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## No Sense of Decency

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# NO SENSE OF DECENCY

Kathryn E. Miller\*

*Abstract:* For nearly seventy years, the Court has assessed Eighth Amendment claims by evaluating “the evolving standards of decency that mark the progress of a maturing society.” In this Article, I examine the evolving standards of decency test, which has long been a punching bag for critics on both the right and the left. Criticism of the doctrine has been fierce but largely academic until recent years. Some fault the test for being too majoritarian, while others argue that it provides few constraints on the Justices’ discretion, permitting their personal predilections to rule the day. For many, the test is seen as a lightning rod over constitutional interpretation, as its very language embodies living constitutionalism and seems to reject originalism.

Now an evaluation of the possible replacements for the “evolving standards of decency” test takes on greater urgency. Appellate court judges have begun to press the Court to replace or reconsider the test. Three Justices have signaled their willingness to overrule the test, and at least two more are likely to join them. Given that *stare decisis* does not appear to be a formidable constraint on the current Court, the time has come to grapple with a new reality for the Eighth Amendment.

This Article begins with a comprehensive evaluation of the tests that both originalist and non-originalist scholars have proposed as replacements. It contends that none of the proposed tests eliminate the shortcomings of the evolving standards of decency test, then concludes that originalism is an unsuitable methodology for interpreting the Eighth Amendment. The Article then proposes a new test—grounded in the structural harms of the modern criminal punishment system—that constrains judicial discretion in line with the constitutional values of antisubordination and human dignity. This new test addresses the flaws of the evolving standards of decency test without rendering Eighth Amendment jurisprudence a dead letter.

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## INTRODUCTION

The Supreme Court’s opinion in *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup> confirmed the worst suspicions of those who feared the new super-majority on the Supreme Court would disregard established precedent in favor of long-sought policy goals of the conservative movement. As many commentators were quick to point out, the stark language of the opinion, which criticized the right to an abortion as an “unenumerated right” not found in the text of the Constitution and not “deeply rooted in this Nation’s history and tradition,” could be easily applied to eliminate many fellow substantive due process rights, including the right to contraception, interracial marriage, gay marriage, and gay sex.<sup>2</sup>

1. 597 U.S. \_\_\_, 142 S. Ct. 2228 (2022).

2. See, e.g., Phillip Elliot, *Is Same-Sex Marriage Vulnerable? Yes, and Ignore Those Who Say Otherwise*, TIME (July 28, 2022, 3:22 PM), <https://time.com/6201711/same-sex-marriage-vulnerable-supreme-court/> (last visited Feb. 2, 2023) (warning that the overturning of *Roe v. Wade* puts other rights at risk despite the assurances of conservative Justices otherwise); Brandon Lowrey, *Dobbs*

While the *Dobbs* opinion inflamed public anxiety, for many in the legal academy, it merely represented a bolder, more honest declaration of what the Court had already been doing quietly in other contexts. In criminal constitutional law, the Court has effectively overturned long-standing precedents that protected the individual rights of defendants.<sup>3</sup> In the Sixth Amendment context, the Court's recent opinion in *Shinn v. Ramirez*<sup>4</sup> undercut the right to effective assistance of counsel.<sup>5</sup> Without an explicit reversal, the *Shinn* Court rendered hollow its previous decision in *Martinez v. Ryan*.<sup>6</sup> *Martinez* had held that criminal defendants could raise Sixth Amendment claims of ineffective assistance of trial counsel for the first time in federal court, provided their failure to do so in state court resulted from ineffective assistance of their post-conviction counsel. *Shinn* instead found a legislative bar to present evidence in federal court in support of these Sixth Amendment claims, eviscerating the *Martinez* exception and rendering defendants with a succession of ineffective lawyers without a legal avenue for review.<sup>7</sup>

In the Eighth Amendment context, the Court has similarly gutted precedent, but without the transparency it exhibited in *Dobbs*. As I have argued in a previous work,<sup>8</sup> the Court's 2021 decision in *Jones v. Mississippi*<sup>9</sup> implicitly overruled *Montgomery v. Louisiana*,<sup>10</sup> which had

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*Casts Shadow on Gay Rights, Birth Control*, LAW360 (June 24, 2022, 4:53 PM), <https://www.law360.com/pulse/articles/1505907/dobbs-casts-shadow-on-gay-rights-birth-control> [<https://perma.cc/S72N-TDRP>] (explaining that the Supreme Court's reasoning to overturn *Roe v. Wade* could be applied to other precedential decisions protecting rights not enumerated in the Constitution); see also *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, 142 S. Ct. 2228, 2260 (2022); *id.* at 2300–01 (Thomas, J., concurring) (stating that the due process clause does not protect any of these substantive due process rights).

3. This is true with one exception. In the Sixth Amendment context, the Court explicitly overruled two much-maligned cases permitting non-unanimous jury convictions in *Ramos v. Louisiana*, 590 U.S. \_\_\_, 140 S. Ct. 1390 (2020). *Ramos* generated little controversy, likely due to the narrow application of the cases it overruled—as only two states permitted the practice, with one having recently abandoned it. *Id.* at 1407.

4. 596 U.S. \_\_\_, 142 S. Ct. 1718 (2022).

5. *Id.* at 1734.

6. 566 U.S. 1 (2012); *Shinn*, 596 U.S. \_\_\_, 142 S. Ct. 1718.

7. *Shinn*, 142 S. Ct. at 1727 (finding that post-conviction counsel's failure to develop the record regarding trial counsel's ineffectiveness did not overcome the bar against factual development in federal court codified in 28 U.S.C. § 2254(e)); Noam Biale, *Conservative Majority Hollows Out Precedent on Ineffective-Counsel Claims in Federal Court*, SCOTUSBLOG (May 23, 2022, 6:56 PM), <https://www.scotusblog.com/2022/05/conservative-majority-hollows-out-precedent-on-ineffective-counsel-claims-in-federal-court/> [<https://perma.cc/22FZ-QZAF>] (discussing *Shinn*'s holding that defendants cannot introduce evidence in support of *Martinez* claims guts *Martinez* claims).

8. Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. 1319, 1324, 1340–45 (2022).

9. \_\_\_ U.S. \_\_\_, 141 S. Ct. 1307 (2021).

10. 577 U.S. 190 (2016).

previously found that the Eighth Amendment created a substantive limitation on the imposition of life without parole on children—reserving it for the few children who were found to be “irreparably depraved.”<sup>11</sup> Although the *Jones* Court denied that it was overruling *Montgomery*, it maintained that the Eighth Amendment’s limitations were only procedural, requiring a sentencer to merely consider “an offender’s youth and attendant characteristics” before sentencing a child defendant to die in prison.<sup>12</sup>

*Shinn* and *Jones* are noteworthy both because they upended recently decided cases that had garnered more than a bare majority of votes and because their results are potentially devastating for individual defendants seeking postconviction review of their sentences.<sup>13</sup> But neither case constituted a sea change for the Court’s criminal jurisprudence. That is likely to change. With *Dobbs* marking the ascendancy of originalism that trumps commitments to stare decisis, the question remains how far the Court is willing to take this method of interpretation. Could the Court rely on originalism to jettison the poster child for living constitutionalism: the Eighth Amendment’s evolving standards of decency test? Or does the fundamental nature of the Eighth Amendment eschew originalist interpretation?

The nearly seventy-year-old evolving standards of decency test has provided the foundation for the Court’s Eighth Amendment jurisprudence since its inception, serving as the mechanism for determining if a punishment is cruel and unusual.<sup>14</sup> Not explicit in the Constitution, the test first appeared in a plurality opinion in *Trop v. Dulles*,<sup>15</sup> where Chief Justice Earl Warren explained that because the text of the

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11. *Montgomery* had interpreted the Court’s 2012 ruling in *Miller v. Alabama*, 567 U.S. 460 (2012), which banned mandatory sentences of life without parole for these children, finding that *Miller* applied retroactively because it amounted to a substantive constitutional ruling: it exempted all, but the few children found to be irretrievably deprived from sentences of life without parole. *Montgomery*, 577 U.S. at 208.

12. *Jones*, 141 S. Ct. at 1311.

13. *Martinez* was a 7-2 decision decided in 2012, and *Montgomery* was a 6-3 decision decided in 2016.

14. The scope of this article concerns the Court’s sentencing jurisprudence. It does not apply to conditions of confinement cases for which the Court has required evidence of culpable mens rea for state actors. *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (requiring inquiry into state actor’s state of mind in conditions of confinement claims); see also *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (holding that acts that indicate “deliberate indifference” to the medical needs of incarcerated people offend the evolving standards of decency). Although scholars have argued for an end to this distinction, e.g., Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 *FORDHAM URB. L.J.* 53, 54 (2009), it has persisted.

15. 356 U.S. 86 (1958).

Eighth Amendment was not precise, the prohibition against cruel and unusual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>16</sup> Subsequent decisions made clear that the test requires two inquiries. First, the Court must determine whether a “national consensus” has developed against a particular punishment, rendering the punishment unusual.<sup>17</sup> Second, the justices must draw on their independent judgment to assess if the punishment is cruel, typically by judging the fit between a punishment and its penological justifications.<sup>18</sup>

Most famously, the Court has utilized the evolving standards of decency test to find extreme sentences unconstitutionally disproportionate for particular defendants or for particular crimes. For example, the test was the mechanism behind the Court’s decisions barring the death penalty for individuals with intellectual disability,<sup>19</sup> those suffering from insanity,<sup>20</sup> and those under 18 at the time of their crime,<sup>21</sup> and for severely curtailing the imposition of life without parole on juveniles.<sup>22</sup> It also undergirded the Court’s decisions finding the death penalty unconstitutional for non-homicide crimes, including rape of both adults<sup>23</sup> and children,<sup>24</sup> along with some types of felony murder.<sup>25</sup>

The test has never been a favorite of conservative justices, who have long contended that it reeks of functionalism. Recently, they have renewed calls for its abandonment. Justices Alito and Thomas have repeatedly authored dissents criticizing the test and proposing a replacement based on originalism.<sup>26</sup> Chief Justice Roberts joined Justice

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16. *Id.* at 101. *Trop* relied on *Weems v. United States*, 217 U.S. 349 (1910), wherein the Court found that twelve-and-a-half years of hard labor and other penalties constituted cruel and unusual punishment when levied for fraud that required only a risk of harm.

17. *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

18. *Id.*

19. *Atkins v. Virginia*, 536 U.S. 304 (2002).

20. *Ford v. Wainwright*, 477 U.S. 399 (1986).

21. *Roper*, 543 U.S. 551.

22. *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

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

24. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

25. *Enmund v. Florida*, 458 U.S. 782 (1982) (finding capital punishment cannot be imposed for the crime of felony murder unless the defendant (1) actually killed, (2) attempted to kill, or (3) intended for a killing to occur); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding capital punishment permissible where the defendant was a “major participa[nt]” in the underlying felony and acted with reckless indifference to human life).

26. *See, e.g., Graham*, 560 U.S. at 97 (Thomas, J., dissenting) (criticizing the majority decision for forbidding life without parole for juvenile nonhomicide crimes, although “the text of the Constitution is silent” regarding the sentence and “it would not have offended the standards that prevailed at the

Alito's dissent in 2008's *Kennedy v. Louisiana*,<sup>27</sup> along with Justices Scalia and Thomas.<sup>28</sup> While the dissent focused on the majority's application of the test, it also complained that the holding was "not supported by the original meaning of the Eighth Amendment."<sup>29</sup>

An indication that others on the Roberts Court might be sympathetic to these positions appeared in 2019's *Bucklew v. Precythe*,<sup>30</sup> an as-applied Eighth Amendment challenge to Missouri's lethal injection protocol, in which the evolving standards test was conspicuously absent. Neither Justice Gorsuch, who wrote the opinion of the Court, nor Justices Thomas and Kavanaugh, both of whom concurred, made any mention of the test whatsoever.<sup>31</sup> Instead, Justice Gorsuch grounded the Court's analysis of the punishment clause in a historical account of execution methods beginning at the time of the Framing.<sup>32</sup>

Following *Bucklew*, a Ninth Circuit judge authored a dissent in a different Eighth Amendment context—a challenge related to conditions of confinement—based on the Court's failure to apply the original meaning of the terms "cruel" and "unusual."<sup>33</sup> On behalf of five of his brethren, the judge explained, "As inferior court judges, we are bound by Supreme Court precedent. Yet, in my view, judges also have a 'duty to interpret the Constitution in light of its text, structure, and original understanding.'"<sup>34</sup>

A 2021 Third Circuit concurrence took an even bolder approach. While the majority opinion upheld the constructive life sentence of a juvenile defendant,<sup>35</sup> influential conservative Judge Thomas Hardiman wrote a

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founding"); *Miller*, 567 U.S. at 508, 510 (Alito, J., dissenting) (criticizing the evolving standards of decency test and lamenting that "[t]he Court long ago abandoned the original meaning of the Eighth Amendment").

27. 554 U.S. 407 (2008).

28. *Id.* at 448–69 (Alito, J., dissenting).

29. *Id.* at 469.

30. \_\_\_ U.S. \_\_\_, 139 S. Ct. 1112 (2019).

31. *Id.* at 1118–35.

32. *Id.* at 1122–25.

33. *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (en banc) (Butamay, J. dissenting).

34. *Id.*

35. *United States v. Grant*, 9 F.4th 186, 193 (3d Cir. 2021). Grant had been previously sentenced to mandatory life without parole following his conviction for a homicide and related crimes that he committed as a teenager. After the Supreme Court's decision in *Miller v. Alabama* entitled him to a resentencing hearing, Grant's sentence was reduced to sixty-five years, a number that would require him to remain incarcerated for a period of time equal to his life expectancy. With good time credits, Grant will be released at age 72. *Id.* at 192. The majority found that *Miller* applied only to mandatory sentences of life without parole. *Id.* at 194–95. Because Grant's sentence was discretionary and because it was a term of years and not a sentence of life without parole, *Miller* did not prohibit it. *Id.* at 190.

concurring opinion staking out a position that neither party had argued in the case: the illegitimacy of the evolving standards of decency test.<sup>36</sup> The concurrence amounted to a thinly veiled appeal to the Supreme Court to abandon the test altogether. Hardiman's concurrence, which was joined by three colleagues, echoed many of the criticisms that conservative Justices have raised about the test: (1) that it departed from the text of the Constitution; (2) that its pedigree was tainted; and (3) that its application was subject to manipulation.<sup>37</sup> After citing dissenting opinions of Justices Scalia, Thomas, and Alito, Hardiman invoked Justice Roberts in propositioning the Court: "[I]f the Supreme Court continues to apply 'the evolving standards of decency' test, I wonder what will be the next stop on this runaway train of elastic constitutionalism? As Chief Justice Roberts cautioned nine years ago: this process has 'no discernable end point.'"<sup>38</sup>

In fairness, some of Hardiman's complaints have validity. Significant scholarly ink has been spilled criticizing the test from the left as well as the right. Critics have four chief complaints. First, by assessing whether a "national consensus" exists against a punishment, the Supreme Court counterintuitively relies on a majoritarian test to protect the rights of an often-despised minority.<sup>39</sup> Second, relatedly, even if state legislatures are theoretically a sound metric to determine popular conceptions of decency, in practice the political process excludes the voices of significant segments of society.<sup>40</sup> Third, the test is subject to manipulation in support of the preferences of individual justices, permitting the Court to have too much of a normative role.<sup>41</sup> Fourth, the test is based on a false premise that society is inherently progressive when, in fact, recent history has revealed a trend toward harsher punishments.<sup>42</sup>

Against the backdrop of originalism's ascendancy and amidst growing calls for the Supreme Court to jettison the evolving standards of decency test, evaluating what might replace it takes on a greater urgency. This Article begins in Part I with a brief overview of the existing test's origins and justifications, as well as the criticisms it has weathered from all sides. In Part II, I consider two potential replacement tests based on originalist methodology and argue that they both fail to remedy the deficits of the current test and, in fact, inject additional problems. In Part III, I engage in

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36. *Id.* at 201 (Hardiman, J., concurring).

37. *Id.*

38. *Id.* at 207 (quoting *Miller v. Alabama*, 567 U.S. 460, 493 (2012) (Roberts, C.J., dissenting)).

39. *See infra* section I.B.2.a.

40. *See infra* section I.B.2.b.

41. *See infra* section I.B.2.c.

42. *See infra* section I.B.2.d.



a comprehensive and critical review of the alternative tests that non-originalist scholars have proposed and determine to what extent these tests also fall short. Finally, in Part IV, I reject the use of originalism as an interpretive approach to the Eighth Amendment. I argue that any interpretation of the cruel and unusual punishment clause must rest on the constitutional values of antisubordination and human dignity. With these values as guides, I then propose my own alternative approach, which requires the Court to apply strict scrutiny not only to punishments that are outliers but also to punishments imposed in an arbitrary or racially discriminatory fashion. This approach envisions a robust Eighth Amendment that provides significant protection both *for* the politically marginalized and *from* the structural harms of mass incarceration.

## I. THE EVOLVING STANDARDS OF DECENCY TEST

The evolving standards of decency test is the implementation rule for the Eighth Amendment's cruel and unusual punishment clause. Under the Court's modern jurisprudence, the test has two parts. First, the Court examines so-called objective evidence to determine if a "national consensus"<sup>43</sup> exists against a particular punishment. Historically, this evidence almost always includes state legislation<sup>44</sup> permitting or banning the punishment but may also include jury sentencing verdicts,<sup>45</sup> legislative

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43. Justice O'Connor first conceived of the test as requiring evidence of a "social consensus" or "national consensus" against a punishment in 1988's *Thompson v. Oklahoma*, 487 U.S. 815, 848 (1988). This "national consensus" requirement stuck, appearing in all of the Court's capital proportionality cases and, most recently, *Jones v. Mississippi*, 593 U.S. \_\_\_, 141 S. Ct. 1307, 1315 (2021).

44. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) ("In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.' First among these indicia are the decisions of state legislatures, 'because the . . . legislative judgment weighs heavily in ascertaining' contemporary standards.") (internal citations omitted) (first quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 175 (1976)); and then quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (referring to state legislation as "clearest and most reliable objective evidence of contemporary values"), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

45. *E.g.*, *Enmund v. Florida*, 458 U.S. 782, 794 (1982).

trends,<sup>46</sup> legislative intent,<sup>47</sup> the positions of professional associations,<sup>48</sup> and the domestic law of foreign countries.<sup>49</sup> This assessment roughly corresponds to the “unusual” portion of the punishment clause. Second, the Court supplements its national consensus analysis with an explicitly subjective inquiry: the Court’s “independent judgment” as to whether a punishment violates the evolving standards of decency.<sup>50</sup> This inquiry grew out of the Court’s dignity concerns and corresponds to the “cruel” portion of the punishment clause.<sup>51</sup> There is no explicit standard for how the Court applies its independent judgment.<sup>52</sup> The Court has typically focused on how well a punishment achieves its penological justifications (typically, retribution and deterrence),<sup>53</sup> but it has also examined the relationship between the punishment and the culpability of the defendant. Without a tight fit between punishment and justification or punishment and culpability,<sup>54</sup> the Court has expressed concern that the pain and suffering associated with the punishment is “purposeless.”<sup>55</sup> Under this inquiry, the Court will also sometimes consider factors that undermine the reliability of a conviction, including a defendant’s ability to participate in their defense, their susceptibility to false confessions, and their competence—factors that increase the risk that the defendant who lacks any culpability whatsoever could be subjected to the punishment.<sup>56</sup>

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46. *E.g.*, *Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

47. *E.g.*, *Thompson*, 487 U.S. at 850 (O’Connor, J., concurring) (“If we could be sure that each of these 19 state legislatures had *deliberately chosen* to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice . . . . As the plurality points out, however, it does not necessarily follow that the legislatures in those jurisdictions have *deliberately concluded* that it would be appropriate to impose capital punishment on 15-year-olds . . . .” (emphasis added)).

48. *E.g.*, *id.* at 830.

49. *E.g.*, *id.*

50. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“[T]he 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.”).

51. *See* Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 100–01 (2010) (noting that the Court’s independent judgment regarding the Eighth Amendment typically considers human dignity and arguing that the Court should more rigorously define its conception of cruelty through this assessment).

52. *Id.* at 98.

53. *Id.* at 102–12; *see also, e.g.*, *Thompson*, 487 U.S. at 836–38 (examining rationales of deterrence and retribution for capital sentence for children under fifteen at the time of their crimes).

54. Because the penological goal of retribution encompasses culpability, these analyses are not always distinct.

55. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

56. Ryan, *supra* note 51, at 117–18.

In this Part, I will discuss the origin and development of the evolving standards of decency test as a mechanism to assess the proportionality of criminal sentences—particularly capital sentences. Then I will discuss significant judicial and scholarly critiques of the test, while weighing in on the merits of these critiques.

A. *History of the Test*

The evolving standards of decency test is unabashedly a product of the judicial philosophy that the Constitution is a living or organic document, the meaning of which changes over time. Although the test first appeared in 1958's *Trop v. Dulles*,<sup>57</sup> most scholars trace its roots to the 1910 case of *Weems v. United States*.<sup>58</sup> In *Weems*, the Court held unconstitutional a sentence of up to fifteen years of *cadena temporal*, or shackled labor, imposed in the Philippines (then a U.S. colony) as punishment for falsification of government documents. In finding the punishment cruel and unusual, the Court emphasized that the punishment clause, like the Constitution itself, was intended to be dynamic:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.<sup>59</sup>

Nearly fifty years later, the Court specifically applied this philosophy in *Trop v. Dulles*, in which a plurality of the Justices found it unconstitutional for an individual to be made to forfeit citizenship as a punishment for wartime desertion.<sup>60</sup> Chief Justice Earl Warren drew on *Weems* in explaining that “the words of the Amendment are not precise, and . . . their scope is not static,” before setting forth that cruel and usual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>61</sup>

Following these two non-capital cases, the Court began to regularly

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57. 356 U.S. 86 (1958).

58. 217 U.S. 349 (1910).

59. *Id.* at 373.

60. *Trop*, 356 U.S. at 92–93.

61. *Id.* at 100–01. J.D. Candidate Courtney Christensen has argued that Warren’s invocation of the Eighth Amendment was somewhat of an afterthought. Courtney Christensen, Note, *Trop v. Dulles: How Earl Warren’s Contradicting Legal Opinions Secured Trop’s Victory*, 46 J. OF SUP. CT. HIST. 331, 334–35, 338–39 (2021). Warren had previously attempted to persuade the Court to invalidate the punishment on at least three other grounds but was unable to rally sufficient support. *Id.* at 332.

employ the test in death penalty cases. Justices Douglass, Brennan, and Marshall invoked the phrase in voting to strike down capital punishment in *Furman v. Georgia*.<sup>62</sup> Four years later, when the Court reinstated capital punishment, the Justices relied on the test again to achieve the opposite result in *Gregg v. Georgia*.<sup>63</sup> The *Gregg* Court questioned whether the *Furman* Justices had correctly applied the test, given that thirty-five state legislatures took steps to reenact capital punishment following the decision.<sup>64</sup> *Gregg* also criticized the *Furman* Justices' inquiry as incomplete, proclaiming that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive."<sup>65</sup> The Court explained that the evolving standards of decency test required a second form of assessment: whether a penalty was consistent with the "dignity of man."<sup>66</sup> A punishment failed to comport with the dignity of man if it was "excessive."<sup>67</sup> Excessive punishments involved "the unnecessary and wanton infliction of pain" or were "grossly out of proportion to the severity of the crime."<sup>68</sup> The Court emphasized that this inquiry was relevant to "abstract," as opposed to "particular," punishments.<sup>69</sup> This distinction laid the groundwork for the possibility that this two-part inquiry was necessary only when considering whether a punishment was categorically unconstitutional—that is, whether it could *ever* be validly applied—and not when a person was challenging the constitutionality of their individual sentence.<sup>70</sup> This distinction, along with the Court's simultaneous declaration that "death is different"<sup>71</sup> from other punishments, set the stage for the idea that the Court's interpretation of the cruel and unusual punishment clause could differ based on the circumstances.

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62. 408 U.S. 238 (1972).

63. 428 U.S. 153 (1976).

64. *Id.* at 179–80; *see also* *Roberts v. Louisiana*, 428 U.S. 325, 352–53 (1976) (White, J., dissenting) ("In *Furman*, it was concluded by at least two Justices that the death penalty had become unacceptable to the great majority of the people of this country and for that reason, alone or combined with other reasons, was invalid under the Eighth Amendment, which must be construed and applied to reflect the evolving moral standards of the country . . . . That argument, whether or not accurate at that time, when measured by the manner in which the death penalty was being administered under the then-prevailing statutory schemes, is no longer descriptive of the country's attitude. Since the judgment in *Furman*, Congress and 35 state legislatures re-enacted the death penalty for one or more crimes." (internal citations omitted)).

65. *Gregg*, 428 U.S. at 173.

66. *Id.* (quoting *Trop*, 356 U.S. at 100).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 188.

The Court's continued refinement of the test resulted in a doubling down on the "death is different" principle to create a parallel jurisprudence based on severity of punishment. The test grew to be synonymous with death penalty proportionality jurisprudence, as the Court relied on it to strike down capital punishment for vulnerable defendants, such as the intellectually disabled,<sup>72</sup> those who were under 18 at the time of their crimes,<sup>73</sup> and those who had become incompetent prior to their execution.<sup>74</sup> The Court also employed the test when finding capital punishment unconstitutionally disproportionate for the non-homicide crimes of rape of adults<sup>75</sup> and rape of children,<sup>76</sup> as well as certain instances of felony murder.<sup>77</sup> Finally, the Court struck down mandatory death sentences as violative of the test.<sup>78</sup>

For decades, the test had a far reduced role in assessing non-capital cases, including those involving extreme sentences of life without parole. The Court noted its "reluctance to review legislatively mandated terms of imprisonment"<sup>79</sup> and began to cabin its review of noncapital cases to those which were "grossly disproportionate."<sup>80</sup>

Parallel tracks continued to exist for capital and noncapital cases until 2010, when the Court applied the evolving standards of decency test in the limited noncapital context of children sentenced to life without parole. That year, the Court found that sentences of life without parole imposed on individuals convicted of non-homicides committed before age 18 violated the evolving standards of decency.<sup>81</sup> In 2012, the Court found that the same sentence violated evolving standards when mandatorily imposed

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72. *Atkins v. Virginia*, 536 U.S. 304 (2002). This case overturned *Penry v. Lynaugh*, 492 U.S. 302 (1989), which, only thirteen years earlier, had held that imposing capital punishment on the intellectually disabled did not offend the evolving standards of decency.

73. *Roper v. Simmons*, 543 U.S. 551 (2005). Similarly, *Roper* overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had previously held that the execution of individuals who committed their crimes before age 18 was consistent with the evolving standards of decency.

74. *Ford v. Wainwright*, 477 U.S. 399 (1986).

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

76. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

77. The Court's decisions in *Enmund v. Florida*, 458 U.S. 782, 797 (1982) and *Tison v. Arizona*, 481 U.S. 137, 158 (1987) establish that the capital punishment cannot be imposed for the crime of felony murder unless the defendant either: (1) actually killed, (2) attempted to kill, (3) intended for a killing to occur, or (4) was a "major participant" in the underlying felony and acted with reckless indifference to human life. This exemption only applies to when multiple defendants are charged with felony murder, but some are less culpable than others.

78. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

79. *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

80. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)).

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

on children who committed homicides.<sup>82</sup>

To sum up the Court's jurisprudence to date, the Court has relied on the evolving standards of decency test to conduct meaningful proportionality review on a small portion of its criminal docket: capital cases and those involving children sentenced to life without parole.<sup>83</sup> The test has taken a back seat in majority of the Court's Eighth Amendment docket, including noncapital sentencing, conditions of confinement,<sup>84</sup> and methods of execution.<sup>85</sup>

## B. *Criticism of the Test*

### 1. *From the Judiciary*

Conservative Justices have increasingly found fault with the evolving standards of decency test. While the test is far from unique in requiring the Court to assess contemporary standards,<sup>86</sup> its explicit endorsement of the living Constitution philosophy stands out. In many ways the test may make a larger target for conservative criticism than other, similar doctrines because it says the quiet part out loud. Little judicial criticism of the test existed during the early years of its application when an organic view of the Constitution was more common among the Justices. Even the dissenters in *Furman* embraced the idea that the meaning of cruel and

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82. *Miller v. Alabama*, 567 U.S. 460 (2012).

83. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) ("The Supreme Court takes two very different approaches to substantive sentencing law. Whereas its review of capital sentences is robust, its oversight of noncapital sentences is virtually nonexistent.").

84. Although the Court has indicated that it is guided by the evolving standards of decency in determining the constitutionality of conditions of confinement, see *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), satisfaction of a different inquiry is required to establish a constitutional violation. Successful litigants must demonstrate not only a sufficiently serious deprivation, but also that state actors possess a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 298–301 (1991).

85. In *Bucklew v. Precythe*, 587 U.S. \_\_\_, 139 S. Ct. 1112, 1124 (2019), a case assessing the constitutionality of lethal injection, the Court eschewed any mention of the evolving standards of decency test and instead undertook a historical analysis, finding that the Constitution did "not guarantee a prisoner a painless death." The Court held that methods of execution violate the Constitution if they superadd pain to the execution despite "a feasibly and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125.

86. See, e.g., Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 366–69 (2009) (arguing that the Court engages in majoritarian analysis by considering whether a consensus exists in the form of contemporary state legislation in many areas of the law, including substantive and procedural due process, equal protection, and First, Fourth, and Sixth Amendment jurisprudence).

unusual should be determined by contemporary values.<sup>87</sup> Chief Justice Burger conceded that “[a] punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”<sup>88</sup>

However Chief Justice Burger’s dissent introduced what would become the foundation of later critiques of the test’s operation: (1) that the test lacked “judicially manageable criteria”; (2) that it required the Court to encroach on the legislative role of determining public opinion; and (3) that these defects enabled justices to “enact [their] personal predilections into law.”<sup>89</sup> Burger’s complaint faded as the Justices embraced the test without question in subsequent cases, until Justice Scalia joined the Court. Justice Scalia initially appeared to believe that the test could be redeemed, provided the Court focused on the objective national consensus inquiry and eschewed the subjective independent judgment inquiry.<sup>90</sup> Scalia stressed that the decisions of state legislatures were the most competent evidence of a national consensus.<sup>91</sup> He reiterated these positions in subsequent cases,<sup>92</sup> applying the objective portion of the test in 1989’s *Stanford v. Kentucky*<sup>93</sup> to find that the Constitution permitted the execution of juveniles.<sup>94</sup> Summing up his position that the objective inquiry was the only appropriate one, Justice Scalia explained that for the Court to exercise independent judgment to reach a different result would “replace judges of the law with a committee of philosopher-kings.”<sup>95</sup>

Over time, Justice Scalia’s begrudging acceptance of the evolving standards test eroded, and he began to characterize even the objective portion of the test as “mistaken[] jurisprudence,” calling instead for a test

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87. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 326–27 (1986).

88. *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

89. *Id.* at 376, 383 (Burger, C.J., dissenting).

90. *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting).

91. *Id.* at 874 (Scalia, J., dissenting).

92. *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

93. 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

94. *Id.* at 379.

95. *Id.* In the noncapital context, Justice Scalia eschewed the test altogether in favor of an originalist approach. In his opinion in *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991), Scalia delved into the historical meaning of the cruel and unusual punishment clause and settled on a narrow reading that lacked any requirement of proportionality.

that reflected the “original meaning” of the Eighth Amendment.<sup>96</sup> Scalia urged the Court to reconsider its reliance on evolving standards, even suggesting that it overrule *Trop*: “That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.”<sup>97</sup> Soon other Justices joined the call. Justice Thomas has argued that the cruel and unusual punishment clause must be interpreted in light of the punishments permitted at the time of the Framing.<sup>98</sup> Thomas characterized the Framers’ intentions in enacting the clause as an effort to forbid “torturous punishments.”<sup>99</sup> Justice Alito similarly has advocated for analysis grounded in the “original meaning of the Eighth Amendment,” and criticized the independent judgment inquiry as permitting the Court to engage in policy arguments.<sup>100</sup> Alito further chastised the Court for stating that the test did not create a one-way ratchet in favor of leniency, when reality told a different story.<sup>101</sup>

These three Justices joined in opposition to the test in a dissenting opinion in *Graham v. Florida*,<sup>102</sup> where the majority found life without parole to be an unconstitutional punishment for children convicted of non-homicide crimes.<sup>103</sup> Penned by Justice Thomas, the dissent criticized the majority’s decision as prohibiting a punishment that “would not have offended the standards that prevailed at the founding.”<sup>104</sup> The Justices criticized the evolving standards test as reducing constitutional analysis to a “snapshot of American public opinion” that pushed punishment in the direction of leniency.<sup>105</sup> They attacked the independent judgment inquiry as “the power . . . to approve or disapprove of democratic choices” and lamented that the Court’s Eighth Amendment jurisprudence lacked “a principled foundation.”<sup>106</sup> Justice Alito echoed these concerns in his dissent in *Miller v. Alabama*,<sup>107</sup> contending that “[b]oth the provenance and philosophical basis” for the evolving standards of decency test “were problematic from the start.”<sup>108</sup> By way of illustration, he raised three

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96. *Roper*, 543 U.S. at 608, 626 (Scalia, J., dissenting).

97. *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

98. *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring).

99. *Id.* at 97.

100. *Kennedy v. Louisiana*, 554 U.S. 407, 462, 469 (2008) (Alito, J., dissenting).

101. *Id.* at 465–66, 469.

102. 560 U.S. 48 (2010).

103. *Id.* at 97 (Thomas, J., dissenting).

104. *Id.*

105. *Id.* at 101 (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

106. *Id.* at 102.

107. 567 U.S. 460 (2012).

108. *Id.* at 510 (Alito, J., dissenting).



questions: (1) “Is it true that our society is inexorably evolving in the direction of greater and greater decency?”<sup>109</sup> (2) “Who says so, and how did this particular philosophy of history find its way into our fundamental law?”<sup>110</sup> (3) “And in any event, aren’t elected representatives more likely than unaccountable judges to reflect changing societal standards?”<sup>111</sup>

## 2. *From the Academy*

While judicial criticism of the evolving standards of decency test has exclusively come from the Court’s conservative faction, scholars across the political spectrum have weighed in on the test’s flaws. Critics have complained of the test’s reliance on majoritarianism to protect minority rights, its reliance on imperfect proxies for public opinion, its manipulability, and its grounding on the false premise that society grows more “decent” over time.

### a. *Majoritarian Paradox*

Most fundamentally, scholars have criticized the use of a majoritarian test to protect the rights of a minority—particularly a socially disfavored and politically powerless minority like the class of individuals convicted of crimes.<sup>112</sup> In espousing his own theory of judicial review, John Hart Ely explained that “it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”<sup>113</sup> Erwin Chemerinsky has similarly cautioned, “[t]he preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right.”<sup>114</sup> John Stinneford has recognized that not only can majority views reflect undesirable values such as racial animus, they can also constitute an expression of moral panic resulting from false perceptions about crime rates.<sup>115</sup> For example, public hysteria around crack cocaine, purported super predators, and pedophilia all resulted in significantly more punitive

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109. *Id.*

110. *Id.*

111. *Id.*

112. *E.g.*, Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 *BROOK. L. REV.* 1141, 1144 (2014).

113. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69 (1980).

114. Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 *HARV. L. REV.* 43, 88 n.200 (1989) [hereinafter Chemerinsky, *Vanishing*].

115. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 *VA. L. REV.* 899, 969–70 (2011) [hereinafter Stinneford, *Rethinking Proportionality*].

legislation.<sup>116</sup>

Others have complained that the majoritarian aspect of the test prevents the Court from having much of a normative role.<sup>117</sup> Put another way, if the Court is merely parroting state legislatures to determine what decency is, why is it necessary to involve the Court at all?<sup>118</sup> Michael S. Moore has warned that relying on a test that equates morality with popular opinion abrogates the Court's role as a bulwark against the excesses of the state: "The rights enshrined in the Madisonian compromise are supposed to be good against the majority. It does not make sense to give a majoritarian interpretation of minority rights against the majority."<sup>119</sup>

Some critics fear that counting state legislatures renders the Court feckless. Tonja Jacobi has argued that "declaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed."<sup>120</sup> Likewise, Eighth Amendment scholar William W. Berry III has concluded that by employing this practice the Court merely "limit[s] the power of certain states to employ punishments departing from the norms of their fellow

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116. *Id.* (discussing increased punishments arising from the "moral panic" as the public came to believe exaggerated or false notions concerning the harm of crack cocaine, the "rising generation" of merciless "superpredators", and the insatiability of "sex offenders").

117. However, other scholars contend that the Court typically divines constitutional meaning through majoritarian methodology such as by assessing state legislation or consensus views. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS SHAPED THE MEANING OF THE CONSTITUTION* (2009) (exploring the relationship between Supreme Court jurisprudence and popular opinion); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (arguing that the Court's civil rights case often reflected shifts in popular attitudes about race); CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS* 11 (2009) (positing that "truth, or at least sense and valuable information" can be found "in the judgments of large groups of people"); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993) (arguing that courts are as majoritarian as legislatures and thus not lacking in legitimacy); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* xii (2006) (arguing that "courts for most of American history have tended to reflect the constitutional views of majorities"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 6 (1996) (arguing that the counter-majoritarian critique of the Court is overblown, as the Court frequently "takes a strong national consensus and imposes it on relatively isolated outliers").

118. *See* Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927, 941 (1985) ("What is the significance of a curb on majority and legislative will which cannot be employed to check or restrain that will?").

119. Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 63 (2008).

120. Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006); *see also* Cover, *supra* note 112, at 1175 ("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." (emphasis in original)).

states.”<sup>121</sup>

*b. Participatory Process Concerns*

Even accepting the premise that a majoritarian evaluation of decency is desirable, questions arise regarding whether the indices used to assess public morality are accurate proxies. State legislation and jury verdicts are generally considered the gold standard of objective criteria—particularly by those who balk at the Court’s consideration of the views of professional associations or the domestic law of foreign countries as unrepresentative of the American public. However, state legislation and jury verdicts are also flawed barometers of public opinion. Studies suggest that legislators’ policy priorities frequently do not reflect the wishes of their constituents.<sup>122</sup> Lobbyists and special interest groups exacerbate this problem.<sup>123</sup> Moreover, voting laws have stymied the participation of particular groups. Most directly, many individuals convicted of felonies—who are disproportionately people of color—are stripped of the right to vote, ensuring their voices are not expressed in resulting state legislation.<sup>124</sup> Voter-ID laws prevent additional barriers to political participation that disproportionately impact Black and Latinx voters.<sup>125</sup>

Jury sentencing verdicts are also a problematic metric. Juries necessarily view cases in isolation, with only an intuitive understanding of how one crime or criminal defendant may compare to another. At best,

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121. William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of “Death-Is-Different” Jurisprudence*, 28 PACE L. REV. 15, 22 (2007) [hereinafter Berry III, *Decency*].

122. See, e.g., Phillip D. Waggoner, *Do Constituents Influence Issue-Specific Bill Sponsorship?*, 47 AM. POL. RSCH. 709, (2018) (finding that legislators often incorrectly assume their constituents’ preferences based on the dominant industries in their state); Alexander Hertel-Fernandez, Matto Mildenerger & Leah C. Stokes, *Legislative Staff and Representation in Congress*, 113 AMER. POL. SCI. REV. 1, 1 (2019) (finding that Congressional staffers systematically incorrectly estimate the opinions of their constituents).

123. See, e.g., Rob O’Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They’re Letting Corporations Do It Instead.*, CTR. FOR PUB. INTEGRITY (Apr. 4, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead/> [<https://perma.cc/GG4Y-L5KX>] (discussing the success of model legislation penned by special interest groups); Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–18 (1984) (arguing that legislators respond to special-interest groups in lieu of the public interest).

124. Nazgol Ghandnoosh, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/policy-brief/voting-rights-in-the-era-of-mass-incarceration-a-primer/> [<https://perma.cc/X73A-YYHG>].

125. See, e.g., *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/EN8A-G4C4>] (summarizing studies showing the racially disparate effects of laws that result in voter suppression).

juries' sentencing decisions reveal moral determinations about an individual defendant, not a particular punishment in the abstract. As with voting, structural barriers to participation permeate jury service. Many states preclude those convicted of felonies from serving on juries.<sup>126</sup> Jury pools drawn from voter registration rolls exclude Black and Brown jurors at a higher rate.<sup>127</sup> Prosecutors continue to exercise peremptory strikes to remove Black and Brown potential jurors from the jury pool.<sup>128</sup> Capital juries, which the Court has repeatedly turned to in its death penalty cases, are even less representative because they typically employ death qualification.<sup>129</sup> Death qualification removes potential jurors who indicate that their personal opposition to capital punishment would prevent them from imposing a death sentence under any circumstances. Because Black people and women of all races are more likely to oppose the death penalty,<sup>130</sup> death qualification disproportionately removes their voices from capital sentencing juries.<sup>131</sup>

In the noncapital context, individual judges typically render sentencing decisions. These decisions also present a poor metric. In a previous work, I explored the lack of diversity on the bench and its potential impact on

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126. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 73 (2020); James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 3 (2014) (noting that “[f]elon jury exclusion statutes . . . presume that convicted felons pose a unique threat to the jury process” and that “[n]o other group of prospective jurors is categorically excluded from the jury pool because of an alleged pretrial bias”).

127. See Hoag, *supra* note 126, at 73 (observing that when voter eligibility determines juror eligibility and individuals with felony convictions are excluded from voter registrations, African Americans and Latinx people are most likely to be excluded from juries).

128. See Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 845–46 (2020) (discussing failure of the Court's decision in *Batson v. Kentucky* to prevent the unconstitutional removal of Black and Brown potential jurors and corresponding scholarship).

129. *Id.*

130. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 157 (2018).

131. See generally Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. L. REV. 299, 399–45 (2017) (demonstrating that more Black or female jury members were removed for cause for anti-death penalty views than white male jury members in Lexington County); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. J. 113, 118 (2016) (discussing the disproportional racial impact of *Witherspoon* strikes and death penalty opposition); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1140–43, 1147–48 (2014) (explaining that “[B]lack jurors expressing reservations about capital punishment are subject to exclusion through peremptory strikes” which greatly reduces the number of Black jurors serving on a capital jury); Alec T. Swafford, Note, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 158 (2011) (asserting that disproportional exclusion of Black people from capital juries results in partiality, particularly in cases with Black defendants).

sentencing decisions;<sup>132</sup> contemporary statistics confirm that approximately 80% of the federal and state judiciary is white and just over 70% is male.<sup>133</sup>

These exclusions raise the question of whose morality the Court is actually assessing when it considers these metrics. Decency measured thus is not that of the American public generally, but of a fraction of the public that skews white and male.

*c. Manipulability*

Many scholars have pointed to the Court's lack of discipline in determining the criteria for assessing the existence of a national consensus, casting doubt on the objectivity of this inquiry. The Court has never provided guidance on the number of states or rate of change necessary to establish a national consensus. One critic observed that the Court went from "virtual unanimity in *Coker* to supermajority agreement in *Enmund* and bare majority agreement in *Roper* and *Atkins*."<sup>134</sup> The Justices were inconsistent on what constitutes indicia of decency.<sup>135</sup> Early cases counted the number of states that permitted a punishment, along with the number of times the punishment was imposed—typically through jury sentencing verdicts.<sup>136</sup> However, subsequent cases moved beyond binary counting and began to examine legislative trends as evidence of a growing consensus. The Justices explained, "It is not so much the number of these States that is significant, but the consistency of the direction of change."<sup>137</sup> Some decisions considered the normative recommendations

132. Miller, *supra* note 8, at 132–34.

133. Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/8K3P-KSHX>]; Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1903–08 (2017) (discussing a 2017 study of state court judges that found that 80% were white and nearly 70% were male and concluding that "[w]hite men dominate state courts").

134. Note, *State Law As "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1689 (2007) (citing *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977); *Enmund v. Florida*, 458 U.S. 782, 792 (1982); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002)); see also Mitchel A. Brim, *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 SW. U. L. REV. 275, 298 (2003) ("[T]he Court subjectively chooses an arbitrary number of states to constitute a national consensus.").

135. Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 410 (2011) ("The first problem with this simple mathematical calculation is that no one can agree on the relevant data.").

136. See, e.g., *Coker*, 433 U.S. at 593–97 (assessing the number of state legislatures permitting death sentences for rape convictions and the number of jury verdicts resulting in death sentences).

137. *Atkins*, 536 U.S. at 315.

on punishment of professional associations, such as the American Bar Association or American Law Institute.<sup>138</sup> Others began to look beyond the national consensus to determine how particular punishments were imposed internationally.<sup>139</sup> However, courts do not consider these variables consistently. For example, in finding no national consensus against sentencing people with intellectual disabilities to death in *Penry*, the Court refused to consider evidence of public opinion polls or the domestic law of foreign countries; however, in reversing *Penry* thirteen years later, the Court relied on both of these variables to find the existence of a national consensus against sentencing them to death—albeit in a footnote.<sup>140</sup>

Questions on what data points to consider were the least of the Court's problems. More fundamentally, the Justices could not align on how to interpret even those on which they all agreed should be counted: state legislation and jury verdicts. Most fundamentally, the Justices disagreed as to which states went into the calculus. For example, Justice Scalia would omit states that had abolished capital punishment when considering whether death should be imposed under particular circumstances, while Justice Stevens would not.<sup>141</sup> The content of state legislation also proved vexing. While some Justices looked to the plain language of states legislation, others considered legislative intent: had states actively intended to impose a punishment on particular groups or had they merely passively permitted it through vaguely worded legislation?<sup>142</sup> Similarly, some Justices viewed few instances of the actual imposition of a punishment as evidence of a consensus against it, while other Justices interpreted this evidence as jurors exercising appropriate discretion to impose the punishment rarely on only the worst offenders.<sup>143</sup>

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138. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (considering the opposition of the American Bar Association and the American Law Institute to the juvenile death penalty).

139. *See, e.g., id.* at 830–31 (taking into account that many Western European nations and the Soviet Union had outlawed the death penalty for juveniles).

140. *Compare Penry v. Lynaugh*, 492 U.S. 302, 323–25 (1989), *with Atkins*, 536 U.S. at 316 n.20.

141. *Thompson*, 487 U.S. at 824–30 (considering the fourteen states that did not authorize capital punishment in calculating a national consensus against the death penalty for children under age 16); *Roper v. Simmons*, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting) (arguing that state legislatures that outlaw the death penalty generally should not be counted because they are unlikely to have considered its propriety with respect to specific populations).

142. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 66–67 (2010) (observing that “the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences”).

143. *See, e.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 374 (“[I]t is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters

Charges of manipulation are not limited to the objective test. While many believe the Court can and should play a normative role in the determination of what is cruel and unusual, scholars have frequently observed that the Court's independent judgment inquiry lacks rigor.<sup>144</sup> To begin with, the Court has never explicitly found that the objective indicia of decency conflict with its independent judgment.<sup>145</sup> Instead, the Court's judgment serves to bolster its reading of these indicia, or, alternatively, manipulates the objective indicia to concur with its judgment.<sup>146</sup> The result of this mushiness is doctrinal uncertainty, as it becomes difficult to predict how the Court will decide future cases—save perhaps the political positions of the Justices—all of which raises questions concerning the Court's legitimacy.<sup>147</sup>

*d. False Premise*

Finally, some scholars have argued that the evolving standards of decency test is flawed because it rests on a false premise: that society becomes more enlightened, and less barbaric, over time. John Stinneford has pointed out that in some ways, the public has been more prone to cruelty, favoring lengthier sentences and extreme punishments for particularly unpopular groups, like chemical castration for those convicted of sex offenses.<sup>148</sup>

Others have argued that regardless of the theoretical validity of the test's underlying premise, it functions as a ratchet: once the Court finds evidence of a national consensus against a more severe punishment (no matter how fleeting) and holds the punishment to be unconstitutional, the more severe option is forever lost as an option.<sup>149</sup> Constitutional

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to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed.” (emphasis omitted)).

144. See, e.g., Berry III, *Decency*, *supra* note 121, at 23–24 (arguing that subjectivity of the Court's independent judgment inquiry gives Eighth Amendment meaning “a certain tenuousness”); Sigler, *supra* note 135, at 415 (“In the face of these discrepancies, the Court has acknowledged the importance of its ‘own judgment,’ but its efforts to articulate it have been unconvincing.”).

145. Stinneford, *Rethinking Proportionality*, *supra* note 115, at 921.

146. *Id.*

147. Berry III, *Decency*, *supra* note 121, at 28.

148. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1754–55 (2008) [hereinafter Stinneford, *Unusual*]; see also Stinneford, *Rethinking Proportionality*, *supra* note 115, at 919 (“[T]he evolving standards of decency test depends upon optimistic assumptions regarding the progressive nature of history—assumptions that have proven false. . . . Over the past forty years, however, societal attitudes have become harsher and more punitive, not less so. Legislatures have ratcheted up the severity of criminal punishments to an unprecedented degree.”).

149. E.g., Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet*

punishment marches only in the direction of leniency. Eric Posner has illustrated this idea:

If people in the various states [later] change their minds and come to believe that the punishment is justified, legislatures will not be able to enact the punishment without violating the Constitution. It seems likely that they will therefore not bother, and so a new consensus in the other direction cannot get started.<sup>150</sup>

Some have pushed back against this idea, noting that in the wake of *Furman*, where the Court found capital punishment cruel and unusual, thirty-five states and the federal government enacted new capital sentencing schemes.<sup>151</sup> Within just four years, the Court declared capital punishment constitutional, provided it came along with certain procedural safeguards.<sup>152</sup>

Others have noted that states legislatures can pass contingent legislation, wherein legislation authorizing a particular punishment only becomes law, say, if a threshold number of other states also authorize the punishment or if the Supreme Court finds the punishment constitutional.<sup>153</sup> Thirteen states employed this strategy in the abortion context by enacting “trigger laws,” which banned abortion in the event that the Court overturns *Roe v. Wade*,<sup>154</sup> and which took effect almost immediately, following the *Dobbs* decision.<sup>155</sup> Finally, state legislatures have the option of passing resolutions that declare support for particular punishments, even if the Court has found the punishments unconstitutional.<sup>156</sup>

The depth and breadth of these critiques make the evolving standards of decency test a logical target for a Court that is primed to flex its originalism muscles. In the next Part, I evaluate the two primary approaches originalists have recommended that the Court pursue in lieu

*Puzzle*, 20 U. PA. J. CONST. L. 677, 678 (2018); John F. Stinneford, *The Original Meaning of “Cruel”*, 105 GEO. L. J. 441, 496 (2017) [hereinafter Stinneford, *Cruel*]; Jacobi, *supra* note 120, at 1119–23.

150. Eric Posner, *The Eighth Amendment Ratchet Puzzle in Kennedy v. Louisiana*, SLATE (June 25, 2008, 11:06 AM), <https://slate.com/news-and-politics/2008/06/the-eighth-amendment-ratchet-puzzle-in-kennedy-v-louisiana.html> [<https://perma.cc/9N28-GWWN>].

151. *Gregg v. Georgia*, 428 U.S. 153, 179 n.23, 179–80 n.24 (1976).

152. *Id.* at 153.

153. Usman, *supra* note 149, at 680.

154. Elizabeth Wolfe, *13 States Have Passed So-Called ‘Trigger Laws,’ Bans Designed to Go into Effect If Roe v. Wade Is Overturned*, CNN (May 3, 2022, 3:00 PM), <https://www.cnn.com/2022/05/03/us/state-abortion-trigger-laws-roe-v-wade-overturned/index.html> [<https://perma.cc/X7SB-P8M2>].

155. *After Roe Fell: Abortion Laws by State*, CTR FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/3Q2B-Y97Z>].

156. Usman, *supra* note 149, at 135.



of the test.

## II. ALTERNATIVE TESTS GROUNDED IN ORIGINALISM

In light of the growing criticism of the evolving standards of decency test and the ascendancy of originalism, evaluation of the possible replacements for the test takes on greater urgency. In this Part, I tackle two alternative approaches to the evolving standards of decency test that are grounded in originalist methodology. After explaining the test and its potential implications on punishment jurisprudence, I evaluate each test's ability to address the criticisms levied at the evolving standards of decency test and explore its desirability as a possible replacement. I conclude both tests would make flawed replacements.

### A. Justice Scalia's Original Practice Approach

In response to his frustrations with the evolving standards of decency test, as well as other aspects of the Court's Eighth Amendment jurisprudence, Justice Scalia developed an alternative theory of interpretation based on originalism. According to Scalia, the purpose of the cruel and unusual punishment clause was to outlaw certain forms of "cruel and illegal" methods of punishment<sup>157</sup> that were already condemned at the time of the Framers—punishments like the rack, thumbscrews, pillorying, branding, and the cropping and nailing of ears.<sup>158</sup> Other forms of violent punishment, including execution and punishments deemed grossly disproportionate by today's standards, are permitted by the Eighth Amendment because they existed in the late eighteenth century.<sup>159</sup> New punishments, or those found to be unusual, offend the punishment clause only if they involve the intentional infliction of unnecessary pain.<sup>160</sup>

Scalia's original practice approach avoids some of the criticisms levied at the evolving standards of decency test. It strives for consistency, avoids a preference for leniency, does not rest on a false assumption of society's progressive enlightenment, and discourages subjective analysis with

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157. *Harmelin v. Michigan*, 501 U.S. 957, 973–74 (1991).

158. *Atkins v. Virginia*, 536 U.S. 304 (2002) (Scalia, J., dissenting); see also William J. Brennan, Jr., *Foreword: Neither Victims nor Executioners*, 8 NOTRE DAME J.L., ETHICS & PUB. POL'Y 1, 5 (1994) (discussing other punishments levied at the time of the Founding).

159. *Harmelin*, 501 U.S. at 974, 980–81; *Atkins*, 536 U.S. at 349; Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION 129, 145 (Amy Gutmann ed., 1997) ("[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.").

160. *Baze v. Rees*, 553 U.S. 35, 102 (Thomas, J., concurring).

ambiguous standards.

While Scalia's approach is not majoritarian in the sense that it does not require a tally of state legislation, it rests on several premises that threaten minority protection. This approach takes as given that practices permitted by the common law are constitutional. At the time, the legality of these practices was determined by common law judges—landed white men who made decisions based on precedent as filtered by their individual values.<sup>161</sup> Scalia also gives the First Congress's Crimes Act of 1790 presumptive validity because so many of these men were also constitutional delegates.<sup>162</sup> However, as Erwin Chemerinsky has noted, only a small fraction of elite white men ratified the Constitution—less than five percent of the country's population.<sup>163</sup> Neither common law judges nor members of the First Congress were likely to factor in the preferences or positions of women and people of color in their decisions. Moreover, these judges and congressmen were often themselves subject to the law in theory only.<sup>164</sup>

In addition, Scalia's approach only cabins subjectivity when modern punishments are identical to those administered during the eighteenth century. But this is rarely the case. When called upon to assess whether a contemporary punishment is consistent with American history and tradition—i.e., punishments permitted by the common law—the Court must nevertheless engage in subjective analysis. The Justices must again make decisions based on an assessment of precedent filtered through their individual values, or, as Justice Kavanaugh has put it, they must engage in “old-fashioned, common law judging.”<sup>165</sup> When a punishment lacks an eighteenth-century analog, the Justice must determine if any intentional infliction of pain is “unnecessary,” which similarly invites a subjective determination.

In addition to these critiques, Professor John Stinneford has questioned both the wisdom and the workability of Scalia's practice approach, which

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161. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1917 (2017) (“And common-law tests almost by definition call on judges to assess whether they think the law is important enough to uphold in light of the larger values at stake.”); DAVID LEMMINGS, PROFESSORS OF THE LAW 274 (2000).

162. *Harmelin*, 501 U.S. at 980 (“Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code.”)

163. ERWIN CHERMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 78 (2022) [hereinafter CHERMERINSKY, ORIGINALISM].

164. RON CHERNOW, ALEXANDER HAMILTON 717–23 (2005) (detailing how Aaron Burr was never subject to criminal punishment for killing Alexander Hamilton in a duel and noting, “Ordinarily, gentlemen were not prosecuted for duels”).

165. Kavanaugh, *supra* note 161, at 1915.

condones abhorrent punishment.<sup>166</sup> Stinneford noted that eighteenth-century punishments included public disembowelment or burning alive for those convicted of treason, as well as flogging, pillorying, and mutilation.<sup>167</sup> Stinneford points out that even Justice Scalia himself was not prepared to fully commit to original practice on this scale: “Justice Scalia has announced that he would likely use the Cruel and Unusual Punishments Clause to strike down any attempt to revive punishments such as flogging, despite the fact that he would have to violate his own originalist principles to do so.”<sup>168</sup>

Under Scalia’s approach, the Court’s primary role is that of historian—a role for which many of the Justices are neither trained nor well-suited.<sup>169</sup> More fundamentally, Scalia’s original practice approach defangs the punishment clause in the modern era, for the simple reason that no state currently imposes punishments more severe than those of the eighteenth century.<sup>170</sup> Because Scalia also rejects that the Framers’ punishment clause contemplated any requirement of proportionality,<sup>171</sup> these constitutional challenges would also fail. Accordingly, Scalia’s punishment clause would amount to no punishment clause at all.

### B. *John Stinneford’s Original Meaning Approach*

A number of scholars have challenged Justice Scalia’s historical cherry-picking as ignoring important indicators of the Eighth Amendment’s original meaning. John Bessler and Samuel Pillsbury have emphasized the Framers’ admiration of Enlightenment thinkers who condemned excessive punishment, including those

166. Stinneford, *Unusual*, *supra* note 148, at 1742.

167. *Id.*

168. *Id.*; see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (“What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists— would sustain them against an [E]ighth [A]mendment challenge . . . . Even so, I am confident that public flogging and handbranding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.”).

169. See *Brown v. Davenport*, 596 U.S. \_\_\_, 142 S. Ct. 1510, 1520–21, 1535 (2022) (Kagan, J., dissenting) (noting the inaccuracy that results when the Justices “play amateur historian”).

170. Justice Scalia alluded to this reality as a reason he did not have to worry about the implications of his original practice approach. See Scalia, *supra* note 168, at 864 (“I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case’s arising either.”).

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

commonly imposed like capital punishment.<sup>172</sup> Alexander Reinert has argued that eighteenth and nineteenth-century slavery jurisprudence similarly reveals the recognition that cruel and unusual punishment encompassed disproportionate punishment.<sup>173</sup>

Perhaps the scholar most committed to debunking Justice Scalia's narrow originalism is John Stinneford, who contends that the Eighth Amendment should be interpreted not based on original practice but based on original public meaning. In a series of well-researched articles, Stinneford illustrates that Scalia advocated for "a much more restrictive reading of the Cruel and Unusual Punishments Clause than the historical evidence warrants."<sup>174</sup> Stinneford begins by criticizing Scalia's historical interpretation that the clause was only meant to forbid cruel methods of punishment at the time of the Framing, finding that this conclusion disregards the significance of "unusual" as a legally independent criterion.<sup>175</sup> After a review of historical indicators of original public meaning, Stinneford concludes that "unusual" is neither too vague to carry independent meaning, nor—as others have concluded—synonymous with "uncommon."<sup>176</sup> Instead, the Framer's understanding of "unusual" was "contrary to long usage."<sup>177</sup>

In a subsequent article, Stinneford undertakes a similar deep dive on the historical meaning of the word "cruel," concluding that the term means "unjustly harsh."<sup>178</sup> When read in conjunction with unusual, the phrase has relative meaning: a "cruel and unusual" punishment is one that is unjustly harsh in comparison with the punishment it replaces.<sup>179</sup> Accordingly, Stinneford's historical meaning approach would invalidate increasingly harsh innovations.

Stinneford contends that his original historical meaning approach avoids many of the problems associated with the evolving standards of decency test. He contends that because it rests on concrete historical analysis instead of a contemporary assessment of decency, it is less

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172. JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 66–161 (2012); Samuel H. Pillsbury, *Talking About Cruelty: The Eighth Amendment and Juvenile Offenders After Miller v. Alabama*, 46 *LOY. L.A. L. REV.* 885, 896–99 (2013) (exploring the writings of Cesare Beccaria and Montesquieu alongside those of John Adams and Thomas Jefferson).

173. Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 *N.C. L. REV.* 817, 822 (2016).

174. Stinneford, *Unusual*, *supra* note 148, at 1757.

175. *Id.* at 1757–58.

176. *Id.* at 1766–1815.

177. *Id.* at 1767.

178. Stinneford, *Cruel*, *supra* note 149, at 445.

179. *Id.* at 446–47.

subject to judicial manipulation.<sup>180</sup> He also argues that it provides greater protection for minority rights because it does not take into account public opinion, which can often become inflamed against criminal defendants.<sup>181</sup> Stinneford contends that his approach brings other Eighth Amendment claims into the fold, including those challenging incarceration, mandatory minimums, and chemical castration—none of which were common eighteenth-century punishments.<sup>182</sup>

Stinneford's approach raises the question, "how long is long usage?" His answer is the time necessary to show a multi-generational cultural consensus against a punishment, or approximately a century.<sup>183</sup> According to Stinneford, the virtue of this length of time is that it allows the Court to ignore potential temporary swings in public opinion and thereby avoids the one-way ratchet problem—in the sense that legislatures may experiment with new punishments without fearing that doing so suggests they have abandoned their traditional punishments.<sup>184</sup> Stinneford's original meaning approach avoids the perverse results of Scalia's originalism: punishments common at the time of the Framing—including public flogging and branding—would no longer be constitutional because they have fallen out of usage for over a century and are cruel in comparison with modern alternatives.<sup>185</sup> On the other hand, contemporary capital punishment and its execution protocols would survive constitutional challenge, as capital punishment has existed continuously since the Founding and modern methods of execution are likely less harsh than traditional methods.<sup>186</sup>

Stinneford's approach fails to answer additional questions, which would be presumably left to the Justices' discretion. Would existing punishments be inherently constitutional due to their long usage, even if they were potentially cruel innovations at the time of their enactment? Put another way, would challenges to incarceration really be legally viable, given that incarceration has existed as a punishment for well over a

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180. Stinneford, *Unusual*, *supra* note 148, at 1816; Stinneford, *Cruel*, *supra* note 149, at 497.

181. Stinneford, *Unusual*, *supra* note 148, at 1816.

182. *Id.* at 1818. Stinneford also argues that because his reading of "cruel" does not require a negative state of mind on behalf of the state actor imposing punishment, his approach would reinvigorate conditions of confinement litigation. Stinneford, *Cruel*, *supra* note 149, at 502–03.

183. John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 538, 593–94 (2014) [hereinafter Stinneford, *Desuetude*]; Stinneford, *Cruel*, *supra* note 149, at 497–98.

184. Stinneford, *Cruel*, *supra* note 149, at 497–98.

185. Stinneford, *Desuetude*, *supra* note 183, at 538–39.

186. Stinneford, *Unusual*, *supra* note 148, at 1821–22. Stinneford questions whether lethal injection is actually less cruel than preexisting methods of execution. *Id.*; Stinneford, *Cruel*, *supra* note 149, at 447–48.

century? Additionally, it is unclear what Stinneford's jurisdiction of comparison is—should the Court compare innovative punishments to other punishments in the same state or to punishments nationally?<sup>187</sup> The former approach would lead to a patchwork quilt of constitutional punishments, with little consistency between states. Assuming the latter approach is more likely Stinneford's aim, the Eighth Amendment will protect only the outliers—those who receive punishments that are out of step with those in all other states, likely a very small portion of the Court's criminal docket.<sup>188</sup>

Contrary to his assertion, Stinneford's original meaning approach is a majoritarian one. While it does not require determination of a contemporary national consensus, a test resting on historical meaning necessarily requires determination of the historical consensus of that meaning. This latter endeavor is as difficult as the former, but rests on less available evidence. Moreover, majoritarian values are also baked into Stinneford's concept of desuetude, which requires not just a national consensus against a punishment, but a multi-generational national consensus.

The test also exhibits participatory process concerns. The "usage" of a punishment assumes both that the punishment is authorized by state legislatures and that it is implemented by judges and juries. Both of these entities have historically excluded and continue to exclude the voices both of those most directly impacted by punishment and of Black and Brown communities generally. Stinneford's approach gives these non-inclusive legislative bodies dead hand control over the punishment system.

Another difficulty is that Stinneford's test overcorrects the one-way ratchet problem. Stinneford contends that his approach retains a constrained normative role for the Court, with Justices determining first, if a punishment is new, and second, if that punishment is harsher than the one it replaces.<sup>189</sup> While both inquiries permit more manipulability than

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187. At times Stinneford seems to advocate for interjurisdiction comparison, although it is unclear if he merely means that states should apply his approach when interpreting their own constitutions: "We have not reached that point at the national level [of establishing non-usage], but it may already be the case that the death penalty is cruel and unusual under the constitutions of states that abolished it several generations ago." Stinneford, *Desuetude*, *supra* note 183, at 539.

188. This outcome may be positive or negative, depending on the reader's feelings about current punishment practice in the criminal legal system.

189. Stinneford, *Desuetude*, *supra* note 183, at 590 ("Judges are capable of determining objectively whether a practice is new. They are also capable of determining the harshness of a new punishment in relation to the traditional practices it replaces. This inquiry involves an exercise of judgment, but it is judgment directed at an objective fact.").

Stinneford may be comfortable admitting,<sup>190</sup> to the extent Stinneford is correct, these constraints make it more difficult for the Court to exercise discretion in favor of minority rights beyond what was authorized by the democratically determined status quo.<sup>191</sup>

Although perhaps better theorized than Justice Scalia's approach, Stinneford's original public meaning approach fails to improve on the existing evolving standards of decency test. Instead, the test envisions a majoritarian Eighth Amendment that merely serves as a bulwark against cruel experimentation and the revival of long-dead punishments.

The primary virtue of both of these originalist tests is that they purport to present considerable constraints on judicial discretion—in marked contrast to the evolving standards of decency test's independent judgment inquiry. While some scholars have questioned the efficacy of originalist constraints,<sup>192</sup> even when effective, they may not be desirable. Constraint for its own sake lacks intrinsic worth if it results in repugnant outcomes.<sup>193</sup> Because both of these tests lead to problematic outcomes, they are not suitable replacements for the evolving standards of decency test.

In the next Part, I will consider four alternative approaches by non-originalist scholars and evaluate whether any would serve as an improvement on the evolving standards of decency test.

### III. NON-ORIGINALIST ALTERNATIVES

In this Part, I synthesize the legal literature to focus on four proposed non-originalist<sup>194</sup> alternatives to the evolving standards of decency test. After explaining the test and its potential implications on punishment

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190. Historical analysis is subject to judicial cherry-picking. A determination of relative harshness will rest to some extent on the Justice's subjective beliefs.

191. Stinneford likely sees this as feature and not a bug:

Only after social movements have changed the societal consensus, and such consensus has been entrenched for several generations, can judges appropriately recognize such change in constitutional adjudication. The judicial role is not to lead the change, but to recognize it after it has been firmly established. But this weakness may not be a weakness after all if we care about reliability, entrenchment, and popular sovereignty.

Stinneford, *Desuetude*, *supra* note 183, at 592.

192. CHEMERINSKY, ORIGINALISM, *supra* note 163, at 19–22.

193. *Id.*

194. I define non-originalism as any theory of constitutional interpretation that does not rest on the assumption that the meaning of the constitution was fixed at the time of Framing and does not rely on determinations of the Framers' intent or the original public meaning to the exclusion of other inputs. See CHEMERINSKY, ORIGINALISM, *supra* note 163, at 25, 28–29 (discussing characteristics of originalism); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987) (setting forth a typology of constitutional arguments including arguments derived from text, the Framers' intent, constitutional theory, precedent, and values).

jurisprudence, I evaluate each test's ability to address the criticisms levied at the evolving standards of decency test and explore its desirability as a possible replacement. I conclude that while some of these proposals improve upon the evolving standards of decency test, all have flaws that would make them imperfect replacements.

A. *Goldberg and Dershowitz's Purposive Test*

In 1970, prior to the Court's repudiation of the death penalty in *Furman v. Georgia*, former Justice Arthur Goldberg and his former law clerk Alan Dershowitz wrote a seminal article arguing that capital punishment was unconstitutional.<sup>195</sup> Writing from the perspective that the Court was a counter-majoritarian body and expressing "faith in and commitment to national self improvement," the authors sought a principled way for the Court to apply the punishment clause in light of these principles.<sup>196</sup>

Recognizing that the Court's normative role required constraints, the authors proposed what they deemed the "purposive test," which subjected punishments to strict scrutiny.<sup>197</sup> The purposive test was rooted in the concept of human dignity and forbade punishments "degrading in their severity and wantonly imposed."<sup>198</sup> The degrading requirement corresponded to an assessment of cruelty, while the "wantonly imposed" requirement assessed unusualness.<sup>199</sup> A punishment was degrading if it was physically or mentally torturous, and it was wantonly imposed if it was "administered arbitrarily or discriminatorily."<sup>200</sup> When a punishment fit these criteria, the State had the burden to supply a compelling justification for its use.<sup>201</sup> This justification required the State to demonstrate that the punishment at issue "serve some other end besides retribution more effectively than any other less severe penalty."<sup>202</sup> That is, the punishment needed to be narrowly tailored to achieve its purported non-retributive penological aim. Absent such a compelling justification, the Constitution would require that a less severe punishment be imposed.<sup>203</sup>

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195. See generally Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

196. See Goldberg & Dershowitz, *supra* note 195, at 1773–77.

197. See *id.* at 1784–98 (discussing design of the purposive test).

198. *Id.* at 1784 (internal quotations omitted).

199. *Id.* at 1784–94.

200. *Id.* at 1785–90.

201. *Id.* at 1794.

202. *Id.* at 1797.

203. *Id.* at 1794.



The purposive test addresses many of the problems associated with the evolving standards of decency test. To begin with, it is consciously counter-majoritarian with the aim of protecting the rights of those experiencing the punishment. It does not rely on a moral consensus or attempt to divine decency as a result of political participation. Instead, it permits the Court to play a coherent normative role in evaluating a punishment's severity and the regularity of its imposition. By doing so, it avoids the participatory process concerns of the evolving standards of decency test.

However, even though the purposive test provides more constraints on judicial discretion than the independent judgment inquiry of the evolving standards test, its loosely defined elements—"degrading" and "wantonly imposed"—present opportunity for manipulability. Justices are unlikely to agree on what makes a punishment physically or mentally torturous. Similarly, the purposive test has mixed results with respect to the one-way ratchet problem. The test's lack of interest in consensus appears to avoid the problem, as it does not penalize individual states for punitive innovation, provided the new form of punishment is not degrading or wantonly imposed. However, by the same token, the test is unlikely to provide a cause of action for punishment outliers, provided their sentences rest on articulable, non-discriminatory bases. For example, it is unclear that the purposive test would forbid a state to sentence children to life without parole for minor crimes, provided that the state could articulate a justification for the sentences and that the sentences were not racially discriminatory.

Although proposed in the capital punishment context, adoption of the purposive test has the potential to reinvigorate the punishment clause as a tool to rein in mass incarceration. Goldberg and Dershowitz made clear that the test could apply in a broader context. The authors' illustration of "degrading" punishments, as extrapolated from *Trop* and *Weems*, included disproportionate punishments, the "mere possibility" of lingering physical pain, psychological distress, and "lifetime civil disabilities"<sup>204</sup>—all of which are characteristics of many modern punishments. Moreover, the test's use of arbitrary and racially discriminatory imposition implicates most modern punishments, as these qualities are endemic to the criminal legal system.<sup>205</sup> Consequently,

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204. *Id.* at 1786–87.

205. *See* *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) ("McCleskey's claim [of racially-discriminatory imposition of punishment], taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."); *id.* at 339 (Brennan, J., dissenting) (referencing the majority's fear that racially discriminatory sentencing applied to "all aspects of criminal sentencing").

depending on the proclivities of the Justices applying it, the purposive test could result in an extremely robust punishment clause, requiring the Government to provide a compelling interest, narrowly tailored to achieve a non-retributive penological interest for nearly all criminal penalties. William W. Berry III has espoused that this general applicability is one of the primary benefits of the purposive test, arguing for its use in review of non-capital sentences and methods of execution;<sup>206</sup> those concerned with undermining the legitimacy of the entire criminal legal system might disagree.<sup>207</sup>

Goldberg and Dershowitz's formulation of the purposive test raises the question of why retribution is exempted as a penological justification. Indeed, many scholars of all political persuasions contend that retribution is of singular importance in punishment theory both because it predicates punishment on the existence of both culpability and harm and because it assumes a proportional relationship between these requirements and the severity of the punishment.<sup>208</sup> Ostensibly, Goldberg and Dershowitz exempt retribution from the purposive test, not because they consider it illegitimate, but because they considered it impossible to measure: "The effectiveness of a punishment in achieving the purpose of retribution or revenue is probably impossible to assess," as "[i]t is primal community passion that provides the standard."<sup>209</sup> Goldberg and Dershowitz seem to conceive of retribution as the purview of mobs; however, it may also be conceived as a relationship between a defendant's culpability and the severity of their sentence. The Court has routinely assessed retribution by examining defendant culpability in its Eighth Amendment proportionality jurisprudence, finding reduced culpability disqualifying for certain severe punishments.<sup>210</sup> Similarly, state court judges have developed mechanisms

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206. Berry III, *Decency*, *supra* note 121, at 20–21, 29–30.

207. *McCleskey*, 481 U.S. at 314–15.

208. See, e.g., John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 712–19 (2012) [hereinafter Stinneford, *Punishment*] (equating retribution and culpability); Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 33–35 (2016) (arguing that retributive purpose is the characteristic that separates criminal punishment from civil penalties); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684, 699–700 (2005) (identifying the principle behind the Eighth Amendment excessive punishment clause as "retributivism as a side constraint" which "precludes sentences harsher than those justified under retributivism even if they can be justified under a different rationale, such as deterrence or incapacitation"); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363–97 (1981) (formulating deserved punishment as degree of responsibility multiplied by harm).

209. Goldberg & Dershowitz, *supra* note 195, at 1796.

210. *Atkins v. Virginia*, 536 U.S. 304, 315–17 (2002) (evaluating evidence of a defendant's diminished culpability including the science of intellectual disability); *Miller v. Alabama*, 567 U.S.

to assess retribution as culpability in proportionality review under their own constitutions.<sup>211</sup> Marah Stith McCleod has argued that retribution may play a critical limiting role on punishment, provided evaluators disentangle it from consequentialist concerns and take into account community norms.<sup>212</sup> Finally, taken to its logical end, rendering retribution irrelevant to punishment legitimizes punishment for those who lack culpability—a result that most would consider perverse.

### B. *Strict Scrutiny for “Suspect” Classes*

Also embracing a strict scrutiny model, Ian Farrell has proposed that the Court continue to assess contemporary standards to determine the constitutionality of a punishment but with a new methodology.<sup>213</sup> Borrowing from equal protection jurisprudence, Farrell argues that the Court should apply different tiers of scrutiny to different classes of crimes, punishments, or convicted individuals.<sup>214</sup> Strict scrutiny would be reserved for “suspect classes,” consisting of instances “where we have reason to be skeptical that the punishment is proportional to the crime.”<sup>215</sup> Examples of Farrell’s suspect classes include (1) “absolute” punishments including the death penalty and life without parole; (2) defendants with “diminished capacities and therefore presumptively diminished culpability,” including youth and individuals with mental illness; and (3) crimes where “traditional culpability does not apply,” including strict liability crimes and crimes of omission.<sup>216</sup> Strict scrutiny would place the burden on the State to establish that a particular penological goal “require[s]” the punishment-at-issue.<sup>217</sup> Absent a suspect class, the Court

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460, 471–73 (2012) (evaluating culpability in light of evidence concerning brain development); *Graham v. Florida*, 560 U.S. 48, 71–74 (2010) (same); *Roper v. Simmons*, 543 U.S. 551, 571–73 (2005) (same); *Enmund v. Florida*, 458 U.S. 782, 794–97 (1982) (evaluating culpability in light of degree of participation in the crime).

211. Some state courts also assess proportionality by assessing the severity of the punishment in light of the defendant’s culpability. See William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1643 n.119, 1654–55 (2021) [hereinafter Berry III, *Non-Capital Punishments*].

212. Marah Stith McCleod, *Is the Principle of Desert Unprincipled in Practice?* 7–9 (Aug. 4, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4186298](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186298) [https://perma.cc/W6R5-DU47]. However, McCleod contends that this assessment is better made by juries than judges.

213. Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 894 (2013).

214. *Id.* at 897.

215. *Id.* at 897, 899.

216. *Id.*

217. *Id.* at 857, 899–900.

would apply rational basis review and the State would merely have to demonstrate that the relationship between the punishment and the penological goal was reasonable.<sup>218</sup> Farrell concedes that rational basis review would be the default in sentences of terms of years, because “there is room for reasonable disagreement about how to calibrate the precise number of years that is proportional to a given offense.”<sup>219</sup>

By jettisoning the objective portion of the evolving standards of decency test, Farrell addresses several long-standing criticisms, including majoritarian bias, participatory process concerns, and manipulable criteria that masquerade as objective counting. He also attempts to provide a principled basis for the Court’s subjective analysis, thereby reining in discretion. However, his emphasis on culpability creates the impression that the unusualness requirement has become a dead letter. For example, if a single state were to impose a punishment of branding or thumbscrews on an individual, the Court would apply rational basis review so long as the individual was not a member of a suspect class.

Questions also arise concerning Farrell’s articulation for the basis behind his proposed suspect classes. Farrell contends that these classes constitute scenarios where we should be especially skeptical of the proportionality because of “noncontroversial[.]” determinations of lesser culpability.<sup>220</sup> He contends that “few would argue that the mentally retarded, as a class, and juveniles, as a class, have equivalent mental and moral capacity to that of fully competent adults.”<sup>221</sup> This conclusion is flawed in two respects. First, it is not, in fact, clear that “few” would argue that these groups have equivalent moral responsibility to adults lacking intellectual disability. Multiple Justices made such arguments in *Stanford* and *Penry*.<sup>222</sup> Second, by emphasizing culpability, Farrell chooses the opposite path from Goldberg and Dershowitz. While the latter scholars barred consideration of retribution as a penological justification, Farrell *requires* a penological justification of retribution. Put another way,

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218. *Id.* at 900–01.

219. *Id.* at 899.

220. *Id.* at 856, 899.

221. *Id.* at 856.

222. *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (finding scientific evidence did not “conclusively” establish the reduced culpability of juveniles), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005); *Penry v. Lynaugh*, 492 U.S. 302, 338–39 (1989) (“In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.”), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also id.* at 324 (“Penry’s mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.”).

deterrence and incapacitation would not qualify as valid justifications because they are utilitarian aims that do not require culpability to achieve maximum effect.<sup>223</sup>

Further, Farrell's "suspect" classes have an ad hoc feel that seems to reproduce the outcomes of the Court's modern Eighth Amendment decisions. Under this test—just as under the evolving standards of decency test—the death penalty would likely be found unconstitutional for children and the intellectually disabled, and life without parole would likely be found unconstitutional for children. Farrell's test thus doubles down on the Supreme Court's much criticized jurisprudence of constitutional "difference."<sup>224</sup> His concession that sentences of terms of years would garner only rational basis review makes clear that, with a few exceptions, this test recreates the stark division between meaningful review of capital cases and cursory review of noncapital ones. Farrell aims his test at the two extremes of the punishment clause, focusing on the State's power to mete out the most extreme punishment and concern for the most vulnerable individuals in receipt of punishment. It remains to be seen how Farrell's third category of suspect classes (strict liability crimes) would play out, as it appears to apply to a very small number of crimes. Farrell's example of this category includes failure to register as a sex offender—a crime that is not captured by the Court's jurisprudence. However, because a significant number of jurisdictions have a mens rea requirement for this offense, imposing strict scrutiny on the remaining jurisdictions would have little impact.<sup>225</sup>

### C. *The Moral Reasoning Approach*

In contrast to the alternatives that attempt to cabin or even extinguish the Court's normative role, several scholars have called for an expansion of the Court's normative role in evaluating the Eighth Amendment. Michael S. Moore has advocated for increased moral reasoning in

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223. Michael Tonry, *Doing Justice in Sentencing*, 50 CRIME & JUST. 1, 7 (2021); Michael M. O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1090, 1095–96 (2013).

224. It is possible that the suspect class approach would pull a few additional groups into the "different" tent, resulting in decisions that outlawed life without parole for intellectually disabled adults or the mentally ill.

225. OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (SMART), U.S. DEP'T OF JUST., SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES – MARCH 2018 (2018), [https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/8-case-law-update-2018-residency-failure-to-register\\_0.pdf](https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/8-case-law-update-2018-residency-failure-to-register_0.pdf) [<https://perma.cc/5LVD-CR52>].

constitutional interpretation.<sup>226</sup> Writing in response to interpretive theories embraced by Robert Bork and Justice Scalia, Moore has rejected the notion that morality was “a sham” consisting of “personal preferences masquerading as objective truth” and that consequently judicial review should be limited to cases where “plain facts, such as the historical fact of what was intended by the Framers, can supplant the independent moral reasoning of judges.”<sup>227</sup> Instead, Moore argues that judges must rely on moral reasoning to protect minority rights.<sup>228</sup> In contrast to Goldberg and Dershowitz’s contention that the fit between punishment and retribution is immeasurable and thus beyond the purview of judges, Moore contends that the Eighth Amendment rightly requires the Court to engage in this very analysis: Justices must determine questions of moral desert in order to assess the proportionality of punishment.<sup>229</sup> To do this, Moore counsels that “judges should use their own first-person, committed judgments about the moral issues.”<sup>230</sup> Moore rejects that value-laden judgments are avoidable, and argues that the Framers contemplated that judges would engage in moral reasoning.<sup>231</sup> He similarly rejects the notion that judges should look to the community to determine moral consensus: “It does not make sense to give a majoritarian interpretation of minority rights against the majority.”<sup>232</sup> Rather, when judges rely on their own first-person moral reasoning, they become more invested in and take more responsibility for the ruling.<sup>233</sup>

While Moore’s interpretive approach both has the potential to prove more protective of minority rights than the evolving standards of decency test and theoretically avoids the one-way ratchet problem, it provides no principled basis on which to cabin or guide judicial discretion, reducing the entire inquiry to the Justices’ independent judgment. Moore concedes that this interpretive approach depends on the identity of the judges making these moral decisions: “Given the power we are giving judges, of course we only want persons of virtue who have strong powers of moral discernment. Not everyone should be entrusted with such responsibility.”<sup>234</sup> While it may be debatable whether the current Justices

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226. See Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47 (2008).

227. *Id.* at 51.

228. *Id.* at 51–52.

229. *Id.* at 52–53.

230. *Id.* at 58.

231. *Id.* at 58–62.

232. *Id.* at 63.

233. *Id.* at 64.

234. *Id.* at 62.

are qualified to serve as moral leaders, it is clear that their racial identities, wealth, and educational backgrounds differ significantly from those typically affected by criminal punishment. Particularly in light of recent decisions,<sup>235</sup> these differences raise the question of whether the Court is likely to be *less* protective of minority rights than the general public would be.

Mary Sigler has also advocated that the Court “must develop greater confidence in its ‘own judgment.’”<sup>236</sup> Sigler’s interpretive suggestions have much in common with Moore’s, rejecting the Court’s majoritarian assessment of morality as what she agrees is an illustration of the Court’s adherence to moral skepticism.<sup>237</sup> She similarly agrees with Moore that the Founders contemplated moral reasoning by judges.<sup>238</sup> However, Sigler contends that judges should look neither to public opinion nor to their own individual values to make moral determinations but rather to “the political morality of our liberal democracy.”<sup>239</sup> She argues that, despite its flaws, the current evolving standards of decency test supplies a moral framework through its commitment to human decency and its aspirational inquiry call “to resist inhumanity in criminal punishment.”<sup>240</sup> Sigler stops short of articulating the specific parameters of this approach, instead proposing “general contours.”<sup>241</sup> Sigler’s political morality rests on assumptions that liberal democracies accept the premise that all humans are deserving of dignity and that, accordingly, criminal punishments must avoid “the gratuitous infliction of suffering—beyond what is necessary or deserved.”<sup>242</sup> In applying the Eighth Amendment, she argues that the Court must “pay serious attention to” the penological justifications for punishment and a punishment’s proportionality in light of its justification—suggesting that this may require a State to submit empirical evidence on the relationship between a punishment and its deterrent

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235. See, e.g., Domenico Montanaro, *Poll: Majorities Oppose Supreme Court’s Abortion Ruling and Worry About Other Rights*, NPR: ALL THINGS CONSIDERED (June 27, 2022), <https://www.npr.org/2022/06/27/1107733632/poll-majorities-oppose-supreme-courts-abortion-ruling-and-worry-about-other-righ> [<https://perma.cc/XFK7-XNV6>] (indicating national dissatisfaction and disagreement with the Court’s decision overturning *Roe v. Wade*).

236. Sigler, *supra* note 135, at 406.

237. *Id.* at 405–06, 416–21.

238. *Id.* at 403, 420.

239. *Id.* at 406. Sigler uses Robert Verner’s definition of political morality, defining it as the “set of distinct political principles [that apply] specifically to the use of [state] power.” *Id.* at 422 (quoting RICHARD VERNON, *POLITICAL MORALITY: A THEORY OF LIBERAL DEMOCRACY* 35 (2001)). She further describes political morality as “the collective analogue of personal morality.” *Id.*

240. *Id.* at 406.

241. *Id.* at 427.

242. *Id.* at 424–25.

effect.<sup>243</sup> Sigler also calls for a “more robust” analysis of cruelty that centers dignity, although she leaves open to interpretation whether the analysis should center the dignity of the criminal defendant or of the victim.<sup>244</sup> Finally, Sigler makes clear that the Court’s understanding of political morality should be contemporary, not historical, to allow for societal growth and maturation.<sup>245</sup>

Sigler’s approach, while perhaps better theorized, does not provide significantly more guidance for the Court’s inquiry than Moore’s approach does. Instead, she appears to argue that the Court should do a better job of what it is already doing—assessing the fit between punishment and penological justification, but with more specificity and consistency.<sup>246</sup> Like Moore, Sigler also ignores the unusual requirement of the punishment clause. Not only does she include no discussion of the meaning of unusual, but in advocating that the Court abandon its reliance on so-called objective criteria, she provides no alternative basis for its assessment. Thus, while Moore and Sigler both make compelling cases about what is wrong with the Court’s unusual analysis, their solutions jettison the requirement entirely.

#### D. *The Reconstruction Amendment Approaches*

By contrast to Moore and Sigler, other scholars have contended that not only should an ideal test constrain judicial discretion, but it should do so based on non-originalist history.<sup>247</sup> A growing number of scholars have argued that the Eighth Amendment interpretation should instead draw meaning from the principles of the Reconstruction Amendments. Professor Priscilla Ocen has advanced an “antisubordination approach,” where evolving standards of decency analysis is guided by the historical aims of the Thirteenth Amendment.<sup>248</sup> Although Ocen’s critique is aimed at the constitutional assessment of conditions of confinement and centers on the practice of shackling pregnant women,<sup>249</sup> her conclusions may be applied to the Court’s Eighth Amendment jurisprudence more broadly.

Ocen contends that the evolving standards of decency should be

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243. *Id.* at 427.

244. *Id.* at 428.

245. *Id.* at 426.

246. *Id.* at 427 (“In particular, [the Court] must develop, as it so far has not, a coherent account of the relevant justifications as a basis for evaluating a state’s proffered rationale.”).

247. See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1248 (2012); Cover, *supra* note 112, at 1144.

248. Ocen, *supra* note 247, at 1248.

249. *Id.* at 1247–48.



understood in light of the Framers' intent to abolish slavery and its badges and incidents through the passage of the Thirteenth Amendment.<sup>250</sup> Drawing on Justice Harlan's dissent in *Plessy v. Ferguson*,<sup>251</sup> Ocen argues that the intent of the Thirteenth Amendment was not just to eliminate slavery, but to prevent the racial subordination that was its legacy.<sup>252</sup> These values animate her proposed test for assessing cruelty, which would include any practice that "constitutes a badge or incident of slavery, or relies on normative racial and gender constructs that are outgrowths of slavery."<sup>253</sup> To determine if a punishment constituted a badge or incident of slavery, a reviewing court would assess the nature of the relationship between the punishment, slavery, and post-Civil War racial subordination; whether it assumes "the normative constructs derived from slavery;" and whether it "reinforces racialized notions of inferiority" stemming from slavery.<sup>254</sup> Punishments reinforcing racial subordination would accordingly be found unconstitutional.

Ocen's antisubordination approach provides strong protection for minority rights, including individuals most impacted by the criminal legal system. By doing so it avoids majoritarian and participatory process harms. Her test attempts to limit manipulability by replacing the Justices' independent judgment with clear, objective criteria to assess cruelty. However, the test's historical approach requires a high level of sophistication from reviewing Justices, who historically have embraced colorblindness, to recognize connections between punishment and historical racial subordination.<sup>255</sup> Finally, Ocen's focus on cruelty appears to elide unusualness from the analysis.

In a similar vein, Professor Aliza Cover has proposed a "redemptive approach," designed to correct for the racially disparate impact that has resulted from majoritarian policymaking in the criminal legal system.<sup>256</sup> She argues that the punishment clause should be understood to forbid

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250. *Id.* at 1295.

251. *Plessy v. Ferguson*, 163 U.S. 537, 555–58 (1896) (Harlan, J., dissenting).

252. Ocen, *supra* note 247, at 1298.

253. *Id.* at 1300.

254. *Id.* at 1301.

255. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (noting, in Chief Justice Roberts' opinion with Justices Alito and Thomas joining, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So.*, WALL ST. J. (Sept. 27, 1999, 12:01 AM), <https://www.wsj.com/articles/SB938365458335869648> [<https://perma.cc/WF7E-YJZF>] (supporting "the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: 'Under our Constitution there can be no such thing as either a creditor or a debtor race . . . . In the eyes of government, we are just one race here. It is American.'").

256. Cover, *supra* note 112, at 1144.

“severe punishments disproportionately imposed upon minorities.”<sup>257</sup>

Under Cover’s test, the unusualness inquiry takes precedence. If a defendant can show that a punishment is disproportionately imposed on a minority group, then the Court must apply heightened scrutiny to determine whether the punishment is also cruel.<sup>258</sup> Cover further states that the tiers of scrutiny applied will “vary with the degree of unusualness,” but does not elaborate on what degree is necessary for a particular level of scrutiny.<sup>259</sup> After a demonstration of disparate impact, the Court will apply strict scrutiny to assess a punishment’s cruelty, requiring the State to demonstrate that the punishment is narrowly tailored to a compelling government interest. Like other scholars,<sup>260</sup> Cover does not find all penological interests equally compelling. Instead, she contends that retribution and rehabilitation should carry *greater* weight in the analysis than their purely utilitarian cousins, incapacitation and deterrence, which benefit the majority at the expense of the minority.<sup>261</sup> Cover contends that with deterrence and incapacitation “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.”<sup>262</sup>

Finally, in defining what constitutes a minority group or suspect class for Eighth Amendment purposes, Cover draws inspiration from equal protection jurisprudence. However, she then argues that suspect classes 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.”<sup>263</sup> This is an ambiguity likely to be resolved by judicial subjectivity.<sup>264</sup> Whether an individual defendant must be a member of the suspect class to raise a claim is similarly left unstated. Cover also does not explain if a successful claim would result only in the invalidation of an

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257. *Id.* (emphasis omitted).

258. *Id.* at 1147.

259. *Id.* at 1183.

260. *See infra* section III.A.

261. Cover, *supra* note 112, at 1191.

262. *Id.*

263. *Id.* at 1184.

264. Cover concedes that this definition would likely exclude gender-based claims, as men are often disadvantaged by the criminal legal system relative to women, but have comparative political power, while women, though they may lack political power, receive more favorable treatment in the criminal legal system. *Id.*; *see also, e.g.*, Jill K. Doerner, *Gender Disparities in Sentencing Departures: An Examination of U.S. Federal Courts*, 22 *WOMEN & CRIM. JUST.* 176 (2012) (finding that female defendants have lower odds of incarceration and receive shorter sentences than male defendants in federal court sentencing, even after other factors are controlled for). However, Cover posits that sexual orientation would likely be a suspect class due to historic criminalization of gay and transgender status and conduct, but leaves as an open question whether poverty or illegal immigration status would qualify. Cover, *supra* note 112, at 1184–85.

individual's punishment, of a punishment imposed on particular groups, or of a punishment writ large. Assuming all three are possible, this could result in punishments that are constitutional for some, but not for others.<sup>265</sup>

While Cover envisions a robust Eighth Amendment that targets the excesses of mass incarceration, her test has several limitations. First, rather than acting as an alternative to the evolving standards of decency test, Cover's redemptive approach operates alongside it and thus fails to plug several holes in Eighth Amendment jurisprudence.<sup>266</sup> In the event that a defendant cannot establish disparate impact, Cover contends that the Court should then engage in a "traditional" Eighth Amendment review, evaluating "evolving standards of decency, arbitrariness, and the narrow gross proportionality inquiry."<sup>267</sup> Cover suggests no changes for these traditional tests—all of which have been criticized as feckless outside of the capital context. Thus, under Cover's approach, it remains possible that outlier punishments will not receive adequate protection, as cruel, noncapital innovations would likely survive a gross proportionality analysis.<sup>268</sup> Similarly, punishments imposed in an arbitrary fashion would not garner heightened protection under Cover's proposal, leaving them difficult to attack.<sup>269</sup>

Second, Cover's test encourages more subjectivity with her contention that consequentialist penological goals should have discounted status. The achievement of consequentialist goals—i.e., deterrence and incapacitation—is easier to measure as it tends to rest on empirical evidence, whereas judges must engage in more subjective analysis when assessing retributive goals. Given her goal of reducing the harms of mass incarceration, along with the reality that causal connections between a punishment and its deterrent effect are notoriously difficult to demonstrate,<sup>270</sup> it seems that Cover should not penalize states for pursuing this path.

Each of the tests proposed by non-originalist scholars improve upon

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265. This is true in the current regime, as extreme sentences are constitutional for most adults but not, in many cases, for children or the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

266. Cover, *supra* note 112, at 1183, 1188.

267. *Id.*

268. The gross proportionality doctrine has not resulted in a reversal at the Supreme Court level since 1983. *See Solem v. Helm*, 466 U.S. 277 (1983).

269. Although the Supreme Court originally found that the death penalty violated the Eighth Amendment due in part to arbitrary imposition, *see Furman v. Georgia*, 408 U.S. 238 (1972), arbitrariness has since had little to no application as a mechanism of review.

270. Mitchell N. Berman, *The Justification of Punishment*, in *THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW* 141 (Andrei Marmor ed., 2012).

some of the critiques of the evolving standards of decency test; however, none are without significant flaws of their own. Some envision a test that could remedy the modern structural harms of the criminal legal system, while others focus on interpretive methodology tied to contemporary penological or democratic values. All differ in both degree and kind in terms of the constraints placed on judicial discretion. The common thread of the non-originalist alternatives is an emphasis on rights protection at the expense of State power. Unlike the originalist scholars, these scholars recognize that deference to the punishment practices of democratically elected state legislatures and fidelity to the Framers' Constitution do not result in adequate safeguarding of politically powerless minorities. Instead, all rest on contemporary understandings of what is cruel and unusual. But beyond that, all also recognize *the current test's* inadequate protection of minority rights; it is not an accident that all jettison the majoritarian objective inquiry.

In the next Part, I build on these counter-majoritarian approaches to propose a new Eighth Amendment test that channels judicial discretion both to protect minority rights and to remedy the structural harms of contemporary punishment.

#### IV. TOWARDS A NEW APPROACH

In this Part, I make the normative case for a new approach in interpreting and implementing the punishment clause. In essence, I propose that the Court strictly scrutinize the cruelty of punishments that are uncommon or that suffer from "unusual" application. My test responds to the two most critical flaws in the evolving standards of decency test: (1) the majoritarianism advanced in the threshold objective inquiry and (2) the lack of constraint attached to the Court's exercise of independent judgment. The majoritarian aspect of the current test has fueled a "death is different" jurisprudence, as concerns about measurement and administrability curbed the test's influence in the noncapital realm. The lack of articulable constraints on the subjective inquiry opened the test up to legitimate criticism that the outcome of the test was best determined by the personal preferences of whatever Justices were in the majority—as best illustrated by the Court's flip-flopping when *Roper* reversed *Stanford* and *Atkins* reversed *Penry* in short order. Thus, these two flaws have resulted in a weak Eighth Amendment jurisprudence that fails to apply to most of the defendants within the criminal legal system and fails to address the structural harm of contemporary mass punishment.

A. *Originalism as Unsuitable to Eighth Amendment Interpretation*

As a threshold matter, I contend that originalist methodology is particularly unsuitable to interpretation of the Eighth Amendment. There are three reasons for this. First, the Eighth Amendment is unique among individual rights because it involves the most extreme power of the State levied against the most vulnerable of individuals. Second, the Framers could never have envisioned the scope or complicity of the punishment system as it is today. Finally, criminal punishment at the time of the Framing did not chiefly operate as a mechanism of racial subordination in the way that it does today and thus the Eighth Amendment was not formed or understood with that structural harm in mind. More pointedly, most of the Framers simply did not reject racial subordination.<sup>271</sup>

Originalists tout their methodology as a way of reading the Constitution narrowly to minimize judicial interference in democratic decision making.<sup>272</sup> Moreover, they claim their approach has a monopoly on “constitutional fidelity.”<sup>273</sup> However, neither fidelity to the original Constitution nor limited judicial interference are desirable qualities in Eighth Amendment interpretation. As an individual right, the Eighth Amendment is unique in two respects. First, it delineates the most extreme power that the government has over individuals: the power to inflict pain, even to the point of death. Second, the Eighth Amendment concerns punishment experienced by the most politically powerless individuals in our society across several overlapping categories. Recipients of punishment typically include people who are in receipt of society’s moral disapproval, those who are formally disenfranchised, and a disproportionate number of those who are racially marginalized. This utmost power differential requires extra vigilance for state overreach. Deference to the punishment practices of majority elected state legislatures is simply undesirable as a starting point, given both the degree and risk of harm potentially caused by that process.

Fidelity to the original Constitution is also not desirable in the Eighth Amendment context. Today’s punishment system is simply not an

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271. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857) (holding that Black people at the time of the Founding “were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them”); Noah Feldman, *James Madison’s Lessons in Racism*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/opinion/sunday/james-madison-racism.html> [<https://perma.cc/X5ZZ-7QK9>] (observing that, like many of the Framers, James Madison’s theoretical principles of equality did not trump his economic interest in slaveholding).

272. CHEMERINSKY, ORIGINALISM, *supra* note 163, at 31.

273. *Id.* at 21.

analogue of the localized punishments meted out at the time of the Framing.<sup>274</sup> Most punishment was corporal or capital, with incarceration just beginning to gain traction as a more humane alternative.<sup>275</sup> The First Congress proved reluctant to enact expansive criminal laws, likely indicating that the Founders had never envisioned a federal police power.<sup>276</sup> The Crimes Act of 1790 set forth the first federal criminal laws, all of which had a direct connection to the federal government.<sup>277</sup> A decade into their operation, only a few hundred people had been prosecuted in federal court.<sup>278</sup>

The Framers simply could never have envisioned the criminal punishment system as it is today, with nearly two million people in jails and prisons—a rate of 573 per 100,000 residents.<sup>279</sup> They would not have predicted that the United States would become the leader in mass incarceration worldwide.<sup>280</sup> Nor would they have predicted the elaborate system of surveillance over the additional 3.8 million people forced to participate in community supervision, including probation and parole.<sup>281</sup> They could not have foreseen the proliferation of federal criminal law and federal detention to include nearly 160,000 people.<sup>282</sup> As such, interpreting the Constitution in such a way to maximize fidelity to a version of the Constitution that never contemplated modern realities does not reflect desirable values.

Finally, at the time of the Framing, criminal punishment did not operate to achieve racial subordination as it does today.<sup>283</sup> That is not to say that

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274. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 62 (1993) (describing American criminal justice in the eighteenth and nineteenth centuries as “quite local”).

275. *Id.* at 48. Public shaming and fines were also common punishments. *Id.* at 38.

276. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1147–48 (1995).

277. Crimes Act of 1790, ch. 9, 1 Stat. 112 (1790).

278. Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 59 (1996).

279. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol’y Initiative, Mass Incarceration: The Whole Pie 2022 (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/S5G2-X74E>].

280. *Id.*

281. RICH KLUCKOW & ZHEN ZANG, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 — STATISTICAL TABLES (2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf> [<https://perma.cc/3SGX-N5UL>].

282. Brickey, *supra* note 276; *Population Statistics*, FED. BUREAU OF PRISONS (last updated Feb. 2, 2023, 12:00 AM), [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) [<https://perma.cc/JN5S-9SAK>].

283. The powers conferred on slave owners meant that violence toward enslaved people typically occurred outside of the court system. FRIEDMAN, *supra* note 274, at 52–53 (discussing the power of slave owners and the fact that enslaved people were likely underrepresented in the criminal court

the Framers would necessarily have been opposed to such a use, but instead that racial subordination was achieved and maintained through other mechanisms, such as chattel slavery and racially discriminatory legislation.<sup>284</sup> As these mechanisms were constitutionally repudiated by the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, it follows that modern constitutional interpretation should employ methodology that takes this repudiation into account. It also follows that what was repudiated by the passage of the Reconstruction Amendments should not lawfully find shelter in the Eighth Amendment.

Originalism as an interpretative methodology is too blunt an instrument to address these complexities. It ignores the power differential inherent in Eighth Amendment protections and fails to take into account the size, complexity, and structural harms of the modern punishment system, none of which could have been envisioned by the Founders. Originalism similarly deprives judges of remedial tools to address the contemporary use of punishment to entrench racial caste.

Having argued that originalism is not an appropriate approach to Eighth Amendment interpretation, my proposed test is explicitly non-originalist and rests on a variety of interpretive factors.<sup>285</sup> I begin with consideration of the text of the Eighth Amendment. As contrasted with other specific provisions of the Constitution, such as the minimum age of the President, the language of the Eighth Amendment is intentionally vague. This suggests that the Framers understood it would be subject to interpretation over time.<sup>286</sup> I next consider the historical context of the Amendment's enactment. Much has been written about the Framers' positions on the nature and extent of punishment, and what is clear is that different and sometimes opposing views existed simultaneously.<sup>287</sup> As discussed in detail above, the individual nature of localized punishment at the Founding—which centered on inflicting pain on the body—bears little relationship to the system of mass punishment that exists today. With the penitentiary having not yet gained traction as a replacement for public

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system). However, capital punishment—particularly in the South—was disproportionately suffered by enslaved people. *Id.* at 44.

284. *Id.* at 84–85.

285. CHEMERINSKY, ORIGINALISM, *supra* note 163, at 15 (discussing how non-originalists rely on a combination of factors to interpret the constitution, including the text, the Framers' intent, the structure of the Constitution, tradition, precedent, and modern social needs); Fallon, *supra* note 194 (identifying five constitutional arguments concerning text, intent, theory related to the structure of the Constitution, precedent, and values).

286. See ELY, *supra* note 113, at 7–8; JACK BALKIN, LIVING ORIGINALISM 23–26 (2011).

287. See note 172 and accompanying text (discussing that some Framers held views consistent with Enlightenment thinking that capital punishment and disproportionality should be abandoned, despite their legality).

shaming, banishment, and corporal and capital punishment, the Framers simply could not have conceived of the massive nature or extensive structural harm of the contemporary punishment system.<sup>288</sup>

Finding neither the text of the Constitution nor the historical context of the Eighth Amendment's enactment elucidating, I turn to what the structure of the Constitution suggests about how the Eighth Amendment should be interpreted. The Bill of Rights itself provides a structural argument that the Framers were concerned about government overreach in the criminal realm: approximately half of the text of the first ten amendments is devoted to criminal law—both limiting the criminal powers of the State and increasing the rights of those under its control.<sup>289</sup> This is consistent with viewing the Constitution as a structural document outlining the parameters of democratic government and the Bill of Rights as identifying areas in which democratic excesses are likely to be the most harmful. Accordingly, I present a test that is grounded in the protection of minority rights in the face of government excess, with a particular focus on rights of those who lack power in the democratic process.

Finally, like the evolving standards test, my approach is grounded in contemporary values; however, unlike this test, my own test focuses on remedying the structural harms of the contemporary criminal legal system. In the next section, I identify these values and discuss how they can serve as constraints on judicial discretion in favor of robust protection of minority rights.

### *B. Underlying Values*

What the evolving standards of decency test and the six previously proposed replacement approaches have in common is that they all constitute attempts to cabin the discretion of the Justices to make what is essentially a moral decision: what is meant by punishment that is both cruel and unusual? Put another way, how much pain can the state lawfully inflict on one of its citizens, and under what circumstances? For many of us, *Dobbs* has confirmed that we are right to have anxiety about leaving this decision entirely to a small, elite, unaccountable group of judges.

Each of the approaches discussed in this article attempts to address this anxiety by constraining the Justices' decision making. The proposed constraint on discretion reveals the author's commitment to a greater value or values. For example, the evolving standards test constrains discretion through the objective inquiry, which attempts to require that the Justices be guided by contemporary, majority conceptions of morality.

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288. Pillsbury, *supra* note 172, at 900–02; BESSLER, *supra* note 172, at 7.

289. FRIEDMAN, *supra* note 274, at 72.



Scalia's originalism and Stinneford's original meaning look to history and tradition.<sup>290</sup> Farrell's strict scrutiny emphasizes limiting state power and protecting minority rights.<sup>291</sup> Sigler's moral reasoning redesigns evolving standards to focus on the values of liberal democracies.<sup>292</sup> Ocen and Cover suggest different approaches that prioritize remedying racial subordination.<sup>293</sup> Even Moore's refusal to fetter discretion rests on a commitment to judicial investment in decision making.<sup>294</sup>

Accordingly, in designing a replacement test for evolving standards I first acknowledge the higher values that will animate the test. Then I determine a basis in line with those values for guiding judicial discretion.

The most fundamental value behind my proposed Eighth Amendment test is protection of minority rights. The purpose of the Bill of Rights is to protect the People from the excesses of the State, with special emphasis on the State's criminal powers.<sup>295</sup> This purpose was cemented by the passage of the Reconstruction Amendments following a Civil War that nearly ended the Republic. The Reconstruction Amendments marked a further shift in constitutional understanding away from preservation of state's rights to preservation of individual rights.<sup>296</sup>

But even as an individual right, I have argued that the Eighth Amendment is unique in two respects. First, it concerns the most extreme power that the government has over individuals: the power to inflict pain, even to the point of death. Second, this power is inflicted on the most politically powerless individuals in our society across several overlapping categories. Recipients of punishment typically include people who are in receipt of society's moral disapproval, those who are formally disenfranchised, and a disproportionate number of those who are racially marginalized. This utmost power differential requires extra vigilance for state overreach.

Under this frame, any test deferring to majority vote is fatally flawed. Even in theory, the idea that the moral positions of the majority would adequately protect the minority is logically suspect. Those defending a majoritarian approach contend that members of the majority are incentivized to protect the minority in a world where membership in the

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290. See *supra* Part II.

291. See *supra* section III.B.

292. See *supra* section III.C.

293. See *supra* section III.D.

294. See *supra* section III.C.

295. See, e.g., Chemerinsky, *Vanishing*, *supra* note 114, at 66; Cover, *supra* note 112, at 1147–51; BESSLER, *supra* note 172, at 8, 10; ELY, *supra* note 113, at 96–97.

296. See BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 82, 100 (1991); BALKIN, *supra* note 286, 67–68.

two groups is fluid. Criminal laws are meant to apply to everyone, so members of the majority should be able to imagine themselves in the position of criminal defendants.

Unfortunately, that is not the world we live in. Marginalized groups, particularly people of color, disproportionately bear the impact of punishment. Rachel Barkow's scholarship has emphasized the near impossibility of relying on the political process for noncapital sentencing reform.<sup>297</sup> Consequently, to protect the rights of individuals who lack political power, and in the case of convicted persons who are sometimes despised, constitutional interpretation must fundamentally be counter-majoritarian.

Any interpretation of the Eighth Amendment must not ignore the structural harms perpetuated by the modern punishment system, including mass punishment, racial subordination, and dehumanization. Nor can it ignore the inability of the democratic process to eliminate these harms. Consequently, two additional values underlie my counter-majoritarianism approach: antisubordination and human dignity. An antisubordination approach requires recognition that, for constitutional purposes, "the People" consist of both individuals and groups, or castes.<sup>298</sup> A counter-majoritarian rule recognizing antisubordination seeks to protect people both as individuals and as members of groups that have historically been deprived of political power through legal subordination—in the case of the Eighth Amendment, members of racially-marginalized groups, particularly Black Americans. Many scholars have identified the modern punishment system as the modern manifestation of slavery, sharing its function of racial subordination.<sup>299</sup>

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297. *E.g.*, Barkow, *supra* note 83; Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723–35 (2005); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1280–83 (2005); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1028–31 (2006).

298. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9–10 (2003); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1403–05 (1991); *see also* DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 162–77 (1987) (criticizing the Court's application of an anti-classification approach to interpreting the Fourteenth Amendment); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

299. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) [hereinafter Roberts, *Forward*] (“[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished.”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1580–84 (2019) (discussing the connection between slavery and the modern carceral state); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104

Antisubordination, although most evident in the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, must not be limited to claims under these amendments.<sup>300</sup> As the passage of these Amendments constitutionally repudiated racial subordination, it follows that the interpretation of other Amendments should take this repudiation into account. Likewise, it follows that racial subordination should not lawfully find shelter in the Eighth Amendment.

Indeed, antisubordination is a value underlying constitutional interpretation more generally—most famously espoused by Justice Harlan Stone in footnote 4 of *United States v. Carolene Products Co.*<sup>301</sup>—that permits the Court to provide different degrees of deference to state legislation that infringes on the rights of “discrete and insular minorities.”<sup>302</sup> While these protections have come to fruition through the application of strict scrutiny in the First, Fifth, and Fourteenth Amendment contexts,<sup>303</sup> the racialized nature of contemporary punishment makes greater scrutiny equally appropriate for the Eighth Amendment.

Commitment to protection of minority rights and antisubordination requires rejection of originalist conceptions of history and tradition as higher values. As Bruce Ackerman has noted, at the time of the Founding, “‘We the People of the United States’ referred to a relatively concrete group of historical actors.”<sup>304</sup> Many of the Founders’ moral values have been subsequently condemned and cannot inspire successful government in a pluralistic society. Values that the Framers took for granted justified enslavement, subordination of women, genocide of Native people, and

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CORNELL L. REV. 899, 911 (2019) (arguing that slavery transformed over time into sharecropping, Jim Crow segregation, and contemporary prison labor); Kim Gilmore, *Slavery and Prison—Understanding the Connections*, 27 SOC. JUST. 195, 195–96 (2000) (discussing the relationship between the prison industrial complex and racialized chattel slavery); ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 35–37 (2005); Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, NEW YORKER (June 1, 2020), <https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests> [https://perma.cc/C4E3-T6QZ] (arguing that slavery did not end in 1865; it simply evolved into racial terror, segregation, and mass incarceration); see also Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 395–97 (2021) (summarizing this literature).

300. See *supra* note 298.

301. 304 U.S. 144 (1938).

302. *Id.* at 152 n.4.

303. See generally Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006) (discussing how, despite footnote 4 in *United States v. Carolene Prods. Co.*, the Court has limited application of strict scrutiny to the First, Fifth, and Fourteenth Amendments).

304. ACKERMAN, *supra* note 296, at 87.

criminalization of gay sex, among other things.<sup>305</sup> Each of these has been repudiated as a product of white supremacy and patriarchy. Modern constitutional interpretation should acknowledge and celebrate the rejection of these values for the simple reason that if the laws of a society seek only to reify the past, then they serve as shackles for progress. To call a test of constitutional interpretation that recognizes progress “aspirational” is no critique. What is a constitution if not an aspirational document, devised to enshrine a plan for a “more perfect Union?”<sup>306</sup>

The second value encompassed in protection for minority rights is human dignity. Supreme Court precedent has long recognized human dignity as an Eighth Amendment value. *Trop* underscored that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>307</sup> Several scholars have described dignity as “too flabby and squishy” and thus undesirable as an analytical lens.<sup>308</sup> Here, I use human<sup>309</sup> dignity to mean, in the words of Justice Brennan, that punishment must not “treat members of the human race as nonhumans, as objects.”<sup>310</sup> Human dignity is not subject to forfeit: “even the vilest criminal remains a human.”<sup>311</sup> Human dignity operates on an individual

305. Famed civil rights lawyer and law professor Bryan Stevenson has emphasized that the Founding Fathers also valued the practice of dueling, including when it resulted in death. Bryan A. Stevenson, *The Eighth Amendment: A Contemporary Perspective*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103#the-eighth-amendment-a-progressive-perspective> [<https://perma.cc/9TSN-RKMK>].

306. U.S. CONST. pmbl.

307. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Several Eighth Amendment cases predating *Trop* advance dignity themes. The *Weems* Court condemned *cadena temporal* in defendant-centered language, finding that it forever kept one “under the shadow of his crime.” *Weems v. United States*, 217 U.S. 349, 366 (1910). It further criticized the punishment’s extinguishment of the defendant’s hope for redress, noting “[n]o circumstance of degradation is omitted.” *Id.* In *re Kemmler*, an 1890 case that found the Eighth Amendment did not apply to the states, described cruel punishments as “inhumane” and included those that result in “a lingering death.” 136 U.S. 436, 442–47 (1890). In dicta, the Court appeared to condone use of the electric chair on the grounds that it was intended to be a more humane death. *Id.*

308. Jonathan Simon, *The Second Coming of Dignity*, in *THE NEW CRIMINAL JUSTICE THINKING* 284 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (summarizing the arguments of Harvard Psychology Professor Steven Pinker); see also Jeffrey Fagan, *Dignity Is the New Legitimacy*, in *THE NEW CRIMINAL JUSTICE THINKING* 308–09 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (noting that the definition of dignity is “not just elusive, but an analytic challenge” and observing that “[a]t least some of the distrust of the term ‘dignity’ stems from just this lack of definition”).

309. I specify that human is an essential modifier. For example, my use of dignity would not include what the Court has recently termed “the dignity of the procedure,” which it uses to describe a specific protocol that masks the harm of a particular method of execution. *Baze v. Rees*, 553 U.S. 35, 57 (discussing that the state, when carrying out lethal injection, may choose to administer a paralytic drug to prevent the visible distress of the person being executed to preserve the “dignity of the procedure”).

310. *Furman v. Georgia*, 408 U.S. 238, 272–73 (Brennan, J., concurring).

311. *Id.*

level, irrespective of group membership, and thus could be seen as in tension with the value of antisubordination. Instead, I see the two values as complementary. Racialized punishment offends antisubordination by entrenching the caste system; but it also offends human dignity because an individual receives increased punishment due to societally-determined group membership. Finally, my use of human dignity results in a test that centers the experience of the person suffering the punishment, demanding that pain inflicted be no more than necessary to achieve a compelling end.<sup>312</sup>

### C. *Cabining Judicial Discretion*

The second question is how to cabin judicial discretion in a way that is in line with these core values. The best way to do this is to fashion a test that requires the Court to err on the side of the criminal defendant.<sup>313</sup> Thus, when the Justices make decisions that are out of step with contemporary or majority values—as they inevitably will—they will be *more* protective of defendants, who are the people actually experiencing the punishment.

The question then becomes, what makes a punishment cruel and unusual in light of the constitutional values of protecting despised individuals and minority groups? My proposed test is illustrated in the flowchart below.

For the unusual analysis, the test focuses on application. It consists of two independent inquiries. A punishment is unusual if it is not regularly imposed in a majority of states. Alternatively, a punishment is unusual if it is applied in an arbitrary or discriminatory manner.

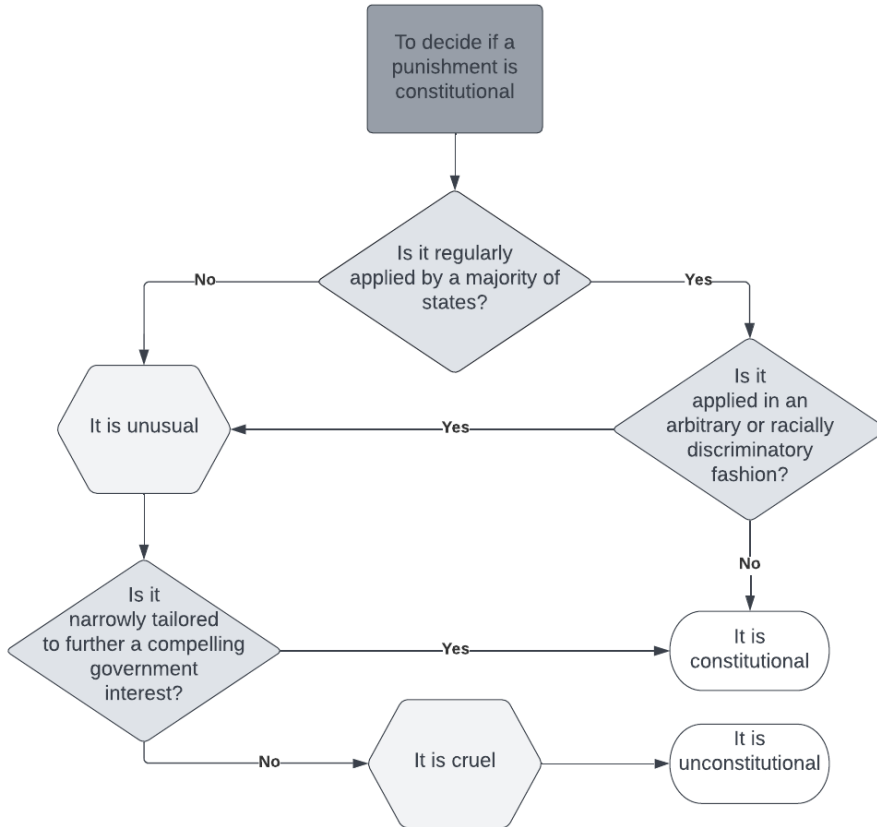
If the Court determines that a punishment is unusual under either prong, it proceeds to the cruel analysis, where strict scrutiny is applied. A punishment is cruel if it is not narrowly tailored to achieve a compelling government interest. I unpack each of these inquiries below.

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312. See sources cited *supra* note 307 (indicating a defendant-centered test is in line with the Court's early Eighth Amendment jurisprudence).

313. Protections in favor of criminal defendants have a long history. See, e.g., *United States v. Wiltberger*, 18 U.S. 76, 77 (1820) (discussing the rule of lenity, where penal laws are strictly construed in favor of criminal defendants).

Figure 1: Considerations to Determine Constitutionality of a Punishment



### 1. *The Unusual Inquiry*

There are two bases for finding a punishment unusual under my proposed test. First, the punishment itself is unusual. Second, and alternatively, the punishment is applied in an unusual way.

#### a. *Unusual Per Se*

One basis for finding a punishment unusual is that it is uncommon. Specifically, under my proposed test, the Court will determine if a punishment is regularly imposed by a majority of states. Should the Court determine that the punishment is *not* regularly imposed by a majority of

states, it will find the punishment unusual and will proceed to the cruelty analysis. However, if the Court finds that the punishment is regularly imposed by a majority of states, the unusual inquiry does not end. Instead, the Court will need to assess whether the *application* of the punishment qualifies as unusual.

As in the evolving standards of decency tests, in this portion of the test, rareness serves as a proxy for moral rejection of punishment. A national consensus against the punishment gives the punishment outlier status, rendering it suspect. On the surface, this may seem to be a majoritarian analysis, but it does not operate that way for several reasons. First, here, the majority analysis sets a floor, not a ceiling. Under the evolving standards of decency test, the objective inquiry is dispositive. If there is not a national consensus against a punishment, it is not unusual. Here, a lack of national consensus does not prevent a punishment from being found to be unusual. It simply requires the Court to conduct another inquiry regarding the punishment's application. Rareness becomes sufficient to establish unusualness, but not necessary. Second, if the proposed test is to rest on the value of protecting minority rights, it should, at the very least, exclude punishments that even the majority has found inappropriate. Because the majority is not incentivized to protect minority rights, majority rejection of a punishment is likely to indicate that the punishment is wildly out of step with contemporary values.

To avoid the manipulability of the evolving standards of decency test, evidence of rareness must be objective and limited to the sentencing verdicts of judges and juries. Consideration of state legislation is not necessary because imposition requires legal permission. Moreover, if an authorized punishment is not being imposed in a state, this indicates a moral rejection of the punishment. By removing state legislatures from the calculus, the Court need not make decisions about whether states actually intended to authorize certain punishments or whether or not to include states whose laws are silent as to the permissibility of a punishment. The views of professional associations or the domestic law of foreign countries will not be germane to this portion of the test.

One drawback of this inquiry is that judges and jurors remain imperfect proxies for community opinion because of the structural exclusion of people of color and people with criminal convictions.<sup>314</sup> That reality is another reason that majority consideration is set up to only work in favor of criminal defendants—as a sufficient, but not a necessary, showing.

Critics might also complain that this test disincentivizes experimentation in the punishment realm because new punishments are

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314. See *supra* notes 122–31 and accompanying text.

inherently rare. However, the disincentive only exists for punishments that are also likely to be found cruel. States would have no impediment for experimentation with punishments intended to be more humane. The underlying value of human dignity supports an approach that discourages experiments on humans that would likely be considered cruel.

*b. Unusual Application*

In the death penalty context, Bryan Stevenson has urged that the Court consider not whether a defendant deserves to die, but if the State deserves to kill—particularly in light of its history of legalized racial discrimination and subordination.<sup>315</sup> This portion of the unusual inquiry adopts Stevenson’s framework in the sense that it penalizes the state for imposing punishment in a harmful way in light of the American history of racial subordination. As Goldberg and Dershowitz and Aliza Cover have proposed before me,<sup>316</sup> I believe that the unusual inquiry should consider a punishment’s application. To adopt Goldberg and Dershowitz’s parlance, an unusual punishment is one that is wantonly imposed.<sup>317</sup> Arbitrary or racially discriminatory application is evidence of wanton imposition.

Why is arbitrary application unusual? Much has been written about arbitrariness in the capital sentencing context.<sup>318</sup> There, a punishment is arbitrary when there is not a reasonable basis for the decision, but rather it is the product of a random variable, akin to a lightning strike.<sup>319</sup> Although it is presumed that similar problems exist with noncapital sentencing,<sup>320</sup> there have been few empirical studies. Rachel Barkow has noted that arbitrary outcomes are likely because sentencers typically have broad discretion, the Court “has made no effort to ensure that [sentencer] discretion is properly channeled in noncapital cases,” and legislators often draft vague and overbroad sentencing laws.<sup>321</sup>

Under my proposed test, a showing of arbitrariness could be made on an individual or a systemic level. On an individual level, a defendant could demonstrate that their case is an outlier in light of similarly situated cases.

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315. Stevenson, *supra* note 305.

316. *See supra* section III.A, D.

317. Goldberg & Dershowitz, *supra* note 195, at 1784.

318. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring); *id.* at 291–93 (Brennan, J., concurring).

319. *Id.* at 309 (Stewart, J., concurring).

320. Barkow, *supra* note 83, at 1146 (“Mandatory punishments proliferate with no attention to an individual’s particular culpability, sentences are frequently disproportionate given the actual conduct and culpability of the offender, and arbitrariness abounds.”).

321. *Id.* at 1166–67.



On a systemic one, the defendant could rely on a more complex empirical showing that their sentence is the product of a random variable, such as whether the sentencing judge had eaten lunch<sup>322</sup> or whether it was an election year for the judge or prosecutor.<sup>323</sup>

Why is racially discriminatory application unusual?<sup>324</sup> It is no longer controversial to state that the criminal legal system has long functioned as a mechanism for racial subordination.<sup>325</sup> Mass incarceration has resulted in the incarceration, surveillance, and stigmatization of Black people.<sup>326</sup> This is not a new phenomenon: the criminal legal system replaced slavery as a subordinating mechanism shortly after Emancipation, with Black Codes criminalizing the daily behaviors of free Black people to limit their political power and forcing them to perform manual labor via convict leasing systems.<sup>327</sup> Following the imposition of formal segregation, federal “reforms” expanded the powers of prosecutors and intentionally limited the agency of disproportionately Black criminal defendants in contrast to that of primarily white civil litigants.<sup>328</sup> Finally, as the Civil Rights Movement began to dismantle overt racial classifications, a new “color-blind” racial subordination began in the facially race-neutral

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322. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, PNAS (Apr. 11, 2011) <https://www.pnas.org/doi/full/10.1073/pnas.1018033108> [<https://perma.cc/P6HS-CGYL>].

323. Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases> [<https://perma.cc/PA9K-95A6>].

324. Referring to racially discriminatory application of punishment as “unusual” does not mean to suggest it is rare; rather, this argument relies on the definition of unusual as “wantonly imposed.”

325. See, e.g., Roberts, *Foreword*, *supra* note 299, at 4 (“[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished.”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 19 (2010) (describing the criminal legal system as “a new racial caste system”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262 (2007) (“The U.S. criminal justice system has always functioned, in coordination with other institutions and social policy, to subordinate [B]lack people and maintain the racial caste system.”).

326. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 47–69 (2017); Goodwin, *supra* note 299, at 952.

327. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (chronicling post-slavery imprisonment of African Americans as forced laborers); Roberts, *Foreword*, *supra* note 299, at 20 (“After Emancipation, criminal control functioned as a means of legally restricting the freedoms of black people and preserving whites’ dominant status.”); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880* (2007) (ebook).

328. Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 20–25 (2021).

system of mass incarceration.<sup>329</sup> As Stevenson suggests, this history indicates that no deference is due to states who impose punishment in a racially discriminatory way.

As with arbitrariness, claims of racially discriminatory application could be satisfied on an individual level if evidence of racial animus exists in an individual defendant's case or on a systemic level with a larger empirical study indicating that race was a determinative factor in the defendant's sentence.<sup>330</sup> One virtue of this inquiry is that it would permit litigants to shed light on the extent to which arbitrariness is a problem in sentencing more broadly. Another is that it would encourage states to adopt guidelines to channel sentencer discretion.

Like Aliza Cover's redemptive test, my test would not require evidence of intentional wrongdoing by the state; a showing of disparate impact would suffice to demonstrate that a punishment was arbitrary or racially discriminatory.<sup>331</sup> With respect to arbitrariness, intentional arbitrariness borders on contradictory. Moreover, the Court has a history of considering evidence of arbitrary application in aggregate in the punishment context, as it invalidated capital punishment on that basis.<sup>332</sup> With respect to racial discrimination, modern punishment functions to subordinate through laws that are facially race-neutral. While no doubt some bad actors remain, minority groups most require protection not from these individual actors but from the structural defects of the state's criminal legal system.<sup>333</sup>

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329. See generally ALEXANDER, *supra* note 325 (arguing that the criminal legal system perpetuates racial subordination through the facially race-neutral tool of mass incarceration); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 96 (2001).

330. The Baldus Study consisted of two empirical analyses conducted by David C. Baldus, Charles Pulaski, and George Woodworth in the 1980s. See *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987). The researchers analyzed over 2,000 Georgia murder cases before concluding that capital defendants who killed white victims were 4.3 times as likely to receive a death sentence as those who killed Black victims and that Black defendants were 1.1 times as likely to receive death as white defendants. *Id.*

331. My interpretation of the Eighth Amendment would likely lead to different outcomes than those dictated by the Court's current equal protection jurisprudence. However, my approach does not offend the Fourteenth Amendment for the simple reason that it is an interpretation of a distinct enumerated right. The Eighth and Fourteenth Amendments are on equal footing and may rely on different standards for assessment. For a discussion of potential jurisprudential barriers to the adoption of my approach, see *infra* note 333.

332. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 291–93 (Brennan, J., concurring) (discussing arbitrary application as a reason that capital punishment was unconstitutional).

333. *McCleskey v. Kemp* is a potential obstacle to adopting this test. 481 U.S. 279 (1987). In that case, the Court held that evidence that the death penalty had a racially disparate impact in Georgia did not demonstrate that the death penalty violated the Eighth Amendment for two reasons. First, the Eighth Amendment required procedures to minimize the risk of arbitrariness in imposition of the death penalty but did not guarantee outcomes. *Id.* at 306. Second, the Georgia punishment system was

## 2. *The Cruel Inquiry*

Once the defendant has made a showing of unusualness, the Court will assess cruelty by applying a weighted balancing test that considers the defendant's interest in not suffering the pain or deprivation that comes with a particular punishment, against the government's interest in imposing that particular punishment. In other words, the Court will apply strict scrutiny. Strict scrutiny is appropriate for several reasons. First, the right at issue is enumerated in the text of the constitution. Second, the power differential between the state and the punished individual is at its most extreme. Third, a threshold finding of usualness has established either that the punishment itself or its application is suspect. These conditions establish that deference to state legislation is not appropriate, given the risk of harm.

Accordingly, the state must demonstrate that the punishment at issue furthers a compelling governmental interest and that it is narrowly tailored to achieve that interest. The balancing test serves as a constraint on judicial discretion; it is intentionally weighted in the direction of the criminal defendant in light of the underlying values of antisubordination and human dignity.

Unlike Goldberg and Dershowitz, who excised retribution from consideration as a compelling governmental interest,<sup>334</sup> and Cover, who discounted deterrence and incapacitation,<sup>335</sup> I would not propose any limitations on what the government asserts as its interest or under what circumstances the Court might find that interest "compelling." I recognize

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arbitrary in application because some racial discrimination is an inherent effect of jury discretion and the power to bestow leniency. *Id.* at 308–12. Although the opinion was limited to death sentences, the majority expressed concern that McCleskey's arguments "thr[ew] into serious question the principles that underlie our entire criminal justice system" and further worried that "there is no limiting principle to the type of challenge brought by McCleskey." *Id.* at 315, 318. The Court wishing to adopt my proposed test would have several options to get around *McCleskey*. First, it could find that *McCleskey* is limited to the death penalty context. Noncapital cases lack the same procedural protections as capital ones and thus fail to guard against arbitrary and racially discriminatory outcomes. Second, it could require more compelling evidence or a greater disparity than McCleskey was able to claim. The *McCleskey* Court did acknowledge that there is a hypothetical point at which the risk of racial discrimination becomes constitutionally unacceptable. *Id.* Perhaps a modern Court would require a more compelling statistical showing. Third, because the very act of reinterpreting the punishment clause will likely require the overruling of prior precedent, the Court could choose to overrule *McCleskey* as well. This last option has particular appeal, given that *McCleskey* has been dubbed "the death penalty's *Dred Scott*." Annika Neklason, *The 'Death Penalty's Dred Scott' Lives On*, ATLANTIC (June 14, 2019), <https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424/> [<https://perma.cc/9GA8-7FLA>]. For a response to the *McCleskey* Court's concern about the system-ending potential of litigating these claims, see *infra* section IV.C.

334. See *supra* section III.A.

335. See *supra* section III.D.

that assessing a compelling interest of retribution will allow for more subjective analysis than other interests; however, I reject Goldberg and Dershowitz's contention that judges are not up for this task, given instances to the contrary in proportionality assessments.<sup>336</sup> Goldberg and Dershowitz are concerned that retribution merely reflects "primal community passion."<sup>337</sup> While passion certainly may be at play in the legislature or in sentencers, it is less likely to inflame reviewing judges, who are several layers (and years) removed from the crime.

My test would, however, require the government to both identify a compelling interest and provide proof of the state legislature's having considered the interest in authorizing the punishment. This would constrain the Court from using its discretionary powers to bolster the state's case at the expense of the criminal defendant. It would also shed light on why the state legislature is actually enacting particular laws instead of why these laws might be theoretically coherent in the furtherance of a desirable goal.

Unlike the unusual inquiry, the cruel inquiry would have no restriction on what evidence the Court could consider. For example, the parties might present scientific evidence that sheds light on modern understandings of culpability or social science data that supports consequentialist aims.

#### *D. Implications*

My proposed test envisions more expansive Eighth Amendment protection than the evolving standards of decency test, raising practical questions about which defendants could qualify, how claims could be litigated, and whether increased litigation could overwhelm courts.

One implication of my proposed test is that it will apply to more defendants because it does not make distinctions based on "difference."<sup>338</sup> While the evolving standards test does not do this on its face, the Court has limited its meaningful application primarily to the death penalty and children faced with life without parole—inspiring the shorthand phrases "death is different"<sup>339</sup> and "children are different."<sup>340</sup> Because my test rests on the stated values of minority protection, antisubordination, and human dignity, which are equally applicable to those serving noncapital punishments, there is no basis to limit its application. My test applies to

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336. See *supra* notes 208–12 and accompanying text.

337. Goldberg & Dershowitz, *supra* note 195, at 1796.

338. While my proposed test makes no distinctions based on crime of conviction, due to their granularity, conditions of confinement are beyond the scope of this Article.

339. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

340. *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

both method and degree of punishment. It lacks the staunch requirement of majoritarian comparison, which can prove difficult when assessing punishments for terms of years. While this majoritarian approach is available to defendants via the first prong of the unusual inquiry, it is not a requirement for success. When defendants choose to pursue this route, they are the ones necessarily suggesting the points of comparison. Because the defendant has the burden of making a showing of unusualness, the Court need not accept the defendant's representations of similarity when evaluating if a punishment is regularly imposed in a variety of states.

In light of the application of this test to noncapital cases and its focus on arbitrary and racially discriminatory outcomes, it will no doubt result in more Eighth Amendment challenges. Whether this is a feature or a bug—a “fear of too much justice”<sup>341</sup> or “crushing litigation”<sup>342</sup>—no doubt depends on one's beliefs about the need for reform of the criminal legal system. However, several aspects of the test limit the amount of viable litigation. First, the defendant has the initial burden of demonstrating unusualness. This will frequently require a sophisticated statistical showing that will not be within the reach of every defendant. Instead, in reality, it is likely to be undertaken by nonprofit groups and researchers who have identified problematic punishment patterns. An individual suffering this punishment would be identified as a test case, and an Eighth Amendment claim would be raised on their behalf. This does not mean that relief would be unavailable for defendants who were not chosen for initial litigation. Other similarly situated defendants would benefit from the Court's decision declaring a punishment unconstitutional. Rather than litigate each of these claims, states would most likely pursue a statutory fix, as they did when replacing life without parole sentences with lesser sentences, following the Court's decisions in *Miller* and *Graham*.<sup>343</sup>

A more robust Eighth Amendment test would incentivize states to pursue legislation to guide sentencer discretion and to reexamine punishments that contribute to the continued subordination of people of color. Some might see this as an objection to the test. Critics might wonder if this test is getting at ends that are the purview of the legislature, not the courts. However, minority protection is the purview of the Court, not the legislature, for the simple reason that democratic majorities have no incentive to act beyond their own interests—particularly when those minorities are excluded from the political process to the extent that they

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341. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

342. *See id.* at 315–19 (discussing the unlimited litigation that could result from a finding that racial discrimination in sentencing is unconstitutional).

343. *See Miller*, 567 U.S. 460; *Graham v. Florida*, 560 U.S. 48 (2010).

cannot form meaningful coalitions.

The Court's weak Eighth Amendment jurisprudence has allowed states to experiment with punishment in ways that harm individuals and further racial subordination. The result is a system of mass incarceration that places inchoate goals over individual liberties. When minority groups are consistently and pervasively oppressed by the majority, judicial intervention is required.

#### *E. Practical Relevance*

Critics of my proposed test may argue that, while theoretically interesting, it lacks practical relevance because it is unlikely to appeal to the Court's current supermajority of conservative Justices. While it is undoubtedly true that these Justices are unlikely to be enthusiastic supporters, the same need not be said of current or future liberal Justices on the Court. In particular, Justices Sotomayor and Jackson may be amenable to replacing the evolving standards of decency test with a counter-majoritarian test grounded in antisubordination and human dignity. Justice Sotomayor has previously recognized that a counter-majoritarian approach is necessary to protect the rights of racial minorities. For example, in her dissent in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary*,<sup>344</sup> Sotomayor noted that "without checks, democratically approved legislation can oppress minority groups" and explained that "[f]or that reason, our Constitution places limits on what a majority of the people may do."<sup>345</sup> In that same dissent, she framed racial discrimination in terms of subordination: "[T]o know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process."<sup>346</sup> Justice Jackson similarly has recognized that the Fourteenth Amendment should be construed in a "race conscious way," and indicated it was adopted "to ensure that people who had been discriminated against, the freedmen . . . actually brought equal to everyone else in the society."<sup>347</sup> While Jackson's comments were cast in the popular media as "progressive

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344. 572 U.S. 291 (2014).

345. *Id.* at 337 (Sotomayor, J., dissenting).

346. *Id.* at 337–38.

347. Transcript of Oral Argument at 58, *Merrill v. Milligan*, \_\_ U.S. \_\_, 142 S. Ct. 879 (2022) (No. 21-1086), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2022/21-1086\\_6j36.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1086_6j36.pdf) [<https://perma.cc/5A4H-V5XG>].

originalism”<sup>348</sup> they are equally consistent with an anti-subordination approach.

It is also a mistake to believe the supermajority has coalesced around a particular originalist replacement test. Justice Gorsuch cited John Stinneford in the majority’s historical analysis upholding Missouri’s execution protocol in *Bucklew v. Precythe*.<sup>349</sup> Gorsuch was joined by Chief Justice Roberts and Justices Kavanaugh, Alito, and Thomas.<sup>350</sup> However, Gorsuch cited Stinneford for the proposition that methods of execution that had “long fallen out of use” by the time of the Founding were unusual under the punishment clause.<sup>351</sup> Curiously, this analysis seems to have elements both of the Scalia approach and the Stinneford approach, perhaps suggesting that some concession was necessary to bring Justices Alito and Thomas on board.<sup>352</sup>

Justice Gorsuch also did not adopt Stinneford’s test for cruelty—whether the punishment at issue is unjustly harsh as compared with the punishment it replaced.<sup>353</sup> Instead, Gorsuch defined a cruel execution as one intensified by a “superadd[ition] of terror, pain, or disgrace.”<sup>354</sup> Further, Gorsuch punted on whether intentional state action is necessary for a method of punishment to qualify as cruel, concluding that “revisiting that debate isn’t necessary here.”<sup>355</sup> While Justices Thomas and Scalia have explicitly called for this requirement,<sup>356</sup> Stinneford’s approach repudiates the idea, arguing instead that an intentionality requirement is contrary to history.<sup>357</sup> The implications of *Bucklew* are these: the Court is aware of Stinneford’s approach, and some conservative Justices may support it. But, as of 2019, the Court did not have five votes in favor of

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348. Evan Turiano, *Justice Jackson Offered Democrats a Road Map for Securing Equal Rights*, WASH. POST (Oct. 10, 2022), <https://www.washingtonpost.com/made-by-history/2022/10/10/originalism-ketanji-brown-jackson-supreme-court/> [https://perma.cc/62PD-KZDU].

349. 587 U.S. \_\_\_, 139 S. Ct. 1112, 1123 (2019).

350. *Id.*

351. *Id.*

352. While Stinneford’s scholarship does support a reading that punishments that fall out of long usage become unusual, he does not limit his analysis to the time of the Founding. That is Scalia’s approach. Stinneford explicitly uses the long usage principle to evaluate the constitutionality of punishments going forward into contemporary society. Under Stinneford’s rubric, while capital punishment is consistent with long usage, lethal injection is not, and therefore it is unusual. Stinneford, *Unusual*, *supra* note 148, at 1770–71, 1814.

353. Stinneford, *Cruel*, *supra* note 149, at 446–47.

354. *Bucklew*, 139 S. Ct. at 1124 (citations and quotations omitted).

355. *Id.* at 1126.

356. *Id.*; *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Thomas, J., concurring); *Baze v. Rees*, 553 U.S. 35, 94–107 (2008) (Thomas, J., concurring).

357. Stinneford, *Cruel*, *supra* note 149, at 445–46, 451–58.

implementing Stinneford's approach. This fractured originalism may prevent substantial change to the evolving standards test until the composition of the Court changes.

More immediately, state supreme courts judges, who must choose how to interpret the punishment clauses in their own state constitutions, may choose to do so more broadly.<sup>358</sup> Most states have Eighth Amendment analogues in their own constitutions.<sup>359</sup> While some contain identical language, others are broader in scope, protecting against either cruel *or* unusual punishment or explicitly including proportionality requirements.<sup>360</sup> Even several states with identical language have deviated from the Supreme Court's interpretive approach.<sup>361</sup> Perhaps, if the Court replaces the evolving standards of decency test with a test grounded in originalist history and tradition, more of these states will choose to pursue their own interpretative paths.

## CONCLUSION

While strong reasons may exist to rethink the evolving standards of decency test, originalism as an interpretive methodology is unsuited to this task. A better path envisions a robust Eighth Amendment test aimed at protecting minority rights and grounded, not in selective history, but in the constitutional values of antistatutory subordination and human dignity. This test should constrain judicial discretion in favor of the person suffering the pain of punishment. Most importantly, it should not turn a blind eye to the structural harms of the criminal punishment system; instead, it should serve as a corrective to the limits of the democratic process, which have failed to remedy the punishment system's overreach and racial subordination.

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358. William W. Berry III has written extensively on the punishment clauses of state constitutions and their viability as avenues for relief to criminal defendants. *See, generally*, Berry III, *Non-Capital Punishments*, *supra* note 211 (discussing state punishment decisions in noncapital cases); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201 (2020) [hereinafter Berry III, *Cruel*] (arguing that state punishment clauses offer broader avenues of relief than the federal constitution); William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. 1 (2020) (arguing that some states that impose capital sentences may be violating the punishment clauses in their state constitutions).

359. Berry III, *Cruel*, *supra* note 358, at 1205.

360. *Id.* at 1213–40.

361. *Id.* at 1215–19.



