individualized evidence of discriminatory purpose. Statistics showing that the capital punishment system had a disparate racial impact were insufficient to

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 292 (“Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’ A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination ‘had a discriminatory effect’ on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.” (footnote omitted) (citations omitted)). The *McCleskey* Court held that the statistical evidence presented on systemic inequality was insufficient to establish discriminatory purpose in his individual case, *id.* at 297, and that the statistical information presented was also inadequate to prove that the legislature enacted or maintained the capital punishment system as a whole in order to further a racially discriminatory purpose, *id.* at 298.

¹⁵⁰ *Id.* at 308.

¹⁵¹ *Id.* at 312-13 (“At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is ‘a far cry from the major systemic defects identified in *Furman*’ . . .”) (footnotes omitted) (internal quotation marks omitted).

¹⁵² *Id.* at 313.

establish a constitutional violation, as long as other procedural protections over the criminal process remained in place.

Outside *McCleskey*, efforts to obtain a constitutional remedy against the disparate impact of the criminal justice system have met with similar obstacles. At every stage of the criminal process, there is evidence of disparate treatment of minorities—from policing practices¹⁵³ to prosecutorial charging decisions¹⁵⁴ to sentencing determinations.¹⁵⁵ Yet, presented with evidence of unequal *impact*, the courts have time and again denied relief due to lack of individualized evidence of overt discriminatory *purpose*. For instance, courts rarely sustain selective prosecution and selective enforcement claims—again because defendants are unable to prove discriminatory intent.¹⁵⁶ This evidentiary burden is particularly daunting given the inherent discretion afforded prosecutors and law enforcement officials¹⁵⁷ and the additional

¹⁵³ See, e.g., David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 299-303 (2001) (citing numerous studies showing racial disparities in traffic stops); AMERICAN CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 47-65 (2013), <https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rel1.pdf> (showing racially disparate arrest rates for marijuana possession).

¹⁵⁴ E.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7, 27-31 (2013).

¹⁵⁵ E.g., U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 2-3 (2010), http://www.albany.edu/scj/documents/USSC_Multivariate_Regression_Analysis_Report_001.pdf. But see generally Starr & Rehavi, *supra* note 154.

¹⁵⁶ *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.” (footnotes omitted) (citations omitted)).

¹⁵⁷ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (“A selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive The Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’ . . . As a result, [t]he presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’ . . . In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’ . . . Of course, a prosecutor’s discretion is ‘subject to constitutional constraints.’ . . . One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, . . . is that the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’ A defendant may demonstrate that the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . . with a mind so

obstacles the Supreme Court has erected before defendants can even obtain discovery on selective prosecution practices.¹⁵⁸ Likewise, requiring a discriminatory purpose, courts have denied relief in dramatic instances of racial inequality in punishment, including the 100:1 disparity under the Federal Sentencing Guidelines in punishment of crack and powder cocaine—drugs distinguishable primarily because of their differential usage by blacks and whites, respectively.¹⁵⁹ Instead, the Supreme Court has merely held that judges *in their discretion* may take into account the disparate punishment for crack and cocaine in deciding whether to depart from the Federal Sentencing Guidelines, made advisory by *Booker*.¹⁶⁰

Because the Court has required cross-contextual uniformity in its equal protection doctrine, the traditional limiting principles on the equal protection clause apply in full to claims made in the criminal justice context.¹⁶¹ The universal discriminatory purpose requirement recognizes that much of government action, no matter how benign, will disparately affect individuals of different races, and if *all* legislation were subject to strict scrutiny merely on account of disparate impact,

unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (citations omitted)).

¹⁵⁸ Merely to obtain discovery in a case alleging selective prosecution, the defendant must make a "credible" threshold showing that the "[g]overnment declined to prosecute similarly situated suspects of other races." *Id.* at 458. The Court explained that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim . . . require a correspondingly rigorous standard for discovery in aid of such a claim." *Id.* at 468; *see also* Davis, *supra* note 83, at 18.

¹⁵⁹ David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303 (1995) ("Black defendants have mounted equal protection challenges to the federal crack sentences in each of the regional federal courts of appeals. The precise forms of the challenges have varied. Some defendants have argued that Congress acted unconstitutionally in 1986, some have attacked the Sentencing Commission's extension of the 100:1 ratio adopted by Congress, and some have challenged Congress' and the Commission's failure to amend the ratio when presented with evidence of its overwhelmingly disproportionate impact on black defendants. The results, however, have been remarkably consistent: the defendants always have lost, and the opinions generally have been both unanimous and short.") (citing numerous cases).

¹⁶⁰ *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) ("A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing. 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses.").

¹⁶¹ *See* Sklansky, *supra* note 159, at 1284 ("For at least the past two decades the Supreme Court, along with many of its critics, has tended to assume that equal protection doctrine should remain relatively uniform regardless of factual context: the test for unconstitutional inequality in criminal sentencing, for example, should be the same as in civil service promotions.").

the legislature would be unable to legislate. As the Court explained in *Washington v. Davis*,

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.¹⁶²

Numerous scholars have explored the conceptual flaws with requiring discriminatory purpose to achieve heightened scrutiny under the equal protection clause.¹⁶³ The intent requirement fails to adequately factor in the prevalence of unconscious racism in our society; it fails to respond to the savvy of modern-day racists who can easily avoid appearances of overt racial bias; and it fails to protect minorities who, at the end of the day, are trapped in an unequal system regardless of the intent of the state actors. It likewise fails to account for the historical shift from overt and legalized racist systems which imposed illegitimate punishments on African Americans (through slavery and Jim Crow), to covert racism that disproportionately imposes ostensibly legitimate punishments on minorities, aided by unconscious biases and discretionary decision-making by layers of state actors.¹⁶⁴ Yet, in light of the breadth and uniformity of equal protection doctrine, any doctrinal change to account for these critiques and, specifically, to account for the inequity in the criminal justice system, would have far-reaching, even nuclear, implications—implications that the Court is unwilling to accept.¹⁶⁵

Even if the Court were to understand the demands of equal protection differently in the criminal context,¹⁶⁶ the

¹⁶² *Washington v. Davis*, 426 U.S. 229, 248 (1976).

¹⁶³ See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Eric Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982); Sklansky, *supra* note 159.

¹⁶⁴ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 332-33 (1987) (Brennan, J., dissenting).

¹⁶⁵ Of course, many have argued that Equal Protection doctrine *should* change—for example, to recognize that subconscious racism of legislatures and other state actors produces disparate racial impact far more, in modern times, than overtly discriminatory purpose. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Richard Salgado, *Dan the Xenophobe Rides the A-Train, or the Modern, Unconscious Racist in "Enlightened America"*, 15 AM. U. J. GENDER SOC. POLY & L. 69 (2006).

¹⁶⁶ For an extended discussion of how and why the Court should reject a uniform or universalist approach to the equal protection clause, see Sklansky, *supra* note 159, at 1312-22.

pragmatic anxiety would remain that a hard look into racial inequality would unravel the entire criminal justice system as we know it. Although there may be disagreement about the cause of the inequality, it is indisputable that, in practice, the criminal justice system *does* operate disproportionately against African Americans and other minorities. Given that reality, the Court fears that acknowledging the racial inequity in constitutional terms could crumble the very foundation of the criminal justice system in America. In *McCleskey*, the Court stated with surprising honesty:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. [n38]

n38 Studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences.¹⁶⁷

Justice Brennan, in dissent, criticized the Court for its apparent “fear of too much justice.”¹⁶⁸

The Court recognizes that the criminal justice system bears a disparate racial impact—or, at least, that defendants might legitimately and predictably make such a claim. Indeed, it is because the imbalance is so marked, and so widespread, that a pragmatic Court finds itself unable to make any kind of pronouncement that the disparity is unconstitutional. The Court prefers not to remedy *any* of the inequality rather than risk invalidating the entire system. Though ostensibly limited to the death penalty context, *McCleskey* presented the Court with another nuclear option. The Court saw no limiting principle within the equal protection clause or the “arbitrary

¹⁶⁷ *McCleskey*, 481 U.S. at 314-15 & n.38 (citations omitted).

¹⁶⁸ *Id.* at 339 (Brennan, J., dissenting); *see also id.* at 365 (Blackmun, J., dissenting) (“One of the final concerns discussed by the Court may be the most disturbing aspect of its opinion. Granting relief to McCleskey in this case, it is said, could lead to further constitutional challenges. *Ante*, at 314-19. That, of course, is no reason to deny *McCleskey* his rights under the Equal Protection Clause. If a grant of relief to him were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit. Where no such factors come into play, the integrity of the system is enhanced. Where such considerations are shown to be significant, efforts can be made to eradicate their impermissible influence and to ensure an evenhanded application of criminal sanctions.”).

and capricious” doctrine that would cabin its reach and prevent the paralysis of the entire criminal justice system.¹⁶⁹

* * *

Thus the Court has resisted placing a robust counter-majoritarian check on draconian prison sentences, has more broadly interpreted the constitutional protection against excessive punishments in majoritarian terms, and has seen no constitutional infirmity when punishments are imposed differentially upon minorities than on the majority. These interpretations fail to adequately account for the original counter-majoritarian, anti-discrimination, and racially egalitarian principles enshrined in the Constitution, and fail to give those principles meaning in the modern world. The real-world ramifications have been stark. The Court has stood by as the majority has set in motion the modern American punishment machine and, predictably, placed the weightiest burdens of that punitive system disproportionately upon minorities.

IV. CONSTITUTIONAL CONSTRUCTION: THE PATH FORWARD

The Court has advanced an impoverished understanding of the Eighth Amendment that is blind to the original counter-majoritarian imperative and thus is unresponsive to the cruelty and inequality endemic to our age of mass incarceration. I advance a different interpretation—one that keeps faith with the amendment’s original counter-majoritarian and anti-discrimination principles and redeems those principles for our generation. The Eighth Amendment, I argue, is concerned with severe punishments that bear a disparate impact upon minorities.

We need a new Eighth Amendment doctrine that puts this theory into practice. This doctrine must contain, at a minimum, three core features. First, it must include a robust *counter-majoritarian* dimension, not simply a consideration of majoritarian norms. Second, it must be responsive to punishments with a *disparate impact* upon minorities, irrespective of discriminatory purpose. Third, it must be provide a substantive check on *cruelty* in punishments, beyond the death penalty context.

¹⁶⁹ Arguably, a ruling in favor of McCleskey could have legitimately been limited to the death penalty context, under the oft-cited principle that death is different. See, e.g., *Woodson v. N. Carolina*, 428 U.S. 280, 305 (1976).

Here I explore one doctrinal approach that achieves each of these three core features.¹⁷⁰ I propose a two-step test for adjudicating Eighth Amendment claims about excessive punishment. First, a judge should determine whether a punishment for a particular crime is “unusual”—i.e., disproportionately meted out against minorities or a suspect class. If a punishment is “unusual,” the court should then assess whether the punishment is cruel, using tiered levels of heightened scrutiny that vary with the degree of unusualness. If the punishment is not “unusual,” but is rather imposed proportionately against the majority and minorities alike, traditional Eighth Amendment inquiry into the punishment’s constitutionality would apply—including a consideration of evolving standards of decency, arbitrariness, and the narrow gross disproportionality inquiry.

This approach offers important improvements over the Court’s existing set of doctrines. It takes seriously the counter-majoritarian imperative of the Eighth Amendment, and promises a meaningful engagement with injustices that existing case law fails to see.

A. *Identifying “Unusual” Punishments*

The first step in this test for “cruel and unusual punishments” is to determine whether a punishment is “unusual”: whether it has a disparate impact upon a minority that receives insufficient protection through the political process—or, in other words, upon an Eighth Amendment “suspect class.” This presents two more questions: First, what is a “suspect class” for the purposes of the Eighth Amendment? Second, what real-world measure of inequality is sufficient to establish disparate impact?

1. Eighth Amendment “Suspect Classes”

To understand whether a punishment bears an “unusual” impact upon a particular minority group, we must, of course, define which groups count as “minorities” or “suspect classes” for the purposes of the Eighth Amendment. As a starting point, judges can borrow from the approach of equal

¹⁷⁰ It is not the only workable model; one can imagine other doctrinal innovations that might achieve similar ends, and the development of the ideal solution should be informed by practical application and real-world feedback.

protection law, where case law about suspect and quasi-suspect classifications is well developed.

The clearest examples of suspect classes are “discrete and insular minorities”¹⁷¹ that have faced historical discrimination or unequal treatment, and who that been significantly underrepresented in the political process. The Supreme Court recognizes a suspect classification when a group is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁷² Racial minorities such as African Americans and Latinos would clearly meet that definition in the Eighth Amendment context, just as in the equal protection context.

Equal protection doctrine, however, should be a starting point and not the end point of the Eighth Amendment analysis, which must be tailored to the specific context of criminal punishment. “Suspect classes” for the purposes of Eighth Amendment analysis should specifically reflect a historical or heightened risk of disadvantage *in the criminal justice system* as well as a political marginalization in society at large. For this reason, equal protection suspect classes will be both under- and over-inclusive. For example, although gender-based classifications receive heightened scrutiny under equal protection law, the relative absence of a history of discrimination against women in the criminal justice system may counsel against gender imbalance being “unusual” for the purposes of the Eighth Amendment.¹⁷³ By contrast, laws that disproportionately affect individuals on the basis of sexual orientation may well be “unusual,” given the nation’s history of criminalizing sodomy, transgender conduct, and homosexual status, even though the Supreme Court has yet to recognize sexual orientation as a suspect or quasi-suspect classification in the equal protection context.¹⁷⁴ Other groups that have faced discrimination in the criminal justice system and underrepresentation in the political process—including poor people, disenfranchised felons, and illegal

¹⁷¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

¹⁷² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁷³ Some may reasonably disagree with this conclusion, and women could certainly litigate the historical question in the courts. A case could be made that women who have come into contact with the criminal justice system have been punished excessively relative to male counterparts; for example, prostitution may be punished more harshly than the purchasing of sex.

¹⁷⁴ *See, e.g., Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff’d on other grounds*, 133 S. Ct. 267 (2013).

immigrants—present harder cases. Whether disparate punishment of these groups would be “unusual” is a complex question that goes beyond the scope of this article.¹⁷⁵

2. Disparate Impact

Next, to determine whether punishment under a particular statute has a “disparate impact” upon members of an identifiable suspect class, a court should consider statistical evidence about the rate of punishment of different demographic groups for particular crimes.¹⁷⁶ The greater the statistical disproportion in conviction rates, the more “unusual” the punishment.¹⁷⁷ Evidence of discriminatory intent in the

¹⁷⁵ The Supreme Court has refused to consider classifications based on relative wealth to be “suspect” in the Equal Protection context. *See Maher v. Roe*, 432 U.S. 464, 471 (1977). However, the long and entrenched history of discrimination in the criminal justice system against poor people—as well as unique problems of providing adequate legal representation to the poor, notwithstanding the ostensible protections of *Gideon v. Wainwright*, 372 U.S. 335 (1963)—may counsel in favor of a different rule in the Eighth Amendment context. Not only are indigent people underrepresented in the political system, but they are also, as a whole, underrepresented in the legal system. *See, e.g.*, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* iv (2004); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006). The recognition of suspect classification for indigent persons in the punishment context, even if not in the general legislative context, may be sensible and, in fact, would cohere with the Court's existing recognition that there are special concerns raised when the poor receive disparate treatment in the criminal justice context. *See Maher*, 432 U.S. at 471 n.6.

Similarly, because disenfranchised felons and undocumented immigrants are barred from voting, they are perhaps the quintessential minorities at risk of majoritarian overreaching. There is a special concern that laws directly targeting recidivists and illegal immigrants may be excessive, even if it is perfectly legitimate to criminalize the underlying conduct, because the majoritarian legislators and people like them will experience only the benefits, and not the costs, of a harsh punishment regime. However, there are obvious differences between recidivism or undocumented status and the immutable traits such as race and gender that have given rise to traditional suspect and quasi-suspect classes.

¹⁷⁶ In addition to considering the proportion of minorities convicted of a particular crime, it is arguable that judges considering the “unusualness” of a punishment should also take evidence on disparities in the relative harshness of sentences actually imposed upon members of the majority and minority groups when judicial sentencing discretion is available. However, because disparities in judicial sentencing practices bear a far more complex relationship to majoritarian excesses than do legislative and executive actions, a full doctrinal analysis of how judicial sentencing disparities should be considered under the counter-majoritarian Eighth Amendment goes beyond the scope of this article. This article focuses, instead, on legislative determinations of mandatory minimum sentences and executive patterns of law enforcement.

¹⁷⁷ The relevant population pool would be the jurisdiction setting the punishment. Thus, the “unusualness” of a statewide criminal statute should be evaluated according to the impact of that statute statewide—because the relevant

legislative history of a criminal statute or in the manner of its enforcement would be admissible and would contribute to the Eighth Amendment analysis by justifying a stronger assessment of the degree of “unusualness,” but evidence of such a purpose would *not* be required. The defendant would only need to prove a differential *effect* of a criminal statute upon a suspect class to satisfy the “unusual” prong.¹⁷⁸

Let us take an example. A state statute criminalizes theft under \$500. Statewide, 75% of the people convicted of violating this statute are African American, although only 35% of the state population is African American. The criminal statute has a disparate impact upon a suspect class, and the “unusual” prong is satisfied.

Note that it is not clear from these statistics whether the disparate impact is a result of differential rates of crime commission or disparate patterns of law enforcement. In other words, it is unclear whether, per capita, more African Americans than whites in the state commit the crime of petty theft; or whether police officers and prosecutors simply enforce the law more strictly against African Americans. Any number of complicated reasons ranging from overt discrimination to unconscious bias at multiple points of discretionary decision-making could lead to a disparate racial impact. Under a counter-majoritarian theory of rights, however, the *reason* for the differential impact on minorities should not control the determination of whether the punishment is “unusual.”

Most would agree that there is something suspicious—something warranting a second look—when criminal laws are disproportionately *enforced* against minorities, despite relatively equal offense rates across the population. Thus, for example, let us assume¹⁷⁹ that whites and African Americans use

majoritarian political community setting that particular punishment would be at a state level. By contrast, the unusualness of federal laws should be evaluated on a national level, and the unusualness of local ordinances should be evaluated locally.

¹⁷⁸ A claim that a punishment is “unusual” should be available to all, not merely to members of the suspect class. The key to the counter-majoritarian concern here is that the incentives of the political process are skewed when a particular punishment disproportionately (but not *exclusively*) impacts minorities. Members of the majority who are subject to criminal sanctions approved under the skewed majoritarian process should likewise be able to remedy that procedural defect. Analogously, the courts have permitted *Batson* challenges to the racially discriminatory use of peremptory strikes against potential jurors, irrespective of the race of the defendant. *Holland v. Illinois*, 493 U.S. 474, 476 (1990).

¹⁷⁹ Much evidence suggests this is not merely an assumption but in fact reality. See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEPT OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES tbl.1.24B (2012), available at <http://www.samhsa.gov/data/NSDUH/>

marijuana at similar rates, but that the laws prohibiting possession are disproportionately enforced against blacks. The end result is a defect in majoritarian fairness because the majority is not internalizing the costs of setting harsh sentences. Although the college-aged sons and daughters of the legislators are theoretically at risk of getting caught and punished for marijuana possession, that possibility is not internalized when the legislators set the sentencing range because the risk is not a realistic one.¹⁸⁰ Legislators set penalties knowing that law enforcement has vast discretion in executing the law and that this discretion will generally be used to externalize the costs of punishment upon “the other.”

A similar, though less recognized, breakdown in majoritarian political protections against excessive punishment arises when criminal laws target conduct that is, ordinarily, committed more frequently by minorities. For instance, let us assume that, statistically, more blacks than whites use crack-cocaine, and thus disparate punishment rates for possession of crack are a result not of bias by law enforcement officials or prosecutors but of real-world behavioral differences. Similarly, let us assume that a disproportionate number of those convicted of the crime of illegal reentry in Texas are Latino, and that disproportionate numbers of Latinos relative to whites actually *commit* that crime in reality. At first glance, the disparate impact of these laws upon minorities may not be surprising or troubling, because it accurately reflects objective differences in criminal conduct. But even in these scenarios the danger remains that the majority will set cruel or excessive punishments, because the majority is able to externalize the burdens of punishment and internalize all the benefits of that criminal law. To attain even nominal advantages for society at large, the legislature may set harsh penalties for particular types of conduct that it would be unwilling to accept as proportionate if those punishments affected them. This may help explain why the crack/cocaine sentencing disparity arose.

2011SummNatFindDefTables/NSDUH-DefTabsPDFWHTML2011/2k11DetailedTabs/Web/HTML/NSDUH-DefTabsSect1peTabs1to46-2011.htm#Tab1.20A (reporting that whites over the age of twelve have higher rates of lifetime marijuana use and slightly lower rates for previous year and previous month marijuana use than blacks).

¹⁸⁰ See, e.g., ELY, *supra* note 34, at 173 (“A severe (or ‘cruel’) punishment to which any of us who transgresses is realistically subject is one thing: assuming an impartial enforcement regime, the political processes can be counted on to block beheading as the penalty for tax fraud. If, however, there are buffers, if the system is constructed so that “people like us” run no realistic risk of such punishment, some nonpolitical check on excessive severity is needed.”).

Perhaps in setting the punishment for crack possession, the majority was able to externalize all the burdens of punishment, but in setting the punishment for cocaine possession—a crime that was committed frequently by whites—the majority internalized the costs of that punishment and set a more moderate sentence when it affected “their own.”

Thus even when—and, perhaps, *especially* when—disparate impact is caused by disparate behavior, there is a necessary role for a court to play in scrutinizing the severity of punishments more carefully, given that the political process will not offer robust protections. When members of the majority (and their constituents) face little realistic possibility of being convicted under a criminal statute, the political process protections against excessive punishment fall apart.¹⁸¹

B. Identifying “Cruel” Punishments

The threshold determination of whether a particular punishment is “unusual”—imposed disproportionately upon minorities—informs the subsequent judicial scrutiny into the excessiveness or “cruelty” of that punishment.

When punishments for certain crimes are not “unusual”—when they are *not* imposed with disproportionate frequency or severity on suspect classes—traditional Eighth Amendment doctrine should apply. Here, courts should consider the cruelty of prison sentences with the traditional deference to majoritarian legislative judgments about appropriate punishments for crimes, taking into account all the legitimate penological purposes of retribution, deterrence, incapacitation, and rehabilitation.¹⁸² The narrow “gross disproportionality” review of prison sentences that the Supreme Court has permitted to date would remain virtually unchanged, and in the death penalty and juvenile life without parole contexts, the Court would continue its more robust and independent inquiry into disproportionate punishment, referencing evolving standards of decency.

The more irregular or “unusual” the application of a particular punishment, however, the stricter the judicial scrutiny and the more compelling the governmental interests must be to justify a harsh punishment—including a lengthy

¹⁸¹ Moreover, requiring proof of whether disparate impact is caused by disparate enforcement or disparate conduct would place an undue and frequently impossible burden upon the defendant to explain the causal significance of unequal effects.

¹⁸² See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

prison sentence. If a punishment has a disparate impact upon suspect classes of people, the courts should no longer pay heavy deference to the majoritarian legislative determinations of appropriate punishment. Rather, the burden should shift to the government to show that the punishment is not “cruel” or “excessive” under the circumstances. An extreme disparity in the punishment rates of a particular crime would lead to the strictest Eighth Amendment scrutiny, with the most rigorous testing of how compelling the government’s asserted interests are, how narrowly tailored the punishment scheme is to address the asserted governmental interest, and how reprehensible the conduct being punished is compared to the harshness of the penalty. A lesser, but still noticeable, disparity in application would lead to an intermediate level of scrutiny.

Under this two-pronged test, “unusual” application of a law against a minority group would not, in itself, be fatal to a particular punishment. A short prison sentence for a minor offense might not be “cruel” no matter how “unusual.”¹⁸³ Conversely, the harsh sentence of life without parole or even the death penalty for a serious offense such as murder might not be “cruel,” even if disparately applied, because the court might conclude that it is justified by compelling government interests. However, heightened scrutiny would likely lead to the invalidation of other draconian prison sentences imposed for less serious offenses that bear a disparate impact on minorities—including severe penalties for simple or repeat drug possession, broadly defined three-strikes laws, and harsh mandatory minimums. In other words, this approach would pertain less to harsh punishments for murder, rape, and armed robbery, and much more to harsh punishments for nonviolent and victimless crimes.

In short, evidence of “unusual” effect would trigger a heightened judicial scrutiny into possible cruelty without heavy deference to majoritarian judgments about the appropriateness of the penalty—a marked divergence from the Court’s current approach under *Rummel*¹⁸⁴ and its progeny. In today’s age of mass incarceration, this approach would have the critical effect of providing meaningful judicial review for draconian prison

¹⁸³ Although, of course, the fact that a prison sentence is short is not conclusive that it is not cruel. As the Supreme Court has long recognized, “To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.” *Robinson v. California*, 370 U.S. 660, 667 (1962).

¹⁸⁴ 445 U.S. 263, 274 (1980).

sentences. Under rational basis scrutiny—which is essentially what the courts apply now¹⁸⁵—severe prison sentences will almost always survive, no matter how unequal their impact. With rare exceptions, there will always be some rational governmental interest in imposing a particular punishment. Even the paradigmatic example of life in prison for a parking violation *does* serve a legitimate government interest of deterring objectionable conduct. Heightened judicial scrutiny is needed to give meaning to the counter-majoritarian imperative of the Eighth Amendment, and will be of special consequence in today’s punitive criminal justice system.

When applying heightened scrutiny, courts should consider the *type* of penological interest alleged by the government alongside the severity of the sentence when a disparate impact can be established. The problem with majoritarian rule, and the reason why a counter-majoritarian check is necessary, is that the interests of the majority inevitably take precedence over the interests of the minority. An unchecked majority will seek to internalize benefits while externalizing costs. The internalized benefits may be entirely legitimate policy interests—such as minimizing crime, protecting property, or fighting drug addiction. But when the costs are externalized to a population other than the majority, the legislative cost-benefit analysis is skewed. The majority is able to place excessive burdens on a small population in order to obtain relatively minor benefits for itself. Were those burdens spread across the population equally, society may deem them unacceptable payment for the benefits sought.

The court should consider the majoritarian tendency toward cost-externalization when scrutinizing “unusual” punishments. The severity of the punishment must be such that the majority would accept it if the burdens were spread evenly across the population.¹⁸⁶ Moreover, the court should place differing weight on the different types of legitimate penological interests according to whether the burdens and benefits associated with each asserted interest are *tailored to the individual circumstances of the case or diffusely distributed across*

¹⁸⁵ See, e.g., *Ewing v. California*, 538 U.S. 11, 27-28 (2003) (plurality opinion) (“We do not sit as a ‘superlegislature’ to second-guess [the state’s] policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’” (citations omitted)).

¹⁸⁶ The challenges and importance of understanding what burdens the majority might accept to achieve a particular good finds some resonance in the Rawlsian concept of the veil of ignorance. See JOHN RAWLS, *A THEORY OF JUSTICE* 118 (1971).

society. Interests that are focused on the *offender's direct culpability*—retribution and rehabilitation—should be primary in the determination of “cruelty.” Interests that are directed toward *benefits for society as a whole*—incapacitation and deterrence—should be accorded less weight, because there is a heightened risk that the majority will over-value any benefits it receives while under-valuing the associated costs imposed upon the minority.

Interestingly, in the wake of the budgetary crises and fiscal austerity measures of recent years, the majority has for the first time begun to internalize more of the costs of mass incarceration and the war on drugs. Although these financial costs are relatively minor in comparison with the extraordinary burdens that the war on drugs has placed upon minority communities,¹⁸⁷ we are seeing the first real initiatives against mass incarceration in the context of the war on drugs.¹⁸⁸ If the majority is unwilling to bear the financial cost of adequately funding prisons to secure the governmental interests asserted in favor of tough-on-crime legislation, we can safely assume that the majority would not be willing to endure the dramatic and severe criminal and community consequences that minorities have experienced if they were imposed equally against the majority.

C. *Implementing the Doctrinal Framework*

Imagine a 45-year-old African American man, Timothy Johnson, in my present home of New Orleans. Over the past 20 years, Mr. Johnson has had three prior felony convictions: one conviction for marijuana possession,¹⁸⁹ and two for possession of

¹⁸⁷ These burdens include, of course, the costs of disproportionate rates of incarceration. But additional burdens are imposed on the entire community—ranging from absent parents and spouses to eviction from public housing to reduced privacy in the home and neighborhood. See generally John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 599-614 (1991).

¹⁸⁸ See, e.g., Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> (reporting on the legalization of marijuana in Washington and Colorado and noting that “[s]upporters say the laws will end thousands of small-scale drug arrests while freeing law enforcement to focus on larger crimes. They estimate that taxing marijuana will bring in millions of dollars of new revenue for governments, and will save court systems and police departments additional millions.”); John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all> (reporting on growing dissatisfaction with punitive incarceration policies, in large part due to their extraordinary expense).

¹⁸⁹ LA. REV. STAT. ANN. § 40:966(E)(2)(a) (2012).

cocaine.¹⁹⁰ He has just been convicted again of possession of cocaine. Based on his history of recidivism, he was charged under the multiple bill statute as a “quadruple bill.”¹⁹¹ Although the sentencing range for simple possession of cocaine is up to five years in prison,¹⁹² when combined with the multiple bill statute,¹⁹³ he is facing 20 years to life.

At his sentencing hearing, Mr. Johnson raises an Eighth Amendment challenge to the mandatory sentencing range. He presents statistical evidence about the rates of punishment under both the cocaine statute and the multiple bill statute, and makes the threshold showing of “unusual” punishment: that African Americans are disproportionately charged and convicted for violating these statutes.

This demonstration of disparate impact triggers a heightened judicial scrutiny into cruelty: into the proportionality of the punishment to the offense, without the traditional deference to the legislative determinations of appropriate sentencing practices. Mr. Johnson presents mitigating evidence about his own history and argues that a sentence within the given range would be inappropriate in his own case; he also argues more universally that 20 to life is an excessive punishment for cocaine possession, even when combined with a history of recidivism. Although the judge may consider societal interests in deterrence when assessing the proportionality of the punishment, she must place greater weight on individualized factors, including the culpability of the particular offender and the severity of the offense, taking into consideration whether the offense was nonviolent or victimless. The judge has the obligation, under the Eighth Amendment, to sentence Mr. Johnson to a lower term of years than the mandatory minimum, if she deems the sentencing range to be cruel or excessive without deferring to legislative determinations.

If Mr. Johnson loses his constitutional challenge in the trial court, he will be able to appeal the sentence actually imposed by the judge to the higher courts on Eighth Amendment grounds, and if unsuccessful in state court, may subsequently file a petition for habeas relief in a federal court.

¹⁹⁰ *Id.* § 40:967(C)(2) (2012).

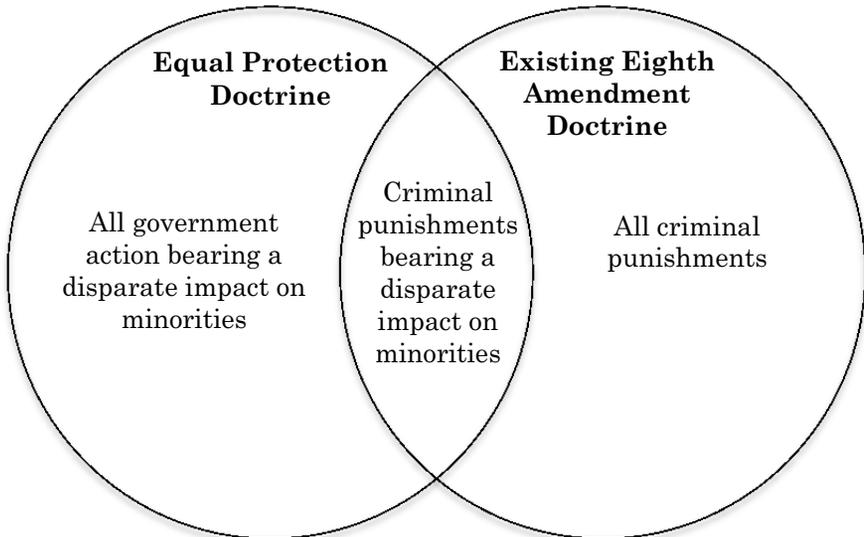
¹⁹¹ Under Louisiana’s Habitual Offender Law, criminal defendants may be charged as second-, third-, or fourth-time offenders (colloquially known as double, triple, or quadruple bills) and be subject to significantly harsher sentences. *See Id.* § 15:529.1.

¹⁹² *Id.* § 40:967(C)(2).

¹⁹³ *Id.* § 15:529.1(A)(4)(a).

D. *Cabining Judicial Anxiety*

As a practical matter, the doctrinal approach proposed here has advantages over that rejected in *McCleskey*, in which existing equal protection and Eighth Amendment doctrines were leveraged to remedy systemic inequality in the criminal justice system. Specifically, this approach has the benefit of reducing judicial anxiety and, with it, judicial paralysis. If equal protection doctrine and Eighth Amendment doctrine are circles in a Venn diagram, a counter-majoritarian Eighth Amendment lies at the overlapping intersection of those circles—a narrower subset of the two. Equal protection doctrine covers *all* government action, not just criminal punishments; traditional Eighth Amendment doctrine covers *all* punishments, not just those disproportionately imposed against minorities.



My approach requires heightened judicial scrutiny into cruelty/proportionality where disparate impact (but not necessarily discriminatory intent) can be shown. This cabined set of circumstances neither threatens to dismantle *Washington v. Davis* (which requires discriminatory intent in addition to discriminatory effect for heightened scrutiny under the equal protection clause) nor forces a court to engage in unbounded review of “gross disproportionality” (rejected in *Harmelin*). The narrower context of criminal punishment—and, even more specifically, *cruel* punishment—makes it feasible to tackle disparate effect without threatening to invalidate all governmental action, no matter how benign, that

affects individuals of different races differently. While in the equal protection context, the courts have refused to employ strict scrutiny on a showing of disparate impact alone, the combination of severity or harshness *and* disparate impact has a focused and contained constitutional significance.

McCleskey and *Harmelin* demonstrate acute judicial anxiety over the radical consequences of unbounded disparate impact or proportionality review. By recognizing that the Eighth Amendment places a distinctly counter-majoritarian limitation on excessive sentences, we can take these nuclear options off the table and use judicial scrutiny to target a still massive, but more manageable, problem: the imposition of punitive criminal sanctions disproportionately against minorities. The counter-majoritarian Eighth Amendment does not prohibit *all* disparate impact (or “unusual” impact) in the criminal justice system. But where there *is* disparate impact, and the punishments are particularly *cruel* or *harsh*, then the Eighth Amendment raises a red flag that majoritarian protections have been insufficient and may in fact have contributed to improper cost-externalization upon a minority group.¹⁹⁴

CONCLUSION

My reading of the Eighth Amendment as prohibiting cruel (particularly severe) and unusual (disparately imposed) punishments redeems its original counter-majoritarian and anti-discrimination constitutional principles for the modern age. By mandating heightened judicial scrutiny into “cruelty” when “unusualness” can be shown, the doctrinal framework I propose would empower the judiciary as a robust counter-majoritarian check against excessiveness when the effects of the criminal justice system fall disproportionately on minorities—when the political process protections against cruelty fall short. But it would do so without dismantling decades of equal protection jurisprudence or requiring the court to second-guess all legislative determinations about appropriate punishment. This doctrinal model would focus the courts’ attention on the most constitutionally suspect cases: those in which the punishment is harsh, the severity of the underlying conduct is moderate, and the disparate impact is apparent.

¹⁹⁴ One could always argue that harshness of punishment is indicative of discriminatory intent; however, there are so many other penological reasons for harsh punishment that this argument will rarely if ever succeed.

For years, the courts have stood by as America has waged a punitive war on drugs and crime that has exacted a heavy and disproportionate toll on minorities. The current state of affairs is a paradigm of majoritarian excess. The Constitution can—and must—be read to limit this inequality. My approach would illuminate and begin to remedy pervasive inequities in the American system of punishment that have, to date, been constitutionally invisible.