Cornell Law Review

Volume 102
Issue 2 *January 2017*

Article 3

Constitutional Liberty and the Progression of Punishment

Robert J. Smith

Zoe Robinson

CONSTITUTIONAL LIBERTY AND THE PROGRESSION OF PUNISHMENT

Robert J. Smith† *& Zoë Robinson*‡

The Eighth Amendment's prohibition on cruel and unusual punishment has long been interpreted by scholars and judges to provide very limited protections for criminal defendants. This understanding of the Eighth Amendment claims that the prohibition is operationalized mostly to prevent torturous methods of punishment or halt the isolated use of a punishment practice that has fallen into long-term disuse.

This Article challenges these assumptions. It argues that while this limited view of the Eighth Amendment may be accurate as a historical matter, over the past two decades, the Supreme Court has incrementally broadened the scope of the cruel and unusual punishment clause. The Court's contemporary Eighth Amendment jurisprudence—with its focus on categorical exemptions and increasingly nuanced measures of determining constitutionally excessive punishments—reflects an overt recognition that the fundamental purpose of the Eighth Amendment is to protect vulnerable citizens uniquely subject to majoritarian retributive excess.

Animating these developments is a conception of constitutional liberty that transcends the prohibition on cruel and unusual punishment. Indeed, 2015's same-sex marriage decision, Obergefell v. Hodges, reflects a similar trajectory in the Court's substantive due process jurisprudence. Taken together, these doctrinal developments illustrate a concerted move to insert the Court as the independent arbiter of legislative excesses that undermine the basic right to human dignity by virtue of unnecessarily impinging upon individual liberty. Ultimately, these liberty-driven developments signal new possibilities for the protection of defendant rights in a variety of contemporary contexts, including juvenile life without parole

---

† Director of the Fair Punishment Project, a collaboration between the Charles Hamilton Houston Institute for Race and Justice & The Criminal Justice Institute, Harvard Law School. J.D., Harvard Law School; B.A., University of California, Berkeley.

‡ Professor of Law, DePaul University College of Law. J.D., University of Chicago Law School; LL.B. (Hons), The Australian National University College of Law; B.A., The Australian National University; B.Mus., Queensland Conservatorium, Griffith University. We thank Rory Fleming, Mark Larouche, Dawn Milam, Hensleigh Crowell, Andrea Torgrimson, and Susanna Wagar for outstanding research assistance.

for homicide offenses, life without parole for non-violent drug offenses, the death penalty, certain mandatory minimum sentences, and the prolonged use of solitary confinement.

INTRODUCTION

The Eighth Amendment's prohibition on cruel and unusual punishment is widely thought of as providing remarkably limited protections for criminal defendants.[1] This understanding of the Eighth Amendment claims that the prohibition is operationalized mainly as a mechanism for protecting against torturous modes of punishment unlikely to be authorized in a constitutional democracy,[2] or as a means of securing a *coup de grace* when a punishment practice has fallen into disuse.[3]

This Article challenges these assumptions. It argues that while it is accurate to claim that the protection against cruel and unusual punishment has historically been limited in its utility for criminal defendants, as a matter of modern Eighth Amendment jurisprudence, the description falls short. Instead, as this Article claims, over the past two decades the Supreme Court—with Justice Anthony Kennedy at the helm—has incrementally moved Eighth Amendment doctrine toward a

---

1 *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1148 (2009) (noting that in a recent year "more than one million adults received noncapital sentences versus 115 people who received death sentences," yet "[t]he Court has focused on the tiny percent of cases" and "ignored the rest"); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1061 (2004) ("The bottom line . . . is that there is little in the way of proportionality review for prison sentences."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (concluding "with gloomy irony, that the Supreme Court's Eighth Amendment jurisprudence . . . not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States").

2 *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) ("The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment."); *id.* at 985 (concluding that "those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences"); *id.* at 997 (Kennedy, J., concurring) (concluding that the Eighth Amendment does contain a "narrow" proportionality principle).

3 *See, e.g.*, John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 539 (2014) ("[T]he death penalty could be declared unconstitutional consistent with the original meaning of the Cruel and Unusual Punishments Clause if it were to fall out of usage long enough that a 'tradition' or 'custom' of desuetude developed against it. Such non-usage would have to last several generations to be considered a reliable measure of constitutionality."); Coker v. Georgia, 433 U.S. 584, 595-96 (1977) (invalidating the death penalty where Georgia was "the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman").

fundamentally robust protection that has at its core the protection of the liberty interests of criminal defendants.[4]

Rather than focusing on the more limited case-specific proportionality analysis or the assessment of "super due process" procedural rights, two approaches which previously exemplified that Court's Eighth Amendment jurisprudence,[5] the Court's modern doctrine reflects an increasingly nuanced understanding of modern politics, and its consequent impact on criminal defendants. In doing so, the Court has moved to a regime where the individual defendants are secondary to a more generalized consideration of the penological purpose of any given punishment practice vis-à-vis any given class of offenders or category of offenses.[6] Further, in measuring the penological purpose of a punishment practice, the Court has additionally shaped a sophisticated and functional rubric for assessing contemporary standards of decency.

Driving the Court's jurisprudential shift is an overt recognition of the peculiarly vulnerable nature of the population that the Eighth Amendment is designed to protect, namely criminal defendants.[7] The Court's recent jurisprudence reflects a

---

4 *See infra* Part II.

5 The procedural regulation approach, which is an attempt to manage the capital trial process in the hope of eliminating arbitrary and discriminatory outcomes, is best exemplified by *Gregg v. Georgia*, 428 U.S. 153, 200 (1976) (plurality opinion) (rejecting claims that "the capital-sentencing procedures adopted by Georgia in response to *Furman* do not eliminate the dangers of arbitrariness and caprice in jury sentencing"), and *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (invalidating one of the statutory aggravating factors—that the crime was "outrageously or wantonly vile, horrible and inhuman" because it was too vague to meet the Eighth Amendment's requirement of "rationally reviewable . . . process" in capital cases). The case-specific proportionality approach, which considers whether a sentence is cruel and unusual as applied to a particular person, is best exemplified by *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding unconstitutional a sentence of life imprisonment for the passing of a bad check by a convicted felon) and *Ewing v. California*, 538 U.S. 11, 18 (2003) (affirming a sentence of 25 years to life upon a non-violent recidivist offenders who stole "three golf clubs, priced at $399 apiece, concealed in his pants leg"). For a robust discussion of these strands of Eighth Amendment jurisprudence, see *infra* notes 126–32 and accompanying text (discussing the Court's procedural regulation under the Eighth Amendment); *infra* notes 139–53 (discussing the Court's case-by-case proportionality approach under the Eighth Amendment).

6 *See infra* notes 154–205 and accompanying text (discussing the Court's contemporary Eighth Amendment jurisdiction).

7 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152, n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry"); McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (noting that, especially in times of public panic over real or perceived crime spikes, "[t]hose whom we would banish from society or from the human commu-

deeper understanding of the impact that unchecked legislatures can have on the most unpopular members of our constitutional community. As Justice Kennedy recently underscored, "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."[8]

Concerns over majoritarian excess are not new.[9] The constitutional Framers recognized the potential for a majority of the community to impose on the minority. James Madison famously noted in *Federalist Paper No. 51* that

> [i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.[10]

The Court has noted the role of the Bill of Rights in protecting against these very concerns, commenting that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[11]

Yet, as the latter half of the last century evidences, concerns about majoritarianism are amplified in the context of criminal defendants. The United States' prison population skyrocketed in the 1980s and 90s,[12] and now the nation incarcerates more of its citizens than any other country in the world.[13] This flood of criminal defendants is attributable to retributive excess as a direct result of a series of moral panic events, whereby the public reacts to a real or perceived crime

---

nity itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.").

8 Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

9 For a thorough overview of the majoritarian difficulty and its many academic commentators, see generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L.J. 153, 176–215 (2002) (criticizing academic characterizations of the Court as a countermajoritarian institution).

10 THE FEDERALIST NO. 51 (James Madison).

11 *Barnette*, 319 U.S. at 638.

12 *See* JUSTICE POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1 (2000).

13 *Highest to Lowest—Prison Population Total*, INST. FOR CRIM. POL'Y RESEARCH, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate [https://perma.cc/WD5M-93H9].

problem in a way that is hysterical and out-of-all-proportion.[14] Legislators, in turn, pass harsh sentences to address these public concerns, but when the panic fades the reality of excessiveness in punishment sets in.[15] And while contemporary legislators and executive officials work to undo some of the retributive excesses of the decades prior,[16] if there is any lesson from the past half century, it is that it is implausible to rely solely on legislators to get the retributive calculus of punishment right. Further, the punitiveness of the public mood—and, therefore, political action—can shift rapidly from rights-protective to retributive.[17]

Until recently, the judiciary has remained on the sidelines, unable or unwilling to act as a majoritarian counterweight to provide robust protections for the rights of criminal defendants.[18] Constrained by the previously limited scope of the Eighth Amendment, many judges have been at a loss to know how to respond to continued legislative excess. For example, in 2015, the Alabama Supreme Court affirmed a mandatory life without parole sentence for marijuana possession imposed upon a seventy-six-year-old disabled combat veteran.[19] Chief Justice Roy Moore called the punishment "excessive and unjustified,"[20] and urged the legislature to wrestle with the "grave flaws in our statutory sentencing scheme"[21] and consider whether such punishment "serves an appropriate purpose."[22]

This Article claims that the Court's evolving Eighth Amendment jurisprudence overtly recognizes these deep and intracta-

---

14 *See infra* notes 30–96 and accompanying text (discussing moral panic and retributive excess).

15 *Id.*

16 Consider, for example, that both Senator Ted Cruz (R) and Senator Corey Booker (D) recently co-sponsored the Smarter Sentencing Act, which would reduce draconian mandatory minimum sentences. *See* Lydia Wheeler, *Bipartisan Bill Would Ease Drug Sentences*, THE HILL (Feb. 12, 2015, 3:47 PM), http://thehill.com/regulation/232670-bill-targets-prison-population-through-non-violent-drug-crimes [https://perma.cc/JS6P-BUC8]. Further, President Obama announced clemency in 2015 for dozens of non-violent offenders. *See* Matt Ford, *Obama's Christmas Clemency Cavalcade*, THE ATLANTIC (Dec. 18, 2015), http://www.theatlantic.com/politics/archive/2015/12/obama-pardons-clemency/421317/ [https://perma.cc/G66F-6TQD].

17 *See infra* notes 30–96 and accompanying text (discussing moral panic and retributive excess).

18 *See infra* notes 97–125 and accompanying text (discussing the historic and contemporary role of the judiciary in enforcing Eighth Amendment rights).

19 *Ex parte* Lee Carroll Brooker, No. 1141160, slip op. at 2 (Ala. 2015) (Moore, J., concurring).

20 *Id.*

21 *Id.* at 6.

22 *Id.*

ble concerns about majoritarian retributive excess. Tracing the Court's jurisprudence over the past two decades, the Article demonstrates the Court's gradual shift away from a narrow and wooden Eighth Amendment framework to one that embraces the role of the judiciary as an independent arbiter of excessive punishment. The doctrine evidences a carefully measured renunciation of concerns over the randomness of punishment toward a more holistic consideration of proportionality (i.e. the fit between the culpability of the defendant and the purpose of the punishment).[23] At the level of application, this has resulted in a burgeoning categorical exemption jurisprudence as well as an increasingly nuanced measure of the conception of constitutionally excessive punishments.[24]

Animating the Court's Eighth Amendment jurisprudential shift is the evolving concept of *constitutional liberty*, a fundamental constitutional value that Justice Kennedy describes as being based in a "spacious phrase" in the Fifth and Fourteenth Amendments, which creates, "a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go."[25] According to Justice Kennedy, this value of constitutional liberty includes "certain specific rights that allow persons, within a lawful realm, to define and express their identity."[26] This conception of constitutional liberty as driving the scope of constitutional rights is not limited to the Eighth Amendment. Instead, constitutional liberty has begun to permeate the Court's jurisprudence in other areas, most recently and notably in the Court's Fourteenth Amendment substantive due process jurisprudence, at least as it relates to gay rights.[27] In its seminal 2015 decision of *Obergefell v. Hodges*, the Court emphasized the driving force of liberty in determining the content of the substantive due process right.[28] The development of Eighth Amendment constitutional liberty,

---

23 *See infra* notes 126–68 and accompanying text (discussing the Court's shift toward categorical exemptions to strike down excessive punishment practices).

24 *See infra* notes 169–205 and accompanying text (demonstrating the Court's embrace of its role as the independent arbiter of excessive punishment, which has shifted the case law away from concerns about the randomness of punishment as applied to any specific defendant, to a more holistic consideration of proportionality).

25 *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States*, 100th Cong. 86 (1987) [hereinafter *Kennedy Nomination*] (statement of Anthony M. Kennedy).

26 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

27 *See infra* notes 206–37 and accompanying text (describing the ascendency of constitutional liberty in the marriage doctrine).

28 *Obergefell*, 135 S. Ct. at 2605–06.

then, has borrowed from, and developed with, the value of constitutional liberty in other discrete constitutional rights.

In refocusing the debate on constitutional liberty and the Court's Eighth Amendment exemplification of that value, this Article sets the groundwork for reinventing contemporary criminal justice jurisprudence, including life without parole for juvenile homicide offenders, life without parole for non-violent drug offenders, the death penalty, certain mandatory minimum sentences, and the prolonged use of solitary confinement.[29]

To this end, this Article proceeds in four Parts. Part I begins by proposing and defending the claim that the purpose of the Eighth Amendment is to guard against legislative retributive excess, especially overreaches that result from moral panic. Part II charts the Court's gradual acceptance of this understanding of the Eighth Amendment, mapping out the waning influence of the previously dominant jurisprudential strands of procedural fairness and case-by-case proportionality, and the rise of liberty-driven categorical exemptions and functional consensus evaluation. Part III situates the conception of Eighth Amendment liberty in its broader context, arguing that the evolving Eighth Amendment jurisprudence reflects broader normative determinations about the role of constitutional rights and judicial enforcement of those rights in a constitutional democracy. Finally, building on the Court's evolving jurisprudence, in Part IV we sketch a likely trajectory of future Eighth Amendment claims, demarcating both the promise and the limitations of the Kennedy framework.

I
THE EIGHTH AMENDMENT AND RETRIBUTIVE EXCESS

To begin with, what is the fundamental purpose of the Eighth Amendment? This Part presents the claim that the Eighth Amendment is a structural constitutional protection specifically tailored to curb legislative retributive excess, particularly in times of moral panic. In this Article, we use the term "moral panic" to refer to a legislative overreaction to isolated criminal conduct. In subpart A, we explore this idea of moral panic and the impact of moral panic on crime and punishment, specifically how moral panic typically results in *excessively harsh* punishments.

---

29 *See infra* notes 277–341 and accompanying text (outlining the near-term trajectory of constitutional liberty on these contemporary—and critical—areas of criminal justice).

Subpart B suggests that the purpose of the Eighth Amendment is to guard against these retributively excessive laws. The subpart argues that the best interpretation of the Eighth Amendment is that it directs the judiciary to intervene to correct any lack of legislative restraint and modesty evident in criminal laws and procedures. The subpart also foreshadows the discussion in Part II and overviews the Supreme Court's performance on that dimension, suggesting that while the Court has historically been hesitant to employ the Eighth Amendment such that it acts as a counter-majoritarian weight, recent doctrinal developments suggest the Court is actively moving to accept a broader role in mitigating retributive excess.

A. Moral Panic and Retributive Excess

Moral panic can be best defined as "an exaggeration or distortion of some perceived deviant behavior or criminal activity."[30] In a situation of moral panic, a salient yet unrepresentative crime captures the public imagination.[31] Or a legitimate spike in crime occurs and consequently overzealous fear and anger spread through the public. The issue is frequently presented in a "stylised and stereotypical fashion by the mass media [with] the moral barricades [being] manned by editors, bishops, politicians or other right-thinking people."[32]

Legislators feel these same emotions. In addition, legislators perceive the desires of their constituents, both directly and

---

30 Dawn Rothe & Stephen L. Muzzatti, *Enemies Everywhere: Terrorism, Moral Panic, and US Civil Society*, 12 CRITICAL CRIMINOLOGY 327, 329 (2004). On the idea of moral panic, see, for example, Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 21 CRIME, L. & SOC. CHANGE. 147, 157–58 (1999) (discussing the influence of the media on moral panic surrounding school shootings); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 808–12 (2014) (addressing moral panic over "bad mothers" leading to criminalization of normal risks of pregnancy like stillbirth); Kaytee Vota, *The Truth Behind* Echols v. State*: How an Alford Guilty Plea Saved the West Memphis Three*, 45 LOY. L.A. L. REV. 1003, 1004 (2012) (explaining how Satanic ritual abuse panic in the 1980s and 1990s contributed to innocent men interested in gothic fashion and heavy metal music being wrongfully convicted of three murders).

31 *See* Burns & Crawford, *supra* note 30, at 150 ("[T]here must be a belief . . . that a greater portion of the population is engaged in this disturbing behavior than actually is, or that the harm incurred is greater than what has occurred."); Rothe & Muzzatti, *supra* note 30, at 329 ("[Media coverage] serves to inflate the seriousness of the incidents, making them appear more heinous and frequent than they truly are. Public anxiety is whipped up . . . .").

32 Rothe & Muzzatti, *supra* note 30, at 328 (quoting STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 9 (1972)).

via the media and relevant interest groups.[33] Subsequently, legislators are motivated to respond to community outrage, and new laws are drafted and punishment is ratcheted-up.[34] And then, inevitably, the panic fades. Perhaps the legislature repeals some of the worst excesses.[35] But thousands and thousands of people suffer from the now-anachronistic wrath; and, selectively, a few people[36]—often racial minorities or particularly vulnerable people—will continue to face the wrath in the future as, for example, the personalities of outlier local

---

33 *See* Burns & Crawford, *supra* note 30, at 159 ("Media outlets . . . enable 'issue-identification' by which politicians are able to determine which topics they need to address . . . .").

34 This legislative behavior is rational according to the public choice literature, even if extra punishment is unnecessary for public safety. Public Choice is "best defined as the application of the rational choice model," which assumes actors will always try to maximize the achievement of their individual preferences for their own self-interest, to "non-market decision-making" like politics. P.J. Hill, *Public Choice: A Review*, 34 FAITH & ECON. 1, 1 (1999). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991) (specifying that public choice is "the application of the economist's methods to the political scientist's subject"); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202 (1988) ("[T]he public choice literature . . . is an effort to demonstrate that given certain suppositions about the way political actors . . . behave, and given certain suppositions about the actual power government possess, the democratic sphere is, at its core, an arena of theft, an unmitigated disaster that should be limited carefully, tolerated only if fundamentally powerless."); Abner Mikva, *Foreward to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988) (examining a debate surrounding the public choice model of the politician); Dennis C. Mueller, *Public Choice in Perspective*, in PERSPECTIVES ON PUBLIC CHOICE 1 (Dennis C. Mueller ed., 1997); Elinor Ostrom, *Collective Action and the Evolution of Social Norms,* 14 J. ECON. PERSP. 137, 139–48 (2000) (examining the theoretical and empirical evidence explaining the development of public collective action, where individuals cooperate despite acting in their own self-interest); Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 553–58 (explaining how social science theory—including public choice—can be helpful to the study of law).

35 *See, e.g.*, Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, N.Y. TIMES (Nov. 13, 2015), http://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html?_r=0 [https://perma.cc/7DPU-45BX] (explaining that, to avoid ill-fitting child pornography charges with mandatory sex offender registration, "[a]bout 20 states have adopted new laws intended to address juvenile sexting by providing a less severe range of legal responses to personal photo-sharing, including misdemeanor charges that may be expunged, and required community service or counseling."); Linda Greenhouse, Opinion, *Crack Cocaine Limbo*, N.Y. TIMES (Jan. 5, 2014), http://www.nytimes.com/2014/01/06/opinion/greenhouse-crack-cocaine-limbo.html [https://perma.cc/QYJ9-Q8FZ] (explaining that the commuted sentences of certain federal prisoners incarcerated for "crack cocaine offenses had resulted in the harsh penalties mandated by a sentencing formula that Congress repudiated when it passed the Fair Sentencing Act of 2010").

36 *See* Burns & Crawford, *supra* note 30, at 149 ("[T]he demonization of these evildoers . . . is often easy because they are typically already marginalized and don't have the resources nor the creditability to counter this stigmatization.").

district attorneys continue to use the statute, however infrequently.[37]

This description of moral panic is not mere hyperbole. America endured a series of moral panics in the 1980s and 1990s.[38] During this period, while violent crime did rise,[39] the legislative response is best characterized as retributive excess, where the reaction was out of step with the problem. Consider the following examples.

Willie Horton. In 1987, after disappearing while on a furlough from a Massachusetts prison, Willie Horton raped a woman.[40] Republican strategist Lee Atwater used the moment to attack Michael Dukakis, George H. W. Bush's main competition for President. Atwater's goal, in his own words: "By the time we're finished, they're going to wonder whether Willie Horton is Dukakis' running mate."[41] Television ads ran that used

---

37 *See, e.g.*, Mike Blasky, *Teacher's Arrest Based on Discriminatory Law, Civil Rights Advocates Say*, LAS VEGAS REV.-J. (Sept. 24, 2012) http://www.reviewjournal.com/news/crime-courts/teachers-arrest-based-discriminatory-law-civil-rights-advocates-say [https://perma.cc/3PDW-9N3D] (describing case where two adults, one man and one woman, had three-way sex with a sixteen-year-old girl in Nevada and only the woman was arrested on a charge of "'solicitation of a minor to engage in acts constituting crime against nature,' a holdover from the days when Nevada banned anal and oral sex"); *Bowe Bergdahl Charged With Rarely Used Misbehavior Before the Enemy*, CBS DC (Sept. 8, 2015), http://washington.cbslocal.com/2015/09/08/bowe-bergdahl-charge/ [https://perma.cc/EXL7-KJ5T] (explaining that Bergdahl, captured by the Taliban and imprisoned for years until a prisoner swap was agreed upon by the U.S., was prosecuted under a law carrying a potential life sentence, despite the law having been "seldom used since World War II").

38 *See, e.g.*, STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS, ROUTLEDGE CLASSICS xvii–xviii (3d ed., 2002) (detailing the moral panic of the 1980s surrounding "cult child abuse" where Satanic cults involved children in "torture, cannibalism and human sacrifice"); U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 1999 NATIONAL REPORT SERIES JUVENILE JUSTICE BULLETIN: CHALLENGING THE MYTHS 2–3 (2000) (describing the debunked super-predator theory, which predicted in the 1990s a large wave of remorseless and violent juvenile offenders).

39 In 1981, the rate of violent crime was 35.3 crimes per 1,000 persons—higher than at any time before 1977. Although the violent crime rate briefly declined between 1982 and 1989, it had risen to 32.1 crimes per 1,000 by 1992. *See* U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973–92 TRENDS 1 (1994). Additionally, media coverage of violent crime increased significantly in the 1990s. *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 422–36 (2006) (describing the trends and growth in crime story coverage among network and local media outlets).

40 *See* Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALT. SUN (Nov. 11, 1990), http://articles.baltimoresun.com/1990-11-11/features/1990315149_1_willie-horton-fournier-michael-dukakis [https://perma.cc/H3DD-2KPA] (discussing the trajectory of the Willie Horton phenomenon in politics).

41 *Id.*

Horton to depict Dukakis as soft on crime: "Dukakis not only opposes the death penalty, he allowed first-degree murderers to have weekend passes from prison."[42] Then-Senator Joe Biden said that one of his political goals was "to lock Willie Horton up in jail."[43] And George Bush, capitalizing on his tough on crime credibility, told Americans, "We need more prisons, more jails, more courts, more prosecutors."[44] Ultimately, prison furlough programs—the same ones that Ronald Reagan touted—disappeared.[45] So, too, did parole. As Senator Richard Durbin recently told the Marshall Project, "[t]he ghost of Willie Horton has loomed over any conversation about sentencing reform for over 30 years."[46]

Polly Klaas. In October 1993, in Petaluma, California, a twelve-year-old girl, Polly Klaas, was abducted and murdered.[47] The person who committed the murder was Richard Davis, a recidivist paroled from a California prison. The shocking murder instantly captured the imagination of the public, lending momentum to a proposed statewide ballot initiative—Proposition 184—that mandated strict mandatory minimum sentences for recidivist offenders. Proposition 184, which came about "[w]ithin days" of Polly's death, became the "fastest qualifying initiative in California history."[48] A few months later, President Bill Clinton spotlighted the Polly Klass case during his State of the Union address commenting, "those who commit repeated violent crimes should be told when you commit a third violent crime, you will be put away and put away for good."[49]

---

42 *A 30-Second Ad on Crime*, N.Y. TIMES (Nov. 3, 1988), http://www.nytimes.com/1988/11/03/us/a-30-second-ad-on-crime.html [https://perma.cc/6JRJ-YFWR] (discussing a Dukakis "tough on crime" television advertisement).

43 EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 146 (1996).

44 Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. TIMES (Sept. 6, 1989), http://www.nytimes.com/1989/09/06/us/president-offers-strategy-for-us-on-drug-control.html?pagewanted=all [https://perma.cc/E2E6-KXA2].

45 Beth Schwartzapfel and Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#.MvFXwWQqy [https://perma.cc/WQ3F-ZUWA].

46 *Id.*

47 Ewing v. California, 538 U.S. 11, 14–15 (2003).

48 *Id.* at 15.

49 William J. Clinton, President of the United States, State of the Union Address (Jan. 25, 1994), *reprinted in* WASH. POST http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou94.htm [https://perma.cc/ZFN7-7URN]. On the President's State of the Union remarks, see, for example, Gwen Ifill, *State of the Union: The Overview; Clinton Vows Fight for his Health Plan*, N.Y. TIMES (Jan. 26, 1994), http://www.nytimes.com/1994/01/26/us/state-of-the-union-the-overview-clinton-vows-fight-for-his-health-plan.html?pagewanted=all

And then, to roaring applause, Clinton boomed, "three strikes and you are out."[50] Like a virus, three strikes laws specifically—and mandatory minimum sentences in particular—began to spread across the nation.[51] Indeed, twenty-four states enacted three strikes over a two-year period following the death of Polly Klaas.

Super-predators. In 1995, Professor John DiIulio and others warned the nation of a coming "breed" of juvenile offenders who "kill, rape, maim, without giving it a second thought."[52] These are not kids, but "fatherless, Godless, and jobless" super-predators.[53] Campaigning for the omnibus crime control bill, Hillary Clinton said in 1996: "They are not just gangs of kids anymore. They are often the kinds of kids that are called super-predators. No conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel."[54] President Bill Clinton further amped-up the drama proclaiming, "[w]e cannot renew this country when 13-year-old boys get semi-automatic weapons to shoot 9 year olds for kicks."[55] This super-predator rhetoric significantly contributed to sharp increases in life without parole sentences for juveniles, as well as the transfer of cases from juvenile to adult court.[56]

The Crack-Cocaine Epidemic. In the 1980s, crack-cocaine use spiked in American cities, leading doctors and other public

---

[https://perma.cc/KE59-HD2N] (noting that Clinton was emotional when discussing his plans to combat crime in America).

50 Clinton, *supra* note 49; The Book Archive, *State of the Union Address: Speech by President Clinton (1994)*, YOUTUBE (May 5, 2012), https://www.youtube.com/watch?v=zyb0TC_JGFQ [https://perma.cc/3LJV-9MPR].

51 *See generally* JOHN CLARK ET AL., NAT'L INST. OF JUST., "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION (1997) (comparing the provisions of three-strikes laws in twenty-four states).

52 Editorial, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html [https://perma.cc/X9V6-THGL].

53 John J. DiIulio, Jr., *Arresting Ideas*, 74 HOOVER INST. POL'Y REV. 12, 15 (1995).

54 Robert Mackey, *Hillary Clinton on 'Superpredators' in 1996*, C-SPAN (Feb. 25, 2016), https://www.c-span.org/video/?c4582473/hillary-clinton-superpredators-1996 [https://perma.cc/R2Q4-YE5P]. Note that this is the same bill that contained the "three strikes" law referenced by President Bill Clinton in his 1994 state of the union address. *See* Clinton, *supra* note 49.

55 Clinton, *supra* note 49.

56 *See* JOHN R. MILLS, ANNA M. DORN & AMELIA C. HRITZ, PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 9–11 (2015); *see also* Michael Bochenek, *Trying Children in Adult Courts*, HUM. RTS. WATCH (Nov. 1999), https://www.hrw.org/reports/1999/maryland/Maryland-02.htm [https://perma.cc/G2QN-E59J] (describing the mistreatment of juvenile defendants in Maryland's jails).

health officials to warn of "crack babies"[57]—the children born of addicted parents; children forecasted to be of unsound mind and body—and crack murders spilling out of poor, black, inner-city streets and into white, wealthier suburban neighborhoods.[58] This increasingly salient fear of crack, and the violence it propelled, reached its boiling point in 1986 when Len Bias, a star college basketball player that the Boston Celtics had drafted, died after using cocaine.[59] Congress immediately held hearings on the crack-cocaine epidemic wherein legislators invoked Bias's name eleven times.[60] A few months later, President Reagan signed into law the Anti-Drug Abuse Act, which contained a 100:1 sentencing disparity for possession of crack relative to powder cocaine.[61]

Taken together, these panic-fueled legislative enactments contributed to a meteoric and unprecedented increase in our national jail and prison populations.[62] At its peak, the Ameri-

---

57 *See* Charles Krauthammer, *Worse Than 'Brave New World': Newborns Permanently Damaged by Cocaine*, PHILA. INQUIRER (Aug. 1, 1989), http://articles.philly.com/1989-08-01/news/26148256_1_cocaine-babies-crack-babies-damage [https://perma.cc/9TR6-K7QQ]; *see also* Stacey Burling, *The Littlest Victims of Cocaine*, PHILA. INQUIRER (Aug. 24, 1989), http://articles.philly.com/1989-08-24/news/26150896_1_babies-foster-care-supervisor-cocaine [https://perma.cc/AW36-B4PB] (discussing the "growing number of babies in Chester County are being born with cocaine in their systems"). *But see* Janine Jackson, *The Myth of the 'Crack Baby,'* FAIR (Sept. 1, 1998), http://fair.org/extra-online-articles/the-myth-of-the-crack-baby/ [https://perma.cc/AVR9-QFP5] (explaining the media myth of the "crack baby" as inferior and doomed, while listing a number of articles that perpetuated this myth).

58 *See* Peter Kerr, *A Crack Plague in Queens Brings Violence and Fear*, N.Y. TIMES (Oct. 19, 1987), http://www.nytimes.com/1987/10/19/nyregion/a-crack-plague-in-queens-brings-violence-and-fear.html?pagewanted=all [https://perma.cc/4F4H-8CP9]; *see also* Nicholas M. Horrock, *Crack Wars Push Murder Rates to Record Level in Washington*, CHI. TRIBUNE (Nov. 6, 1988), http://articles.chicagotribune.com/1988-11-06/news/8802130346_1_murder-rate-crack-nightclub [https://perma.cc/KG3T-RT3M] (describing rise in violence relating to crack epidemic).

59 *See* Jonathan Easley, *The Day the Drug War Really Started*, SALON (Jun. 19, 2011), http://www.salon.com/2011/06/19/len_bias_cocaine_tragedy_still_affecting_us_drug_law/ [https://perma.cc/BSJ6-6KDV].

60 United States v. Petersen, 143 F. Supp. 2d 569, 573 (E.D. Va. 2001).

61 Easley, *supra* note 59.

62 Some reasons for this explosion in the incarcerated population include, among other things, the federalization of crime; extreme political pressure to not seem "soft on crime"; lack of political power from the incarcerated and the ex-offender populations due to poverty and disenfranchisement; and a general lack of desire to fund public services. *See* Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 310–11 (2008). John Gleissner focuses on the war on drugs perpetuated by the conservative political wing, stating that the "primary mistake made by law & order interests, including most conservatives, is that we tried to pile on more prison time, mandatory sentences and three-strikes legislation in a failed effort to attack the supply of illegal drugs." John Dewar Gleissner, *A Conservative View of Incar-*

can justice system incarcerated one in one-hundred citizens—a tenfold increase over forty years.[63] This is the aftermath of moral panic, the outsized fear over violence in response to a very real increase in violent crime. As one scholar explains, "People's opinions about the sentences required for proper criminal punishment fluctuate as a function of their current perceptions of the threat of crimes and, more generally, their state of fear."[64] In turn, legislators sense this fear in their constituents, often lending support to stricter laws and harsher punishments based on a "public preference formed from miscalculations of risk."[65]

Public anger matters, too. One scholar found that even after "controlling for other factors such as racial prejudice, fear of crime, causal attributions for criminal behavior, and political ideology," "anger about crime is a significant predictor of punitive attitudes."[66] Whether anger or fear is the primary driver, political scientists have found that the data indicate that "shifts in the public's punitiveness appear to have preceded shifts in congressional attention to criminal justice issues."[67] Moreover, "the public's increasing punitiveness has been a primary determinant of the incarceration rate."[68] Consequently, for over a quarter-century, the American justice system appeared to be a "one-way ratchet"—more punishment, harsher punishment, less opportunity for redemption.[69]

Yet, fear and anger necessarily diminishes over time. In 2012, for example, voters in California repealed a significant

---

ceration Reform, CORRECTIONS.COM (Sept. 23, 2013), http://www.corrections.com/news/article/34129-a-conservative-view-of-incarceration-reform [https://perma.cc/LVK3-B8NF].

63 The Justice Policy Institute documented the 1970 prison population as 338,029 people. *See* JUS. POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1, 1 (2000) (using data from U.S. Department of Justice). By analyzing "the whole pie" of incarceration, the Prison Policy Institute estimates that the United States incarcerated approximately 2.3 million people on any given day in 2015. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON PO'Y INITIATIVE (Dec. 8, 2015), http://www.prisonpolicy.org/reports/pie2015.html [https://perma.cc/GN8W-ULLC].

64 Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1989 (2010).

65 *Id.* at 1990 n.172 (*citing* Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 771–79 (1990)).

66 Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUNISHMENT & SOCIETY 51, 51 (2009).

67 Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 858 (2014).

68 *Id.*

69 Chemerinsky, *supra* note 62, at 310.

part of the three-strikes law—ending life imprisonment for most non-violent offenses—with 69% of the vote.[70] Discussing the federal crime bill, Bill Clinton said recently that his administration had "overshot the mark."[71] Hillary Clinton too has noted that "[d]ecisions were made in the '80s and '90s to deal with what was at that time a very high crime rate . . . a lot was done that went further than it needed to go and so now we are facing problems with mass incarceration."[72] Even Lee Atwater, the strategist who used prison furloughs to call Dukakis "soft on crime," backtracked.[73] He said that he, like society, was missing "a little heart, a lot of brotherhood"[74] and that statements he made reeked of "naked cruelty."[75]

Further, time permits robust research to be conducted measuring the voracity of claims made in times of a moral panic. For example, it turns out that crack babies are a myth, with recent studies illustrating that there is no significant difference in the "long-term health and life outcomes between full-term babies exposed to cocaine in-utero and those who were not."[76] Super-predators are a myth, too.[77] As John DiIulio, the political scientist who coined the term recently conceded, "de-

---

70 Aaron Sankin, *California Prop 36, Measure Reforming State's Three Strikes Law, Approved by Wide Majority of Voters*, HUFFINGTON POST (Nov. 7, 2012), http://www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html [https://perma.cc/75KJ-TCSA].

71 Mollie Reilly, *Bill Clinton: 'We Have Overshot the Mark' on Incarceration*, HUFFINGTON POST (Apr. 28, 2015), http://www.huffingtonpost.com/2015/04/28/bill-clinton-mass-incarceration_n_7164712.html [https://perma.cc/U3NJ-ELJ3].

72 Samantha Lachman, *Hillary Clinton Continues to Distance Herself from Her Husband's Crime Policies*, HUFFINGTON POST (AUG. 19, 2015), http://www.huffingtonpost.com/entry/heres-how-hillary-clinton-is-talking-criminal-justice-since-she-met-with-black-lives-matter_us_55d483a2e4b0ab468d9f0ec6 [https://perma.cc/AX56-PNPF].

73 expolitico, *A Little Heart, A Lot of Brotherhood vs. the Politics of Fear*, DAILY KOS (Jul. 11, 2006), http://www.dailykos.com/story/2006/7/11/226417/- [https://perma.cc/8JEL-KY8M].

74 *Id.*

75 *Atwater Apologizes for '88 Remarks About Dukakis*, WASH. POST (Jan. 13, 1991), https://www.washingtonpost.com/archive/politics/1991/01/13/atwater-apologizes-for-88-remark-about-dukakis/5c8be69f-4df3-4d75-8694-7b64c959aa62/ [http://perma.cc/BSQ6-GGNJ].

76 Katie McDonough, *Long-Term Study Debunks Myth of the "Crack Baby"*, SALON (Jul. 23, 2013), http://www.salon.com/2013/07/23/longterm_study_debunks_myth_of_the_crack_baby/ [https://perma.cc/BXA8-CT98]; *see also* Jennifer M. Handzel et al., *Longitudinal Follow-up of Poor Inner-City Youth Between Ages 8 and 18: Intentions Versus Reality*, 129 PEDIATRICS 473, 476–78 (2012) (finding that a greater exposure to "violence and poorer home environment" were most likely to affect youth outcome rather than gestational cocaine exposure).

77 N.Y. TIMES, *supra* note 52.

mography is not fate and criminology is not pure science."[78] Professor DiIulio joined dozens of other scholars in filing an amicus brief that urged the U.S. Supreme Court to bar life without parole sentences for juvenile offenders.[79] That brief noted that, "the fear of an impending generation of superpredators proved to be unfounded. Empirical research that has analyzed the increase in violent crime during the early-to mid-1990s and its subsequent decline demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless."[80]

Even those most susceptible to moral panic, legislators, have indicated a softening of the rhetoric surrounding criminal justice and the heightened punishment regimes of the past few decades. Today, there is serious bipartisan support for criminal justice reform at the state and federal levels. For example, Senators Corey Booker and Rand Paul are working together to reform criminal justice.[81] Right on Crime, a conservative led organization, has successfully lobbied for sentencing reform across the United States, including in traditionally punitive states such as Mississippi.[82] Even Koch Industries—the Republican super-funders—are investing funds into fighting some of the penal extravagance of the last quarter-century.[83]

However, even under the most optimistic of outlooks, legislative softening of punishment will not reverse all—or even most—of the retributive excess of the past decades. The changes that are occurring are around the edges: for example, the crack-powder disparity is now 18:1;[84] in Oklahoma, small scale drug trafficking isn't subject to an automatic life sen-

78 Steve Drizin, *The 'Superpredator' Scare Revisited*, HUFFINGTON POST (Apr. 9, 2014), http://www.huffingtonpost.com/steve-drizin/the-superpredator-scare_b_5113793.html [https://perma.cc/9V3D-XCR4].

79 Brief for Jeffrey Fagan et al. as Amici Curiae, Miller v. Alabama, 132 U.S. 2455 (2012).

80 *Id.* at 8.

81 Jonathan D. Salant, *Cory Booker, Rand Paul Push to Overhaul Criminal Justice System*, NJ.COM (Mar. 9, 2015), http://www.nj.com/politics/index.ssf/2015/03/booker_and_paul_re-introduce_legislation_to_overha.html [https://perma.cc/82CR-JDDC].

82 *Mississippi Flips Stance on Reforms, for the Better*, RIGHT ON CRIME (June 14, 2011), http://rightoncrime.com/2011/06/mississippi-flips-stance-on-reforms-for-the-better/ [https://perma.cc/32KU-HBMT].

83 Dana Liebelson, *Inside the Koch Campaign to Reform Criminal Justice*, HUFFINGTON POST (Feb. 9, 2015), http://www.huffingtonpost.com/2015/02/09/koch-brothers_n_6646540.html [https://perma.cc/3RJN-8V93].

84 FAIR SENTENCING ACT, American Civil Liberties Union, https://www.aclu.org/node/17576 [https://perma.cc/HWZ4-9MMP]; *see also* Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2012) (codified in 21 U.S.C. § 841, 844) (changing the sentencing scheme for possession crack cocaine).

tence;[85] and in California, a new offense of stealing a few golf clubs won't result in life imprisonment for a person with two other felony convictions.[86] Yet, for thousands of prisoners, new laws will not spell relief as legislative changes to punishment often are not retroactive.[87] In Oklahoma, for example, over fifty people who received automatic life sentences are set to die in prison for crimes that would no longer trigger that rule.[88]

Further, even these mostly peripheral and non-retroactive reforms are not happening everywhere. For instance, in 2015, the Alabama Supreme Court affirmed an automatic life sentence upon a seventy-six-year-old man for a non-violent drug offense.[89] The trial judge said he wished to impose a sentence of "less than life without parole"; but, he concluded that the statute leaves no room for "discretion by the Court."[90] In an opinion affirming the sentence, the chief justice of the Alabama Supreme Court concurred, but called the sentence "excessive and unjustified"[91] and urged the "legislature to revisit that statutory sentencing scheme to determine whether it serves an appropriate purpose."[92]

Critically, we are not immune to new incidents of moral panic, and political moments that ratchet down retributive excess do not last forever. The thing about moral panic is that it can sweep the nation in ways that often defy reason and prediction. A particularly salient and shocking crime, especially

---

85 Hannah Rappleye, *'They Sentenced Me to Die in Prison'*, NBCNEWS (Nov. 9, 2015), http://www.nbcnews.com/news/us-news/they-sentenced-me-die-prison-n459511 [https://perma.cc/T8AF-LLJK] (discussing passage of Oklahoma's 2015 Justice Safety Valve Act, which changed the mandatory minimum for a third drug felony from life without parole to twenty years); *see also* Justice Safety Valve Act, 2015 Okla. Sess. Laws 243 (giving judges authority to depart from mandatory minimum sentences for "substantial and compelling reasons").

86 *See* J. RICHARD COUZENS & TRICIA A. BIGELOW, THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW 5 (2016) (explaining that a third non-violent felony will not automatically trigger a 25-to-life sentence under the new sentencing scheme); Three Strikes Reform Act of 2012, Cal. Ballot Proposition 36 (2012).

87 The United States Sentencing Commission did vote in 2011 to make parts of the Fair Sentencing Act retroactive. *Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. SENTENCING COMM'N, http://www.ussc.gov/policymaking/amendments/frequently-asked-questions-2011-retroactive-crack-cocaine-guideline-amendment#NaN [https://perma.cc/5L4S-WNZ6].

88 Rappleye, *supra* note 85.

89 Associated Press, *Roy Moore: Life Sentence for Drug Violation Shows 'Grave Flaw' in Sentencing*, AL.COM (Sept. 11, 2015), http://www.al.com/news/index.ssf/2015/09/roy_moore_life_sentence_for_dr.html [https://perma.cc/SB9L-P732].

90 *Ex parte* Lee Carroll Brooker, No. 1141160, at *1 (Ala. Sept. 11, 2015) (Moore, C.J., concurring).

91 *Id.*

92 *Id.* at *6.

one committed by a person with a prior record, however unrepresentative of crime generally, could lead to a new statute or sentencing enhancement. Consider the so-called "Ferguson Effect," the idea that violent crime "spike[d]" in 2015 because of a national disrespect for the police as illustrated by people protesting police shootings of unarmed civilians.[93] It turns out that the "effect" was imaginary, but that did not stop the *New York Times*, *Wall Street Journal* and other publications—not to mention police chiefs, union officials, and the FBI—from breathlessly repeating the idea.[94]

Fortunately, unlike in prior decades, the rise of social media and participatory journalism permitted swift and definitive discrediting of the idea before it ballooned.[95] But the drafters of the Eighth Amendment seem not to have believed that would-be criminal defendants should be at the mercy of the Twitter-verse when it comes to avoiding the retributive excess of moral panics. As we discuss in subpart B, the Eighth Amendment's prohibition on cruel and unusual punishment creates an institutional obligation for the judiciary to ensure "moderation and restraint" in the imposition of punishment.[96]

---

93 Evan Perez et al., *FBI Chief Tries to Deal with the 'Ferguson Effect'*, CNN (Oct. 27, 2015), http://www.cnn.com/2015/10/26/politics/fbi-comey-crime-police/ [https://perma.cc/T28G-C7QQ].

94 *See*, *e.g.*, Monica Davey & Mitch Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES (Aug. 31, 2015), http://nyti.ms/1KACvGj (reporting that for "some experts and rank-and-file officers, the notion that less aggressive policing has emboldened criminals — known as the 'Ferguson effect'" explains the rise in violence in many cities); Heather Mac Donald, Opinion, *The New Nationwide Crime Wave*, WALL STREET J. (May 29, 2015), http://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425 [https://perma.cc/HAD2-9FZN] (lamenting that an "incessant drumbeat against the police has resulted in . . . the 'Ferguson effect'"); Angie Ricono, *FBI Says Public Scrutiny Impacts Policing*, KCTV-5 NEWS (Dec. 12, 2015), http://www.kctv5.com/story/30506367/fbi-says-public-scrutiny-impacts-policing [https://perma.cc/UNF6-6MFD] (reporting on FBI director's belief that "officers might start to be afraid to step out of their patrol cars" when faced with public scrutiny).

95 *See*, *e.g.*, Cristian Farias, *The 'Ferguson Effect' Isn't Real, and the New York Times Shouldn't Act Like It Might Be*, HUFFINGTON POST (Sept. 5, 2015), http://www.huffingtonpost.com/entry/new-york-times-ferguson-effect_us_55e833b7e4b0c818f61ab744 [https://perma.cc/LC8K-EQGE] (criticizing the media for reporting on the "Ferguson effect" based on "bad math and bad science"); Carimah Townes, *The Myth of the 'Ferguson Effect'*, THINKPROGRESS (Jun. 17, 2015), http://thinkprogress.org/justice/2015/06/17/3670203/ferguson-effect-isnt-real-in-st-louis/ [https://perma.cc/D7YU-ET89] (reporting that "evidence does not support a causal relationship between the events that unfolded in Ferguson and subsequent homicides" in St. Louis).

96 Robert J. Smith, *Humane Criminal Justice Is Not Hopeless*, SLATE (Sept. 28, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/pope_francis_and_supreme_court_on_cruel_and_unusual_punishment_death_penalty.html [https://perma.cc/ZHN8-C48U].

That is, the Eighth Amendment provides a backstop against new and continuing retributive excesses that result from moral panic.

B. The Role of the Eighth Amendment in Protecting Against Moral Panic

The Supreme Court has long recognized the unique role of the Eighth Amendment in protecting against retributive excess. In the 1910 decision of *Weems v. United States*, the Court struck down the sentence of "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, [at] hard and painful labor," as well as "a perpetual limitation of his liberty"[97] (including the right to hold office, vote, receive retirement pay, and change his domicile without prior government approval) for a disbursing officer with the U.S. Coast Guard found guilty of falsifying an official document.[98]

In striking down the sentence as violative of the Eighth Amendment's cruel and unusual punishment clause, Justice McKenna held that that sentence reflected an "unrestrained" exercise of government power, and not merely "different exercises of legislative judgment."[99] In losing the ability to punish Weems so severely, the government, McKenna wrote, "suffers nothing and loses no power," because the "the purpose of punishment is fulfilled" with a lesser punishment that is of "just, not tormenting severity" and that leaves "hope" for "the reformation of the criminal."[100]

As the *Weems* Court explained, the Eighth Amendment is protection against disproportionate punishment.[101] As we discuss in depth in Parts II and III, the idea of disproportionality captured in the Eighth Amendment is undergirded by a deeper principle of constitutional liberty, which includes the right to be free from undue government coercion. When a punishment is disproportionate—and an individual's liberty is unnecessa-

---

97 Weems v. United States, 217 U.S. 349, 366 (1910).

98 *Id.* at 362–64.

99 *Id.* at 381–82.

100 *Id.* at 381.

101 *Id.* at 353; *see also* Thompson v. Oklahoma, 487 U.S. 815, 837–38 (1988) (holding that death penalty is disproportionate punishment for juvenile offender under sixteen because of the malleability of a person of that age); Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that death penalty is not a proportionate punishment as applied to any juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (applying the same logic to the intellectually disabled); Solem v. Helm, 463 U.S. 277, 303 (1983) (holding unconstitutional a sentence of life imprisonment for the passing of a bad check by a convicted felon).

rily restrained—the government fails to live up to its most basic duty: to affirm the basic human dignity of every person, even those who commit serious transgressions.[102] This claim requires significant unpacking, and in Part II we undertake an in-depth case study of the Court's Eighth Amendment jurisprudence that supports this understanding of the Constitution's role vis-à-vis criminal defendants before examining the idea of liberty as a constitutional value more generally in Part III.

Suffice it to say, however, that this conception of the Eighth Amendment as enshrining the value of constitutional liberty—to be operationalized by the judiciary as a bulwark against retributive excess—is a vision of the Amendment that steps beyond traditional conceptions of the protection against cruel and unusual punishment. Traditionally, the Eighth Amendment protections are discussed as providing a backstop against a punishment practice that was once supported by right-headed legislative judgments, but that lost its reasonableness as society evolved.[103] However, this conception of the Amendment fails to account not only for the broader conception of individual rights that the Constitution enshrines, but the on-the-ground reality of crime and punishment in America. As we noted in subpart A, the lesson of the past few decades is that retributive excess often results not from reasonable legislative judgments that fail to stand the test of time, but rather from unrestrained and immoderate legislative excess that is induced by the fear, anger, and poor risk-management that moral panics like the juvenile super-predator and crack epidemics entail. In light of this, the traditional, narrow conception of the Amendment renders the provision a veritable nullity. This is untenable. The Eighth Amendment arguably has a significantly broader role; its prohibition of cruel and unusual punishments, then, is in large part a protection against this grim picture of moral panic.

This conception of the Eighth Amendment necessarily engenders a question that we have asked previously: What role has the Court taken to promote the Eighth Amendment as a bulwark against retributive excess in the democratic branches?[104] Unfortunately, the answer is that the Court has

---

102 *See* Graham v. Florida, 560 U.S. 48, 58–59 (2010).

103 *See* Trop v. Dulles, 356 U.S. 86, 101 (1957) (holding that Eighth Amendment is entwined with evolving standards of decency, which required that denationalization not be used as punishment).

104 *See* Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV 605, 650 (2016) (arguing that the Court's disaggregated assessment of constitutional

historically failed to live up to its constitutional responsibilities in protecting these "discrete and insular minorities."[105] While the Court has occasionally noted that its role as protecting individuals against majoritarianism is particularly important in the Eighth Amendment context,[106] at core, the Court's Eighth Amendment jurisprudence presents "a worrying narrative of majoritarianism, whereby the decision to" uphold or strike down laws relating to punishment has historically reflected the will of "dominant classes and harms subordinate and vulnerable groups."[107] That is, until recently, the Court's criminal justice jurisprudence closely aligns with contemporary public opinion and the views of the political branches.[108] While a robust body of scholarship has described the Court's majoritarian tendencies,[109] these concerns are arguably ampli-

---

rights-holders undermines the Court's persona as the institutional protector of individual rights).

105 United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, n.4 (1938).

106 For example, Kennedy wrote in *Kennedy v. Louisiana*, 554 U.S. 407, 435–36 (2008), that courts are supposed to step in to ensure "restraint and moderation" in punishment. Justice William Brennan put the point, especially in times of public panic over real or perceived crime spikes: "Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life." McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

107 Robinson, *supra* note 104, at 646 (making this claim in a more generalized context).

108 *See, e.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 192 (1989) ("Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution."); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 424 (2002) ("Supreme Court decisions by and large correspond with public opinion." (citations omitted)); Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 2–3 (2005) (claiming that the Supreme Court is a majoritarian, rather than a countermajoritarian, institution); Willliam Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) ("Our analyses indicate that for most of the period since 1956, the Court has been highly responsive to majority opinion."); Helmut Norpoth & Jeffrey A. Segal, Response, *Popular Influences on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711 (1994) ("[N]umerous scholars have found that the Court is not generally out of line with public opinion.").

109 *See, e.g.*, Hutchinson, *supra* note 108, at 20 n.119 (stating that the "'results' in legal contests 'come from those same political social, moral, and religious value judgments from which the law purports to be independent'" (quoting David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 247–49 (1984))); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) ("Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.").

fied in the context of crime and punishment due to the particularly vulnerable nature of the rights-holder.

Conventional literature portrays the Supreme Court as the institutional enforcer of rights, with the Court typically viewed as the bulwark against governmental transgressions on individual rights.[110] Most famously associated with John Hart Ely's defense of judicial review, this general conception of the Court sees the institution as the protector of the rights of individuals against abridgement by transient popular majorities.[111] This conception of the Court, it is argued, finds its roots in the original intent of the Framers, who recognized the importance of guarding against "one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure."[112] The Court has overtly accepted this characterization of its role, commenting in *Barnette* that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . liberty . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections.[113]

---

110 *See, e.g.*, Robinson, supra note 104, at 648–49 (summarizing the scholarly literature on judicial majoritarianism); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980) (justifying judicial review on the grounds that it ensures the protection of vulnerable minorities from majoritarian abuse); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996) (arguing that the perception of Supreme Court as protector of "minority rights from majoritarian overreaching" is one that "exercises a powerful hold over our constitutional discourse"). *But see* Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 380 (2008) (discussing how judicial review "changes political dynamics"); Andrei Marmor, *Randomized Judicial Review*, USC GOULD LEGAL STUDIES RES. PAPER SERIES NO. 15–8, at 2 (2015) (suggesting that the countermajoritarian rationale for Constitutional Judicial Review is flawed); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 158 (2010) (arguing that the power of other government institutions constrains the Court's ability to be wholly countermajoritarian).

111 *See* ELY, *supra* note 110, at 135–36. This understanding of the judicial role is best exemplified by the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry.").

112 THE FEDERALIST NO. 51 (James Madison); *see also supra* notes 9–10, and accompanying text (discussing the Framers' view of the Court as a counter majoritarian check).

113 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942).

However, while the Court as a countermajoritarian institution provides a popular justification for judicial review, increasingly scholars are challenging the depiction of the Court as "the defender of unpopular minorities."[114] This counternarrative argues that the Court in fact functions as a majoritarian institution, with, "the policy views dominant on the Court . . . never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[115] Scholars have demonstrated the voracity of this claim, exploring swathes of constitutional doctrine that evidence that "far from being a countermajoritarian institution, the Supreme Court primarily functions to enforce and enshrine majoritarian views,"[116] with its decisions reflecting the preferences and views of America's popular majority.[117] As one scholar suggests, the Court "does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced."[118] Professor Corinna Lain has noted that,

---

114 Robinson, *supra* note 104, at 649.

115 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). For Dahl, the Court is "inevitably a part of the dominant national alliance," because "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite." *Id.* at 291–93. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed. 2008) (discussing how political actors constrain the Supreme Court's decision making); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE 137–57 (1998) (arguing the Court's relationship with the other branches of government prevent the Justices from deciding based on personal policy preferences); SEGAL & SPAETH, *supra* note 108, at 3–26 (explaining Congress' influence over judicial decisions).

116 Robinson, *supra* note 104, at 649–50 (quoting Pildes, *supra* note 110, at 110); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177–94 (2000) (arguing that popular opinion has a profound impact on constitutional law); Hutchinson, *supra* note 108, at 19–22 (discussing the contributions of critical race theorists to the literature rebutting the "countermajoritarian difficulty"). *But cf.* Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1210 (1987) (arguing that the Constitution has both majoritatian and countermajoritarian elements); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 629 (1993) (arguing that the Constitution is neither majoritarian nor countermajoritarian because "government operates not to represent a majority but to hear and integrate the voices of many different constituencies").

117 *See* Pildes, *supra* note 110, at 126; *cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977) (arguing that individual rights precede the interest of the majority). *See generally* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 674–92 (2005) (surveying majoritarian constitutional theories).

118 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582–83 (1990).

"the force of majority will imposes constraints on the Justices' ability to deviate significantly, and for long, from the public's views."[119]

This counternarrative is deeply troubling for proponents of robust rights for criminal defendants and challenges the perception of the Court as a bulwark against majoritarian excessive in punishment.[120]

That the judiciary would intervene to eradicate excessive punishment reads like an empty promise. The Court itself, in an opinion that Justice Kennedy authored, recently characterized some of its Eighth Amendment jurisprudence as "not altogether satisfactory" and "still in search of a unifying principle."[121] Justice David Souter, dissenting from an opinion that upheld a life sentence for shoplifting, said that if the sentence in that case "is not grossly disproportionate, the principle has no meaning."[122] Other commentators are even more brutal. Professor Erwin Chemerinsky said in 2003 that the Court had declared that "there will be no relief from inhumane sentences in the courts."[123] Professor Anthony Amsterdam called the Court's decision in *McCleskey v. Kemp*, where it affirmed the constitutionality of the death penalty despite powerful evidence of racial disparities in its administration, "the *Dred Scott* decision of our time."[124] And Professor Tom Stacy, summing up what is possibly the majority view among scholars and court-watchers, said that the whole jurisprudence is "plagued by deep inconsistencies" and is a "mess."[125]

However, echoing a theme of this Article, the majority view is not always the most accurate. We concede that it is true that

---

119 Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L. J. 113, 160 (2012).

120 *See* ELY, *supra* note 110, at 174–76; Joseph Raz, *Rights and Individual Well-Being*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN MORALITY OF LAW AND POLITICS 44–60 (1995); s*ee also* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (noting that "of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty [percent] asked that its benefits be extended to corporations").

121 Kennedy v. Louisiana, 554 U.S. 407, 436–37 (2008).

122 Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (Souter, J., dissenting).

123 Erwin Chemerinsky, Opinion, *3 Strikes: Cruel, Unusual and Unfair*, L.A. TIMES (Mar. 10, 2003), http://articles.latimes.com/2003/mar/10/opinion/oe-chem10 [https://perma.cc/XG4L-64L9].

124 Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007).

125 Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) ("The Court's jurisprudence is plagued by deep inconsistencies concerning the Amendment's text, the Court's own role, and a constitutional requirement of proportionate punishment.").

for most of its history, the Court has failed to live up to its obligations to protect unpopular and vulnerable citizens from legislative excess. We also concede that in failing to perform that role, the Court has been complicit in the suffering that the anger and fear of moral panics entail. However, we argue that the Court's recent Eighth Amendment jurisprudence has begun to shift the mechanics and scope of the Eighth Amendment jurisprudence in ways that portend that an Eighth Amendment revolution is on the horizon. This shift, and its broader implications, is the subject of Part II.

II
THE ORIGINS AND ASCENDENCY OF EIGHTH AMENDMENT LIBERTY

The goal of this Part is to chart the trajectory of the Court's approach to questions of retributive excess challenged under the Eighth Amendment's cruel and unusual punishment provision. This Part undertakes this goal by disaggregating and examining three discrete yet interrelated bodies of Eighth Amendment jurisprudence. Together, they show the modern Court's move away from a narrow and limited conception of cruel and unusual punishment to a more robust conception of the Eighth Amendment as a right whose goal is to empower the Court to curb retributive excess.

To this end, subpart A examines the Court's shift toward categorical exemptions, examining punishment practices as a whole, to strike down excessive punishment practices. This shift has come at the expense of the narrow and limited Eighth Amendment jurisprudential fault lines that focus on case-by-case proportionality analysis as well as procedural regulation of statutory punishments.

Subpart B takes up where subpart A leaves off, examining the Court's burgeoning categorical exemption jurisprudence. Building on the analysis in subpart A, subpart B demonstrates that the Court has begun to embrace its role as the independent arbiter of excessive punishment, shifting the case law away from concerns about the randomness of punishment as applied to any specific defendant to a more holistic consideration of proportionality; that is, the fit between the culpability of the defendant and the purpose of the punishment. In so doing, the Court has begun to overtly refer to principles of liberty and dignity as driving these constitutionally directed proportionality determinations.

Finally, subpart C takes up the functional question of measurement: if the Court is engaged in categorical exemptions where retribution will always be considered constitutionally excessive, how does the Court determine what is or is not excessive? That is, what are the indicators the Court relies on to determine constitutionally excessive punishments in the context of a modern democratic society? Subpart C discusses the Court's move to a functional assessment of societal standards of decency, which again emphasizes the value of individual liberty as its constitutional guidepost.

Together, these discrete aspects of the Court's emerging Eighth Amendment project evidence a doctrine that is less fastened to procedural regulation or case-by-case proportionality review, more focused on categorical decisions anchored in the penological purpose that the punishment serves as applied to a particular category of crimes or class of offenders, and driven by functionally accurate methods of assessing contemporary societal standards. This is a doctrine that is more respectful of horizontal and vertical federalism and more aware of the institutional limitations of the judiciary, yet simultaneously, more self-confident in the role of the Court in guarding against a lack of legislative moderation and restraint. With these changes, the Court has begun to alter the course of the cruel and unusual punishment jurisprudence in ways that make a more robust Eighth Amendment plausible.

A. Imposition of Substantive Limits on Offender and Crime Classes

With Justice Kennedy at the helm, the Court has shifted away from interpreting the Eighth Amendment as an instrument requiring "super due process" in order to ensure the fairness and rationality of sentencing outcomes as well as case-by-case review of excessive sentences. This subpart discusses those doctrinal shifts.

1. *The Shift Away from the "Super Due Process" Procedural Regulations*

This section tracks the Court's fading interest in using procedural regulations to monitor the processes that can result in constitutionally cruel and unusual punishments. This shift is important for two reasons. First, as we describe below, the procedural regulation route did not guarantee or even provide judicial monitoring of the substantive limitations that the Eighth Amendment imposes upon punishment. Second, regu-

lating procedure required the Court to depart from its institutional competence and to delve into the micro-workings of state legislatures and courts.

The rise of the procedural regulation approach started with (and remained limited to) the death penalty.[126] In 1972, the Court held that then-existing death penalty statutes violated the constitution because the utter lack of standards for how to decide who lives and dies resulted in a system, which, in the words of Justice Potter Stewart, produced "death sentences [that] are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[127] States created new statutes that narrowed the pool of eligible offenders, channeled juror discretion, and provided meaningful appellate review, among other procedural innovations.[128] The Court affirmed the validity of these new statutes, making explicit its faith that these procedural protections could ensure rationality and produce consistent results.[129]

Instead of monitoring the results that emerged under the redesigned death sentencing statutes, the Court micromanaged the capital punishment process. For example, it regulated the substance and review of aggravating factors.[130]

---

126 *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1980); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 421–26 (1995). *See generally* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (3d ed. 2006) (outlining the Supreme Court's death penalty decisions); NINA RIVKINO & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY (2d ed. 2005) (same).

127 Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). In those days, at least in theory, a person who committed a rape or a kidnapping could receive the death penalty. *Id.* at 341 (Marshall, J., concurring). Moreover, the death penalty trial had but one phase. The jury did not receive a list of aggravating factors or mitigating factors. The state simply asked the jury whether it recommended death or a lesser sanction. JEFFREY B. ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 220 (2000) (describing the capital trial process in the pre-*Furman* era).

128 *See generally* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg: *Only the Appearance of Justice*, 87 J. CRIM. L. & CRIMINOLOGY 130, 222–62 app. A (1996) (outlining post-*Furman* statutes).

129 Gregg v. Georgia, 428 U.S. 153, 206–07 (1976). The new Georgia statute limited the class of eligible offenders. *Id.* at 162–63. It created a bifurcated trial: in the first phase the jury decided guilt or innocence; and, if the jury returned a guilty verdict, then the jury decided whether to impose the death penalty or some lesser sanction. *Id.* at 163. To help guide the sentencing determination, Georgia created a list of aggravating and mitigating circumstances. *Id.* at 163–64. The jury must have found that the aggravating factors outweighed the mitigating factors to return a death sentence. *Id.* at 164–66.

130 For instance, in *Godfrey v. Georgia*, the Court invalidated one of the statutory aggravating factors—that the crime was "outrageously or wantonly vile, horri-

It also imposed substantive constraints on the presentation of evidence in capital trials.[131] Each of these decisions turned on the cruel and unusual punishment clause of the Eighth Amendment, as opposed to the due process clause contained in the Fourteenth Amendment. Unlike in non-capital cases, the Eighth Amendment's super due process clause required "heightened rationality" of the punishment imposed in death penalty cases.[132] This need for hyper-rationality is a method of regulating the risk of arbitrary or discriminatory death sentences earlier in the process—at the level of statutes and trials, not back-end appellate review. But it also stretches the limits of the Court's competence; from picking apart the precise language of state statutes to regulating the evidence admissible in state trials, the Court looked most like a legislature in regulating these processes.

Then, it stopped. For instance, the Court rejected challenges to statutory aggravating factors,[133] gave the states more leeway in the evidence that they could introduce during the penalty phase of the trial,[134] and, finally, in 2006, in an opinion that Justice David Souter called "morally absurd,"[135] the Court, in *Kansas v. Marsh*, affirmed a state statute that directed the jury to return a death sentence when aggravating

---

ble or inhuman"—because it was too vague to meet the Eighth Amendment's requirement of "rationally reviewable process" in capital cases. 446 U.S. 420, 428 (1980). *See also* Maynard v. Cartwright, 486 U.S. 356, 346–66 (1988) (stating that the Oklahoma statutory aggravating factor, a homicide that is "especially heinous, atrocious, or cruel" is unconstitutionally vague under the Eighth Amendment).

131 The Court reversed two death sentences because of improper arguments that the prosecutor made during oral argument. In *Caldwell v. Mississippi*, the prosecutor improperly implied that the Mississippi Supreme Court, not the jury, had the ultimate moral responsibility for determining the death penalty. 472 U.S. 320, 328–29 (1985). In *South Carolina v. Gathers*, the Court reversed a death sentence because the prosecutor read a prayer that was found among the belongings of the victim and used it to bolster the impact of the death of the victim. 490 U.S. 805, 811 (1989).

132 McClesky v. Kemp, 481 U.S. 279, 335 (1987) (Brennan, J., dissenting).

133 In 1993, in *Arave v. Creech*, the Court affirmed a death sentence based on an aggravating factor that required the homicide to exhibit "utter disregard for human life." 507 U.S. 463, 471 (1993). The state supreme court held that this aggravating circumstance meant that the defendant had to be a "cold-blooded, pitiless slayer." *Id.* at 468. Unlike in *Godfrey*, the Court held that this factor was not vague and thus did not run afoul of the heightened reliability standard. *Id.* at 472.

134 For example, in *Payne v. Tennessee*, the Court held—reversing course from *Gathers*—that victim impact statements are permissible in the penalty phase of a capital trial. 501 U.S. 808, 830 (1991).

135 Kansas v. Marsh, 548 U.S. 163, 207 (2006) (Souter, J., dissenting).

and mitigating factors are in equipoise.[136] Only a decade after *Furman*, Professor Robert Weisberg had already noted the Court's fading attention to procedural regulation, accusing the justices of having "reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance."[137] Twenty years later, in 2005, Professor Janet Hoeffel declared that the Court "essentially abandoned a regime of meaningful guidance."[138] Importantly, Justice Kennedy consistently joined the conservative wing of the Court to hasten the deregulation of the death penalty.

2. *The Shift Away from Case-Specific Proportionality Review*

This section tracks the Court's retreat from another pathway through which it protected prisoners against excessive punishment: case-by-case proportionality review. Unlike the procedural regulation approach, proportionality review had the advantage of being within the Court's core competency. Indeed, the Eighth Amendment envisions that the judiciary protects against excessive punishment. However, the case-by-case approach has the disadvantage of reaching into state court decisions far more often than decisions that apply to categories of offenses or categories of offenders, which are necessarily less frequent, broader rulings.

In capital cases, the Court first referenced proportionality review in *Gregg v. Georgia*, the case that affirmed the newly designed death penalty statutes.[139] Specifically, the Court noted with approval that the Georgia statute contained a "provision for appellate review . . . [that] serves as a check against the random or arbitrary imposition of the death penalty."[140] A number of state supreme courts implemented this type of pro-

---

136 *Id.* at 181 (majority opinion).

137 Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 (1983) (describing how the procedural regulations that the Court seemed to promise in *Gregg* were more a mirage than an oasis for would-be capital defendants).

138 Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 781 (2005).

139 *See* 428 U.S. 153, 206–07 (1976) (holding that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances).

140 *Id.* at 206. Moreover, the *Gregg* Court noted "the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* The Court even complimented the Georgia Supreme Court for having "taken its review responsibilities seriously." *Id.* at 205.

portionality review in the 1970s and 1980s.[141] However, in *Pulley v. Harris*, decided in 1987, the Court held that the federal Constitution does not compel this review.[142] Following *Pulley*, most states stopped providing robust comparative case proportionality review in capital cases.[143]

In non-capital cases, the Court has only granted relief in three case-specific challenges to long prison sentences—for a sentence of "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, [at] hard and painful labor,"[144] the "use of denationalization as a punishment,"[145] and a life without parole sentence imposed upon a recidivist offender who uttered a worthless $100 check where the statutory maximum for a first time offender was five years of imprisonment.[146]

In the 1980s and 1990s, though, the Court routinely rejected this type of challenge—including for a non-violent recidivist offender whose third and triggering offense for a mandatory life sentence was "obtaining $120.75 by false pretenses,"[147] a forty-year sentence imposed upon a felon convicted of distributing nine ounces of marijuana,[148] a life without parole sentence imposed upon a first-time offender convicted of distributing 672 grams of cocaine,[149] a twenty-five-year to life sentence where the triggering offense was the theft of $1197

---

141 *See* Bienen, *supra* note 128, at 131 (explaining that "the majority of state legislatures and supreme courts . . . believed that *Gregg* meant what it said . . . and one important difference would be the requirement of proportionality review").

142 *See* 465 U.S. 37, 43–44 (1987). By this type, we mean, a comparative case review, where the appellate court checks to see whether the current case is consistent with other similarly situated cases. As for the Court's earlier comments in *Gregg*: "We take statutes as we find them," the *Pulley* decisions reads, "[t]o endorse a statute as a whole [as the Court did with the Georgia statute in *Gregg*] is not to say that anything different is unacceptable." *Id.* at 45.

143 *See* Bienen, *supra* note 128, at 133 (describing how many states pulled away from even the appearance of conducting a comparative cases proportionality review).

144 Weems v. United States, 217 U.S. 349, 366 (1910).

145 Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (finding that denationalization is "a form of punishment more primitive than torture" in that it is the loss of "the right to have rights").

146 Solem v. Helm, 463 U.S. 277, 281 (1983). Though not a case-by-case challenge, the Court, in *Graham v. Florida*, held that the Eighth Amendment prohibits imposition of a life without parole sentence upon a juvenile offender who commits a non-homicide offense. 560 U.S. 48, 82 (2010). This challenge to a punishment for a class of offenders, as opposed to case-by-case challenges, was discussed previously in subpart II.A of this Article.

147 Rummel v. Estelle, 445 U.S. 263, 266 (1980).

148 Hutto v. Davis, 454 U.S. 370, 370–71 (1982).

149 Harmelin v. Michigan, 501 U.S. 957, 961 (1991).

worth of golf clubs,[150] and a twenty-five-year to life sentence strike where the triggering offense was the theft four videotapes worth $68.84 from a Kmart store.[151] Six of these cases, and all but one of the cases decided since 1916, were five to four decisions.[152]

Justice Kennedy joined with the conservative justices to reject the challenged excessiveness in each of the cases decided during his tenure. Over the past thirty years, moral panic over crack cocaine and super-predators, among other over-reactions, has contributed to an unprecedented rise in the quantity and severity of punishment. Moreover, in the context of the death penalty, though all indications point to the reality that there is still no rationality or consistency as to who among the eligible candidates receive death, the Court has expressly foresworn the requirement that state and federal courts engage in case-by-case outcome monitoring.[153]

It would appear, then, that the Court's shift away from procedural regulation and case-by-case proportionality review is merely a still more profound dereliction of its duty to guard against a lack of "moderation and restraint" in the legislative imposition of punishment. However, over the past fifteen years, the Court has begun to rely more heavily on a third approach to guarding against excessive punishments—the categorical exemption approach.

3. *The Shift Toward Categorical Exemptions from Punishment*

As opposed to a case-by-case determination of whether a punishment is excessive, which is the hallmark of the proportionality cases that we described above, the approach we describe in this section, the categorical exemption approach, queries whether a particular punishment practice is excessive for a broad category of offenses or class of offenders. At first blush, it might seem that the categorical approach is more disruptive of federalism and less sensitive to institutional competency concerns. But there are more than one million felony convictions each year.[154] A robust case-specific proportional-

---

150 Ewing v. California, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting).

151 Lockyer v. Andrade, 538 U.S. 63, 66 (2003).

152 The most recent of these cases, *Hutto*, a summary opinion, was decided six to three. *See* 454 U.S. at 381 (Brennan, J., dissenting).

153 *See* Pulley v. Harris, 465 U.S. 37, 43–44 (1984).

154 *See* SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, FELONY SENTENCING IN STATE COURTS, 2006—SENTENCING TABLES 1 (2009) (reporting 1,132,290 felony convictions in state courts alone in 2006).

ity review jurisprudence could mean hundreds of different judges assessing the excessiveness of punishments without the broader perspective of the federal Supreme Court. By contrast, categorical challenges are rare and destined for the federal Supreme Court, usually in the first instance.

The first categorical challenge cases, like the procedural regulation and case-specific proportionality cases, emerged in the 1970s and 1980s. During those decades, the Court held that the death penalty is an excessive punishment when it is imposed for the rape of an adult woman that does not result in death,[155] upon an offender who commits felony murder where the offender "did not take life, attempt to take it, or intend to take life,"[156] upon an offender who is insane,[157] or upon a fifteen-year-old offender.[158] Conversely, the Court held that the death penalty is not excessive when it is imposed upon a sixteen- or seventeen-year-old,[159] or upon the intellectually disabled,[160] for felony murder upon a finding of "major participation in the felony committed, combined with reckless indifference to human life."[161]

Justice Kennedy joined the majority in these last two cases, the first categorical exemption cases decided during his tenure.[162] On categorical challenges, then—as with procedural regulation and case-specific proportionality review—one might assume that Kennedy would join the Court's conservative block. But this turned out to be profoundly wrong. In 2002, Justice Kennedy joined an opinion barring the execution of intellectually disabled offenders.[163] He then authored opinions which held that the death penalty is excessive when it is im-

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

156 Enmund v. Florida, 458 U.S. 782, 793 (1982).

157 Ford v. Wainright, 477 U.S. 399, 401 (1986).

158 Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

159 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

160 Penry v. Lynaugh, 492 U.S. 302, 339 (1989).

161 Tison v. Arizona, 481 U.S. 137, 158 (1987).

162 To be clear, the evidence of disproportionality, as assessed under the then-prevailing approach to the doctrine, was weaker in these cases than in earlier cases where the Court granted the challenge to the punishment practice. *See Stanford*, 492 U.S. at 384 (Brennan, J., dissenting) (noting that twenty-seven states rejected the practice); *Penry*, 492 U.S. at 334 (noting that only one state rejected the practice).

163 Atkins v. Virginia, 536 U.S. 304, 321 (2002). Justice Scalia, dissenting, chastised the majority for concluding that the societal standards of decency had changed so dramatically over a decade that the *Penry* decision, which Kennedy joined, was no longer good law. *Id.* at 431–33 (Scalia, J., dissenting).

posed upon juvenile offenders[164] and for non-homicide offenses, including, specifically, the rape of a child.[165]

Based on his votes rejecting case-specific excessive punishment claims in three different non-capital cases, observers would have seemed wise to assume that Justice Kennedy would side with the conservatives on the idea that "death is different," which means that this categorical exemption jurisprudence is death penalty specific.[166] However, in 2010, Justice Kennedy wrote the opinion in *Graham v. Florida*, which categorically excluded juvenile offenders who commit non-homicide offenses from life without the possibility of parole.[167] As Justice Clarence Thomas underscored in his dissent in *Graham*:

> Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are "most deserving of execution." . . . Today's decision eviscerates that distinction. "Death is different" no longer. . . . No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well.[168]

In sum, then, the Court has shifted its attention away from both regulating the procedural aspects that can result in constitutionally undesirable sentencing outcomes, and monitoring case-specific outcomes. However, over the past fifteen years, the Court has revived and strengthened the categorical exemption approach to protecting against cruel and unusual punishment. The next subpart shows that the Court has shifted its substantive focus away from the monitoring of random or arbitrary outcomes and towards curbing retributive excess.

B. The Shift from Policing Randomness to Curbing Retributive Excess

When it comes to cruel and unusual punishment it is important to distinguish between two different substantive goals—consistency and proportionality. The goal of consistency is an equality goal, which stems from the idea that if two

---

164 Roper v. Simmons, 543 U.S. 551, 578 (2005). Notably, *Roper* invalidated *Stanford*, another opinion Kennedy joined. *Id.* at 574.

165 Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

166 Harmelin v. Michigan, 501 U.S. 957, 994 (1991).

167 560 U.S. 48, 82 (2010).

168 *Id.* at 102–03 (Thomas, J., dissenting) (quoting *Atkins*, 536 U.S. at 319).

people commit the same offense, they should receive the same punishment.[169] In other words, among people who are eligible for a particular punishment—for instance, the death penalty—the goal is to avoid an arbitrary or random distribution of sentences. The goal of proportionality is to ensure that each person who receives a punishment is culpable enough to warrant it.[170] The overriding anxiety here is that a person will be over-punished—or, in other words, excessively punished. If avoiding excessive punishment is the primary goal, then the question is not who among a class of eligible offenders receives the harsh punishment, but rather is each person who receives the punishment culpable enough to be eligible to receive it. Thus, the excessiveness question is about retributive excess. In this section, we illustrate how the Court's Eighth Amendment jurisprudence has shifted its focus away from preventing randomness in sentencing outcomes and towards curbing retributive excess in the imposition of punishment.

1. *The Shift Away from Randomness*

Justice Potter Stewart best voiced the randomness concern in the context of the death penalty when he stated, "For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[171] The concern is not about eligibility for the death penalty, but rather about fairness in how the punishment is applied. When the Court upheld the post-*Furman* death penalty it did so expressly because the new

---

169 *See* Robert J. Smith, *Forgetting* Furman, 100 IOWA L. REV. 1149, 1161 (2015); *see also* Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) (explaining that "consistency . . . requires that the death penalty be inflicted evenhandedly").

170 *See* Graham v. Florida, 560 U.S. 48, 59 (2010) ("Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to the offense.'" (quoting Weems v. United States, 217 U.S. 349, 367 (1910) (alterations omitted))).

171 Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring). Justice Brennan's *Furman* concurrence echoed the same theme: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." *Id.* at 293 (Brennan, J., concurring). Justice White, too, found the death penalty to be constitutionally untenable where there remained "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

statutes eliminated any "substantial risk that [the punishment] would be inflicted in an arbitrary and capricious manner."[172]

By the late 1980s, however, the Court seemed to sour on the randomness rationale. In *Pulley v. Harris*, the Court provided one reason why the Eighth Amendment did not require comparative case proportionality review in capital cases: "This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense," but rather queries "whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime."[173] Shortly thereafter, the Court, in *McCleskey v. Kemp*, brushed off the idea that the Court should care about consistency in any careful sense, calling any "discrepancy" that a study showing racially disparate outcomes presented "a far cry from the major systemic defects identified in *Furman*," and recasting its prior cases as finding "that constitutional guarantees are met when the mode for determining guilt or punishment itself has been surrounded with safeguards to make it as fair as possible."[174]

2. *The Shift Toward Curbing Retributive Excess*

This section describes the shift towards a greater emphasis on ensuring that punishments do not suffer from retributive excess. Again, unlike randomness, the concern over retributive excess is that the offender possesses insufficient culpability to warrant the degree of punishment in question.

Excessiveness is a concept measured in relation to retribution, which "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused."[175] Retribution is at the core of the criminal law—enjoying the

---

172 Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

173 Pulley v. Harris, 465 U.S. 37, 43 (1984).

174 McClesky v. Kemp, 481 U.S. 279, 312–13 (1987) (internal quotation marks and alterations omitted).

175 Kennedy v. Louisiana, 554 U.S. 407, 442 (2008). As Justice Stevens, writing for the Court in *Atkins* explained: "The Eighth Amendment succinctly prohibits 'excessive' sanctions . . . it is a precept of justice that punishment for crime should be graduated and proportioned to the offense . . . [t]hus, even though imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual, it may not be imposed as a penalty for the 'status' of narcotic addiction, because such a sanction would be excessive. As Justice Stewart explained in *Robinson* [*v. California*]*:* 'Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.'" Atkins v. Virginia, 536 U.S. 304, 311 (2002) (internal quotation marks, citations, and alterations omitted) (quoting Robinson v. California, 370 U.S. 660, 667 (1962)).

support of legal scholars and philosophers, judges, and the lay intuitions of the American people.[176] Nonetheless, it is also the punishment goal "that most often can contradict the law's own ends" and violate "the constitutional commitment to decency and restraint."[177] This tendency towards retributive excess has two main drivers. First, as Justice Brennan put the point, "[t]hose whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment."[178] Second, in times of moral panic, when fear and anger prevail, it is difficult to calibrate retribution.

When legislatures go too far, it is the role of the Court to provide a check. Recall from *Weems*, though, the 1910 case involving the disbursement officer in the Philippines, that the Court understood the validity of "different exercises of legislative judgment," which fell outside the ambit of the Eighth Amendment, but claimed for itself the right to guard against "unrestrained" legislative power.[179] Eighty years later, Justice Kennedy, concurring in a decision rejecting a challenge to a sentence of life imprisonment for a drug offense, reiterated that proportionality is a "narrow" principle that "forbids only extreme sentences that are grossly disproportionate to the

---

176 *See*, *e.g.*, *Furman*, 408 U.S. at 308 (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 7 (2008) ("Retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment."); IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary Gregor trans., 1991) ("If . . . he has committed a murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer . . . ."); Chad Flanders, *Can Retributivism be Saved?*, 2014 BYU L. REV. 309, 309 (2014) ("Retributive theory has long held pride of place among theories of criminal punishment in both philosophy and in law.").

177 *Kennedy*, 554 U.S. at 420. A vocal minority of the Court including, most ferociously, Justices Rehnquist, Scalia and Thomas, recoil at the notion that the Eighth Amendment is a protection against retributively disproportionate punishment. *See* Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring) ("In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."); Harmelin v. Michigan, 501 U.S. 957, 974 (1991) (finding "it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid 'disproportionate' punishments" and noting "even less likelihood that proportionality of punishment was one of the traditional 'rights and privileges of Englishmen' apart from the Declaration of Rights, which happened to be included in the Eighth Amendment").

178 *McCleskey*, 481 U.S. at 343 (Brennan, J., dissenting).

179 Weems v. United States, 217 U.S. 349, 381 (1910).

crime."[180] In other words, as the *Weems* Court expressed, the Eighth Amendment is not concerned with legislative discretion, but rather only serious legislative overreach.[181] The Court later adopted Kennedy's concurrence,[182] which means that current jurisprudence does recognize some retributive constraint on non-capital punishments. Nonetheless, in the three case-specific non-capital proportionality cases decided during his tenure, Justice Kennedy did not vote to invalidate any of the respective sentences.[183]

In our view, this outcome reveals less about retribution than it does about an aversion to case-specific proportionality review. However, a reasonable observer analyzing Justice Kennedy's opinions in Eighth Amendment cases between when he joined the Court in 1987 through 2003 when he voted to reject the last of the case-specific proportionality cases, could not be faulted for assuming that Justice Kennedy—along with the other conservative members of the Court—favored neither a focus on randomness nor a robust commitment to curbing retributive excess.

This all changed, though, alongside the rise in importance of the categorical exemption approach. Under this doctrine, which encompasses six cases over the past fifteen years, Justice Kennedy—and the Court—has focused on curbing retributive excess in three different senses.[184] First, the punishment must not be retributively extravagant relative to the offense. For instance, in *Kennedy v. Louisiana*, the case challenging the death penalty for the rape of a child, Justice Kennedy's majority opinion explained that "[t]he incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment."[185]

Second, a punishment must not be excessive relative to the culpability of the offender. For example, in *Roper v. Simmons*,

---

180 *Harmelin*, 501 U.S. at 959 (Kennedy, J., concurring).

181 *See id.* at 998–99.

182 *See Ewing*, 538 U.S. at 23–24.

183 *See id.* at 13; Lockyer v. Andrade, 538 U.S. 63, 65 (2003); *Harmelin*, 501 U.S. at 960.

184 *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring the death penalty for intellectually disabled offenders); Roper v. Simmons, 543 U.S. 551, 575 (2005) (barring the death penalty for juvenile offenders); Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (holding that the death penalty is unconstitutional for non-homicide offenses); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that life without the possibility of parole is an excessive punishment for a juvenile who commits a non-homicide offenses); Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (barring mandatory life without parole for juvenile offenders); Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (applying the *Atkins* decision).

185 554 U.S. at 441–42.

the Court, with Kennedy at the helm, underscored that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[186] Thus, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[187]

The third sense in which the Court has elevated the importance of curbing retributive excess is a point adjacent to the last point. Namely, the Court has elevated the notion that retribution in terms of moral culpability is not solely a backward-looking enterprise. For example, in *Graham v. Florida*, the Court, underscoring that few, if any, juveniles possess an "irretrievably depraved character,"[188] focused on the idea that children change, often profoundly so.[189] The Court stated that, "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."[190] Thus, in additional to crime specific calculations of desert, the Court's categorical exemption cases focus on both the culpability of the transgressor at the time of the offense and the possibility that she or he will be redeemed over time.

The move towards a more robust purposive focus on retributive excess compliments the move towards the categorical exemption approach to deciding Eighth Amendment questions. But how does the Court know whether a punishment is excessive? The next subpart illustrates that the Court has shifted its methods for answering that critical question.

C. The Move to a Functional Assessment of Societal Standard of Decency

In categorical exemption cases, especially the few decided in the 1970s and 1980s, when the Court turns to "objective

---

186 543 U.S. at 570. Juveniles, the Court explained, have a "susceptibility" to "immature and irresponsible behavior," a "vulnerability and comparative lack of control over their immediate surroundings," and their "struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.*

187 *Id.* at 571.

188 560 U.S. at 68.

189 *See id.* at 72–73.

190 *Id.* at 74.

indicia"[191] of societal consensus to glean whether the punishment in question comports with contemporary norms, it reads as though that inquiry is an end in itself. However, along with the rise in retributive excess as the purpose of the categorical exemption approach, it has become increasingly clear that the goal of considering objective indicators of societal standards is to glean whether the punishment is in fact retributively excessive. Unsurprisingly, then, in recent cases, the Court has moved towards a more robust, functional assessment of societal standards.

The early categorical challenge cases relied heavily on legislative enactments as the measure for societal consensus. For example, in *Coker*, the Court invalidated the death penalty for the rape of an adult woman where only Georgia permitted the practice.[192] Conversely, in *Stanford*, the Court rejected a challenge to juvenile executions where twenty-seven states barred the death penalty for juveniles (with only twelve of thirty-seven capital punishment states barring the death penalty for seventeen-year-old, as opposed to sixteen-year-old, offenders).[193] This focus on state legislative enactments made good sense if one believes that legislatures make rational decisions based upon the preferences of state citizens. If any new modes of punishment, such as a return of the thumbscrew, happened to slip through a legislature, they would be judged against the broad sweep of history and the judgment of the state legislatures collectively. But this static approach does not fit well with the idea of the Eighth Amendment as a protection against moral panic. The moral panics that fueled changes to drug laws and juvenile sentencing in the wake of the crack epidemic and the super-predator scare resulted from legislators, who along with their constituents, got swept up in the moment.[194]

---

191 Gregg v. Georgia, 428 U.S. 153, 173 (1976).

192 Coker v. Georgia, 433 U.S. 584, 600 (1977). Moreover, in *Enmund*, the Court counted forty-two states that legislatively barred the death penalty for a person who "somehow participated in a robbery in the course of which a murder was committed" under circumstances "where a defendant did not take life, attempt to take it, or intend to take life." Enmund v. Florida, 458 U.S. 782, 792–93 (1982).

193 Stanford v. Kentucky, 492 U.S. 361, 384 (1989) (Brennan, J., dissenting).

194 Moreover, when the panic recedes, there are serious difficulties in passing justice reform that repeals the harshness of sentences for serious offenses. First, an aberrational prisoner who is released early may reoffend, and legislators may worry about the public's lack of context or risk-savvy. Second, perversely, when it comes to long-term disuse of a punishment practice, it may be difficult to get the issue on the legislative agenda.

The Court's decisions over the past fifteen years, and especially since 2010, are more sensitive to the realities of legislative excess than the rigid approach of bean counting state legislative enactments to determine societal tolerance for a punishment practice. For example, in *Atkins*, the Court explained that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[195] Significant trend evidence is more sensitive to the realities of legislation than a count of the absolute number of states that legislatively prohibit a punishment. This is so because anti-crime legislation is difficult to pass due to the lack of a powerful lobby, the risk of being labeled soft on crime, and the possibility that a statistical outlier case results in a violent crime.[196]

Another doctrinal development that increased the robustness of the inquiry into prevailing societal norms is a focus on the importance of on-the-ground usage indicators for detecting whether a punishment practice is retributively extravagant. The *Coker* Court noted that juries rejected the death penalty in at least 90% of Georgia capital rape cases.[197] But, on the whole, jury verdicts felt like a ride-along element of the legislative enactment analysis as opposed to an independent consideration. However, in *Graham*, the Court transformed on-the-ground usage data from a sideshow into the main event.[198] Three-quarters of the states and the federal government formally authorized life without parole for juvenile offenders;[199] nonetheless, in finding a societal rejection of the practice, the Court relied on the exceedingly infrequent resort to the punishment. Indeed, "nationwide there [were] only [123] juvenile offenders serving sentences of life without parole for nonhomicide offenses."[200] This usage number is more compelling than legislative judgments because it illustrates that "in

---

195 Atkins v. Virginia, 536 U.S. 304, 315 (2002).

196 *See id.* at 315–16 ("Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").

197 433 U.S. at 597.

198 *See* Graham v. Florida, 560 U.S. 48, 63–67 (2010).

199 *See id.* at 62 (noting that thirty-seven states, the District of Columbia, and the federal government authorize juvenile sentences of life without parole).

200 *Id.* at 62–63. The Court reached this number by adding the 109 juvenile offenders accounted for in a study to an additional fourteen excluded from the study that the Court was able to count independently. *Id.* at 64.

proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes" were an exceedingly rare punishment.[201]

If the sentence is exceedingly rare relative to its availability, then there is good reason to believe that the hysteria has fizzled out. This is true because when it comes to the actual imposition of a punishment, unlike legislatures or public opinion polls, real cases involve real people forced to make difficult moral determinations. A major contributor to retributive extravagance, especially in the midst of moral panics, is a dehumanization of the perpetrators of crime.[202] A person who commits a homicide becomes a wild beast. A teenager becomes a super-predator. But a super-predator as an abstraction is one thing. A fourteen-year-old kid, in the flesh, with the context of the crime and the story of that kid's life at hand, is another.

An additional factor that Court has emphasized recently is the extreme geographic isolation of punishment practice. For example, in *Graham*, Florida alone accounted for 77 of the 123 life without parole sentences nationally—and only ten other states had a juvenile serving life without parole.[203] The degree of geographic isolation provides further context to the standards of decency inquiry because it asks how much of the sentencing activity in question is explained by a few outlier jurisdictions—states or counties—as opposed to being evenly distributed across the nation.

The point here is not an arbitrariness point—namely, that there is an unfairness when an eligible defendant who lives in *Y* county receives the challenged punishment when a similarly situated defendant in *X* county does not receive the challenged punishment. Instead, the point is that it is difficult to justify the retributive necessity of the challenged punishment if most eligible defendants in most counties within a state (or states within the country) do not receive it. In other words, extreme outlier usage by a particular office in a particular county tends to say more about that county (and probably less about the residents than the prosecutor's office or individual prosecutors)

---

201 *Id.* at 66.

202 *See* Robert J. Smith et al., The Racial Architecture of Retribution: An Empircal Study of 500 Jury Eligible Citizens 17–19 (Mar. 2, 2016) (unpublished manuscript) (draft on file with author) (describing how dehumanization occurs in the criminal justice system, and how anger and fear also ratchet up the panic and punishment).

203 560 U.S. at 64.

than it does about the standards of decency of the nation as a whole.

Taken together, infrequency of imposition and geographic isolation are very important tools for gauging societal standards. Again, if a sentence is imposed infrequently or in a geographically isolated pattern, that is an important sign that the punishment is not necessary—for, if the punishment were necessary to achieve a retributive purpose, wouldn't it be imposed routinely and evenly?

Finally, in *Hall v. Florida*, the Court displayed flexibility in how it describes the status of states as retaining a punishment practice. Instead of simply counting legislative enactments from years—or, more often, decades ago, the Court counted Oregon as a death penalty abolitionist state because the governor "suspended the death penalty" and the state had "executed only two individuals in the past 40 years."[204] The Court, with Justice Kennedy authoring the opinion, also described why some of the other states that formally retained an IQ cutoff for intellectual disability claims (the practice at issue in *Hall*) should not count as fully part of the retentionist jurisdictions:

> Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question. Delaware has executed three individuals in the past decade, while Washington has executed one person, and has recently suspended its death penalty. None of the four individuals executed recently in those States appears to have brought a claim similar to that advanced here.[205]

In sum, the Court has moved away from a wooden, constrained approach for detecting social norms to a more flexible, robust approach to answering the precise question—do societal standards indicate that this punishment meaningfully contributes to the need for retribution? In other words, this more functional, sophisticated accounting of societal standards permits a more accurate determination of retributive excess; and, in turn, that more accurate determination of retributive excess facilitates the Court's move to more substantive and categorical Eighth Amendment interventions.

In the next Part, we take a step back and query what is driving the Court, and especially Justice Kennedy, towards this more robust Eighth Amendment jurisprudence. Rather than a new gloss on a contested historical debate over the exact mean-

---

204 Hall v. Florida, 134 S. Ct. 1986, 1997 (2014).
205 *Id.* (internal citation omitted).

ing of the Eighth Amendment, or a closer textual read of the words in the statute, Justice Kennedy, as the next Part shows, is motivated by the deeper liberty and dignity principles that undergird the Eighth Amendment. For Justice Kennedy, the doctrine should align as neatly as possible with the goal of assessing whether a punishment practice fails to meaningfully contribute to some lawful retributive goal. It is this overarching commitment to liberty, one that we describe more closely in the next Part, that inspired the reshaping of the Eighth Amendment jurisprudence in ways that spotlight retributive excess and glean from society in as much detail as possible the contemporary standards of decency.

III
LIBERTY AS A CONSTITUTIONAL VALUE

This Part is concerned with extracting and articulating what is animating the shift in the Court's Eighth Amendment jurisprudence. This Part suggests that, in its aggregation, the Court's Eighth Amendment jurisprudence presents an evolving conception of *constitutional liberty* that has driven, and continues to drive, the Court's Eighth Amendment doctrinal developments. We recognize that in reaching this conclusion we face the potential criticism of interpretive overreach—that is, extrapolating a significant general (and generalizable) principle from a small sample of cases in a limited context. However, it turns out that the Court has made similar shifts from narrow and wooden doctrinal determinations to broader individual liberty determinations in the context of other constitutional rights, specifically in its substantive due process jurisprudence.

The developing concept of constitutional liberty, then, can be understood as an exercise in *symbiotic constitutional borrowing*, whereby the Court has quietly but actively imported substantive due process (and vice-versa) ideas in order to transform the Eighth Amendment and realign its protections with "prevailing community sentiments or experience."[206] The consequence of this symbiotic constitutional borrowing is that the transformation of the Eighth Amendment doctrine is substantially aligned with the shifts in the substantive due process jurisprudence as it relates to marriage. Drawing on the ascen-

---

206 Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 478 (2010) (explaining that this type of borrowing, or "displacement," pursues a "goal of ensuring that the imported ideas eventually come to dominate prevalent ideas and restructure the relationships among governing constitutional norms").

dency of constitutional liberty in the marriage doctrine as we explicate the principle of constitutional liberty, then, can foretell to some degree the likely direction of the Court's developing Eighth Amendment doctrine.[207]

As a first order issue, we must define this idea of constitutional liberty. By constitutional liberty we refer to the core of the deep values undergirding constitutional rights, as recognized by the Court. A "spacious phrase," liberty includes the freedom to maintain "a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go."[208] It also includes "certain specific rights that allow persons, within a lawful realm, to define and express their identity."[209] For instance, the reach of constitutional liberty includes at least the specific right of marriage and the right to parental choice in raising a child.[210] And in its protection of these things and more, the value of liberty promotes and protects human dignity itself, or, in other words, the intrinsic worth of every human being.[211]

Justice Kennedy, who is at the helm of the liberty-based evolution of both the Eighth Amendment jurisprudence and the substantive fundamental rights doctrine, treats these terms liberty and dignity as near synonyms, two words that cast light from different angles to express the full meaning of

---

207 In addition, it adds legitimacy to our observations, as well as the doctrinal path outlined by Kennedy more generally. *See id.* at 478–79 (noting that efforts to apply equality ideas to the religion clauses in the past two decades have "produced a dramatic reordering of expectations as to the scope of rights and institutional obligations such that one could say that, for better or worse, the analytical frameworks and vocabulary associated with equality have largely displaced earlier readings of the Free Exercise and Establishment Clauses").

208 *Kennedy Nomination*, *supra* note 25, at 86 (statement of Justice Anthony M. Kennedy).

209 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

210 *See id.* at 2598–99 (2015) ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

211 *See Obergefell*, 135 S. Ct. at 2608.

the core concept that the Constitution aims to protect.[212] For example, in *Obergefell v. Hodges*, the Court described the right to marry one's same-sex partner as an "ask for equal dignity in the eyes of the law."[213] As Professor Lawrence Tribe recently explained, "The language of dignity is not accidental," indeed, "the concept of dignity is central to contemporary human rights discourse . . . [and] also has deep roots in the Christian notion of grace, extended to all humanity in equal measure."[214] This liberty principle requires "governmental actions [to] pass far more stringent tests when they impinge upon liberty in ways that demean the individual,"[215] for instance, in ways that "negatively affect[ ] a person's dignity."[216]

This base value of liberty is understandably most visible in the Court's Fourteenth Amendment substantive due process jurisprudence, specifically as relating to the rights of same-sex couples.[217] This body of law, which began to evolve shortly after Justice Kennedy's arrival on the court, reached its crescendo last June with the decision in *Obergefell*.[218] There, Justice Kennedy wrote, "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[219] For Kennedy, "liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," and "[c]hoices about marriage shape an individual's destiny."[220]

---

212 Harvard Law School, *Supreme Court Associate Justice Anthony Kennedy Visits HLS*, YOUTUBE (Oct. 26, 2015), https://www.youtube.com/watch?v=ZHbMPnA5n0Q [https://perma.cc/HHA7-SNPH].

213 *Obergefell*, 135 S. Ct. at 2608.

214 Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 20 (2015).

215 HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 5 (2009).

216 *Id.*

217 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding that the federal government's definition of marriage as a heterosexual union was an unconstitutional deprivation of liberty to individuals in state-recognized same-sex marriages); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down a Texas sodomy law and thus legalizing same-sex acts throughout the United States); *see also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 169–70 (2015) (describing Justice Kennedy's methodology of deploying the "argot of liberty" to address substantive due process questions in *Obergefell*, *Windsor*, and *Lawrence*).

218 *See* Yoshino, *supra* note 217, at 148 (explaining that *Obergefell* became a "game changer for substantive due process jurisprudence" by placing a strong emphasis on the "intertwined nature of liberty and equality").

219 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

220 *Id.* at 2597–99.

This clear identification of the importance of liberty as driving the majority's decision making in *Obergefell* is the product of a slow and incremental development in the Court's substantive due process jurisprudence.[221] With roots in Justice Harlan's seminal dissent in *Poe v. Ullman*,[222] under Kennedy's formulation the value of constitutional liberty originates from the premise that, as a nation, we have recognized the need for respecting the liberty of all individuals. Justice Harlan's conception of liberty directs courts to see liberty not as "any formula," but instead a weighted measure that protects a person from unwanted governmental intrusions.[223]

This conception of a liberty formula refers to the deeply contested divide on the Court over *how* the Court was to determine which rights were fundamental liberty rights pursuant to the substantive due process clause. On the one hand is Justice Harlan's (and Justice Kennedy's) broad and inclusive conception of liberty; an approach that Professor Tribe describes as "universally accessible [and] nontechnical" in its prose.[224] On the other is the "wooden three-prong test focused on tradition, specificity, and negativity," best articulated by a majority of the Court in the 1997 case of *Washington v. Glucksberg*.[225] Under this limited approach, fundamental rights are cabined by backward-looking and narrow conceptions of liberty, an approach that resulted in the Court declining to extend Fourteenth Amendment liberty to, for example, the right to die.[226]

---

221 *See generally* Tribe, *supra* note 214, at 16 ("[Obergefell] represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence."); Yoshino, *supra* note 217 (arguing that *Obergefell* was a conclusion of a doctrinal evolution that places antisubordination concerns at the center of a due process analysis).

222 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). The majority's adoption of the opinion in *Planned Parenthood v. Casey* has given Justice Harlan's dissent precedential weight. 505 U.S. 833, 848–49 (1992).

223 *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

224 Tribe, *supra* note 214, at 23.

225 *Id.* at 16. The *Glucksberg* Court required that a right be "deeply rooted in this Nation's history and tradition" as well as "implicit in the concept of ordered liberty" to be recognized as a due process liberty. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 201 U.S. 319, 325 (1937)). Additionally, the Court demanded a "careful description" of the claimed right. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). Finally, the Court implied a restriction to negative—or "freedom from"—rights. *See id.* at 719–20 (noting that the Due Process Clause protects "against government interference with certain fundamental rights and liberty interests").

226 *Glucksberg*, 521 U.S. at 705–06 (holding that a state law prohibition against being the "cause" of or providing "aid" to a person attempting suicide is not a due process clause violation).

With its roots in the seminal 2003 opinion of *Lawrence v. Texas*,[227] Justice Kennedy has incrementally dismantled *Washington v. Glucksberg*'s limited approach to calibrating constitutional liberty in the context of gay rights.[228] In *Lawrence*, Kennedy clearly signaled his intentions from the outset in an opinion striking down a Texas law prohibiting homosexual sodomy. In the first line of the opinion Kennedy wrote, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[229] He continued, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[230] Repudiating the Court's prior decision in the similar case of *Bowers v. Hardwick*, where the Court upheld a Georgia law forbidding same-sex sodomy,[231] Kennedy stated that the *Bowers* Court failed "to appreciate the extent of the liberty at stake."[232] For Kennedy, the *Bowers* Court's calibration of the interest at stake as a right to homosexual sodomy was too narrow, distracting the Court from the fundamental liberty at stake, namely the right to engage in, and set the boundaries of, human relationships and intimate conduct within those relationships.[233]

---

227 Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that under the due process clause a state cannot criminalize consensual intercourse between two people of the same sex).

228 Scholars consider the set of relevant cases to include at least *Windsor*, *Lawrence*, *Bowers v. Hardwick*, *Obergefell*, but potentially reaching back to *Loving* as the foundational case on marriage. *See, e.g.*, Tribe, *supra* note 214, at 22, 31 ("The importance of this idea [of constitutional liberty] to Justice Kennedy's jurisprudence has been most apparent in the gay-rights triptych of *Lawrence v. Texas*, *United States v. Windsor*, and now *Obergefell*"); Yoshino, *supra* note 217, at 170 ("In previous cases, such as *Lawrence*, *Casey*, and *Windsor*, [Justice Kennedy] relied heavily on the notion of 'dignity.' While *Obergefell* makes repeated reference to dignity, it focuses more on the concept of liberty."); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) (expressing the view that liberty and equality are interconnected); United States v. Windsor, 133 S. Ct. 2675, 2691–96 (2013) (recognizing same-sex marriages where made lawful by the states on principles of both federalism and liberty). *Compare* Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (denying protection to same-sex acts under the due process clause either as a right "implicit in the concept of ordered liberty" or as one "deeply rooted in this Nation's history and tradition"), *with Lawrence*, 539 U.S. at 578–79 (omitting specificity and tradition from due process analysis and explaining that the Founders had crafted the Constitution to allow future generations to "invoke its principles in their own search for greater freedom").

229 *Lawrence*, 539 U.S. at 562.

230 *Id.*

231 478 U.S. at 196.

232 *Lawrence*, 539 U.S. at 567.

233 *See id.* at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship

With this, Kennedy signaled that liberty, and the synonymous concept of dignity,[234] was something more than a list of discrete activities. Instead, the constitutional promise of liberty embodies a concept of human good that enables the citizenry to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[235] By the time of the Court's decision in *Obergefell*, then, Kennedy fully embraced the value of constitutional liberty not only as formative for the scope of investigation of fundamental rights, but as an end goal in and of itself. As Kennedy noted, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[236] Liberty, then, is both formative and conclusory; a starting point and the goal.

Critically, this transition from liberty as a guide for assessing the means by which the Court determined whether a right was fundamental under the Fourteenth Amendment to an independent ends against which alleged government infractions are measured, is mirrored in Eighth Amendment jurisprudence. As noted in Part II, at the time Justice Kennedy joined the Court, the Eighth Amendment doctrine could best be described as wooden, formalistic, and overly bound to historical tradition.[237]

While we have already discussed the Court's incremental rejection of a narrow and formulaic approach to the Eighth Amendment in Part II, it is valuable to note here the rhetorical shift in the jurisprudence after Kennedy's confirmation. What we see in these cases is an elevation of the value of liberty (or, as it is sometimes referred to, dignity) in the categorical exemption cases.

This premise of constitutional liberty as guiding the Court's decision making can be seen overtly in the 2005 case of *Roper v. Simmons*. There, Justice Kennedy, writing for the Court, noted that the drafters of the Constitution included "broad provisions to secure individual freedom and preserve

---

may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.").

234 *See, e.g.*, Tribe, *supra* note 214, at 17 (analyzing Justice Kennedy's approach to the concept of dignity as it interconnects with rights and equality).

235 *Lawrence*, 539 U.S. at 574 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

236 Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

237 *See supra* notes 139–53.

human dignity," amongst those the Eighth Amendment prohibition on cruel and unusual punishments.[238] In *Roper*, the Court held that while the state is permitted to "exact forfeiture of some of the most basic liberties" from juvenile offenders convicted of heinous crimes, the Eighth Amendment places a restriction upon the government such that "the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[239] Similarly, in *Graham v. Florida*, in the context of life without parole for a juvenile who committed a non-homicide offense, the Court again framed the question in terms of how legislative excess needlessly deprived the prisoner of the full promise of liberty. There the Court stated, "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ."[240] As the Court in *Atkins v. Virginia* explained, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[241]

Drawing on this evolving value of constitutional liberty (and the synonymous value of dignity), the Court has increasingly undertaken a more expansive assessment of the limits of legislative imposition of punishment. In *Hall v. Florida*, Justice Kennedy noted that through "protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[242] Putting this principle into action, the Court in *Hall* reiterated its holding from *Atkins* that though intellectually disabled persons sometimes commit aggravated homicides, "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[243]

Importantly for Kennedy, in interpreting the boundaries of liberty, the line between the liberty "to do" and the liberty to "not have done to," is not fixed. This "spacious phrase," liberty, is not fastened to the policies and practices of past generations.[244] Instead, liberty is a concept that continues to unfold

---

238 Roper v. Simmons, 543 U.S. 551, 578 (2005).

239 *Id.* at 573–74.

240 Graham v. Florida, 560 U.S. 48, 69–70 (2010).

241 Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

242 Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (citing *Roper*, 543 U.S. at 572).

243 *Id.*

244 *Kennedy Nomination*, *supra* note 25, at 86 (Statement of Anthony M. Kennedy); *see also, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("The

in our own time. Justice Kennedy said during his confirmation hearings that, "what the framers had in mind was to rise above their own injustices," therefore "[i]t would serve no purpose to have a Constitution which simply enacted the status quo."[245] Yet, he went on: "To say that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes."[246] Nor does it "mean that moral principles have not remained the same."[247] It just means that "it sometimes takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct."[248]

Putting this in the context of the Eighth Amendment, then, the claims in *Atkins* and *Simmons* were not that the Eighth Amendment barred the execution of juveniles or intellectually disabled offenders at the time of the Amendment's enactment. Instead, the claim was that the interconnected liberty and dignity interests that undergird the Amendment are "spacious phrase[s]"[249] and their full meaning unfolds over time as society learns, grows, and matures. In *Kennedy v. Louisiana*, Justice Kennedy, writing for the Court, perfectly captured this concept of evolving liberty: "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[250] Thus, "[i]t is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of . . . punishment."[251]

In other words, with knowledge and experience, society understands more fully the consequences of its collective actions; to say that the drafters of the Constitution did not intend

---

generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

245 *Kennedy Nomination*, *supra* note 25, at 152 (statement of Anthony M. Kennedy).

246 *Id.* at 230.

247 *Id.* at 153.

248 *Id.*

249 *Id.* at 86 (explaining that such phrases invoke a zone of protection).

250 Kennedy v. Louisiana, 554 U.S. 407, 420, *modified*, 554 U.S. 945 (2008).

251 *Id.* at 435.

for that experience to be imported into the protections against liberty misunderstands the enterprise of crafting an enduring Bill of Rights. The Court made this point powerfully in *Hall*: "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."[252]

Further, it is the role of the judiciary to interpret what the value of liberty means today as applied to contemporary practices and mores, in light of our historical experience.[253] It is the judiciary, then, that must draw that line that demarcates the outer bounds of liberty; for Justice Kennedy, "[i]t is wavering; it is amorphous; it is uncertain. But this is the judicial function."[254] As a practical matter, then, "the great question in constitutional law," according to Justice Kennedy, is: "One, where is that line drawn? And, two, what are the principles that you refer to in drawing that line?"[255] Justice Kennedy, during his confirmation hearing, said that judges should use "history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed,"[256] yet he also agreed with the second Justice Harlan that this enterprise does not involve "mechanical yardsticks" or "mechanical answers," but rather the exercise of both "judgment and restraint."[257]

In other words, it is the role of the judiciary to guard against legislative extravagance—to ensure that the laws passed through the democratic process do not end up "transgressing the constitutional commitment to decency and restraint."[258] It is the role of the judiciary both to determine "whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts"[259] and to gauge whether restrictions on

---

252 Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

253 *See supra* subpart I.B.

254 *Kennedy Nomination*, *supra* note 25, at 86 (statement of Anthony M. Kennedy).

255 *Id.*

256 *Id.*

257 *Id.* (statement of Sen. Joseph R. Biden, Jr., Chair, S. Comm. on the Judiciary); *accord id.* (statement of Anthony M. Kennedy) (agreeing with Justice Harlan's interpretation as posed by then-Senator Biden).

258 Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

259 *Kennedy Nomination*, *supra* note 25, at 87 (statement of Anthony M. Kennedy).

liberty—particularly in the context of punishment—remain necessary in kind and degree.

Justice Kennedy believes this approach "is consistent with the idea that constitutional values are intended to endure from generation to generation and from age to age."[260] As Justice Kennedy has noted,

> It was not the political branches of the government that decided *Brown v. Board of Education*. It was not the political branches of the government that wrought the resolution of *Baker v. Carr*, the apportionment decision, or that decided the right of counsel case in *Gideon v. Wainwright*. It was the courts.[261]

This is an approach that places the judiciary at the heart of understanding and preserving liberty as a stable moral concept that progresses in its particular demands over time. For Justice Kennedy, the drafters of the Constitution meant for the document to apply to "exigencies and circumstances and perhaps even crises that they could never foresee."[262] This does not mean that judges are free to import their own values or biases to resolve constitutional disputes. "This is not the aristocracy of the robe," then-Judge Kennedy cautioned during his confirmation hearings.[263] "Judges are not to make laws; they are to enforce the laws."[264] Instead, "the idea is that the Constitution is itself a law," "[i]t is a document that must be followed."[265] And thus, "judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution."[266] The standard that has emerged is liberty.

With this understanding of the Court's fundamental shift to, and embracing of, the value of constitutional liberty, and its role in driving the doctrinal shifts in both the Eighth Amendment and substantive due process clause, we turn now to highlight two specific lessons from the Court's most recent substantive due process decision—*Obergefell*. As suggested above, given the symbiotic borrowing between these two provi-

---

260 *Id.* at 140.

261 *Id.* at 100 (statement of Senator Edward M. Kennedy, Member, S. Comm. on the Judiciary) (quoting from a 1978 speech by Anthony M. Kennedy).

262 *Id.* at 139 (statement of Anthony M. Kennedy).

263 *Id.* at 138.

264 *Id.*

265 *Id.* at 140.

266 *Id.* at 138. Fittingly, then, Professor Michael Dorf, a former Kennedy clerk, said of the Justice that he is "probably the most confident of all the justices in the court's power." HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 5 (2009) (quoting Richard Brust, *The Man in the Middle*, 89 A.B.A. J. 24, 25 (2003)).

sions, these observations are instructive for the Court's potential vision of a robust Eighth Amendment jurisprudence.

First. In Part II, we described how the Court has taken a more functional approach to gauging societal norms in the most recent Eighth Amendment cases. For example, the Court has gauged actual sentencing practice, the level of geographic isolation that the punishment reflects,[267] and whether a state that retains a punishment is nonetheless "de facto" abolitionist due to a combination of long-term and prospective disuse (the latter of which, in *Hall*, was signaled by gubernatorial imposed moratoria on executions).[268] Yet, in the context of the substantive due process clause, the Court takes an even more sophisticated approach to assessing societal standards of decency. In *Obergefell* the Court stated:

> There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.[269]

Through the lens of *Obergefell* the function of consulting objective indicia begins to look like the equivalent of civil discovery. The Court is drawing on a broader set of information from a more diverse set of sources. This, then, arguably provides the Court with a greater opportunity to detect whether its own intuitions on the question of excessive punishment adequately reflect the tapestry of norms that comprise the current standards of decency.

Specifically, though, as we discuss in Part IV, this broader conception of the appropriate sources for the Court to consult

---

267 *See* Graham v. Florida, 560 U.S. 48, 62–64 (2010).

268 *See* Hall v. Florida, 134 S. Ct. 1986, 1997 (2014).

269 Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015) (internal citation omitted).

could prove illuminative in cases, unlike the death penalty, where the punishments the Court confronts does not benefit from juror (or even judicial) input.[270] In those cases, for example in the context of mandatory minimum sentences or extreme prison conditions, these sources could help to guard against increasingly subjective judgment on the one hand or forced inaction on the other.

Second. The right to marry has been at the core of substantive due process jurisprudence since the Court's 1967 decision in *Loving v. Virginia*.[271] In *Obergefell*, Justice Kennedy, writing for the Court, focuses on the inequality of permitting one type of couple the dignity to marry (for instance, the interracial couple in *Loving*) while denying that right to another type of couple (same-sex couples).[272] However, the Court did not perform a separate equal protection analysis to give substance to the inequality concerns. Instead, in a move that Professor Tribe refers to as the creation of the "equal dignity" doctrine,[273] Justice Kennedy simply explained:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[274]

This equal dignity concept is incredibly important in the context of the Eighth Amendment. For instance, while executing an intellectually disabled person would violate his "inherent

---

270 *See infra* subpart IV.B.

271 *See* 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." (internal quotation marks omitted)).

272 *Obergefell*, 135 S. Ct. at 2601-02 ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. . . . The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." (citations omitted)).

273 Tribe, *supra* note 214, at 17.

274 *Obergefell*, 135 S. Ct. at 2602–03.

dignity as a human being,"[275] states routinely execute people with similar (or more severe) functional impairments.[276] Or, when the Court considers the ability of juveniles to transform their lives and become productive members of society, the concept of equal dignity might call for consideration of whether the same logic compels the Court to reckon with the ability of adults who are drug-addicted or severely mentally ill, for example, to change over time as their conditions change. The point is not that these inequalities suggest an Equal Protection Clause violation, but rather that the flexibility to observe these inequities is not irrelevant to the question of whether a broad punishment practice violates the Constitution.

The import of these observations coupled with our evaluation in Part II of the continuing trajectory of the Eighth Amendment doctrine under the emerging constitutional liberty principle has significance for the future of criminal justice in America. Part IV assesses the future of the Eighth Amendment and the impact of constitutional liberty on contemporary issues in criminal law and procedure.

IV
LOOKING AHEAD: LIBERTY AND THE MODERNIZATION OF CRIMINAL JUSTICE IN AMERICA

This Part turns to consider both the possibilities and limitations of Eighth Amendment constitutional liberty. To that end, in subpart A we sketch the near-term trajectory of constitutional liberty on three contemporary—and critical—areas of criminal justice: life without parole for juvenile homicide offenders, life without parole for non-violent drug offenders, and the death penalty. In mapping a trajectory of the Eighth Amendment jurisprudence, our goal is not to predict the outcome of any particular challenge to a punishment practice, or even to argue that any particular practice is unconstitutional. Rather, our goal is simply to show where the Court's recent Eighth Amendment doctrinal moves could lead at a concrete level. In doing so, we aim to anticipate some of the practical and doctrinal challenges that the Court may face as it continues to flesh out its burgeoning Eighth Amendment liberty jurisprudence.

---

275 Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

276 *See* CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., 2015 CHHIRJ DEATH PENALTY REPORT [hereinafter CHHIRJ REPORT] (providing accounts of people with functional impairments who were executed in 2015).

Subsequently, in subpart B, we consider the future implications for—and potential limitations of—our exegesis, beyond the doctrinal hubs discussed in subpart A. First, we consider the impact on the doctrine in cases where actual usage data is skewed by the absence of a jury or judge finding because of, for example, mandatory minimum sentences. Second, we consider how the doctrine might respond to a challenged punishment practice, for instance the use of solitary confinement as a punishment for juveniles, where decision makers do make discretionary choices, but those choices are neither neutral nor transparent. In the context of the solitary confinement discussion, we wrestle with the thorny question of what the Court should do when it has imperfect information about a punishment practice. On the one hand, the Court has an obligation to curb retributive excess. On the other hand, in relying on its own judgment without strong confirmation from objective markers of societal standards of decency, the Court risks getting the calculation wrong—and, more fundamentally, damaging is institutional credibility.

A. Reinventing the Eighth Amendment

1. *Life Without Parole for Juvenile Homicide Offenders*

The first area where Eighth Amendment constitutional liberty potentially has an impact is life without parole for juvenile homicide offenders. Meet Taurus Buchanan. Now nearly forty, he is serving life without the possibility of parole for a single punch that he threw as a sixteen-year-old boy during a street fight.[277] Earlier this year, the prosecutor who sent him to prison said: "I think I went too far. If the state of Louisiana lets him out, I would fall on my knees and thank God."[278] Hillary Clinton, too, recently apologized for using the term "superpredator" to refer to child offenders back in the 1990s.[279] Despite these apologies, though, the panic that swirled around the nation—in the media, from the mouths of public intellectuals and politicians, in the minds of ordinary Americans—had a considerable impact on sentencing laws.[280] John Mills, Anna Dorn, and Amelia Hritz have explained that concern over the violence that the new breed of superpredator would unleash on

277 Corey G. Johnson & Ken Armstrong, *This Boy's Life*, THE MARSHALL PROJECT, (Jan. 4, 2016), https://www.themarshallproject.org/2016/01/04/this-boy-s-life#.cm0Dvp5Cp [https://perma.cc/G5B4-AXC7].

278 *Id.*

279 *See* Lachman, *supra* note 72.

280 *See supra* Part I.

Americans led "forty-five states [to] adopt[ ] laws expanding the jurisdiction of adult courts over juveniles, thereby expanding the applicability of JLWOP."[281] Even as violent crime decreased in the 1990s, juvenile life without parole sentences increased.[282] The rhetoric—the moral panic—and not reality drove the legislative response and its retributive overreach.[283]

Under the theory of constitutional liberty, and the rights-protective role the Court is establishing for itself under the Eighth Amendment, what result? It turns out that the objective indicators of societal standards of decency illuminate the rarity and geographic concentration of juvenile life without parole sentences. While only sixteen states bar life without the possibility of parole sentences for juveniles who commit murder (and thirty-five states permit this punishment), nine states have abandoned the punishment in the past four years—a striking number given that the net effect of these changes is to reduce punishment, not taxes.[284] In terms of actual usage of the punishment, fourteen states that retain life without parole for juveniles have five or fewer people serving the punishment statewide,[285] and in six of those states, no person is serving the sentence.[286] Five additional states have imposed either zero or one life without parole sentences upon a juvenile since

---

281 MILLS ET. AL, *supra* note 56, at 4–5. *But see* John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 560 (2016) (detailing legislative enactments and declining usage of juvenile life without parole).

282 Mills, *supra* note 281, at 560 (noting the superpredator era "saw a marked increase in juvenile life without parole (JLWOP) sentences, despite a drop after 1994 in homicides committed by juveniles."); *id.* at 561 fig.1. (citing *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2013*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2015), http://www.ojjdp.gov/ojstatbb/ezash [https://perma.cc/V6NU-3C6A] (providing year over year data on homicides and homicides by juvenile offenders)).

283 *See supra* subpart I.A.

284 MILLS, *supra* note 56, at 4–5 (detailing legislative enactments). The Massachusetts Supreme Court held that juvenile life without parole violated their state constitution. *See* Diatchenko v. Dist. Att'y, 1 N.E. 3d 270, 284–85 (Mass. 2013). Delaware enacted a law that provides juveniles serving life without parole the right to petition for a sentence reduction. *See* An Act to Amend Title 11 of the Delaware Code Relating to Criminal Sentences, 2013 Del. Laws 37 (2013). Thus, in practical effect, there is no life without parole left in Delaware. The other seven states eliminated the punishment outright through their respective state legislatures. MILLS, *supra* note 56, at 4–5.

285 Mills, *supra* note 281, at 603–04 app. B (listing Idaho, Iowa, New Hampshire, North Dakota, Ohio, Oregon, South Dakota, and Utah).

286 *Id.* (listing Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island).

2011.[287] This decreased usage exemplifies the extreme geographic isolation. As scholars have recently noted, "[t]hree counties, which represent 4.1% of the U.S. population, are responsible for over twenty percent of all sentences."[288]

As we have noted throughout this Article, these factors matter because they create a strong inference that life without parole does not meaningfully contribute to legitimate retributive demand.[289] This is because if life without parole did serve a legitimate retributive function then we would expect that the punishment would be used routinely instead of rarely, and broadly instead of in isolated instances.

Further, a closer look at the relationship between the punishment and the goal of retribution reveals deep conflict. First, children under eighteen possess diminished culpability relative to a typically-developed adult.[290] Juveniles "struggle to define their identity," possess a "susceptibility" to "immature and irresponsible behavior," and have a "vulnerability and comparative lack of control over their immediate surroundings."[291] Given that life without parole is the second harshest punishment available under law,[292] the unmistakable severity of the sentence relative to the diminished moral culpability of juveniles helps to explain why, as the moral panic over super-predators fizzled, most of the nation walked away from the punishment.

Another reason why juvenile life without parole raises serious questions about its retributive excess is because people change, often dramatically.[293] Last term, in *Montgomery v. Louisiana*, Justice Kennedy, writing for the Court, reiterated that a sentence of life without parole is extravagant for all but "the rare juvenile offender whose crime reflects irreparable corruption."[294] So, the only time where a life without parole sen-

---

287 *Id.* at 575 n.233 (listing Alabama, Arkansas, Iowa, Maryland, and Minnesota).

288 *Id.* at 571; *see also* Beth Schwartzapfel, *Life Without Parole: For Juveniles, 5 Tough Counties*, THE MARSHALL PROJECT (Sept. 22 2015), https://www.themarshallproject.org/2015/09/22/life-without-parole-for-juveniles-5-tough-counties#.jypg2S9q1 [https://perma.cc/VK8P-4PY2] (discussing sentencing inequities between counties).

289 *See supra* Parts I & II.

290 *See* Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

291 *Id.* at 570.

292 Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

293 *See* Graham v. Florida, 560 U.S. 48, 68 (2010) ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (quoting *Roper*, 543 U.S. at 570)).

294 Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

tence is retributively justified is in the case of a juvenile who is irreparably corrupt. But how is it possible to know whether a thirteen-year-old child is irreparably corrupt? The best time to make that determination is years—or even decades—after the offense when the decision can be made on the basis of lived experience. Thus, life without parole appears to be excessive, in part, because it denies the hope of redemption. As Justice Kennedy articulated in *Graham v. Florida*:

> [Life without parole] deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days."[295]

2. *Life Without Parole for Nonviolent Drug Offenders*

We see similar patterns of moral panic, legislative reaction, and consequent retributive overreach in the category of life without parole for non-violent drug offenders. As we discussed in Part I, the moral panic surrounding drug use in the 1980s and 1990s was high.[296] Former Republican House Speaker Newt Gingrich recently stated, "I was hardcore on the issue of crime . . . [t]here were tremendous unintended consequences. Locking up people for very minor drug offenses destroyed their future."[297] As Professors Bidish Sarma and Sophie Cull have explained, like Gingrich, many Americans were "hardcore" on the issue of drug crime; and, similar to juvenile life without parole, most of the state and federal laws that resulted in life without parole for drug offenses were enacted during a moral panic.[298] At the time, the public ranked crime as the number

---

295 *Graham*, 560 U.S. at 69–70 (2010) (quoting Naovarath v. State, 779 P. 2d 944 (Nev. 1989) (citation and alterations omitted)).

296 *Supra* notes 57–61 and accompanying text (describing the fear regarding the crack-cocaine epidemic).

297 Steven Rosenfeld, *Will the Strange Bedfellow Team of Van Jones and Newt Gingrich Push Congress to Reverse Decades of Criminal Justice and Prison Policy?*, ALTERNET (Jun. 7, 2015), http://www.alternet.org/civil-liberties/will-strange-bedfellow-team-van-jones-and-newt-gingrich-push-congress-reverse [http://perma.cc/CR95-UMAW].

298 *See* Bidish Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W.L. REV. 525, 540–543 (2015). In 1984, Congress passed a law that eliminated parole

one issue in America.[299] The hysteria centered on the perception that drugs and violence were deeply interconnected.[300]

As it turns out, as in the case of juvenile life without parole for homicide offenses, the perception on the interrelatedness of drugs and violence, albeit popular, does not enjoy the advantage of veracity.[301] Again, panic, not reality, drove the retributive overreach. Recognizing this fact, Senators Ted Cruz (R) and Corey Booker (D), among others, have introduced the Smarter Sentencing Act, which would eliminate in practice life without parole for non-violent drug offense prospectively by creating a safety valve through which judges could reduce life sentences.[302] That legislation, which enjoys broad bipartisan support (though not the support of the committee chair), is still pending as of September 2016.[303] Meanwhile, two-thirds of state legislatures have reduced the punishments for various drug offenses,[304] a fact that captures the broad societal under-

---

for people serving a life sentence. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2019, 2069 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). New or expanded federal laws came in '86, '87, and '94. *See* U.S. SENTENCING COMM'N, *The Sentencing Reform Act of 1984: Principal Features*, http://www.ussc.gov/research-and-publications/working-group-reports/simplification/simplification-draft-paper-2 [https://perma.cc/4KAL-AR4Y].

299 *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, CRITICAL CRIMINAL JUSTICE ISSUES: TASK FORCE REPORTS FROM THE AMERICAN SOCIETY OF CRIMINOLOGY TO ATTORNEY GENERAL JANET RENO vii (1995), https://www.ncjrs.gov/pdffiles/158837.pdf [https://perma.cc/X3BJ-AG6J]; *see also* Jeffrey M. Jones, *Americans Perceive Increased Crime in U.S.*, GALLUP (Oct. 14, 2009), http://www.gallup.com/poll/123644/americans-perceive-increased-crime.aspx [https://perma.cc/PJ8L-9P7C] (reporting on polling data showing respondents believed crime is increasing).

300 *See* Begay v. United States, 553 U.S. 137, 146 (2008) ("As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun."); *see also* Roper Ctr. for Pub. Op. Research, *What Accounts for High Rates of Crime?*, THE PUBLIC PERSPECTIVE, June/July 1997, at 14 (1997), https://ropercenter.cornell.edu/public-perspective/ppscan/84/84014.pdf [https://perma.cc/B6HQ-Y3K9] (showing a majority of poll respondents in 1989 and 1990 believed drugs were the leading cause of crime).

301 *See, e.g.*, Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 227 (2015) (explaining that there is no "causal connection between drugs and violence" that appears in "historical arrest data, current research, or independent empirical evidence").

302 *See* 161 Cong. Rec. S. 1576, 1577 (daily ed. Mar. 17, 2015) (statement of Sen. Lee); *see also id.* at 1578 (statement of Sen. Durbin) (detailing how this legislation would reduce, but not eliminate, a number of the mandatory minimum sentences and also provide remedies for people sentenced under the old 100:1 powder-crack regime).

303 *See S. 502: Smarter Sentencing Act of 2015*, GOVTRACK.US, https://www.govtrack.us/congress/bills/114/s502 [https://perma.cc/3EKU-BBX2].

304 *See generally* Ram Subramanian & Rebecka Moreno, VERA INST. OF JUSTICE, DRUG WAR DE'TENTE? A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009–2013 5–23 (2014) (surveying state legislation changing drug laws). For example, in

standing of drug-war overreach and the subsequent energy and success around measures enacted to reduce the severity of punishment.

All told, twenty-two states and the federal government authorize life without parole for non-violent drug offenses.[305] But the real indicator of abandonment, as explained in *Graham*, is the sheer disuse of the punishment practice.[306] As a conservative estimate, there are over 1.5 million arrests for drug crimes in the United States each year.[307] Thus, over the course of 16.4 years (the median number of years served by a person currently serving life without parole for a non-violent offense[308]), nearly twenty-five million people were arrested for drug crimes. Meanwhile, in the entire country, there are approximately 2,500 people serving life without parole for a non-violent drug crime.[309] Hence, the rarity of the sanction reflects strongly the improbability that permanent imprisonment as a punishment practice meaningfully serves a retributive purpose. These comparatively few sentences are highly concentrated at the state level. While approximately 80% of life without parole sentences for non-violent drug offenses occur at the federal level, there are people serving life without parole for drug offenses in as few as eight and as many as eleven states.[310]

Oklahoma, the Republican governor recently signed into law a bill that reduces the severity of mandatory life without parole for a third non-violent drug possession (called trafficking) offense. *See* Justice Safety Valve Act, 2015 Okla. Sess. Laws 243.

305 Sarma & Cull, *supra* note 298, at 561; *see also* JENNIFER TURNER & WILL BUNTING, AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 23 fig.3 (2013) (displaying a map of the states that authorize life without parole for non-violent offenses).

306 *See* Graham v. Florida, 560 U.S. 48, 62–63 (2010) (explaining the extreme rarity of juvenile life without parole for non-homicide offenses relative to the availability of the punishment); *see also supra* notes 195–205 and accompanying text (describing the Court's emphasis on actual sentences usage for curbing retributive excess).

307 *See Crime, Arrests, and US Law Enforcement*, DRUGWARFACTS.ORG, http://www.drugwarfacts.org/cms/Crime#sthash.qqM6xBdC.dpbs [https://perma.cc/5RGZ-5FWH] (reporting annual drug arrests range from 1,501,043–1,841,182 between 2007 and 2014); *Drugs and Crime Facts*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/content/dcf/enforce.cfm [https://perma.cc/Z429-E8HZ] (reporting approximately 1,841,200 drug arrests in 2007).

308 TURNER & BUNTING, *supra* note 305, at 26.

309 *Id.* at 23 tbl.3.

310 *Id.* (listing Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi, Oklahoma, and South Carolina. It is possible that there are people serving life without parole in Delaware, Nevada or Virginia, but the Departments of Corrections in those locations did not respond adequately to public records requests).

3. *The Death Penalty*

A third punishment regime that could be implicated by the Court's emerging approach to the Eighth Amendment is the death penalty. After the Court invalidated then-existing capital punishment statutes in 1972 in *Furman*,[311] thirty-five legislatures across the country enacted new death penalty regimes with impressive speed and ferocity.[312] The American Law Institute drafted a model statute that served as the dominant inspiration for modern capital punishment statutes.[313] In *Gregg*, the Court considered these developments "[t]he most marked indication of society's endorsement of the death penalty for murder."[314]

It is important to note the timing of the *Furman* decision when trying to understand this backlash. *Furman* came one year after the Court's decision mandating bussing,[315] and a year prior to its decision in *Roe v. Wade*, declaring a woman's right to an abortion.[316] Facilitated by *Furman,* the death penalty became the mechanism for a proxy war on deep racial,[317] cultural,[318] and federalism concerns.[319] In this way then, the trajectory of capital punishment resembles the aftermath of a moral panic. Significant societal anger and fear translated into legislative (re)enactment of the death penalty. Yet, even in its heyday in the 1990s, Americans never truly used the death penalty regularly. Indeed, at its peak, Americans only sen-

---

Missouri used to be on this list, but the Governor granted the last person serving life without parole clemency in 2015.

311 Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

312 *See* Gregg v. Georgia, 428 U.S. 153, 179–80, 179 n.23 (1976) (listing the states and explaining that the American people had spoken as to the desirability of the death penalty).

313 *Id.* at 191 (describing the model penal code statute upon which the Georgia statute was modeled).

314 *Id.* at 179.

315 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–30 (1971).

316 Roe v. Wade, 410 U.S. 113, 166 (1973).

317 *See* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RES. CRIME & DELINQ. 202, 205 (1994) (reporting on results of empirical study that show "[w]hite support for the death penalty is . . . associated with antipathy to Blacks and racial stereotyping").

318 *See* Lauren Gambino, *Democrats' Divide on Death Penalty Emerges as a Major Point of Difference*, THE GUARDIAN (Nov. 6, 2015 8:43 PM), https://www.theguardian.com/us-news/2015/nov/06/democrats-death-penalty-clinton-sanders-omalley [https://perma.cc/XMT7-7QCG].

319 *See* Williams v. Taylor, 529 U.S. 362, 378–79 (2000) (addressing deference owed to state courts in post-conviction capital proceedings).

tenced 300–350 people to death each year in a nation that endures 10,000 to 15,000 annual homicides.[320]

Today, nineteen states have formally abandoned the death penalty through legislation (seventeen states) or judicial decision (two states).[321] As with juvenile life without parole, under the old mode of detecting consensus, the fact that thirty-one states and the federal government authorize the punishment would be fatal to any Eighth Amendment challenge. But under the more functional assessment that the Court has begun to employ to legislative trends, actual usage and geographic isolation render the death penalty constitutionally suspect.

Since 2007, seven states have formally eliminated capital punishment.[322] No state that previously prohibited capital punishment has enacted it in over twenty years. Governors in Oregon, Colorado, Washington and Pennsylvania have used their executive discretion to bar executions while they remain in office. Oregon counted on the abolitionist "side of the ledger" in *Hall v. Florida* because the state had "suspended the death penalty and executed only two individuals in the past 40 years."[323] Meanwhile, similar to Oregon, Colorado has executed only one person since *Gregg*.[324] Washington has executed only five people in that time. And Pennsylvania has executed only three people—all volunteers.[325] Other states exhibit similar types of long-term disuse, though without formal moratoria. For example, eleven states plus the federal government performed five or fewer executions since *Gregg*,[326] including two states that have not executed anyone.[327] Justice

---

320 *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES tbl.4 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-4 [https://perma.cc/AG5T-XQZU].

321 *See* Facts About the Death Penalty, Death Penalty Info. Ctr. (July 15, 2016) (listing states); *31 States with the Death Penalty and 19 States with Death Penalty Bans*, PROCON.ORG (Aug. 9, 2016, 3:20 PM), http://deathpenalty.procon.org/view.resource.php?resourceID=001172 [https://perma.cc/YV9M-ELCE].

322 *Glossip*, 135 S. Ct. at 2774 (Breyer, J., dissenting). New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

323 134 S. Ct. 1986, 1997 (2014).

324 FACTS ABOUT THE DEATH PENALTY, *supra* note 321.

325 *Id.*; *see also Pennsylvania*, DEATH PENALTY INFO CTR., http://deathpenaltyinfo.org/pennsylvania-1#sent [https://perma.cc/LU42-AYEQ] (noting that Pennsylvania's three post-*Gregg* executions "have all been volunteers with serious mental health issues, whom courts found to have waived their rights to an appeals process").

326 FACTS ABOUT THE DEATH PENALTY, *supra* note 321.

327 *See Executions by State and Year*, DEATH PENALTY INFO CTR., http://www.deathpenaltyinfo.org/node/5741 [https://perma.cc/KZY7-595A] (Kansas and New Hampshire).

Breyer counted thirty-nine states overall that exhibit long-term disuse or else have formally eliminated the death penalty.[328]

Moreover, both death sentences and executions have declined sharply over the past twenty years. In 2015, only forty-nine new death sentences were imposed nationally, an all-time post-*Furman* low.[329] In Texas, the number of death sentences fell from forty-eight in 1999 to nine in 2013 to two in 2015. Dramatic declines hit the Deep South as a whole. Indeed, over the past decades, death sentence and execution averages dipped significantly below the levels of the decade before *Furman*, causing Justice White to conclude that when, as it had in 1972, "imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied."[330] Moreover, in terms of geographic isolation, in *Glossip*, Justice Breyer emphasized that "the number of active death penalty counties is small and getting smaller."[331] Since 2010, Breyer noted, "only 15 counties imposed five or more death sentences."[332]

Thus, examined at the more granular level that has marked the Court's recent Eighth Amendment cases, over 3000 counties no longer use the death penalty while only 15 counties nationally averaged at least one death sentence per year.[333] When viewed together with the reality that 31 states either formally eliminated the death penalty or else have performed less than one execution per decade since *Gregg*, it becomes difficult to argue that the death penalty meaningfully contributes to a need for retribution.

If one shifts the lens from societal standards to the reality of the death penalty in practice, the relationship between capital punishment and retribution is murkier still. The typical person who commits a murder is not, according to the Court, eligible for a death sentence.[334] To be death-eligible, a person

---

328 Glossip v. Gross, 135 S. Ct. 2726, 2773 (2015) (counting nineteen abolitionist states, eleven states that retain the death penalty but have not executed anyone since 2006, and nine states that have conducted fewer than five executions since 2006, which makes "an execution in those states a fairly rare event").

329 *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFORMATION CTR. (2016), http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 [https://perma.cc/A9G6-C59H] [hereinafter *Death Sentences in the U.S.*].

330 Furman v. Georgia, 408 U.S. 238 311 (White, J., concurring).

331 *Glossip*, 135 S. Ct., at 2774 (Breyer, J., dissenting).

332 *Id.*

333 *Id.*

334 *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (explaining that "[i]f the culpability of the average murderer is insufficient to justify the most extreme

must possess sufficient moral culpability; i.e. more than that of the typically developing adult. Additionally, the Court held that the Eighth Amendment bars the execution of juveniles (more impulsive, less formed identity, susceptible to external influence from peers, etc.)[335] and the intellectually disabled ("cognitive and behavioral impairments" that include "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses") due to their significantly diminished moral culpabilities.[336] Indeed, as the Court reiterated in *Hall*, "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[337] In other words, the punishment of death is so retributively askew that its imposition would violate the inherent dignity that government must preserve even when the offender committed a serious crime.

Unfortunately, putting a wall around juveniles and the intellectually disabled has not solved the problem of executing people with crippling impairments. In 2015 alone roughly 75% of executions involved a concern over retributive excess due to intellectual impairments, brain damage, severe mental illness, and other similarly serious impairments.[338] Consider one example: Georgia executed Andrew Brannan, a decorated Vietnam combat veteran who had been diagnosed with both posttraumatic stress disorder and bipolar disorder. His symptoms included depression, hypomania, flashbacks, recurrent intense anxiety, and paranoia.[339] His "total occupation and social impairment" led the Department of Veteran Affairs to categorize him as 100% disabled.[340]

Finally, the death penalty eliminates both any hope of transformation and any reason to believe that the prisoner has intrinsic value. But the reality is that even people on death row

---

sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").

335 Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (barring the death penalty for juvenile offenders).

336 *Atkins*, 536 U.S. at 320 (barring the death penalty for intellectually disabled offenders).

337 Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

338 CHHIRJ REPORT, *supra* note 276 (describing the credible mitigation evidence for each execution in 2015).

339 Franklin J. Bordenave & D. Clay Kelly, *The Death Penalty and Mentally Ill Defendants*, 38 J. AM. ACAD. PSYCHIATRY & L. 284, 285 (2010).

340 Taylor Barnes, *A Vietnam Veteran with PTSD is the First US Execution of 2015*, INTERCEPT (Jan. 14, 2015), https://theintercept.com/2015/01/14/vietnam-veteran-ptsd-first-us-execution-2015/ [https://perma.cc/LB3T-V2P9].

change. Consider, as one recent example, Kelly Gissendaner, a woman who, while in prison awaiting execution, had mentored despondent prisoners, many of who then became productive members of society when released, including women who are now social workers and literacy teachers. "Kelly is the poster child for redemption," one of those women said. "Killing Kelly is essentially killing hope."[341]

When executing people with marked functional impairments or the demonstrated capacity to change becomes the rule, not the exception, an *Obergefell*-esque concern over equal dignity emerges to cast further doubt on the retributive necessity of the capital punishment enterprise as a whole.

***

As this subpart illustrates, once the strands of a more robust Eighth Amendment jurisprudence are identified, three harsh punishment practices become vulnerable to constitutional attack, even in a short-term view of the doctrine's trajectory. By envisioning in concrete terms the contours of potential Eighth Amendment challenges under the newly robust categorical exemption approach, a few important facts emerge. First, plausibly excessive punishments tend to be geographically isolated at the state and county level. These sanctions also tend to be used very rarely relative to their availability. Taken together, these insights provide a critical rebuff to those scholars who envision that departure from the "modes of punishment" or "contrary to longstanding practice" approaches would result in a hopelessly subjective enterprise too sensitive to momentary trends in opinion.[342] While these critiques have merit under a wooden approach that simply counts state legislatures, the same arguments lose much of their force under the Court's more robust look into societal standards of decency, including, importantly, evidence of how, where, when, and how often local actors use their discretion to seek and impose the challenged punishment practice.

---

341 *Former Inmates Plead for Clemency for Kelly Gissendaner, Who Gave Them Hope in Prison*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/node/6254 [https://perma.cc/4M2J-JWGP].

342 *See, e.g.*, Stinneford, *supra* note 3, at 554–55 (noting the problem of interpreting standards of decency based upon consensus over decades as opposed to centuries).

B. Tensions and Possible Limitations

In this subpart, we briefly outline the possible tensions for, and limitations of, Eighth Amendment constitutional liberty. The chief uncertainty that remains centers on how the Court detects retributive excess. To preview those tensions, we first query what happens when actual sentencing data, which thus far has relied heavily on the joint discretion of prosecutors and jurors, is unavailable due to mandatory minimum sentences that remove discretion from juries and judges. Second, using the context of solitary confinement, an area where Justice Kennedy has showed express interest, we explore how the doctrine should react to usage data that is obscured both by a lack of participation by neutral parties like judges or juries and a fundamental lack of transparency. These decisions are made, literally, behind the prison walls. Relatedly, and finally, this section hypothesizes insufficient information to detect societal consensus with certainty and describes some advantages and disadvantages of the Court invalidating a punishment practice with a heavier reliance on its own judgment that the punishment is excessive or through the consultation of a broader set of indicators, such as the markers of democratic discourse that the Court consulted in *Obergefell*.

1. *When the Typical Usage Indicators Are Unavailable: Mandatory Minimum Sentences*

One of the most promising doctrinal developments in the Eighth Amendment jurisprudence has been the move to a more functional assessment of societal standards of decency. Specifically, the move from a focus on bean counting legislative enactments to a focus on the actual usage of a punishment permits a more fine-tuned understanding of decency because it involves not abstract policy considerations, but rather real cases with real facts decided by local jurors or judges. One tension of the categorical exemption framework, however, is that many different crimes carry mandatory minimum sentences of varying degrees, which skews the assessment of decency that comes from on-the-ground discretionary decisions in individual cases.[343]

In *Miller v. Alabama*, the Court held that the Eighth Amendment prohibits automatic life without parole sentences for juveniles who commit homicide offenses.[344] Thus, a juve-

343 *See* Miller v. Alabama, 132 S. Ct. 2455, 2474–75 (2012).
344 *Id.* at 2475.

nile homicide offender has the right to present evidence that suggests that he is not "irreparably corrupt[ ]" and therefore suggests that a life without parole sentence would be excessive in his case.[345] *Miller* could be interpreted as an instance where the Court, and Justice Kennedy in particular, embraced procedural regulation. After all, in practice, it requires jurors or judges to make additional findings. However, in *Montgomery*, ostensibly a case about retroactivity, Justice Kennedy's opinion for the Court put a substantive gloss on the *Miller* rule:

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.[346]

In sum, then, at least in dicta, Justice Kennedy's gloss in *Miller* places the case within the paradigm of the categorical exemptions cases.

If the Eighth Amendment jurisprudence becomes more robust, the Court likely will need to engage in this line drawing exercise between mandatory sentences and use of the sentence in all instances more regularly. By way of preview, the Iowa Supreme Court recently decided in *State v. Lyle* that under the Iowa state constitution, juveniles cannot be subjected to mandatory minimum sentences *at all*.[347] Moreover, in a recent petition for certiorari to the United States Supreme Court, an Alabama man asserts that mandatory life imprisonment is an excessive punishment for non-violent crimes involving the personal use of marijuana.[348] One, too, could imagine challenges to mandatory life without parole for adults who commit serious non-homicide crimes or even for felony murder. It is true that the typical juvenile has both a diminished moral capacity and a great capacity for change. But the reality is that most people can change, and many of them profoundly so. This is particularly the case, perhaps even more so, for offenders who suffer

---

345 *Id.* at 2469.

346 Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 132 S. Ct. at 2469, and Penry v. Lynaugh, 492 U.S. 302, 330 (1989)) (internal citations omitted).

347 State v. Lyle, 854 N.W.2d 378, 380-81 (Iowa 2014).

348 Petition for Writ of Certiorari at 10–12, Brooker v. Alabama, 136 S. Ct. 1659 (2016). Brooker lived with his son in Houston County, and court documents show police found a marijuana-growing operation there during a search in 2011. The elderly man was convicted of drug trafficking, and a judge sentenced him to life without parole because of past robbery convictions in Florida. *Id.* at 6–8.

from untreated mental illness and addiction. The short of it is that the Court will need to address how and where to draw lines around mandatory sentences.

One sensible solution would be for the Court to use its own independent judgment to glean whether the punishment practice is excessive. If the question proves debatable, but not resolvable, then the invalidation of mandatory minimum sentences that involve the challenged punishment practice would facilitate an important infusion of usage information that the Court could use to help it glean the standards of decency for a future case as to the challenged practice as a whole. Another solution is to only invalidate mandatory minimum sentences in circumstances where a strong legislative consensus has emerged against the practice. But this wooden approach suffers from the same problems that legislative bean counting always suffers—harsh laws, infrequently enacted during moments of moral panic, do not account adequately for real defendants in real cases. The result, not infrequently, is retributive extravagance. Thus, with mandatory minimum sentences the question is when does the mandatory nature of the sentence so risk disproportionality that the Court should intervene to require individualization, so as to reduce the risk of retail level over-punishment and begin the process of gaining more reliable on-the-ground consensus indicators as the excessiveness of the punishment as a whole. But what happens when there is no jury or judge to empower? That's the question we take up in the next subsection.

2. *When the Typical Usage Indicators Are Inapplicable: Solitary Confinement*

When a judge sentences a person to prison the inclusion of long-term solitary confinement is not a part of that sentence.[349] Nonetheless, the cruel and unusual punishments clause applies to a prisoner placed in an "isolation cell."[350] Indeed, Judge Alex Kozinski, the Chief Judge of the Federal Court of Appeals for the Ninth Circuit, has called solitary confinement

---

349 Solitary confinement is a disciplinary measure administered by prison authorities and not the courts. *See, e.g.*, Wolff v. McDonnell 418 U.S. 539, 556 (1974) ("Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply"); Morrissey v. Brewer, 408 U.S. 471, 475 (1972) ("[P]rison officials must have large discretion in making . . . determinations, and . . . courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities.").

350 Hutto v. Finney, 437 U.S. 678, 685 (1978).

"the most severe punishment" and "worse than death."[351] Last year, Justice Kennedy wrote in a separate concurring opinion that because "years on end of near-total isolation exact a terrible price . . . the judiciary may be required" to place limits on the use of solitary confinement.[352] But how could the Court, using its consensus analysis, determine whether solitary confinement is an extravagant punishment when it is applied, for instance, as a means of punishing minor prison infractions or when it is imposed upon juveniles or the mentally ill (a practice that one federal court called "the mental equivalent of putting an asthmatic in a place with little air to breathe"[353])?

The question would be easy if this were a practice like mandatory juvenile life without parole for a homicide offense. The Court could do as it did in *Miller* and require individualized sentencing.[354] In turn, the individualized sentencing would provide data over time into whether the punishment of life without parole generally is unconstitutionally harsh. But there is no jury or judge making these decisions in the context of solitary confinement.

One option is to treat the prison guards who make the decisions to impose solitary confinement as the relevant indicator of consensus, and query how unusual the practice is across America. The problem with that approach, however, is that while jurors and judges are neutral parties, prison guards are not. Indeed, a prison guard or warden deciding whether to impose solitary confinement as a punitive measure is akin to a prosecutor taking over sentencing for the judge or jury.

Second, the Court might decide to inject a local, transparent, neutral decision maker before a prolonged stint of isolation is imposed. For instance, for any use of solitary confinement over thirty days, the Court might require the states to craft a meaningful process that enables both transparency and a role for neutral observers to be included in the processes. If this injection of local, transparent decision makers results in very few instances of prolonged isolation for juveniles or the mentally ill, then the Court would learn over time about the societal

---

351 Alex Kozinski, *Worse Than Death*, 125 YALE L.J.F. 230, 230 (2016) (arguing against the excessive use of solitary confinement in American prisons).

352 Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

353 Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

354 Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012) ("That correspondence—Graham's '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment'—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty." (quoting Graham v. Florida, 560 U.S. 48, 89 (2010) (Roberts, C.J., concurring in judgment))).

norms on the punitive use of prolonged solitary confinement. But the downside of this approach is that it would take the Court back down the path where its institutional competence is at its nadir.

A third option, which finds expression in *Obergefell*, is turning to a broader range of democratic discourse to glean retributive excess.[355] These broader range of materials include, for example, "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, . . . other popular and scholarly writings," and the knowledge gleaned from "extensive litigation in state and federal courts."[356] Resolving which approach is best is beyond the scope of this Article. However, this is but one example of a scenario where under a more robust Eighth Amendment the Court will need to refine its current understanding of the tools available to gauge contemporary standards of decency.

Here, then, it is wise to sound caution at the notion that the Court should move forward based on a broader range of democratic discourse, though without objective indicia that at least mimic the richness of the outcomes of jury trials or judge sentencing. If the Court invalidates a punishment practice without the benefit of that more robust usage data, the likelihood increases that the Court miscalculates in its determination that a punishment serves no legitimate purpose. If it calculates poorly, there is a risk of creating a backlash that triggers a federal constitutional amendment (perhaps this is not realistic in the context of solitary confinement, but change the factual hypothesis to the context of sex offender registries and the probabilities shift). Moreover, even without the risk of error or backlash, the Court expends some of its institutional credibility when it invalidates a punishment that people notice is missing from the set of democratic tools, even if those punishments are marginally excessive.

As Justice Kennedy said in the wake of *Obergefell*, "when we have a controversial case—and a very difficult case like [same-sex marriage]—we draw down on a capital of trust, a deposit of trust, and we have to rebuild that capital. We have to put new deposits, new substance into this reservoir of trust."[357] A robust set of usage indicators, including sentenc-

355 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

356 *Id.*

357 Robert Barnes, *The Supreme Court: Too Liberal?*, WASH. POST, (July 26, 2015), https://www.washingtonpost.com/politics/courts_law/the-supreme-court-too-liberal/2015/07/26/5e31c988-320f-11e5-8353-

ing practices and geographic isolation, significantly limit the capital drawn from the trust. When those indicators are missing, however, it becomes a more difficult balancing act on the margins—an independent judicial belief that a punishment practice is excessive versus the risk of taking a legitimate tool out of circulation or damaging the credibility of the Court. A practice such as prolonged solitary confinement, especially as it is used for punishment of minor infractions or imposed upon juveniles or the mentally ill, is so extreme and our medical literature so robust that the downside risks seem to pale in comparison to the known excess. But this might not be the case with future challenges to a punishment practice; and, in those instances, there is a serious tension in the jurisprudence ahead for the Court to resolve. Sounding a warning is not the same thing as deciding a question though, and we leave it to future scholarship to parse out these nuances in more depth.

CONCLUSION

This Article has argued that the conventional understanding of the scope of Eighth Amendment protections against cruel and unusual punishment is too limited. The moral panics of the 1980s and 90s, including, for example, the crack-baby and super-predator scares, provide startling contemporary examples of why the authors of the Eighth Amendment sought to remove the question of excess punishment—when a punishment serves no legitimate purpose that a lesser sanction could not fulfill—from the rough and tumble of majoritarian politics.

Fortunately, though the U.S. Supreme Court has long been derelict in its duty to fulfill this critical function, the justices have begun to shape the nuances of the doctrine in a way that could foretell a far more robust jurisprudence. Specifically, the Court has begun to use its categorical exemption framework to bar excessive punishments as they relate to categories of offenses or classes of offenders. Within that framework, the Court has been especially focused on preventing retributive excess (as opposed to arbitrariness or discrimination among those offenders otherwise eligible for the punishment). And, in the effort to squelch retributive excess, the Court has created a more sophisticated analysis for assessing whether there is a societal consensus that reflects the excessiveness of the sanction. The hallmark of this more robust approach is an in-

1215475949f4_story.html [https://perma.cc/R4WC-TMU5] (alterations in original).

creased importance on where and how often the punishment is used in practice. Taken together, these doctrinal changes—combined with a clearer theoretical purpose and jurisprudential approach—are the seeds of a more robust role for the Court in protecting citizens against excessive punishment.